

All Good Subsidies Must Come to an End, Part II: The IRS Adds Some Nuances

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In an [earlier post](#) we reviewed the end dates for the ARP COBRA premium subsidy provided by the American Rescue Plan Act of 2021 (“ARP”), and addressed the required expiration notice. This post revisits the topic in light of the new guidance in [IRS Notice 2021-31](#) (the “Notice”).

In general, for individuals otherwise eligible for the COBRA premium subsidy, the subsidy ends on the earliest of:

- The end of the subsidy period set forth in the statute (September 30, 2021),
- When the individual reaches the end of their maximum COBRA continuation period, or
- The first month of coverage beginning on or after the first date that the individual becomes eligible for other, disqualifying coverage.

However, the new IRS guidance provided some clarifications and nuances, addressed below.

End of the Statutory Subsidized Period (September 30, 2021)

ARP makes subsidized COBRA coverage available to eligible individuals through September 30, 2021. In the Notice, the IRS explained that, for individuals still eligible for the premium subsidy on September 30th, the subsidy will not necessarily end on that date. Instead, the subsidy continues until the end of the last “period of coverage” beginning on or before September 30, 2021. A “period of coverage” means a month or shorter period with respect to which premiums would normally be charged. For example, if premiums are usually assessed on a bi-weekly period basis, including the period from September 25th to October 8th, the subsidy would not be prorated to September 30th, but would instead cover the entire period.

The IRS also clarified in the Notice that COBRA coverage continues automatically when the premium subsidy period expires, subject to timely payment of premiums according to the terms of the plan and the extended due dates under the COVID-19 Emergency Relief Notices.

Maximum COBRA Continuation Period

The COBRA premium subsidy ends when an assistance eligible individual is no longer eligible for COBRA continuation coverage. The IRS guidance clarified that an otherwise assistance eligible individual continues to be eligible for the subsidy if they remain on COBRA for an extended period (beyond the 18-month period applicable to an involuntary termination or reduced work hours), due to a Social Security disability determination, second qualifying event, or an extension under a State mini-COBRA law. For example, if an individual who was involuntarily terminated on April 1, 2019 is still receiving continuation coverage due to New York's mini-COBRA extension (*i.e.*, continuation coverage for up to 36 months), then they will be entitled to the premium subsidy from April 1, 2021 through the end of the period of coverage beginning on or before September 30, 2021, assuming they remain assistance-eligible (*i.e.*, not eligible for other disqualifying coverage).

Additionally, the IRS guidance specified that the death of the employee or former employee who experienced the reduction in hours or involuntary termination will not end their spouse's or children's eligibility for the COBRA subsidy.

Disqualifying Coverage

The COBRA premium subsidy ends when an assistance eligible individual becomes eligible for (even if not enrolled in) disqualifying coverage. Disqualifying coverage includes Medicare or another group health plan, but does not include excepted benefits, a qualified small employer health reimbursement arrangement (QSEHRA), or a health FSA. The IRS explained in the Notice that if an individual meets the eligibility requirements for disqualifying coverage but there is a waiting period before such coverage starts, the individual will continue to be eligible for the premium subsidy during the waiting period.

If an employee retires and becomes eligible for retiree coverage that is not COBRA continuation coverage, such retiree coverage may or may not constitute disqualifying coverage. In its guidance, the IRS distinguished between retiree coverage offered under the same group health plan, in which case such coverage would not be disqualifying, and coverage offered under a separate plan, which would be disqualifying. The rules for determining whether plans offered by the same employer (such as an active plan and a retiree plan) constitute one or more group health plans can be complicated, and generally turn on the documentation and plan operation. Legal counsel can help determine whether a retiree plan may be considered part of the active plan (*i.e.*, not disqualifying from the subsidy).

The IRS also clarified that if an individual is eligible for coverage under another plan that would otherwise be disqualifying, but the coverage under that plan is COBRA continuation coverage, such other coverage will not render the individual ineligible to receive a premium subsidy.

Take Away

Generally, the IRS guidance is consistent with the text of ARP and the DOL's discussion of when premium subsidies end. However, the IRS provided some clarifications with respect to specific scenarios. When in doubt, reach out to legal counsel for more information about when an individual's subsidy will end.

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