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IRS Guidance on Involuntary Termination for COBRA Subsidy Eligibility

May 19, 2021

4-Minute Read

On May 18, 2021, the IRS issued [IRS Notice 2021-31](#) in the form of FAQs, which provides extensive guidance on the COBRA subsidy under the American Rescue Plan Act of 2021 (ARP). Previously, the Department of Labor (DOL), in consultation with the Department of the Treasury and the IRS, issued [FAQs](#) written for the benefit of participants and beneficiaries regarding the temporary 100% COBRA subsidy mandated by the ARP. We issued an Advisor containing links to those FAQs as well and to the model notices and forms necessary to implement and administer the COBRA subsidy.

The COBRA subsidy is required to be provided to eligible individuals who experience an involuntary termination of employment or reduction in hours and that have not exhausted the maximum COBRA coverage period as of April 1, 2021. The ARP extends to those individuals an opportunity to make a COBRA election during a special election period that begins on April 1, 2021, and ends on May 31, 2021. The duration of the COBRA subsidy period is six months, ending on September 30, 2021. The IRS guidance was much needed in order to clarify the meaning of involuntary termination, in addition to other issues that remained unresolved after the Agencies' issuance of the FAQs. This Advisor solely focuses on the meaning of involuntary termination of employment for COBRA subsidy eligibility purposes. We intend to issue subsequent Advisors to cover the other issues addressed in the IRS guidance.

In the Notice, Q&A 24 through 34 apply solely for purposes of determining whether there is an involuntary termination of employment for purposes of the subsidy, but not for any other purposes under the Internal Revenue Code (the Code) or any other law.

Severance from Employment

Q&A 24 provides that 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 employee's employment, other than due to the employee's implicit or explicit request, where the employee was willing and able to continue performing services. This suggests that a mutual agreement between the employee and the employer would not qualify as an involuntary termination of employment.



In addition, the IRS guidance provides that an employee-initiated termination of employment constitutes an involuntary termination of employment for purposes of COBRA premium assistance if, based on the facts and circumstances, the termination of employment constitutes a termination for good reason due to employer action that results in a material negative change in the employment relationship for the employee analogous to a constructive discharge.

As an example, the guidance provides that if a termination is designated as voluntary or as a resignation, but the facts and circumstances indicate that the employee was willing and able to continue performing services, so that, absent the voluntary termination, the employer would have terminated the employee's services, and that the employee had knowledge that the employee would be terminated, the termination is involuntary. This could occur, for example, if an employer agrees to classify an employee's termination of employment as voluntary, notwithstanding the employee's involuntary termination, to assist the employee in obtaining subsequent employment.

Termination During Employee Disability Absence

Q&A 25 provides that involuntary termination of employment includes an employer's action to end an individual's employment while the individual is absent from work due to illness or disability if before the action there is a reasonable expectation that the employee would return to work after the illness or disability has subsided. The guidance clarifies that mere absence from work due to illness or disability before the employer has taken action to end the individual's employment is not an involuntary termination of employment.

Retirement is Not Involuntary Termination

Q&A 26 provides that a retirement is a voluntary termination of employment. However, if the facts and circumstances indicate that, absent retirement, the employer would have terminated the employee's employment, 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. Accordingly, an employee's decision to retire instead of being terminated by the employer would be an involuntary termination of employment.

Termination for Cause

Q&A 27 provides that involuntary termination of employment includes termination of employment for cause. However, if the termination of employment is due to gross misconduct of the employee, the termination is not a qualifying event and the loss of the health coverage of the employee and other family members by reason of the employee's termination of employment does not lead to eligibility for COBRA continuation coverage. The IRS confirmed that the loss of coverage due to a termination of employment for gross misconduct will not result in an individual becoming eligible for the COBRA subsidy.

Resignation Due to Change in Location

Q&A 28 provides that involuntary termination of employment includes resignation as the result of a material change in the geographic location of employment for the employee. If an employee declines to relocate as a condition of continued employment, termination of the employee's employment is deemed as being involuntary.



Severance Window Program Participation

Q&A 29 confirms that involuntary termination of employment includes participation by an employee in a window program under which employees with impending terminations of employment are offered a severance arrangement to terminate employment within a specified period of time (the “window”). Window benefit programs often provide an inducement for early retirement and are generally no longer than one year. The IRS guidance specifically refers to the description of window programs under Treasury Regulation § 31.3121(v)(2)-1(b)(4)(v).

Good Reason Termination/Constructive Discharge

Q&A 30 provides that an involuntary termination of employment does not occur if an employee terminates employment for “good reason,” due to concerns about workplace safety due to a health condition of the employee or a family member of the employee. However, a termination of employment would be involuntary if the employee can demonstrate that the employer’s actions (or inactions) resulted in a material negative change in the employment relationship analogous to a constructive discharge. The guidance indicates that a departure due to the personal circumstances of the employee unrelated to an action or inaction of the employer, such as a health condition of the employee or a family member, inability to locate daycare, or other similar issues, generally will not rise to the level of being analogous to a constructive discharge absent the employer’s failure to either take a required action or provide a reasonable accommodation.

Voluntary Termination Due to Lack of Childcare

Q&A 31 provides that involuntary termination does not occur based on an employee’s child’s inability to attend school or because a childcare facility is closed due to the COVID-19 national emergency. However, if the individual maintains the ability to return to work, and the facts and circumstances indicate that the qualifying event is a temporary leave of absence such that the employer and employee intend to maintain the employment relationship, the qualifying event is a voluntary reduction in hours and the individual would potentially be eligible for the COBRA subsidy.

Voluntary Termination Due to Material Reduction in Hours

Q&A 32 indicates that, for purposes of COBRA premium assistance, an employee-initiated termination of employment in response to an involuntary material reduction in hours is treated as a termination for good reason. Thus, an employee-initiated termination of employment due to an involuntary material reduction in hours would be an involuntary termination of employment for purposes of the COBRA subsidy.

Death of an Employee

Q&A 33 confirms that the death of an employee is not a reduction in hours or an involuntary termination of employment. Accordingly, a loss of coverage due to the employee’s death would not result in the spouse and dependent children of the employee being potentially eligible for the COBRA subsidy.

Nonrenewal of Employment Agreement

Q&A 34 provides that an involuntary termination of employment includes an employer’s decision not to renew an employee’s contract, including for an employee whose employer is a staffing agency. An employer’s decision not to renew an employee’s contract will be considered an involuntary termination of employment 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. The guidance, however, provides that if the parties understood at the time they entered into the expiring contract, and at all times when services were being performed, that the contract was for specified services 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.

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