



# A Robinson+Cole Legal Update

## Coronavirus (COVID-19)

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## IRS Clarifies Key Provisions of the COBRA Subsidy

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As anticipated, the Internal Revenue Service (IRS) issued [Notice 2021-31](#) (the Notice) yesterday, providing important guidance to employers and plan administrators regarding their COBRA subsidy-related obligations under the American Rescue Plan Act of 2021 ([ARPA](#)). The following items are of particular interest:

- The IRS clarified that the COBRA subsidy applies to all plans subject to COBRA, including health, dental and vision plans.
- Employers may require individuals to provide self-certification or attestation regarding their eligibility status for the COBRA subsidy (including whether they are eligible for other disqualifying group health plan coverage or Medicare), which may assist the employer in substantiating its entitlement to the credit. If the employer is relying on an individual's self-certification or attestation, the employer must keep a record of this.
- An individual who is *eligible* for other health coverage (such as under a spouse's plan) or Medicare is no longer entitled to the COBRA subsidy as of the date such individual became eligible for such coverage, even if the individual did *not* elect such coverage.
- The Notice generally provides that whether a termination is involuntary is determined under the facts and circumstances. Involuntary terminations may include a severance from employment by the employer's unilateral exercise of authority; a lay-off or furlough that reduces an employee's hours to zero; early retirement and retirement incentive packages in lieu of termination or a threat of termination; and certain "good reason" terminations (using a standard similar to the good-reason rules under Section 409A of the Code).
- An Assistance Eligible Individual will remain eligible for the COBRA subsidy during a waiting period for other group health plan coverage.
- Upon the expiration of the subsidy period, unsubsidized COBRA coverage will automatically continue and the payments will be considered timely if made consistent with the terms of the plan (including any extensions available to the payment deadlines as previously issued in the Emergency Relief Notices [here](#) and [here](#)).
- An individual eligible for retroactive COBRA coverage under the Emergency Relief Notice and for subsidized COBRA coverage must elect *both* subsidized coverage and retroactive coverage within 60 days from the receipt of the COBRA notice, despite the extensions available under the Emergency Relief Notices.
- If an employer provides a subsidy for COBRA coverage, the amount of the tax credit is generally limited to only the amount the employer typically expects as payment from the individual (i.e., if the COBRA premium is \$1,000 and the employer provides a \$200 subsidy so that the COBRA qualified beneficiary only pays \$800, the COBRA subsidy tax credit available to the employer will be limited to \$800).

The IRS guidance answers many of the key questions on the application of the COBRA subsidy and how to calculate the credit. The IRS has begun updating the various forms required to claim the tax credit;

however, these forms and their instructions are not complete and are not yet available for use. Unfortunately, the guidance arrived within a matter of days from when the COBRA subsidy-compliant notices are required to be sent (i.e., May 30), so employers and plan administrators need to act immediately to review the guidance and make any necessary changes.

Read more legal updates, blog posts, and speaking engagements related to this area on [Robinson+Cole's Coronavirus Response Team](#) page and feel free to contact any member of our team with questions.

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