

May 20, 2021

Your Remaining ARPA Questions (Mostly) Answered!

It has been over a month since our [last Alert](#) addressing the federal government's first [FAQ document](#) that provided some guidance to employers regarding the COBRA subsidy provisions contained in the [American Rescue Plan Act](#) ("ARPA"). Although the COBRA subsidy began on April 1, 2021, the first FAQ document left many questions unanswered, causing a struggle with the application of the subsidy in various situations and the need for additional guidance on topics including applying for reimbursement of the subsidy.

On May 18th, the government finally released the next round of guidance on the COBRA subsidy in [IRS Notice 2021-31](#) that includes additional background on both the premium assistance and credit and a Questions and Answers section that provides answers to many of the questions the first FAQ document left unanswered. Notably, the Question and Answers section of the Notice addresses the following topics: Eligibility for Premium Assistance, Reduction in Hours, Involuntary Termination of Employment, Coverage Eligible for Premium Assistance, the Beginning of the COBRA Premium Assistance Period, the End of the COBRA Premium Assistance Period, the Extended Election Period, Extensions under the Emergency Relief Notices, Payments to Insurers under Federal COBRA, Comparable State Continuation Coverage, Calculation of COBRA Premium Assistance Credit, and Claiming the COBRA Premium Assistance Credit.

Although it would be impossible to summarize every piece of the 41-page Notice in this Alert, below are the answers to some of the most prevalent questions we received from employers.

How does an individual certify his/her eligibility for the COBRA premium subsidy? An employer may require individuals to self-certify or attest that they are eligible for the premium assistance due to a reduction in hours or involuntary termination and that they are not eligible for any other group health plan coverage or Medicare that would otherwise negate their eligibility. If an employer does rely on an individual's attestation for either of these purposes, it must keep a record of such attestation to substantiate eligibility for the credit. Either a certification or an attestation may help the employer substantiate its entitlement to the premium assistance credit. If the employer does not require either a certification or attestation, it can rely on other evidence to demonstrate eligibility. Q&A-4 through Q&A-7 address this topic in more detail.

An individual is eligible for other group health coverage on April 1, 2021 but he or she is in a waiting period and not yet permitted to enroll. Is this individual eligible for the premium assistance? Q&A-9 states that until the individual is permitted to enroll in the other group health plan, he or she remains eligible for the COBRA premium assistance.

Is COBRA premium assistance available for any coverage other than health care? COBRA premium assistance is available for coverage under *any group health plan other than a health flexible spending account (health FSA)*. Such coverage includes dental and vision plans, health reimbursement arrangements (HRA), and individual coverage HRAs. However, premium assistance is not available for FSAs, qualified small employer HRAs (QSEHRAs), or any plan not subject to federal COBRA such as group term life insurance. Premium assistance may also be available to retiree health coverage if certain factors are met. Please see Q&A-35 through Q&A-40 for more information.

How is the COBRA premium assistance credit calculated? Generally, the credit for any quarter is equal to the amount charged for COBRA coverage to other similarly situated individuals. This amount can include any administrative costs allowed (generally up to 102% of the applicable premium). If an employer subsidizes the COBRA premium costs for COBRA beneficiaries, the credit is equal to the premium that *would have been charged to* an Assistance Eligible Individual (AEI) in the absence of premium assistance and *does not include* any amount the employer would have otherwise subsidized. Q&A-64 provides many examples of calculating this amount when the employer subsidizes coverage (including via severance payments).

Who claims the premium assistance credit and how does reimbursement work? Per Q&A 71, the “premium payee for continuation of coverage...is eligible for the credit.” The premium payee can be a multiemployer plan, a common law employer that sponsors a group health plan (whether self-funded or fully insured and subject to Federal COBRA) or an insurer (generally, in the case of a fully insured plan not subject to Federal COBRA). Once a premium payee becomes entitled to the credit, such payee can claim the credit by reporting it and the number of individuals receiving the credit on Form 941 (Quarterly Federal Tax Returns). The premium payee then may reduce its deposits of federal employment taxes to which it would otherwise be subject by the amount of the credit. The payee can also request an advance of the amount of the claimed credit that may exceed its available federal employment tax deposits by filing Form 7200.

If an employer does not have any employment tax liability, the credit can still be claimed on Form 941. Q&A 77 provides specific information for that situation. Additionally, a payee is still entitled to the credit even if it uses a third-party to report and pay employment taxes (including a payroll

provider, a PEO, etc.). Q&A 81 provides specific guidance on reporting the credit when a third-party payer is used.

Is an individual who voluntarily reduced his/her hours eligible for premium assistance? Per Q&A-21, a reduction in hours is considered a qualifying event where someone may be eligible of the subsidy regardless of whether the reduction is voluntary or involuntary.

What does or does not constitute an “involuntary termination?” Whether a termination is “involuntary” will need to be evaluated based on the facts and circumstances at hand and specifically whether the employee is willing and able to continue performing services for the employer. Q&A-24 through Q&A-34 provide assistance to employers in determining whether a termination is indeed considered involuntary.

What DOES constitute an involuntary termination of employment?

1. “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.” Here, guidance also indicates that a termination can be “involuntary” even if it is employee-initiated if such termination was the result of an employer’s action or inaction that is akin to a constructive discharge.
2. An employer-initiated termination while the individual is absent from work due to illness or disability if prior to that termination the employee was reasonably expected to return to work after the illness or disability.
3. Termination for cause (other than due to gross misconduct of the employee).
4. An employee’s resignation that results from a material change in the employee’s geographic location of employment.
5. An employee’s participation in a window program.
6. An employee-initiated termination of employment in response to an involuntary material reduction of hours.
7. An employer’s decision not to renew an employee’s contract (including through a staffing agency), generally so long as the employee was willing and able to continue employment and execute a similar contract or continue employment without a contract. (However, see below for information on when this would *not* be considered involuntary.)

What does NOT constitute an “involuntary termination” of employment?

1. Generally, retirement is not considered involuntary termination.
2. Employee-initiated termination of employment due to a child being unable to attend school or a daycare due to the COVID-19 pandemic. (However, based on the facts and circumstances, if the employee could be considered on a “leave of absence” this may constitute a reduction in hours.)
3. Employee-initiated termination due to concerns about workplace safety or the health condition of the employee or his/her family member (unless the situation could be akin to a constructive discharge due to the action or inaction of the employer).
4. Death of the employee.
5. When an employee’s contract is not renewed, but both the employer and employee had always understood that the contract was for specific services over a set term.

My state has a state mini-COBRA law that extends coverage for a period longer than federal COBRA. How does that impact the premium assistance? If the original qualifying event was due to a reduction of hours or an involuntary termination of employment, the premium assistance is available to those who remained on COBRA due to an extension under a State’s mini-COBRA laws *to the extent the additional period of coverage falls between April 1, 2021 and September 30, 2021.*

At the end of Notice 2012-31, the IRS acknowledges that there are still some topics and specific situations which it has not addressed to date. The Notice states that certain issues are still being considered internally and that additional guidance may be released in the future. So, though many employers’ questions should be addressed in this Notice, or at the very least be able to be analogized to situations and examples provided, more guidance may still be forthcoming on certain topics. In the meantime, if you have specific questions regarding the information provided here, please contact the experts at [Patriot Growth Insurance Services](#) and our partner agencies for assistance.