

# COBRA SUBSIDY GUIDANCE ISSUED

*Hodgson Russ Employee Benefits Newsletter*  
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As described in a [previous alert](#), certain COBRA qualified beneficiaries may be eligible for up to six months of free COBRA coverage. The IRS recently issued Notice 2021-31 providing guidance for plan administrators on numerous American Rescue Plan Act (ARPA) COBRA subsidy questions. Highlights from the new IRS guidance include:

Reliance on Employee Attestation. An employer may rely on an individual's attestation regarding a reduction in hours or involuntary termination of employment, and eligibility for other disqualifying coverage, for the purpose of substantiating eligibility for the credit, unless the employer has actual knowledge that the individual's attestation is incorrect. Employers are encouraged to keep a record of these attestations.

Intervening Coverage is Not Disqualifying. An otherwise eligible individual is not disqualified from being eligible for the subsidy if the individual previously enrolled in other group health plan coverage before electing COBRA continuation coverage. So long as the individual is no longer covered by (or eligible to enroll in) the other group health plan coverage as of April 1, 2021, that prior coverage by a group health plan does not disqualify the individual from COBRA premium assistance. However, beginning on April 1, 2021, coverage by (or eligibility to enroll in) another group health plan would disqualify the individual from COBRA premium assistance, even though it does not end the period of eligibility for COBRA continuation coverage.

Coverage under a Healthcare Exchange is not Disqualifying. An otherwise eligible individual is not disqualified from being eligible for the subsidy if they are currently enrolled in individual health insurance coverage through a healthcare exchange. However, an individual is not eligible for a premium tax credit to help pay for the cost of Exchange coverage during any month that the individual is enrolled in COBRA continuation coverage.

Broad Definition of Involuntary Termination. The subsidy is only available to individuals who became eligible for COBRA because of a reduction of hours, or an involuntary termination of employment. Determining whether a termination of employment was involuntary depends on the facts and circumstances of a given situation.

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Generally, retirement would not be considered an involuntary termination. However, if the employee would have been terminated if the employee had not retired, then the retirement would be considered an involuntary termination. Terminations of employment resulting from participating in a retirement “window” program, a required material relocation, or termination for “good reason” are generally considered involuntary terminations. An involuntary termination would also include an employer’s decision not to renew an employment contract 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.

However, a termination of employment would be considered voluntary if the employee terminates employment because a child is unable to attend school or because another childcare facility is closed due to the COVID-19. Also, an employee’s death is not considered an involuntary termination.

Consequences for Individuals. An Assistance Eligible Individual who fails to provide notice that they are no longer eligible for a subsidy may be subject to a Federal tax penalty of \$250 for each failure to notify the employer, plan, or issuer. If the failure to provide notice is fraudulent, the penalty will be the greater of \$250 or 110 percent of the COBRA premium assistance improperly received.

Additional guidance may be issued by the Treasury Department and the IRS.