IRS Releases its Much Anticipated Guidance on ARPA COBRA Premium Assistance

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On May 18, 2021, the IRS released Notice 2021-31, which contains its much-anticipated guidance on the American Rescue Plan Act (ARPA) COBRA premium assistance provisions.

In many respects, the guidance is consistent with previous IRS guidance under the American Recovery and Reinvestment Act of 2009 (ARRA), which is welcome news as many employee benefits experts referred to the prior guidance to assist employers with understanding their likely compliance obligations under ARPA as we awaited official IRS guidance. Now that it's here, we provide a general overview of the guidance in more detail below.

As many examples in the IRS guidance demonstrate whether an individual is an AEI depends on all relevant facts and circumstances and may require legal guidance. For example, the nature of the employment relationship and the facts leading up to a termination can sway whether a seemingly voluntary termination was really involuntary, or the smallest shift in circumstances may dictate whether an individual is really "eligible" for other group health plan coverage. Therefore, it is important for employers to engage counsel directly if there are any questions about an individual's status as an AEI.

Finally, the IRS indicated that it is still continuing to consider certain issues and may issue additional guidance, specifically, which entity should claim the credit for certain coverage provided through the Small Business Health Options Program (SHOP) or where state rules require full payment of premiums by the employer.

IRS Guidance Related to ARPA COBRA Premium Assistance

Who is an AEI?

As set forth in ARPA, an AEI is an individual who: (1) loses eligibility for coverage due to a reduction in hours or involuntary termination employment (other than by reason of an employee's gross misconduct); (2) is eligible for COBRA continuation coverage for some or all of the period beginning on April 1, 2021, through September 30, 2021; (3) elects COBRA continuation coverage; and (4) is not eligible for, or enrolled in, other group health plan coverage (excluding excepted benefits, a qualified small employer health reimbursement arrangement (QSEHRA), or a health FSA) or eligible for Medicare. Spouses or dependents of employees who are AEIs are also AEIs themselves if they were covered under the group health plan on the day before the reduction in hours or involuntary termination of the covered employee's employment and lost coverage as a result. This is true even if the spouse or dependent did not elect coverage when first eligible for COBRA, and they may remain AEIs even if the employee should die during the subsidy eligibility period.

Individuals who are not qualified beneficiaries, such as a spouse or dependent (other than a newborn) who were not covered under the group health plan on the day before the reduction in hours or involuntary termination, or domestic partners or other individuals who may meet an expanded definition of qualified beneficiary under state law, but do not meet the definition of a qualified beneficiary under Federal COBRA, are not AEIs and are, therefore, not eligible for premium assistance.

As the law and guidance suggest, the burden for determining who is an AEI under the first 3 elements listed above largely falls on the employer. The guidance states that employers may allow employees to attest whether their loss of coverage was due to a reduction in hours or involuntary termination of employment to assist in their determination of whether the individual is an AEI; however, the guidance does not suggest these attestations are dispositive. Instead, the guidance provides that the employer may rely on attestations unless the employer has actual knowledge they are incorrect. Furthermore, per the guidance, employers must maintain records, including the attestation, to support an individual's eligibility for the premium assistance and the company's eligibility for the tax credit. Therefore, employers should ensure their reliance on such attestations are reasonable and consistent with any of the employer's general knowledge and employment records.

What further complicates the determination of AEI status is that the employee is responsible for understanding and accurately advising the employer as to whether the employee (or their spouse or dependents, as applicable) are eligible for or enrolled in other coverage that would disqualify them from receiving the subsidy. This is highly fact-sensitive and may be confusing to employees, and employees may be subject to penalties for receiving premium assistance if they are not otherwise eligible for such assistance, although exceptions apply for failures due to reasonable cause and not willful neglect.

If an individual is enrolled in other group coverage or eligible for or enrolled in Medicare, then the answer is easy. However, whether an individual is "eligible" for other group health coverage is more complicated. For example, an individual may be an AEI/eligible for premium assistance if they are eligible for other group health plan coverage, but are not permitted to enroll in such other coverage. Whether this is the case may depend on if there are HIPAA special enrollment rights or if the individual is in a waiting period. These are complicated scenarios and are essentially left up to the employee to understand when completing their Request for Treatment as an Assistance Eligible Individual form or other attestation form provided by an employer, carrier, or administrator. Employers, carriers, or administrators, as applicable, must rely on employee attestations in this regard as long as they do not have actual knowledge they are incorrect.

The guidance also clarifies the following scenarios:

- If an individual was covered by, or eligible to enroll in, other group health plan coverage on April 1, 2021, then that disqualifies them from COBRA premium assistance even though it does not end the period of eligibility for COBRA. One example of this would be if an AEI enrolled in COBRA declines coverage under a new employer's plan and maintains their COBRA coverage, they remain eligible for COBRA, but they are not eligible for the premium subsidy.
- If an employer was subject to federal COBRA in the year during which an AEI becomes eligible for COBRA, but is no longer subject to federal COBRA, the employer must still offer COBRA to any qualified beneficiaries who were previously eligible for COBRA. If the qualified beneficiaries are AEIs, they would be eligible for the premium assistance and the employer would be eligible for the premium credit.
- The initial reason for the loss in coverage is a determinative factor in whether an individual is an AEI. For example, if an employee and spouse divorce and the spouse loses coverage and several months later the employee is involuntarily terminated, the former spouse is not an AEI because the divorce, not the employee's involuntary termination, resulted in the former spouse's loss of coverage.

To Which Plans Does Premium Assistance Apply?

Consistent with ARPA and the DOL guidance, the IRS guidance confirms premium assistance is available for group health plans other than medical coverage, including dental and vision plans, and regardless of whether the employer contributes to the coverage for active employees. Other benefits for which the subsidy may be available include onsite clinics, HRAs, ICHRAs, standalone EAPs or wellness programs.

Premium assistance and premium assistance tax credits are not available for health FSAs, QSEHRAs, non-group health plan coverage (such as life or disability benefits), or other plans not subject to COBRA continuation coverage as defined under ARPA, including temporary continuation coverage under the Federal Employee Health Benefits program, church plans or small employer plans not subject to state mini-COBRA.

State continuation coverage that is comparable to federal COBRA can have a different maximum coverage period than federal COBRA, as well as different qualifying events, different qualified beneficiaries, or different maximum premiums without being deemed to be non-comparable coverage; however, as discussed previously, different qualified beneficiaries may not be AEIs and, therefore, not eligible for premium assistance for coverage.

Additionally, the IRS clarified that premium assistance is not available for retirees on retiree health coverage that is not COBRA continuation coverage and is offered under a separate group health plan than the plan under which COBRA continuation is offered. However, if retiree coverage is offered under the same group health plan coverage available to similarly situated active employees, even if the retiree pays more than active employees, premium assistance is available as long as the amount charged to a retiree does not exceed 102%.

When Does Premium Assistance Begin?

Per the IRS guidance, premium assistance is available as of an AEI's first applicable period of coverage beginning on or after April 1, 2021. A "period of coverage" is generally a monthly or shorter time period during which the plan or issuer normally charges employees or qualified beneficiaries their premiums. This could be after April 1, 2021, if the normal period of coverage that would have been charged did not include April 1, such as for plans with biweekly premium obligations for COBRA and active continuation coverage.

An AEI can elect COBRA retroactively to the date they were first eligible for COBRA (if prior to April 1, 2021), as of April 1, 2021 (without regard to any time they were eligible before April 1, 2021), or prospectively beginning after April 1, 2021. Furthermore, if an AEI is not eligible for COBRA until September 1, 2021, they could elect coverage after September 30, 2021 (as long as they elect COBRA and request to be treated as an AEI within 60 days of receiving their COBRA Election Notice) and receive the premium assistance for the month of September.

When Does Premium Assistance End?

Premium assistance ends on the earlier of (1) September 30, 2021, (2) the date an individual ceases to be an AEI because they are eligible for certain other group health coverage or Medicare, or (3) the last day of the employee's maximum coverage period (or extended coverage period, where applicable). If the employee remains eligible for COBRA after September 30, 2021, they will remain eligible until the last day of their maximum coverage (or extended coverage) unless they fail to pay their premiums (subject to any COVID-19 related extensions) or COBRA otherwise ends early.

What is an Involuntary Termination?

Consistent with the IRS' guidance under ARRA, for purposes of ARPA, the IRS provides that an involuntary termination is "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." Further, if an employee voluntarily resigns, it may still be an involuntary termination if the employee was constructively discharged or forced to resign due to a material

negative change in the employment relationship. Specifically, the IRS provided the following examples of involuntary terminations:

- Where an employee resigns, but the facts demonstrated the employee was ready and willing to work; however, the employee knew they would have been terminated anyway absent their resignation, then the termination is involuntary. For example, where an employee resigns in lieu of termination.
- Where an employee is terminated while they are absent due to illness or injury, but there is a reasonable expectation the employee will return after the illness or injury subsides.
- Where an individual is forced to retire in lieu of being terminated.
- Termination for cause (unless it is gross misconduct).
- Voluntary resignation due to a material change in the geographic location of employment. For example, if the company required the employee to move from Texas to California.
- Termination as a result of an employee's participation in a window program meeting the requirements of Treas. Reg. 31.3121(v)(2)-1(b)(4)(v), i.e., where an employer offers severance to an employee if he or she resigns by a specified period of time.
- Resignation due to concerns about workplace safety only if the employer's actions or inactions result in a material negative change in the employment relationship analogous to a constructive discharge.
- Resignation due to personal circumstances, such as health condition of the employee or family member or inability to locate child care only if it is analogous to a constructive discharge (e.g., the employer fails to take a required action or provide a reasonable accommodation).
- Resignation due to an involuntary reduction in hours.
- An employer's decision not to renew an employment contract if the employee was otherwise willing and able to continue the relationship and willing to execute a contract under similar terms or continue without a contract.

The IRS specified the following are not involuntary terminations:

- Voluntary retirement (i.e., where the employment would have continued absent the employee's decision to resign).
- Resignation due to concerns about workplace safety if there is no material negative change in the employment relationship analogous to a constructive discharge.
- Resigning because the employee's child's school or daycare is closed.
- The employee's death.
- The end of an employment contract where both parties understood at the time the contract was entered that it was for specific services over a specified term and was not subject to renewal.

What is a Reduction in Hours?

Consistent with examples offered by the DOL in its ARPA FAQs, the IRS guidance includes several examples of what constitutes a reduction in hours, including:

- A furlough initiated by the employer or an employee participates in a furlough process analogous to a window program.
- Work stoppage due to a lawful strike or lockout as long as the employer and employee intend to maintain the employment relationship at the time the strike or lockout begins.
- An employee's voluntary reduction in hours, such as an employee's request to go part-time.
- Absence from work due to illness or injury (but the employee remains employed).
- Temporary leave of absence (where employee intends to return to work and the employer and employee intend to maintain the employment relationship).

COBRA Continuation Extensions and Election Requirements

For plans subject to federal COBRA, ARPA extends the election period for federal COBRA coverage if the qualifying event occurred before April 1, 2021, and if the individual has not yet elected COBRA or still has an open election period (such as due to the COVID-19 extensions). In these cases, coverage may be elected retroactive to the date coverage was lost.

The guidance affirms that premium assistance is available from April 1 through September 31, 2021 for AEIs who are in their 18-month maximum COBRA coverage continuation period, or a disability or second qualifying event extension period, or an extension under applicable state continuation, such as extensions applicable to fully insured plans in New York and California.

If an AEI is only eligible for state mini-COBRA and they reside in a state that has not opted to create a similar extended election right to COBRA (similar to the extended election period ARPA creates for federal COBRA), then they are not eligible for an extended election period. In such case, they would only be eligible for premium assistance (if they are an AEI), if they have a resulting period of coverage between April 1, 2021, and September 30, 2021.

In order to be eligible for premium assistance, an AEI must elect COBRA and request treatment as an AEI within 60 days of receipt of the applicable notices. This is the case regardless of whether any COVID-19 related extensions would otherwise apply to certain COBRA deadlines. Moreover, employers, issuers, or multiemployer plans do not have the benefit of any COVID-19 related extensions for providing the ARPA-related notices to individuals.

Furthermore, an individual's failure to pay premiums for COBRA continuation coverage elected before April 1, 2021, does not impact the individual's eligibility for premium assistance beginning the first period of coverage on or after April 1, 2021. This could leave gaps in coverage if an individual paid for only some periods of coverage prior to April 1, 2021.

Finally, if an individual fails to elect retroactive COBRA coverage at the time he or she elects COBRA coverage with premium assistance, his or her election cannot be changed after the end of the 60-day election period even where the COVID-19 related extensions would otherwise apply.

How Does Premium Assistance Work for ICHRAs and HRAs?

For HRAs, if the individual elects coverage under the ARPA extended election period, then the HRA cannot reimburse expenses incurred between the date coverage was lost and the first day of the first period of subsidy assistance beginning on or after April 1, 2021. They will have access to the same level of reimbursements during COBRA continuation as was available immediately before the qualifying event, based on the amount originally available for the HRA plan year and reimbursements for expenses incurred before the qualifying event, reduced by the amount of any reimbursements made during the post-termination runout period.

If an AEI becomes eligible for another HRA (other than an HRA that qualifies as an FSA pursuant to Section 106(c)(2) of the Code), then this effectively ends an individual's eligibility for premium assistance.

An AEI may also receive premium assistance for an individual coverage HRA (ICHRA) integrated with individual coverage; however, not if it is integrated with Medicare. The premium assistance is limited to the ICHRA, and will not apply to the cost of the underlying individual coverage.

Employer Subsidized Continuation Coverage/Certain Severance

If the employer subsidizes some or all COBRA premium costs, the employer is not eligible for premium assistance credits for the amount for which the employer would not have charged the individual. For example, if the employer subsidizes the COBRA costs for employees who lost coverage due to a reduction in hours by paying 50% of the

cost of COBRA, the employer can only claim 50% of the cost of coverage as a premium assistance credit. Or, if the employer subsidizes the cost for former employees at 100% for several months post-employment, the employer cannot claim the premium assistance credit for those months.

What are the Premium Assistance Credits and What are the Parameters for Credits?

For any coverage not subsidized by the employer, as discussed in the previous section, the credit for a quarter is the amount equal to the premiums not paid by AEIs for COBRA continuation coverage as well as administrative costs which, in sum, is 102% of the applicable premium. For ICHRAs, the premium assistance is equal to 102% of the amount actually reimbursed with respect to an AEI.

The plan can increase the COBRA premium amount (if it previously charged less than the maximum 100%) in accordance with Section 54.4980B-8, Q&A-2(b)(1), and the applicable notice requirements, and receive the premium assistance tax credit. Moreover, if the plan provides a taxable severance payment to AEIs it does not reduce the premium assistance tax credit available to the employer. However, as set forth above, the employer may not receive the premium assistance tax credit for employer-subsidized coverage.

Because only qualified beneficiaries as defined under federal law can be AEIs, if non-qualified beneficiaries are covered by continuation coverage, then premium assistance is only available for AEIs. Therefore, if non-AEIs covered by continuation coverage increase the premium cost, then not all of the coverage cost is eligible for premium assistance. For example, if the employee and one child are the only AEIs, but there is another individual covered under continuation coverage who is a non-AEI, then if the cost of COBRA is $800 for Employee+1 coverage and $1,000 for family coverage, only $800 would be eligible for premium assistance, and the employee would be required to pay the $200 difference.

If the plan allows individuals to change coverage to a different benefit, then the different benefit package cannot cost more than the premium for coverage that the individual was enrolled in at the time of the qualifying event; however, this does not apply in situations where changes are made at open enrollment or the former plan is no longer available and the AEI must be offered a plan available to similarly situated active employees that is most similar to the plan the AEI was previously covered under but it costs more than the prior plan.

If an employer is receiving tax credits pursuant to the CARES Act or FFCRA, such as the employee retention credit, among others, for any period during April 1, 2021, and September 30, 2021, then it cannot also claim a premium assistance credit under ARPA for the same period.

Finally, any premium assistance credit is included in the gross income of the entity claiming the credit for the taxable year, including the last day of any quarter with respect to which the credit is allowed.

Who Collects the Premium Assistance Credit?

Consistent with the ARPA, the IRS specifies the premium assistance credit is payable to:

- the employer maintaining the plan for self-funded or fully insured plans subject to federal COBRA;
- the insurer providing coverage subject to state continuation requirements (e.g., mini-COBRA); or
- the multiemployer plan for group health plans that are multiemployer plans.

Unless additional, future guidance provides otherwise, an entity listed above cannot delegate responsibility for, or receipt of, the premium assistance or applicable premium assistance credit.

What about PEOs or Third Party Payers?

Unless, as described below, a PEO or other third-party payer is the premium payee, employers collect the premium assistance credit even if they use a third-party payer, such as a reporting agent, payroll service provider, or PEO to report and pay federal employment taxes. A third-party payer may report the credit on behalf of the employer if it reports and pays the employer's premiums on its behalf. It is reported as follows depending on the type of third party entity:

- Reporting agent: If the employer uses a reporting agent to file its federal employment tax returns, then the agent will reflect the credit on those returns.
- Certified Professional Employer Organization (CPEO): If the employer uses a CPEO or a §3504 designated agent to report federal employment taxes on an aggregate form 941, the CPEO will report the credit on its aggregate Form 941 and Schedule R.
- Non-certified PEOs or other third-party payers: If the PEO or other third-party payer pays and reports the employer's federal employment taxes under its own EIN (versus the employer's) then the PEO or third party payer reports the credit on an aggregate Form 941 and separately report the credit allocable to the employer for which it is filing the Form 941 on an accompanying Schedule R.

Regardless of having a third-party payer of any kind, the employer must file its own Form 7200 to request an advance of the premium assistance credit and provide a copy of Form 7200 to its third-party payer.

The only time the PEO or third party payer can collect the premium assistance credit for itself is if it:

- Maintains the group health plan,
- Is considered the sponsor of the group health plan and is subject to the applicable DOL COBRA guidance, including providing the COBRA election notices to qualified beneficiaries, and
- Would have received the COBRA premium payments directly from the AEI were it not for the COBRA premium assistance.

If these conditions are met, then the third party payer reports the credit on applicable lines of Form 941, and completes line 8 of Schedule R, and may also request an advance of the premium assistance credit using Form 7200 on its own behalf. Similar to employers and other entities, the premium assistance credit is included in the gross income of the third-party payer, and cannot be claimed if the third-party payer receives other tax credits pursuant to the FFCRA or CARES Act for any client for whom it is the third-party payer.

The third-party payer must retain any substantiation records and obtain any information from its client that would ensure it is accurately administering the premium assistance and claiming the credit.

How do Entities Request an Advance of the Premium Assistance Credit?

Entities may reduce their deposits of federal employment taxes in anticipation of the credit for which the entity has become entitled with regard to a period of coverage. This is available as of the date they are entitled to the credit. If the anticipated credit exceeds federal employment tax deposits available for reduction, then the entity can file a Form 7200 after the end of the payroll period in which they become entitled to the credit to request an advance; however, an advance cannot be requested for any credit period that has not yet begun.

Form 7200 must be filed before the earlier of (1) the day the employment tax return for the quarter in which the premium payee is entitled to the credit is filed, or (2) the last day of the month following that quarter. Form 7200 and IRS Notice 2021-24 provide more information about the advance.

State or local governments, or their political subdivisions, Indian tribal governments, agencies or instrumentalities of the federal government described in Section 501(c)(1) and exempt from taxation under 501(a) of the Code, as well as entities that do not have any employment tax liability (such as multiemployer plans with no employees) are entitled to a premium assistance credit for any period of coverage after the payee receives an AEI's election, and for each period thereafter between April 1, 2021, and September 30, 2021.

The premium assistance credit is claimed by reporting the refundable and any non-refundable portions of the credit, as applicable, and the number of persons receiving premium assistance on the designated lines of its federal employment tax return (usually Form 941). Advances of the premium assistance credit can also be requested using Form 7200 for governmental entities, while entities that do not have any employment tax liability can request the advance on Form 941. When completing Form 941 for the advance (for entities without employment tax liability), the entity completes Form 941 and enters zero on all remaining non-applicable lines. (See Question 77 in the IRS guidance for more information).

If an individual is no longer an AEI but fails to notify the entity providing the premium assistance, the entity is still entitled to the credit unless it knew the individual was no longer eligible. Therefore, once an entity is aware, if it ever becomes aware, that an individual is eligible for other group health plan coverage or Medicare, it should stop providing premium assistance and should not apply for the credit.

What Does This Mean For Employers?

Employers should ensure they send all required notices by the applicable deadlines. For individuals who are eligible for an extended election period, the deadline is May 31, 2021. If employers have not coordinated with carriers (if they offer a fully-insured plan and are subject to state mini-COBRA versus federal COBRA), they should do so to ensure processes are in place to comply with ARPA. Employers should also familiarize themselves with the guidance related to what constitutes an involuntary termination or reduction in hours to ensure all potential AEIs receive the required Notices and opportunity to be treated as an AEI, if eligible. Finally, employers should be prepared to file Form 941 (or Form 7200 if an advance premium assistance credit is required) to receive their premium assistance credits.

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