ACA, HIPAA AND FEDERAL HEALTH BENEFIT MANDATES: PRACTICAL Q&A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith, Ken Johnson, Amy Heppner, and Earl Porter provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte, Dallas and Washington, D.C. law firm. Ashley, Carolyn, Ken and Amy are senior members of the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

IRS PROVIDES 86 ANSWERS TO 86 QUESTIONS ABOUT THE COBRA SUBSIDY (PART ONE)

On May 18, 2021 the Internal Revenue Service (IRS) issued Notice 2021-31, providing 86 Q&As on the COBRA premium assistance subsidy under the American Rescue Plan Act of 2021 (ARPA).

This guidance comes less than two weeks before the May 31 deadline to send the ARPA-required COBRA subsidy extended election notices. Notice 2021-31 is largely consistent with the guidance issued back in 2009 for the COBRA subsidy under the American Recovery and Reinvestment Act of 2009 (ARRA) but with a few differences.

> **READERS TAKE NOTE. BETTER LATE THAN NEVER:** The deadline for issuing ARPA COBRA subsidy notices to assistance eligible individuals (AEIs) was May 31. Steps should be taken to ensure that notices are sent as required to minimize potential agency penalties and claims exposure. Any late or missed notices (especially in light of the evolving IRS guidance) should be sent out as soon as feasible.

THE ARPA COBRA SUBSIDY

The ARPA COBRA subsidy applies to certain individuals (referred to as "assistance eligible individuals" or AEIs) whose COBRA qualifying event was an involuntary termination of employment or a reduction in hours of employment.

This 100% COBRA subsidy is provided for the period April 1, 2021 to September 30, 2021. To be eligible for the COBRA subsidy, an AEI cannot be eligible for other group health plan coverage or Medicare. AEIs also include qualified beneficiaries who are the spouse or dependent child of the AEI employee who also lost coverage because of the AEI employee's involuntary termination of employment or reduction in hours.

Generally, an employer advances the subsidy and then recoups that advance through tax credits against the employer's Medicare tax obligations.

Q&A HIGHLIGHTS

One of the most anticipated aspects of the guidance was how the IRS would define involuntary termination of employment and reduction in hours. The Notice largely mirrors the guidance under ARRA but with some nuances.

The Notice provides that, with certain exceptions, an employee who terminates employment because of concerns about workplace safety (presumably including COVID-19) will be treated as having voluntarily terminated from employment and therefore is not an AEI eligible for the subsidy.

The same is true for an employee who terminates employment because of a family member's health issues or a school or daycare closure because of COVID-19. If, however, an employee is allowed to voluntarily reduce his or her hours to take care of a family member or for childcare concerns (or for any other reason) and loses coverage because of the reduction in hours, the individual would be an AEI.

The IRS provided one surprise on how the 60-day "second bite" (extended election period) for subsidized COBRA coverage interacts with the COVID-19 Outbreak Period extension for electing unsubsidized COBRA coverage.

An AEI electing subsidized COBRA coverage must also elect unsubsidized coverage for prior periods if the AEI desires that unsubsidized coverage. The AEI will lose the right to any unsubsidized coverage if the AEI fails to elect this coverage within the 60-day deadline for electing the subsidy.

This is true even though the Outbreak Period for election for that unsubsidized coverage has not otherwise expired.

AEIs are ineligible for the subsidy if they are eligible for other group health plan coverage or Medicare. The IRS provides some helpful guidance on what it means to be "eligible" for other coverage but also provides some "traps" for eligibility due to extended HIPAA special enrollment opportunities under the Outbreak Period.

The IRS notes that employers that already subsidize COBRA coverage will not be eligible for the full Medicare tax credit to the extent of the subsidy. This is the same guidance as provided under ARRA, but the IRS provides some helpful Q&As on possibly ending the employer subsidy to take full advantage of the ARPA COBRA subsidy.

Q&A SUMMARY

The IRS divided its 86 Q&As into the following sections: (1) Eligibility for COBRA Premium Assistance; (2) Reduction in Hours; (3) Involuntary Termination of Employment; (4) Coverage Eligible for COBRA Premium Assistance; (5) Beginning of COBRA Premium Assistance Period; (6) End of COBRA Premium Assistance Period; (7) Extended Election Period; (8) Extensions Under the Emergency Relief Notices; (9) Payments to Insurers Under Federal COBRA; (10) Comparable State Continuation Coverage; (11) Calculation of COBRA Premium Assistance Credit; and (12) Claiming the COBRA Premium Assistance Credit.

This Part One article addresses Q&As in the first 4 categories above. Q&As in categories 5-12 are covered in Part Two of our article, which will be in the August issue of *The Self-Insurer*.

1. ELIGIBILITY FOR COBRA PREMIUM ASSISTANCE (Q&AS 1–20)

AEI definition:

Q&As 1 and 2 provide the definition of an AEI as described above, clarifying that an individual whose termination of employment was for gross misconduct will not be an AEI.

Q&A 3 states that an individual can be an AEI more than once. For example, if an individual (1) loses coverage for a group health plan due to an involuntary termination of employment; (2) gains coverage under the group health plan of a spouse; and (3) loses that spousal coverage because of the spouse's involuntary termination of employment, that individual will be an AEI due to both losses of coverage.

AEI attestations

Q&As 4–7 provide critical guidance on use of AEI attestations to determine eligibility for the COBRA subsidy.

Notably, employers can require the AEI attestation to establish an involuntary termination of employment or reduction

in hours and that the AEI is not eligible for other disqualifying group health plan coverage.

Further, employers may rely on the attestation unless they have actual knowledge that the individual is not eligible for a subsidy. If an employer does not use the attestation, however, it must keep documentation to substantiate that the individual was eligible for the subsidy. If an employer uses an AEI attestation, it must keep that document to substantiate eligibility for the Medicare tax credit.

Practice Pointer: The U.S. Department of Labor (DOL) issued model ARPA notices specifically contemplating the use of an AEI attestation on the form "Request for Treatment as an Assistance Eligible Individual." On that form, the AEI certifies both to an involuntary termination of employment (or reduction in hours) and that the AEI was not eligible for other disqualifying coverage. Many employers and COBRA administrators used this form or a variation. For those that did not, there very well may be other employer records that can be used to verify that the AEI experienced an involuntary termination of employment or a reduction in hours. However, an employer cannot generally determine whether an AEI is eligible for other disqualifying coverage without the AEI attestation. Yet the IRS indicates that an employer must still have this documentation. Therefore, collecting and retaining the attestation remains a critical part of the documentation needed to establish that the AEI is eligible for the subsidy so that the employer can claim the Medicare tax credit.

OTHER DISQUALIFYING COVERAGE

Q&As 9–13: In this series of Q&As, the IRS emphasizes that it is simply eligibility for other group health plan coverage or Medicare and not enrollment that makes an AEI ineligible for the subsidy. An AEI, however, is not eligible for other coverage if the AEI is in a waiting period for that coverage.

Similarly, if an AEI has missed open enrollment for coverage (for example, in a spouse's plan) and cannot enroll mid-year, the individual is not eligible for other group health plan coverage.

If, however, open enrollment for that spouse's plan occurs during the subsidy coverage period, with a coverage effective date during the subsidy period, then that other coverage disqualifies the AEI from the COBRA subsidy whether or not the AEI enrolls in that coverage.

Remember, however, that eligibility for "excepted benefits" such as stand-alone dental or vision coverage or a health FSA is not disqualifying coverage.

In an interesting twist, the Outbreak Period extends the period that an individual can enroll in an employer group health plan due to HIPAA special enrollment rights. An individual with HIPAA special enrollment rights must be allowed to enroll in a group health plan even outside an open enrollment period.

Under the Outbreak Period guidance, the period to assert HIPAA special enrollment rights is extended until the earlier of 31 days after the end of the Outbreak Period (which is ongoing) or one year and 31 days after the HIPAA special enrollment event.

Thus, an AEI with ongoing HIPAA special enrollment rights will be eligible for group health plan coverage and ineligible for the subsidy. (**Q&A 9, Example 3**)

Practice Pointer: The rules regarding eligibility for other disqualifying coverage are complex as illustrated by the HIPAA special enrollment rights and the Outbreak Period. Other complications abound. For example, if an individual cannot enroll in a spouse's plan on a pre-tax basis mid-year but could enroll on a post-tax basis, that individual is apparently not eligible for a subsidy. Also, because of the COVID-19 pandemic, the IRS provided guidance in Notice 2021-15 that permitted an employer to allow mid-year elections into group health plans that ordinarily would not be allowed under the cafeteria plan rules. AEIs may be unaware of whether a spouse's plan has adopted such a provision and that they are, in fact, eligible for the spouse's group health plan. Further, most AEIs who are 65 or older can enroll in Part A of Medicare at any time even outside the special enrollment periods that are applicable to Medicare Part B. So, whether enrolled in Part A or not, it would seem that an individual 65 or older would be ineligible for the subsidy. As mentioned above, an employer can rely on an AEI's attestation that the AEI is not eligible for other coverage. Given all the complexities surrounding what it means to be "eligible" for other coverage, this is all the more reason to use the attestation.

SECOND QUALIFYING EVENTS AND DISABILITY EXTENSIONS

In a break from prior ARRA guidance, in **Q&A 17**, the IRS provides that if the original qualifying event was an involuntary termination of employment or a reduction in hours and the individual's 18 months for that coverage ended before April 1, 2021, then the individual may still be eligible for a subsidy if still enrolled due to a disability extension or a second qualifying event extends the period of COBRA coverage into the subsidy period.

The second qualifying event would only extend the coverage period of a spouse or dependent. The same rule is true for extensions under a state mini-COBRA that extends beyond 18 months.

Practice Pointer: Generally, employers and COBRA administrators "looked back" to October 2019 (18 months before April 2021) to notify potential AEIs. This guidance will likely require a "look back" much further for those COBRA qualified beneficiaries who have experienced a disability extension or a second qualifying

event and elected COBRA. The effect of this expansion of who may be an AEI is likely limited because the individual with a disability extension or a second qualifying event must have "remained on COBRA continuation coverage" to be eligible for this extension and the subsidy.

2. REDUCTION IN HOURS (Q&AS 21–23)

In these Q&As, the IRS confirms that a reduction in hours can be voluntary if it triggers a loss of coverage. Also, a furlough where there is a complete reduction in hours but the employment relationship continues constitutes a reduction in hours, as does a "lawful strike" as long as the employee and employer intend to continue the employment relationship during the strike.

The reduction in hours must, however, have resulted in a loss of coverage for the event to trigger COBRA coverage (and thus ARPA eligibility).

3. INVOLUNTARY TERMINATION OF EMPLOYMENT (Q&AS 24–34)

The IRS maintained the general definition of involuntary termination of employment from ARRA, which is the "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."

As under ARRA, the IRS has specifically articulated that a "good reason" resignation would constitute an involuntary termination of employment if it is due to an "employer action that results in a material negative change in the employment relationship for the employee analogous to a constructive discharge." (**Q&A 24**)

In a somewhat ambiguous Q&A (**Q&A 25**), the IRS states that an involuntary termination of employment occurs when the employer takes action to terminate the individual's employment while an employee is away form work due to illness or disability if "there is a reasonable expectation that the employee will return to work after the illness or disability has subsided."

> Practice Pointer: Of course it is often unknown whether an employee will ever return from long-term disability. Our interpretation is that the inquiry should be whether the employee would return if he or she recovered from the disability. If so, any termination of employment will be considered involuntary. If, however, an employee informs the employer that the employee will never return or if the employee recovers and takes other employment, then the formal termination of that employee will be considered voluntary rather than involuntary.

The Notice provides that, with certain exceptions, an employee who terminates employment because of concerns about workplace safety (presumably including COVID-19) will be treated as having voluntarily terminated from employment and therefore is not an AEI eligible for the subsidy (**Q&A 30**).

The termination, however, will be considered involuntary if 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."

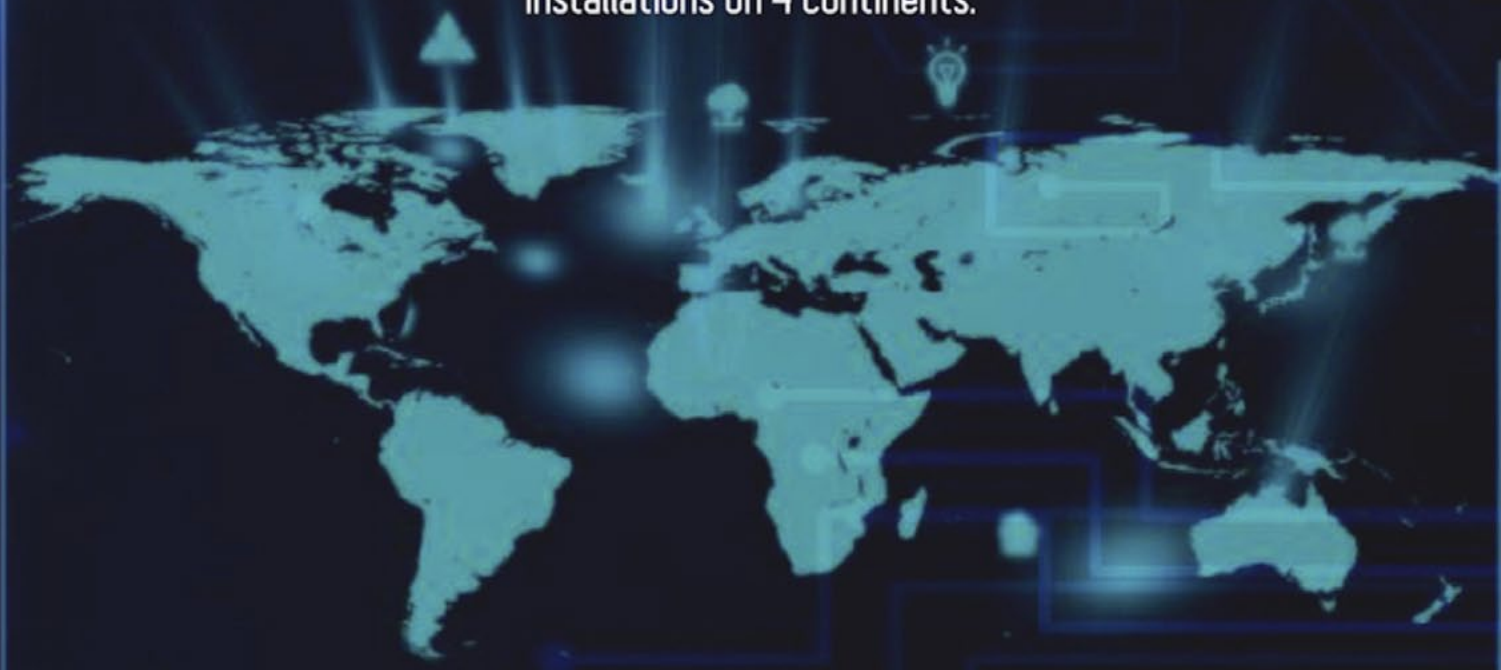
A termination of employment will also be voluntary for an employee who leaves employment because of a family member's health or a school or daycare closure because of COVIID-19 (**Q&A 31**).

On the other hand, if an employee is allowed to voluntarily reduce his or her hours to take care of a family member or because of childcare issues and loses coverage because of the reduction in hours, the individual would be an AEI.

Your Business. Your Time. Your Way.

Innovative, turnkey claims administration
software with a global footprint.

Hi-Tech Health Inc. is a leading supplier of application software, data migration, and implementation services with 30 years of experience and installations on 4 continents.



Unlock Your Business's Potential with Our Series 3000 Claims Administration System Offering:

- Custom, Cloud-Based Web Application
- GDPR, HIPAA, and HITECH Compliant
- Automated Claims Adjudication and Premium Management
- Integrated Electronic Payments
- Mobile Applications and Portal Connectivity

hi-tech health

Solutions as individual as You

1500 Route 517 Suite 200
Hackettstown, NJ 07840
(908) 813-3440
hi-techhealth.com
sales@hi-techhealth.com

Among the other guidance on involuntary termination of employment:

- Death is not an involuntary termination of employment. (**Q&A 33**)
- Retirement is not an involuntary termination of employment unless:
  - Absent retirement, the employer would have terminated the employee.
  - The employee was willing and able to continue employment.
  - The employee had knowledge that he/she would be terminated absent the retirement. (**Q&A 26**)
- An involuntary termination includes an employee who terminates employment due to a material reduction in the employee's hours (good reason termination) even if the reduction in hours did not cause an initial loss in coverage. (**Q&A 32**)
- An involuntary termination includes a resignation due to a material change in location of employment. (**Q&A 28**)
- Participation in a "window program" will be an involuntary termination of employment. (**Q&A 29**)
- An employer's decision not to renew an employee's contract is an involuntary termination, unless the parties understood at the time they entered into the contract that the contract was for specified services and would not be renewed. (**Q&A 34**)

4. COVERAGE ELIGIBLE FOR COBRA PREMIUM ASSISTANCE (Q&AS 35–42)

This series of Q&As confirms that the subsidy is available for all group health plans except health FSAs and includes dental and vision coverage and HRAs (including ICHRAs). QSEHRAs are not included because QSEHRAs are not group health plans. (**Q&As 35, 39, and 40**)

AEIs enrolled in retiree-only coverage will be eligible for the subsidy only if the retiree coverage is available under the same group health plan that covers active employees. (**Q&A 36**)

The Q&As in categories 5-12 are covered in Part Two of our article, which will be in the August issue of The Self-Insurer. ■