

IRS Provides Guidance of COBRA Involuntary Terminations

By: John Kirk on May 24, 2021 on graydon.law

Earlier this week, the IRS issued Notice 2021-31 which provides some much sought after guidance on the new COBRA subsidy in the form of FAQs. As part of this new guidance, the IRS provided some clarity on the definition of “involuntary termination” for purposes of eligibility for the subsidy. The guidance emphasizes the determination of an involuntary termination is a facts and circumstances test but does provide some examples as part of the FAQs.

The guidance notes that the definition of involuntary termination is the same definition that was used for the last COBRA subsidy in 2009. An involuntary termination is “a 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.” While wordy, the definition essentially means that terminations other than voluntary terminations (i.e., at the free choice of the employee) will qualify an individual for the subsidy.

The new guidance also reminds us that the COBRA subsidy is available to individuals who experienced a reduction of hours that caused them to lose coverage. However, unlike termination, a reduction in hours can be voluntary or involuntary, including due to a furlough. The IRS notes that an employee is eligible under a furlough even if the employee is given a choice to stay and agrees to be furloughed.

The FAQ provided examples of involuntary terminations including:

- An employee’s voluntary termination or resignation to avoid being fired, if the employee was willing and able to continue working, but had knowledge that if they continued to work, they would be terminated.
- Termination of an employee for failure to return to work from illness or disability if the employee was expected to return to work prior to the termination.
- Involuntary termination for cause. However, if the termination of employment is due to gross misconduct, the termination is not a qualifying event and the loss of the health coverage of the employee does not lead to eligibility for COBRA continuation coverage.
- Resignation as the result of a material change in the geographic location of

employment for the employee.

- Resignation as a result of a material change in the employment relationship, including a material reduction in hours that did not result in a loss of coverage.
- Termination of employment by an employee to participate in a “window program” under which employees with impending terminations of employment are offered a severance arrangement to terminate employment within a specified period of time.
- An employee’s decision not to renew an employee’s contract. However, the expiration of a contract that was for a set term (i.e., 2 years) that was not set to be renewed would NOT be an involuntary termination.

The FAQs do note that while retirement is not normally an involuntary termination if an employee retires to avoid termination it could qualify as “involuntary.” Like the voluntary termination above, the employee would need to have knowledge that they would be terminated if they didn’t voluntarily retire.

Provided examples of terminations that do NOT qualify as involuntary terminations include:

- Termination because of concerns about workplace safety due to a health condition of the employee or a family member of the employee unless the employee can show the employer’s actions (or inactions) resulted in a material negative change in the employment relationship analogous to a constructive discharge.
- A departure due to the personal circumstances of the employee unrelated to an action or inaction of the employer, such as a health condition of the employee or a family member, inability to locate daycare, or other similar issues, absent the employer’s failure to either take a required action or provide a reasonable accommodation.
- Employee-initiated termination of employment because a child is unable to attend school or because another childcare facility is closed due to the COVID-19.
- Death of an employee.

Finally, the FAQs explain that it is possible for an individual to be eligible for the subsidy more than once. For example, the employee has an involuntary termination, followed by coverage under a spouse’s plan, followed by the spouse’s involuntary termination triggering COBRA continuation coverage with premium assistance.

As can be seen from the examples provided, the determination of an employee’s involuntary termination is fact specific. Unless the circumstances surrounding a termination are clear cut, it is recommend you seek counsel to aid you in any decision to not provide the subsidy. If you have questions about involuntary terminations, the COBRA subsidy, or benefits in general, please contact any of Graydon’s employee benefits team.

