

IRS FAQ Expands Free COBRA Entitlement

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On May 18, 2021, the Internal Revenue Service published guidance in the form of a series of 86 questions and answers ("FAQ") that address the American Rescue Plan Act of 2021's ("ARPA") continuation health coverage in the form of "COBRA premium assistance" under the Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA"), which we previously discussed [here](#). The ARPA provides for a temporary 100 percent reduction in the premium for COBRA continuation health coverage for certain "Assistance Eligible Individuals" ("Free COBRA") which employers are required to cover and can in turn receive reimbursement for the costs through tax credits.

Two items in the FAQ expand the potential reach of the ARPA, as follows:

1. An employee-initiated termination of employment **can** constitute an "involuntary termination" if the termination is for "good reason due to employer action that results in a material negative change in the employment relationship for the employee analogous to a constructive discharge." While the FAQ does not provide a definition for "material negative change" or "constructive discharge," it does provide several examples making clear that this is a narrow concept. Examples include the following:

- An employee is eligible for Free COBRA when quitting due to a personal or family medical issue if (and only if) the employer violates its legal obligations in connection with the same, such as failing to provide a leave or accommodation.
- An employee is eligible for Free COBRA when quitting due to the employer's material reduction in hours (even if health insurance is not lost) or a material change in geographic work location.
- An employee is **not** eligible for Free COBRA when quitting due to a safety concern not being remedied after complaining about the same, unless the employee can demonstrate that the employer's actions (or inactions) resulted in a "material negative change in the employment relationship analogous to a constructive discharge." While not further clarified, this is likely to mean that serious safety issues that are not remedied could potentially amount to constructive discharge.

While not in the FAQ as an example, it is also likely that an employee who resigns due to unlawful harassment amounting to constructive discharge in the discrimination context would also be entitled to Free COBRA. The FAQ makes abundantly clear that whether a termination is involuntary or voluntary is based on the particular facts and circumstances and not necessarily dictated by how the employer categorizes the termination. However, the FAQ **does** allow an employer to rely upon the employee's certification that they are eligible when claiming the tax credit. Thus, employers are well-advised to send the notice containing the ability to self-certify to any employee who may be able to satisfy the standard of constructive discharge.

2. With respect to those individuals who have elected and remained on COBRA continuation coverage for an extended period due to a disability determination, second qualifying event, or an extension under a State mini-COBRA law, the FAQ states that such individuals are eligible for Free COBRA to the extent the additional periods of coverage fall between April 1, 2021 and September 30, 2021, and if the original qualifying event was a reduction in hours or an involuntary termination of employment. This means an individual could qualify for Free COBRA even if the underlying involuntary termination or reduction in hours occurred prior to November 2019 if (and only if) the individual was on COBRA as of April 1, 2021 due to the extended coverage period arising from the disability determination, second qualifying event, or an extension under a State mini-COBRA law. It does not mean individuals involuntarily terminated prior to November 2019 are eligible for the extended election opportunity if the individuals did not remain on COBRA as of April 1, 2021 and such individuals should not get the election notice. Moreover, the FAQ confirms that plans not subject to COBRA are also not subject to the ARP requirements even if the plans are subject to a State's mini-COBRA law.

Employers should monitor developments expected under future regulations and guidance concerning the ARPA as it relates to COBRA. The [Employment & Labor Practice Group](#) at Partridge Snow & Hahn is available to answer your questions about the ARPA.

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