

# CLIENT ALERT

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## IRS GUIDANCE ON COBRA SUBSIDY

### PART I: INVOLUNTARY TERMINATION, REDUCTION IN HOURS, AND GROUP HEALTH PLANS COVERED BY THE SUBSIDY

By Cynthia A. Moore

Under the American Rescue Plan Act of 2021 (“ARPA”), a 100% COBRA subsidy is available to qualified beneficiaries who lose coverage due to an involuntary termination of employment or reduction in hours. The subsidy is available from April 1, 2021 through September 30, 2021 – if the individual is not eligible for other group health plan coverage or Medicare. For more information, please refer to our prior Client Alerts on the new COBRA subsidy, which may be accessed [here](#) and [here](#).

On May 18, 2021, the IRS issued Notice 2021-31, which provides helpful guidance on a number of issues in the form of 86 FAQs. This Client Alert addresses the following issues:

1. When has an “involuntary” termination of employment occurred?
2. What events may constitute a “reduction in hours” for subsidy eligibility purposes?
3. Which group health plans are covered by the COBRA Subsidy?

Future Client Alerts will address other issues in Notice 2021-31.

#### 1. Involuntary Termination of Employment

Involuntary termination of employment generally 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.” Q&A 24 of Notice 2021-31. The determination of whether a termination is involuntary is made based on all the facts and circumstances.

Specific situations addressed in Notice 2021-31 include the following:

- Retirement is generally not an involuntary termination of employment, unless the facts indicate that the employee knew that the employer would terminate his/her employment, and the employee was willing and able to continue performing services.
- Termination for cause includes an involuntary termination of employment (unless the cause constitutes “gross misconduct”).
- A resignation for “good reason,” sometimes called a constructive discharge, is an involuntary termination of employment.
- Death is not an involuntary termination of employment with respect to the surviving spouse and dependents.
- An employee-initiated termination of employment due to

lack of childcare or other personal issues is generally not an involuntary termination.

- The non-renewal of an employment agreement would be an involuntary termination of employment, if the employee was willing and able to continue in employment with or without a contract.
- If an employer materially reduces an employee’s hours but the reduction in hours does not cause a loss of coverage, and the employee subsequently terminates employment, the termination would be involuntary.

An employer can require an employee to attest or self-certify that a termination of employment is involuntary and that the employee is otherwise eligible for premium assistance. An employer is permitted to rely on the employee’s attestation unless the employer has actual knowledge that the attestation is incorrect. The employer must maintain, in its records, a copy of the self-certification or other evidence substantiating that the termination was involuntary. These records will be used to substantiate the employer’s eligibility to claim the premium assistance credit.

The “Summary of the COBRA Premium Assistance Provisions Under the American Rescue Plan Act of 2021,” issued by the DOL in April (click [here](#)), includes a “Request for Treatment as an Assistance Eligible Individual” on which the employee/qualified beneficiary will check a series of boxes indicating that the employee (or his/her spouse or eligible dependent child) is eligible for the COBRA subsidy, and attest that he/she meets all the requirements for treatment as an assistance eligible individual. The employer completes the portion of the form indicating the employer’s approval or denial of the request and returns a copy of the form to the applicant. This form should satisfy the requirement that a qualified beneficiary self-certify whether he/she is subsidy-eligible.

In most cases, the employer and employee/qualified beneficiary will agree on a characterization of the termination as involuntary or voluntary. However, one can envision that situations will arise where the parties will disagree:

- An employee voluntarily resigns and later claims a “good reason” for the termination/constructive discharge.
- An employee has a planned retirement date of May 1, 2021, but after the fact claims that he/she was “forced out.”

If an employee disagrees with an employee’s characterization of termination as involuntary, the consequence would be that the employee and his or her spouse/dependent children are not eligible for the subsidy. In this event, if the group health plan is subject to ERISA, the employer should notify the employee and allow the employee to appeal the decision as an adverse benefit determination.

#### 2. Reduction in Hours

An employee may be eligible for a COBRA subsidy if the reduction in hours that caused a loss of coverage is voluntary or involuntary. Thus, if an employee voluntarily reduces his/her hours due to lack of

childcare and loses health plan coverage, the employee may be able to claim premium assistance. The IRS also clarifies that a reduction in hours due to a furlough (where a return to work is expected) or a strike would potentially create a right to a COBRA subsidy.

### 3. Group Health Plans Covered by the COBRA Subsidy

Consistent with the statutory language in ARPA, the IRS states that premium assistance must be provided for any group health plan, other than a health FSA. This includes:

- Standalone dental
- Standalone vision
- Health reimbursement arrangement (HRA)
- An individual coverage HRA (must be integrated with individual health insurance coverage)

No premium assistance needs to be provided for a qualified small employer HRA (QSEHRA), as it is deemed not to be a group health plan for COBRA purposes.

A basic COBRA rule is that a qualified beneficiary must be provided the opportunity to elect to continue each group health plan in which he/she was covered at the time of the qualifying event. In a non-subsidy environment, qualified beneficiaries often focus on continuing medical coverage to protect against catastrophic health events, but may not elect to continue dental and vision coverage. However, suppose a 100% subsidy is available. In that case, a qualified beneficiary who is subsidy-eligible and previously elected only medical coverage must be provided the opportunity to elect dental and vision coverage during the extended election period under ARPA, and is likely to elect these coverages for the subsidy period.

If you have any questions about the COBRA subsidy, please contact Cynthia A. Moore or any other member of Dickinson Wright's Employee Benefits and Executive Compensation Group. Cyndi can be reached at (248) 433-7295 or [cmoore@dickinsonwright.com](mailto:cmoore@dickinsonwright.com).

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