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IRS (Finally) Issues COBRA Premium Subsidy Guidance

The American Rescue Plan Act's (ARPA) 100% COBRA premium subsidy took effect for periods of coverage beginning on and after April 1, 2021, but IRS guidance on a number of key questions relating to who qualifies for the subsidy, when the subsidy is and is not available, etc., was not issued until May 18, 2021. IRS Notice 2021-31, in conjunction with frequently asked questions (FAQs) and Model Notices the Department of Labor (DOL) issued in April, address numerous issues big and small to help plan sponsors and COBRA administrators make sure the subsidy is being administered appropriately.

Background

In general, for the period from April 1, 2021 through September 30, 2021 (the "Applicable Period"), the ARPA provides that "Assistance Eligible Individuals" (AEIs) will not be required to pay any COBRA premiums. AEIs are those COBRA beneficiaries whose COBRA qualifying event was a reduction in hours or an involuntary termination of employment. Employers are required to offer a 60-day Extended Election Period to individuals who would be AEIs during any part of the Applicable Period but for the fact they failed to elect COBRA or prematurely dropped COBRA coverage.

Employers (or insurers or multiemployer plans, in certain cases) will be able to claim an advanceable, refundable credit against their Hospital Insurance payroll tax liability to subsidize the COBRA premiums these AEIs otherwise would pay during the Applicable Period.

What is an involuntary termination?

As noted, a COBRA beneficiary can only be an AEI if his or her qualifying event is a reduction in hours or an *involuntary* termination of employment. Note that *voluntary* terminations of employment are COBRA qualifying events too, but only *involuntary* terminations can make someone an AEI who is eligible for the COBRA premium subsidy.

As a result, distinguishing between voluntary and involuntary terminations is essential to identifying who is and is not an AEI. According to Notice 2021-31:

> An involuntary termination of employment means a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee's implicit or explicit request, where the employee was willing and able to continue performing services.

The Notice specifically provides that an employee resigning due to a material change in the geographic location of employment is an involuntary termination. A severance window also can be an involuntary termination for employees who accept it if they are otherwise subject to impending termination.

Retirement is frequently considered a voluntary termination, but the Notice provides that if an employee knew she would be terminated if she did not retire then the retirement is an involuntary termination.

The Notice also explains that employees who quit because a child cannot attend school or daycare due to the facility being closed because of the COVID-19 National Emergency generally are not treated as being involuntarily terminated for purposes of the COBRA premium subsidy.

Ultimately, whether an employee's termination is voluntary or involuntary is a facts and circumstances determination. Notice 2021-31 does not address every possible circumstance, but it does provide useful guidance for many common situations that employers may be facing.

Can an employee be an AEI even if his or her qualifying event was a voluntary reduction in hours?

As discussed above, the ARPA specifically excludes voluntary terminations of employment from being treated as a qualifying event that gives rise to AEI status. But what about voluntary reductions in hours?

Both the DOL FAQs and IRS Notice 2021-31 confirm that a reduction in hours resulting in a loss of eligibility for group health benefits is a qualifying event that gives rise to AEI status, regardless of whether the reduction of hours was voluntary or involuntary.

The Notice further confirms that a furlough – meaning a temporary loss of employment or complete reduction in hours with a reasonable expectation of return to employment or resumption of hours – can be a qualifying event that results in the COBRA beneficiary being an AEI. The same is true for a work stoppage resulting from a lawful strike initiated by employees or an employer-initiated lockout.

Coverage Eligible for COBRA Premium Assistance

The general rule is that the COBRA premium subsidy is available for COBRA continuation coverage of any group health plan, except a health flexible spending arrangement ("health FSA") offered under an IRC section 125 cafeteria plan. The Notice confirms the COBRA premium subsidy is available for:

- Dental only plans;
- Vision only plans;
- Health reimbursement arrangements (HRAs); and
- Individual Coverage HRAs (except for Individual Coverage HRAs that are integrated with Medicare).

However, Qualified Small Employer Health Reimbursement Arrangements ("QSEHRA") are not group health plans and are not subject to COBRA. The same is true for Health Savings Accounts ("HSAs").

Beginning of COBRA Premium Assistance Period

Under the ARPA, AEIs are entitled to the COBRA premium subsidy as of the first applicable period of coverage beginning on or after April 1, 2021. A "period of coverage" is a monthly or shorter period with respect to which premiums are normally charged by the plan. For example, assume a group health plan requires biweekly premium payments that correspond to a two-week period of coverage. For March 2021, the last two-week period of coverage is from March 28 through April 10, followed by a two-week period of coverage from April 11 through April 24. In that case, the first applicable period of coverage beginning on or after April 1 is the two-week period beginning on April 11. Therefore, for AEIs participating in this plan, the COBRA premium subsidy would first be available for the April 11 through April 24 period.

End of COBRA Premium Assistance Period

Similar to the above, the COBRA premium subsidy will end for AEIs no later than the end of the last period of coverage beginning on or before September 30, 2021. Continuing with the previous two-week period of coverage example, assume the last two-week period is from September 19 through October 2, 2021. The Notice clarifies the subsidy would apply to the entire period of coverage beginning on September 19 even though the period of coverage includes October 1 and 2.

Of course, the subsidy will end earlier if the individual first becomes eligible for another group health plan or Medicare, or the individual's COBRA coverage period ends.

The next edition of Rewards Policy Insider will feature additional analysis of Notice 2021-31, including the Notice's guidance on calculating the premium tax credit.

The full text of Notice 2021-31 is available here.

Iconic Retirement Policy Duo Introduce Major New Retirement Bill

Senator Rob Portman (R-OH) is not running for re-election in 2022, but before leaving office, he and Senator Ben Cardin (D-MD) hope to leave their mark on retirement policy one last time. On May 20, they introduced their Retirement Savings & Security Act of 2021, which will likely serve as the Senate's alternative to the Securing a Strong Retirement Act of 2021 that the House Ways and Means Committee approved on May 5.

Although similar in many respects, there are significant differences between the two bills. Some of the key provisions in the Portman/Cardin bill are as follows:

- Establish a new automatic enrollment safe harbor, with elective deferrals starting at 6%, and increasing in 1 percentage point increments annually until deferrals reach 10%;
- Increase required minimum distribution age to 75 in 2032, and reduce the excise tax for failing to take a required minimum distribution from 50% to 25%;
- Treat student loan payments as elective deferrals for purposes of matching contributions;
- Reform the minimum participation rule for defined benefit plans;
- Establish a $10,000 catch-up contribution limit for individuals who are at least 60 (this would be in addition to the $6,000 catch up contribution permitted for individuals who are at least 50);
- Clarify the application of certain IRC and ERISA rules to hybrid plans, including cash balance plans;
- Modify the lookback rule to permit defined benefit plans to pay more generous lump sum distributions;
- Eliminate indexing of PBGC variable-rate premium; and

- Permit overfunded defined benefit plans to make 420 transfers to retiree medical accounts if assets are 110% of liabilities.

Additional information about the Portman/Cardin bill, including a link to the bill text, is available here.

The Senate Finance Committee may hold a hearing on retirement issues sometime this summer, with a markup of the Portman/Cardin bill (or other similar legislation) in the fall.

More information about the bill, and about other retirement policy-related developments on Capitol Hill, will be covered in future editions of the Rewards Policy Insider.

IRS Guidance on Special $10,500 Annual Limit for Dependent Care Flexible Spending Accounts (FSAs) in 2021

On May 10 the IRS issued Notice 2021-26 ("Notice") to address certain issues relating to the temporary increase in the maximum gross income exclusion (the "annual limit") for employer-provided dependent care assistance programs ("DCAPs") – including Dependent Care FSAs – to $10,500 for the 2021 tax year, and how it interacts with the special unlimited carry over and extended claims periods for plan years ending in 2020 and 2021. For non-calendar year Dependent Care FSAs, the Notice highlights some important considerations relating to taking advantage of the higher limit.

Briefly, the Notice "clarifies" the position the IRS took in Notice 2021-15 that the special unlimited carryover and extended claims period options for plan years ending in 2020 and 2021 will not count against the annual limit applicable for the following year.

In other words, calendar year Dependent Care FSAs that permitted unlimited carryovers from the 2020 to 2021 plan year can allow employees to make up to $10,500 in salary reduction contributions for the 2021 plan year. As a result, employees potentially can claim up to $15,500 in non-taxable reimbursements from Dependent Care FSAs for dependent care expenses incurred in 2021.

However, the notice also provides a warning for *non-calendar year* Dependent Care FSAs that want to take advantage of the $10,500 exclusion for 2021 tax years. Specifically, even though the plan year beginning in 2021 straddles both the participant's 2021 and 2022 tax years, the $10,500 annual limit will apply only for purposes of determining if a participant had excess reimbursements in the 2021 tax year – and not in the 2022 tax year. In other words, a participant who elects the full $10,500 salary reduction contribution in the plan year beginning in 2021 would want to use most or all of that amount during the 2021 calendar year in order to avoid unintended tax consequences.

The primary challenges for sponsors and administrators of Dependent Care FSAs that take advantage of the $10,500 annual limit for 2021 tax years will be ensuring proper tax reporting, as well as explaining the rule to participants in order to help them avoid any unexpected tax consequences.

The full text of IRS Notice 2021-26 is available here.

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