

IRS GUIDANCE ON COBRA SUBSIDY

PART II: DETERMINING ASSISTANCE ELIGIBLE INDIVIDUALS AND DEALING WITH THE EXTENDED ELECTION PERIOD

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, for individuals 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. Part I of our series of Client Alerts on the new COBRA subsidy (which may be accessed [here](#)) addressed the following issues:

1. When has an “involuntary” termination of employment occurred?
2. What events may constitute a “reduction in hours” for purposes of eligibility for the subsidy?
3. Which group health plans must be offered to assistance eligible individuals?

This Part II addresses:

- When is a qualified beneficiary an Assistance Eligible Individual?
- What rights are available if a potential Assistance Eligible Individual has the right to an extended election period?

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

Determining Whether a Qualified Beneficiary is an Assistance Eligible Individual

An individual is an “Assistance Eligible Individual” if:

- (a) the individual is a qualified beneficiary with a period of COBRA continuation coverage from April 1, 2021 to September 30, 2021;
- (b) the qualifying event is a termination of employment (other than a voluntary termination of employment) or a reduction in hours;
- (c) the individual elects COBRA continuation coverage; and
- (d) the individual is not eligible for other group health plan coverage or Medicare.

Our previous Client Alert addressed whether a termination is voluntary or involuntary, which is one of the essential elements in determining if a qualified beneficiary is an Assistance Eligible Individual. This Client Alert deals with other aspects of the definition.

Spouse and Dependent Children

Notice 2021-31 confirms that an Assistance Eligible Individual includes the spouse and dependent children of the employee if the group health plan covered them at the time of the qualifying event. Other clarifications in the Notice include:

- A spouse or dependent child who is added to COBRA continuation coverage during an open enrollment period is not an Assistance Eligible Individual.
- If the spouse or dependent child is covered by COBRA due to a divorce and the employee loses coverage due to an involuntary termination or reduction in hours, the employee can be an Assistance Eligible Individual, but the divorced spouse and dependent child are not Assistance Eligible Individuals because their loss of coverage is due to the divorce.

Eligibility for Other Group Health Plan Coverage

An individual will not be an Assistance Eligible Individual if he/she is eligible for other group health plan coverage. Eligibility for a plan that provides only excepted benefits (such as a standalone dental or vision plan), a health flexible spending account, or qualified small employer health reimbursement arrangement will not terminate eligibility for the COBRA subsidy. Eligibility for any other group health plan will terminate eligibility for the COBRA subsidy, even if the plan does not provide minimum value or is not affordable under the Affordable Care Act. This includes a health reimbursement arrangement (HRA), unless the HRA qualifies as a health flexible spending account under Section 106(c)(2) of the Internal Revenue Code.

An individual may become eligible for other group health plan coverage at the end of a waiting period or at the conclusion of an open enrollment period. One wrinkle deals with the extended notice periods under the DOL’s COVID relief notices. Under that guidance, an individual’s normal 30-day election period to enroll under a HIPAA special enrollment right is extended for up to one year. During the period an individual has a special enrollment right, the individual is eligible for other group health plan coverage and is not eligible for the COBRA subsidy.

Example: Frank is involuntarily terminated on October 1, 2020 and receives a COBRA notice. The loss of coverage in his employer's health plan triggers a special enrollment right in his spouse's employer health plan. Under the DOL's relief notices, Frank has until September 30, 2021 to exercise his special enrollment rights in his spouse's employer plan. Frank can elect COBRA coverage from his former employer's plan, but he cannot receive any premium assistance because he is eligible for coverage under his spouse's group health plan.

Qualified beneficiaries may not be aware of this rule and may assume that they are not eligible for a special enrollment right after the normal 30-day period has lapsed. In the request for treatment as an Assistance Eligible Individual, if the qualified beneficiary attests that he/she is not eligible for other coverage, the employer is permitted to rely on this attestation absent actual knowledge to the contrary.

Eligibility for Medicare

If a qualified beneficiary is eligible to enroll in Medicare (generally, at age 65), the individual is not an Assistance Eligible Individual. Similarly, if an employee is enrolled in Medicare at the time of a qualifying event that is a reduction in hours or an involuntary termination, he/she may be able to elect COBRA coverage, but will not be eligible for a subsidy.

Qualified Beneficiaries Who are Eligible for COBRA After 18 Months Due to a Disability Extension or a Second Qualifying Event

A qualified beneficiary who remains eligible for COBRA coverage beyond 18 months due to a disability extension or the occurrence of a second qualifying event (such as a divorce that occurs within 18 months of coverage based on a reduction in hours or involuntary termination) is eligible for a COBRA subsidy if the qualified beneficiary has elected and remained on COBRA during the extended period. It is not clear from the guidance to date whether the employer credit for an Assistance Eligible Individual on a disability extension would be 102% or 150% of the COBRA premium.

Extended Election Period

ARPA requires that qualified beneficiaries who otherwise qualify as Assistance Eligible Individuals who did not elect COBRA when it was first offered, or who dropped COBRA before the end of the 18-months, and whose COBRA coverage period would fall

within the subsidy period of April 1, 2021 through September 30, 2021, must be given a second opportunity elect COBRA. This is referred to as the "extended election period." The extended election period is only available under Federal COBRA unless State law permits a similar right.

Notice 2021-31 provides the following guidance on the extended election period:

- If an employee elected self-only COBRA coverage and his/her spouse and dependent children are otherwise Assistance Eligible Individuals, the spouse and dependent children can be added to coverage and receive premium assistance.
- If a qualified beneficiary (due to a reduction in hours or involuntary termination) has an extended period in which to elect COBRA under the DOL's COVID relief notices but has not yet elected COBRA, the qualified beneficiary must receive an extended election period notice and may either elect (1) COBRA retroactive to the qualifying event date (with no premium assistance until April 1, 2021) or (2) COBRA as of April 1, 2021 with premium assistance.
- If a potential Assistance Eligible Individual is enrolled in COBRA for one but not all group health plan coverage in which he/she was enrolled as of the date of the qualifying event, the Assistance Eligible Individual must be given the opportunity to enroll in the other coverage during the extended election period. For example, if the qualified beneficiary is enrolled in COBRA only for the medical plan, he/she must be offered the opportunity to enroll in dental and vision coverage during the extended election period (if enrolled in these coverages at the time of the qualifying event.)

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.

KEY CONTACTS



Cynthia A. Moore is a Practice Department Manager in Dickinson Wright's Troy office. She can be reached at 248.433.7295 or cmoore@dickinsonwright.com.



Deborah L. Grace is a Member in Dickinson Wright's Troy office. She can be reached at 248.433.7217 or dgrace@dickinsonwright.com.



Jordan S. Schreier is a Member in Dickinson Wright's Ann Arbor office. He can be reached at 734.623.1945 or jschreier@dickinsonwright.com.



Roberta P. Granadier is Of Counsel in Dickinson Wright's Troy office. She can be reached at 248.433.7552 or rgranadier@dickinsonwright.com.



Eric W. Gregory is a Member in Dickinson Wright's Troy office. He can be reached at 248.433.7669 or egregory@dickinsonwright.com.