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What Is An Involuntary Termination or Reduction In Hours for ARPA COBRA Premium Assistance?

One of the first questions that must be addressed in order to determine whether an individual is eligible for the temporary 100% subsidy for COBRA health care continuation coverage (including under state mini-COBRA statutes) enacted under the American Rescue Plan Act of 2021 ("ARPA") is whether the individual has had an involuntary termination from employment or a reduction in hours. On May 18, 2021, the IRS released **Notice 2021-31**, which provides guidance on this threshold question. This memorandum addresses what is an involuntary termination or a reduction in hours for purposes of the ARPA COBRA premium assistance.

***Brownstein Comment**: **Notice 2021-31** is comprised of 86 FAQs providing information about various aspects of the premium assistance, including individuals' eligibility, the health coverage eligible for the premium assistance, the premium assistance period, the extended election period, and calculating and claiming the tax credit. We will cover these aspects in other memoranda.*

Involuntary Termination Of Employment

Assistance Eligible Individuals ("AEIs") are eligible for the ARPA COBRA premium assistance. An AEI is an individual (1) who is a qualified beneficiary with respect to a period of COBRA continuation coverage during the period from April 1, 2021, through Sept. 30, 2021, and eligible for that COBRA continuation coverage by reason of an involuntary termination from employment (other than by reason of the individual's gross misconduct) or a reduction in hours and (2) who elects COBRA continuation coverage.

Involuntary Termination - In General

In **Notice 2021-31**, the IRS clarifies that "involuntary termination" relates only to an employment relationship and, for purposes of ARRA COBRA, means:[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.

***Brownstein Comment**: This general definition is identical to the definition that was applied the last time federal COBRA premium assistance was provided in connection with the Great Recession circa 2009. It would be helpful to have clarification as to how the "willing" and "able" standards are to be interpreted and applied.*

Situations That May Be Involuntary Terminations

Based on the facts and circumstances of a particular situation, involuntary termination from employment may include any of the following situations:

- An employee's voluntary termination where the employee had knowledge he otherwise would be terminated by the employer.[2]
- An employee's voluntary termination for "good reason" resulting from "a material negative change in the employment relationship" that is analogous to a constructive discharge.[3] Examples include a material change in geographic location[4] or a material reduction in the number of hours worked.[5] ***Brownstein Comment:*** Employers and employees undoubtedly will have differing views of what is a material negative change. These disagreements may be resolved through the subsidy denial appeal process the DOL is required to establish.
- Termination by the employer while the employee is absent from work due to illness or disability or while on other authorized leave, where there is a reasonable expectation that the employee will return to work.[6]
- Termination by the employer for cause (but not due to gross misconduct as defined by the applicable court for federal COBRA purposes).[7]
- Acceptance of a buy-out or severance package, if the employer indicates that terminations are likely after the offer period expires.[8]
- The nonrenewal of an expired employment contract, if the employee was willing and able to execute a new, similar contract.[9]
- Employee's voluntary termination due to general concerns about workplace safety, but only if the employee can demonstrate that the employer's actions resulted in a material negative change in the employment relationship analogous to a constructive discharge.[10]
- Employee's voluntary termination due to the employee's personal circumstances unrelated to an action or inaction of the employer, such as a health condition of the employee or a family member, inability to locate day care, or other similar issues, but only if the employer failed to either take a required action or provide a reasonable accommodation.[11]
- Employee's death.[12]

Situations NOT Likely To Be An Involuntary Termination

Unless the specific facts and circumstances of a particular situation demonstrate otherwise, involuntary termination does not include the following:

- Termination by the employer while the employee is absent from work due to illness or disability or while on other authorized leave, where there is no reasonable expectation that the employee will return to work.[13]
- Absence from work due to illness or disability before any employer action to terminate the employment relationship.[14]
- Retirement, unless the employer otherwise would have terminated the employee and the employee had knowledge that she would be terminated unless she retired.[15]
- Termination for gross misconduct (as defined by the applicable court for federal COBRA purposes).[16]
- Employee's voluntary termination due to general concerns about workplace safety.[17]
- Employee's voluntary termination due to employee's personal circumstances unrelated to an action or inaction of the employer, such as a health condition of the employee or a family member, inability to locate day care, or other similar issues, where there is no obligation for employer to act or provide reasonable accommodation.[18]
- Employee's voluntary termination because a child is unable to attend school or because another child care facility is closed due to the COVID-19 National Emergency.[19]
- The nonrenewal of an expired employment contract, where the contract was for specified services over a set term and was not intended to be renewed.[20]

- Loss of health coverage due to qualifying events other than involuntary termination or reduction in hours, such as divorce or loss of dependent status under the employer's group health plan.

Reduction in Hours

A qualified beneficiary who loses coverage under an employer's group health plan on account of a "reduction of hours" is a potential AEI. A reduction of hours includes the following:

- An employee's voluntary reduction in hours.[21]
- An employee's furlough. A furlough can be initiated by the employer or the employee (as in a window-type program). A furlough can be a temporary loss of employment or a complete reduction in hours if, in either case, there is a reasonable expectation that the individual will return to employment or resume hours and the employer.[22]
- A work stoppage due to a lawful strike initiated by employees or their union representatives.[23]
- A lockout initiated by the employer.[24]
- A temporary leave of absence.[25]
- Absence from work due to an employee's illness or disability.[26]

***Brownstein Comment**: Importantly, at the outset of the change in the employment relationship in all of the above situations, both the employer and employee must intend to maintain the employment relationship.*

Employee Self-Certification

The IRS guidance states that an employer may require individuals to self-certify or attest to their involuntary termination or reduction in hours. An employer may use these certifications to substantiate the employer's entitlement to the premium assistance credit; provided that the employer retains copies of the certifications in order to produce in the event of audit.[27] The employer may rely on these certifications, and is not required to gather other, additional supporting documentation of the employer's entitlement to the premium assistance tax credit, unless the employer has actual knowledge that the individual's certification is incorrect.[28]

Why All Terminations Cannot Be Treated as Involuntary Terminations

Trying to decide whether an employee has been involuntarily terminated or has reduced hours may seem to require a lot of an employer's time and effort. As a result, an employer may be tempted to treat all terminations as involuntary terminations as an expedient and cost-effective course of action, especially because the federal government is paying for the ARPA COBRA premium assistance. However, this course of action could be expensive for an employer.

First, providing the premium assistance to individuals who are not otherwise eligible results in a violation of the COBRA provisions under the Internal Revenue Code (the "Code"). The Code imposes an excise tax on a group health plan that fails to comply with the COBRA rules with respect to any qualified beneficiary. The excise tax with respect to a qualified beneficiary generally is equal to $100 per day ($200 per day if more than one qualified beneficiary with respect to same qualifying event is affected) for each day beginning when the failure first occurs and ending when the failure is corrected. There are special rules that limit the excise tax amount if the failure would not have been discovered despite the exercise of reasonable diligence or if the failure is due to reasonable cause and not willful neglect.[29]

Second, if the health plan is subject to ERISA, there are potential civil and criminal penalties and fines due to the resulting breach of fiduciary duty for the administrator's failure to follow the terms of the plan and applicable law. If the plan is not subject to federal COBRA, the failure to provide the premium assistance in accordance with ARPA may result in a violation of state law, subjecting the plan sponsor to, among other things, civil and criminal penalties and fines.

Third and finally, the secretaries of the U.S. Department of Labor and U.S. Department of Health and Human Services are authorized to prescribe such regulations aimed at preventing fraud and abuse.

How We Can Help

Please contact one of us or your regular Brownstein attorney for answers to your questions about your health and welfare employee benefit plans.

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[1] Notice 2021-31, Q&A-24.
[2] Notice 2021-31, Q&A-24.
[3] Notice 2021-31, Q&A-24.
[4] Notice 2021-31, Q&A-28.
[5] Notice 2021-31, Q&A-32.
[6] Notice 2021-31, Q&A-25.
[7] Notice 2021-31, Q&A-27.
[8] Notice 2021-31, Q&A-29.
[9] Notice 2021-31, Q&A-34.
[10] Notice 2021-31, Q&A-30.
[11] Notice 2021-31, Q&A-30.
[12] Notice 2021-31, Q&A-33.
[13] Notice 2021-31, Q&A-25.
[14] Notice 2021-31, Q&A-25.
[15] Notice 2021-31, Q&A-26.
[16] Notice 2021-31, Q&A-27.
[17] Notice 2021-31, Q&A-30.
[18] Notice 2021-31, Q&A-30.
[19] Notice 2021-31, Q&A-31.
[20] Notice 2021-31, Q&A-34.
[21] Notice 2021-31, Q&A-21.
[22] Notice 2021-31, Q&A-22.
[23] Notice 2021-31, Q&A-23.
[24] Notice 2021-31, Q&A-23.
[25] Notice 2021-31, Q&A-31.
[26] Notice 2021-31, Q&A-25.
[27] Notice 2021-31, Q&A-4 and Q&A-7.
[28] Notice 2021-31, Q&A-6.
[29] The minimum excise tax is not to be less than the lesser of (1) $2,500 ($15,000 if the failures for any year are more than *de minimis*) or (2) the excise tax. For single employer plans, the overall limit is $500,000, or if less, 10% of the amount the employer paid or incurred during the preceding taxable year for group health plans. For multiemployer plans, the limit is $500,000, or if less, 10% of the amount paid or incurred by the trust to provide medical care during the taxable year in which the failure occurred. Providers of coverage who may become liable for the penalty tax upon a written request to provide COBRA coverage have a special overall limitation of $2 million for a taxable year with respect to all plans for which they provide coverage.