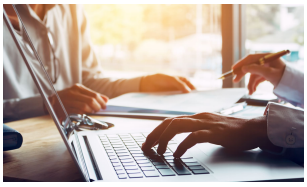

What's in the 86 COBRA Subsidy Q&As Released by the IRS?

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On May 18, 2021, the Internal Revenue Service (IRS) released Notice 2021-31 ("Notice"), a set of 86 Q&As on the COBRA subsidy ("Subsidy") that was enacted as part of the American Rescue Plan Act of 2021. Our original article on the Subsidy can be found here, along with a follow-up on the Department of Labor's model COBRA notices, found here.

Due to the length of the Notice, this article addresses the most relevant Q&As for group health plan sponsors.

Who Qualifies as an AEI?

The Notice confirms that an Assistance Eligible Individual (AEI) is an employee that is COBRA eligible between April 1 and September 30, 2021 due to a qualifying event that is a reduction in hours or involuntary termination of employment (other than due to gross misconduct). AEIs include spouses and dependents of the employee who lost coverage due to the qualifying event. The Notice clarifies that an individual can become an AEI more than once.

The Notice also clarifies that an employer may rely on an individual's attestation regarding a reduction in hours or involuntary termination and becoming eligible for other disqualifying coverage, for the purpose of substantiating eligibility for the credit, unless the employer has actual knowledge that the attestation is incorrect. The employer must also keep a record of such attestations. The Notice addresses other disqualifying coverage and how that affects an AEI's eligibility for the Subsidy, stating that if the disqualifying coverage ended prior to April 1, 2021, the employee is still eligible for the Subsidy. Individuals are also eligible for the Subsidy if they are eligible for other disqualifying coverage but not able to enroll in that coverage until a date in the future.

Finally, the Notice clarifies that an AEI who elected to remain on COBRA for an extended period after the original qualifying event that was a reduction in hours or involuntary termination of

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employment is eligible for the Subsidy. For example, if the employee had a second qualifying event such as a disability determination or a divorce that extended COBRA, the Subsidy would extend along with the extended COBRA as long as the extended COBRA period falls between April 1 and September 30, 2021.

How Does a Reduction in Hours Work?

The Notice clarifies that an employee's reduction in hours will cause the employee to be a potential AEI regardless of whether the reduction in hours is voluntary or involuntary. A furlough can also be considered a reduction in hours qualifying someone for the Subsidy. The Notice defines furlough as a temporary loss of employment or complete reduction in hours with a reasonable expectation of return to employment or resumption in hours such that the employer and employee intend to maintain the employment relationship. A reduction in hours also includes a work stoppage that is the result of a lawful strike initiated by employees or their representatives or a lockout initiated by the employer.

What Is an Involuntary Termination?

The Notice defines an involuntary termination of employment as a severance from employment due to the independent exercise of the employer's unilateral authority 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. An employee-initiated termination of employment constitutes an involuntary termination of employment for purposes of the Subsidy if the termination of employment constitutes a termination for a good reason. In that case, there must be employer action that results in a material negative change for the employee in the employment relationship similar to a constructive discharge. The Notice makes a specific point that the determination of whether a termination is involuntary is based on the facts and circumstances.

In addition, the Notice clarifies that the following are considered involuntary terminations of employment:

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- An involuntary termination of employment for cause (unless the cause rises to the level of gross misconduct where COBRA is not required to be offered).
- An employee's termination after a material change in the geographic location of employment.
- A termination of employment initiated by the employee in response to an involuntary material reduction in hours that did not result in a loss of coverage.
- An employer's decision not to renew an employee's contract if the employee was otherwise willing and able to continue the employment relationship and was willing either to execute a contract with terms similar to those of the expiring contract or to continue employment without a contract; however, if the parties understood at the time they entered into the expiring contract, and at all times after, that that the contract was for a specified service over a set term and would not be renewed, the completion of the contract without it being renewed is not an involuntary termination of employment.

The following items are NOT considered involuntary terminations of employment:

- Retirement; however, if the facts and circumstances indicate that, absent retirement, the employer would have terminated the employee, that the employee was willing and able to continue employment, and that the employee had knowledge that the employee would be terminated absent the retirement, the retirement is an involuntary termination of employment.
- Employee's termination due to general concerns about workplace safety (unless the employee can demonstrate that the employer's actions or inactions resulted in a material negative change in the employment relationship).
- An employee-initiated termination because a child is unable to attend school or because their childcare facility is closed due to the pandemic.
- The death of the employee.

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What Coverage Is Subsidy-Eligible?

The Notice makes it clear that the Subsidy is available for coverage under any group health plan except a health FSA. Group health plans include vision-only and dental-only plans regardless of whether the employer pays for a portion of the premiums for active employees. The Notice also clarifies the retiree coverage is treated as coverage for which the Subsidy is available, but only if the retiree coverage is offered under the same group health plan as coverage for active employees.

The Subsidy is also available for health reimbursement arrangements (HRA), including HRAs that qualify as a health flexible spending account (FSA)SA. Furthermore, eligibility for coverage under an HRA ends the period of the Subsidy in the same way as eligibility for coverage under other group health plans, unless the HRA qualifies as a health FSA. HRAs that are integrated with individual health insurance coverage (i.e., an "individual coverage HRA") is also a Subsidy-eligible plan, but the Subsidy only applies to the HRA and not to the underlying individual health insurance coverage. A qualifying small employer HRA is not a group health plan eligible for the Subsidy.

When Does the Subsidy Begin and End?

The Subsidy begins 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 premiums are paid biweekly for a corresponding two-week period of coverage, and for March 2021, the last two-week period of coverage is from March 28 through April 10. The next period of coverage is from April 11 through April 24, so the Subsidy would apply starting April 11. Furthermore, an AEI electing COBRA under the "extended election period" (see below) can waive COBRA for any period before electing to receive the Subsidy (i.e., the AEI may elect COBRA either retroactively to when the AEI lost coverage, retroactively to April 1, or prospectively).

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Similar to the Subsidy's beginning date, the Subsidy ends as of the end of the last period of coverage beginning on or before September 30, 2021 (unless it ends earlier due to an AEI's COBRA period ending or because an AEI becomes eligible for other coverage). Once the Subsidy ends, COBRA continues for a former AEI automatically, with full premiums paid by the individual. If an individual fails to provide notice that the individual is no longer eligible for the Subsidy, the individual can be subject to a tax penalty of $250 for each failure to notify, or if the failure is fraudulent, the greater of $250 or 110% of the Subsidy improperly received.

How Does the Extended Election Period Work?

The Notice addresses a number of situations regarding eligibility for the extended election period (i.e., the period of time an individual with a qualifying event that occurred prior to April 1, 2021 may elect the Subsidy). AEIs were required to be sent notice of the extended election period by May 31, 2021, and individuals had 60 days from the notice date to elect the Subsidy. AEIs subject to the extended election period can elect retroactive COBRA back to the date coverage was originally lost (prior to the extended election period), but the Subsidy would not apply to any retroactive coverage prior to the first period of coverage on or after April 1, 2021.

Spouses and dependents are also considered AEIs eligible to elect the Subsidy during the extended election period, even if the employee previously elected self-only COBRA. Furthermore, an AEI who previously elected COBRA for only dental and/or vision at the time the individual was first eligible for COBRA also has the opportunity to elect subsidized COBRA during the extended election period for major medical coverage.

The Notice clarifies that the extended deadlines during the "Outbreak Period" (see our article here) do not apply to the Subsidy's notice or election deadlines. The extended deadlines do, however, apply to premium payments for any retroactive periods of coverage prior to the Subsidy period that the AEI elects. An AEI who elects the Subsidy but declines retroactive COBRA may not later

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elect retroactive COBRA after the end of the 60-day extended election period.

How Is the COBRA Premium Assistance Credit Calculated?

The amount of premium assistance available is the amount that would have been charged to the AEI if the Subsidy was not available (i.e., 102% of the applicable premiums), not including the amount of any subsidy the employer would have otherwise provided (e.g., through a severance agreement). If a plan previously charged less than the maximum COBRA premium allowed and then increased premiums for similarly situated employees and qualified beneficiaries, the Subsidy applies based on the increased amount. For HRA coverage, the Subsidy is limited to 102% of the amount reimbursed to the AEI. Employers must keep records substantiating eligibility for the credit but do not need to refund credits received for AEIs who failed to report their ineligibility for the Subsidy.

How Does an Employer Claim the Credit?

For fully insured group health plans subject to federal COBRA and all self-insured plans, the plan sponsor is entitled to the credit and can claim it by reporting the credit on Form 941, reducing the employer's deposits of federal employment taxes by the anticipated credit and/or requesting an advance of the anticipated credit (via Form 7200). The Notice provides additional guidance for employers that use third-party payers to report and pay employment taxes to the IRS.

For more information on the COBRA Subsidy or other employee benefits issues, contact Carl Lammers or another member of the Frost Brown Todd Employee Benefits Team.

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