

New IRS Guidance Offers Employers Direction Regarding COBRA Subsidy Obligations

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05.25.2021

As we previously reported, the recently enacted American Rescue Plan Act of 2021 (ARPA) includes a six-month COBRA premium subsidy whereby the federal government subsidizes 100% of the COBRA premium during the period of April 1, 2021, through September 30, 2021. On April 7, 2021, the U.S. Department of Labor (DOL) released guidance which included helpful FAQs and model notices to assist employers with their compliance obligations related to the new COBRA subsidies under ARPA. On May 18, 2021, the Internal Revenue Service released additional FAQs which provide further details related to the COBRA premium subsidies, including how to claim the payroll tax credit for the subsidy. This *Fast Laner* article updates our prior article on this topic based on the highlights of the IRS's new guidance as well as additional observations of the law.

Plans Eligible for the Subsidy

As noted in the DOL's FAQs, the COBRA subsidy applies to all group health plans sponsored by private-sector employers or employee organizations (e.g., union multiemployer plans) subject to COBRA under the Employee Retirement Income Security Act of 1974 (ERISA). It also applies to plans sponsored by State or local governments subject to the continuation provisions under the Public Health Service Act.

The subsidies are also available for group health insurance required under state "mini-COBRA" laws so even small employers not subject to federal COBRA will need to be mindful of the COBRA subsidies. In most mini-

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New IRS Guidance Offers Employers Direction Regarding COBRA Subsidy Obligations

COBRA cases, the insurance company will be the party expected to provide the subsidy and receive the tax credit instead of the employer.

Eligibility for the Subsidy

The subsidy is available to any employees (and their family members) who experience a loss of health coverage due to an involuntary job loss or reduction in hours. However, the subsidy will not be available if the employee voluntarily terminates employment or is terminated for gross misconduct.

An eligible individual would need to:

- be enrolled in COBRA, or become eligible for COBRA, on or after April 1, 2021, and before the subsidy ends on September 30, 2021, or
- have become eligible for COBRA prior to April 1, 2021, with an 18-month COBRA period that includes any month (or partial month) between April and September of 2021, even if the employee did not elect COBRA when it was initially offered or elected COBRA but discontinued it before April 1, 2021. This individual would need to elect COBRA within 60 days of receipt of the notice explaining the subsidies in order to be eligible for the subsidy.

The DOL provided examples of when a reduction of hours may take place (such as due to a change in a business's hours of operations, a change from full-time to part-time status, taking a temporary leave of absence, or an individual's participation in a lawful labor strike, as long as the individual remains an employee at the time that hours are reduced). Additionally, based on the guidance and the language in the model notices, it appears that only a termination needs to be "involuntary" whereas any reduction in hours that triggers COBRA will result in subsidy eligibility.

Update: The IRS guidance defines an involuntary termination of employment to mean "a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate employment, other than due to the employee's implicit or explicit request, where the employee was willing and able to continue performing services." A determination of whether a termination of employment is "involuntary" is based on the facts and circumstances and, for example, may include a resignation or termination designated as voluntary if the facts demonstrate that absent the voluntary termination, the employer would have terminated the employee's employment. The new IRS guidance provides various examples of involuntary and voluntary terminations of employment.

New IRS Guidance Offers Employers Direction Regarding COBRA Subsidy Obligations

Update: An assistance eligible individual does not include an individual who loses coverage under a health plan that is not subject to federal COBRA continuation coverage or comparable state “mini-COBRA” coverage (such as a self-insured church plan) — even if the plan voluntarily provides for continuation coverage. Also, if an individual whose original qualifying event was a reduction in hours or involuntary termination of employment has elected and remained on COBRA for an extended period due to a second qualifying event, disability determination, or extension under a state mini-COBRA law, such individual is eligible for the COBRA subsidy during the extended period, to the extent it falls within the period April 1 to September 30, 2021.

Update: Unlike federal COBRA, an individual who previously declined to enroll in state mini-COBRA coverage does not have an extended election opportunity to enroll in state mini-COBRA continuation coverage under ARPA, even if s/he otherwise would qualify as an assistance eligible individual.

Due to the COVID-19 National Emergency, the DOL and the IRS issued prior guidance that extended certain deadlines related to employee benefit plans subject to ERISA and the Code, including the 60-day initial election period for COBRA continuation coverage. This extended deadline relief does not apply, however, to the 60-day notice or election periods related to COBRA subsidies under ARPA.

Length of the Subsidy

The subsidy lasts for up to six months (e.g., April 2021 through September 2021) unless the individual’s maximum COBRA coverage period ends before September 2021. The subsidy could also end earlier if the individual becomes eligible for coverage under another group health plan or Medicare. Individuals are required to notify their group health plan if they become eligible for such coverage or face penalties for failing to do so. Eligibility for excepted benefits, such as limited-scope dental or vision coverage, a qualified small employer health reimbursement arrangement (QSEHRA), or a health flexible spending arrangement, alone would not terminate subsidy eligibility.

Update: If an individual becomes eligible for other coverage between April 1 and September 30 due to a special enrollment event or open enrollment period, then the individual will cease being eligible for the subsidy.

Option to Switch Plans

New IRS Guidance Offers Employers Direction Regarding COBRA Subsidy Obligations

Employers have the option to give subsidy-eligible employees up to 90 days (following notice of this new enrollment option) to elect to enroll in a different group health plan offered by their employer. If the employer elects to implement this option, the following restrictions apply:

- the premium for the alternative coverage choice cannot be higher than the premium for the plan in which the employee had been enrolled at the time of the qualifying event;
- the different coverage in which the individual elects to enroll is coverage that is also offered to similarly situated, active employees of the employer at the time at which such election is made; and
- the different coverage in which the individual elects to enroll is not coverage that only provides excepted benefits, a QSEHRA, or a health flexible spending arrangement.

New Notice Requirements for Plans and Employers

The new DOL guidance clarifies the following notice obligations applicable to plans and issuers and has provided model notices for each of these obligations:

- General Subsidy Notice – Plans must provide an election notice that includes a general notice about the availability of the new subsidy to any subsidy-eligible individual who incurs a qualifying event between April 1, 2021 and September 30, 2021. Note: This notice would also have to include information about the plan enrollment option if implemented by the employer.
- Notice of Extended Election Period – Additionally, plans must provide a notice to any subsidy-eligible individual who incurred a qualifying event prior to April 1, 2021. This notice is due within 60 days of April 1, 2021 (e.g., May 31, 2021). Note: This notice would also have to include information about the plan enrollment option if implemented by the employer.
- Notice of Expiration of Subsidy – Plans also must notify individuals if their subsidy will terminate before September 30, 2021. This notice must be provided between 15 and 45 days before the termination of the subsidy. This notice would not be required if the subsidy will terminate due to the individual's eligibility for other coverage.

Subsidy-eligible individuals can begin their coverage prospectively from the date of their election, or, if an individual has a qualifying event on or before April 1, 2021, choose to start their coverage as of April 1st, even if the individual receives an election notice and makes that election at a later date.

New IRS Guidance Offers Employers Direction Regarding COBRA Subsidy Obligations

Update: The DOL model notices included a form that individuals could complete attesting to their eligibility for COBRA subsidies. The IRS guidance confirms that an employer can require individuals to self-certify or attest that they are eligible for the COBRA subsidy and that they do not have other disqualifying group health plan coverage or Medicare, and that an employer can rely on that self-certification or attestation for the purpose of substantiating eligibility for a COBRA subsidy, unless the employer has actual knowledge to the contrary.

Update: The IRS guidance clarifies that if an employer no longer offers the plan previously offered to someone eligible for a subsidy who is electing to enroll in COBRA through an extended election opportunity, then that employer must offer substantially similar coverage even if the premium of such coverage is higher. Also, individuals who make an extended election must be given the opportunity to elect subsidized COBRA coverage to begin later than April 1, 2021, in order to avoid overlapping coverage.

Update: Substantiation and Recordkeeping

The IRS guidance requires employers that claim a subsidy credit to maintain records of either the self-certification or attestation from the individual as to eligibility for the COBRA subsidy, or other documentation substantiating eligibility, in order to demonstrate the employer's eligibility for a subsidy. Employers need to retain this documentation in case the IRS questions the employer's eligibility for the tax credits or conducts audits.

Update: Calculating and Claiming the Subsidy Tax Credit

In general, the subsidy will be paid to employers that are subject to COBRA, the insurance provider, or the multiemployer plan as a credit against the employer or plan's portion of Medicare taxes.

The credit is equal to the amount that the premium payee (i.e., employer, multiemployer plan, or insurer, as applicable) would have charged the individual for the COBRA premium (per quarter). This amount includes the amount charged for COBRA, plus the administrative cost allowed (generally a total of 102% of the applicable premium). The credit does not include any amount of subsidy that the employer or plan would have otherwise provided even absent ARPA (e.g., through a separation agreement, etc.).

In claiming the subsidy credit, the premium payee claims the credit on the quarterly IRS Form 941 or in advance on IRS Form 7200. Overpayments are not refunded by the premium payee if the individual's subsidy terminates in the middle of a quarter and the premium payee's, as well as the individual's, gross income is increased by the amount of the subsidy credit. The IRS guidance also provides how employers

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may use third party payers to report and pay employment taxes to the IRS.

Action Items

Plan sponsors and employers should consider the following next steps:

- Issue the extended election notice to assistance eligible individuals by the May 31, 2021 deadline and utilize the DOL guidance and model notices to meet additional notification obligations.
- Decide whether to offer subsidy-eligible individuals the option to enroll in different health coverage.
- Be mindful of the impact of the COBRA subsidies on separation agreements. Many employers offer subsidized COBRA as consideration for an employee to enter into a separation agreement. Because the COBRA subsidies are available by law, only offering a COBRA subsidy in a separation agreement for the period of April 2021 through September 2021 would not be adequate consideration.
- Review the new IRS guidance for further details that may be more applicable to your particular situation.

Please contact your Laner Muchin servicing attorney or a member of our Employee Benefits Group with any questions.