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ARPA COBRA Subsidy – When is a Termination of Employment Involuntary?

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As we previously explained in our prior blogs, both here and here, on the new COBRA subsidy rules, the American Rescue Plan Act of 2021 ("ARPA"), includes a 100% COBRA premium subsidy for periods of coverage occurring between April 1 and September 30, 2021. The subsidy is available to qualified beneficiaries who are eligible for COBRA coverage due to a covered employee's reduction in hours of employment or involuntary termination of employment.

If someone's entitlement to COBRA coverage is due to a reduction in hours of employment (leave of absence, for example), the question of whether it is voluntary or involuntary does not apply. ARPA's exclusion from the subsidy only applies to voluntary terminations of employment.

One of the key interpretive questions, therefore is "what is an *involuntary* termination of employment"? Given the various factual situations that could arise, it is not surprising that this is one of the most frequently asked questions on the ARPA premium subsidy. Back in 2009, Congress enacted another version of a COBRA subsidy and, at that time, the IRS issued guidance to help define an "involuntary" termination of employment. There is no assurance that the IRS will reach the same conclusions under ARPA; but for those of you who are planning, the following criteria were relevant in 2009 and may be relevant today.

Under the 2009 rules, the basic principles are that an involuntary termination means:

- 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.

In the end, the determination of whether a termination is involuntary is based on all the facts and circumstances. So just because a termination of employment is labeled as "voluntary" does not mean it is voluntary for ARPA purposes. Again, here are some key scenarios from the 2009 guidance.

CAUTION: The following information is from 2009 guidance on COBRA subsidies and cannot be relied upon until the IRS and/or DOL issues ARPA guidance:

Layoffs

An involuntary reduction of employment to zero hours, such as a layoff, furlough or other suspension of employment, resulting in a loss of health coverage was treated as an involuntary termination. This was true even if the layoff included recall rights. Unlike the 2009 ARRA subsidy provisions, however, ARPA includes reduction in hours of employment as one of the qualifying events that trigger eligibility for the COBRA subsidy. Thus, a qualified beneficiary who loses coverage in these circumstances should be eligible for the ARPA COBRA subsidy without having to treat it as an "involuntary termination of employment," assuming they satisfy the other eligibility requirements.

Strikes/lockouts

Generally, an employee-initiated strike was not treated as an "involuntary" termination of employment. However, a lockout initiated by the employer was an involuntary termination.

Severance deals/'buy-outs'

The IRS included in the category of *involuntary* terminations a termination elected by the employee in return for a severance package (a "buy-out") where the employer indicates that after the offer period for the severance package, a certain number of remaining employees in the employee's group will be terminated. What was less clear was how a truly voluntary buy-out would be treated.

Constructive termination/'good reason' quits

Another important category of “involuntary” terminations from 2009 included so-called “good reason” terminations. This refers to an employee-initiated termination from employment where the termination occurred by the employee for good reason due to employer action that caused a material negative change in the employment relationship for the employee. This could also apply if there is a significant change in the geographic location of where the services are performed.

Limited duration contract/seasonal employees

Some employees are hired through a voluntary but limited duration employment agreement. For example, an employee might be hired for six months. Or an employee might be hired for a particular season that begins in April and ends in September. In these cases, does reaching the end of the limited duration mean that there has been an involuntary termination of employment? As a general rule, the IRS view articulated in 2009 was that failure to return to work after the end of the initial contract was an *involuntary* termination. Specifically, an involuntary termination could include the employer’s failure to renew a contract at the time the contract expires, if the employee was willing and able to execute a new contract providing terms and conditions similar to those in the expiring contract and to continue providing the services. This was true even if the employer simply failed to offer additional work and was not limited to a case where the employer specifically terminates the employee.

Retirements

If an employee retires, some might think that this means the individual was not involuntarily terminated. However, that may not necessarily be correct for purposes of ARPA. Under the 2009 guidance, if the facts and circumstances indicate that, absent retirement, the employer would have terminated the employee’s services, and the employee had knowledge that he or she would be terminated, the retirement would be treated as an involuntary termination. Moreover, in many cases, to “retire” simply means that the employee met certain age and service conditions at the time of a termination of employment. So if the employer fires an employee, if that employee met the age and service conditions, he or she could retire, but still be considered to have involuntarily terminated employment.

Military call-up

In its 2009 guidance, the IRS indicated that an employee who was a member of a military Reserve unit or the National Guard and who was called up to active duty is to be treated as involuntarily terminated from employment. On a related note, the IRS also clarified that eligibility for coverage under TRICARE would not end entitlement to a premium subsidy.

Failure to be re-elected

The IRS indicated in its 2009 guidance that an elected official who completed his or her term of office and was not reelected was treated as involuntarily terminated. Similarly, an elected official who could not run again due to term limits was treated as involuntarily terminated at the end of his or her term of office. However, if an elected official simply failed to run for reelection when eligible, the termination was treated as voluntary.

These are just a few of the many scenarios that will arise in interpreting an “involuntary” termination of employment. Hopefully, future IRS and/or DOL guidance will clarify the rules.

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- **Roberta K. Chevlowe**
  Senior Counsel