

Publications

IRS Answers ARP COBRA Subsidy Questions

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On May 18, 2021, the IRS released Notice 2021-31, answering 86 questions on the COBRA subsidy under the American Rescue Plan (ARP). This client alert covers highlights from the IRS Q&As. For more details, please contact us or register for our June 2 webinar, COBRA Subsidy 2.0.

Brief recap of the COBRA subsidy

The COBRA subsidy is available to Assistance Eligible Individuals (AEIs). An AEI is a COBRA qualified beneficiary:

- (1) who lost group health coverage and became eligible for COBRA coverage due to (a) a voluntary or involuntary reduction in hours, or (b) an involuntary termination of employment (other than for gross misconduct);
- (2) whose COBRA period includes months between April 1, 2021 and September 30, 2021;
- (3) who is not eligible for other non-excepted group health coverage or Medicare on or after the later of April 1, 2021 or the start of COBRA coverage; and
- (4) who elects COBRA coverage.

Plan sponsors are required to notify potential AEIs of the availability of the COBRA subsidy. This includes the requirement to send Extended Election Notices no later than May 31, 2021 to potential AEIs whose reduction in hours or involuntary termination was before April 1, 2021.

The COBRA subsidy is equal to the amount an AEI otherwise would need to pay for COBRA coverage absent the subsidy, meaning an AEI pays nothing for COBRA coverage during the portion of the AEI's COBRA period that falls between April 1, 2021 and September 30, 2021. The amount of the COBRA subsidy is then taken as a credit against the plan sponsor's share of Medicare tax under Internal Revenue Code Section 3111(b). If the COBRA premium tax credit exceeds the taxes

owed for a quarter by the plan sponsor, the excess is refundable (or advanceable).

For more background on the COBRA Subsidy, see our previous client alerts, 100% COBRA Subsidies under the American Rescue Plan (3/16/2021) and DOL Notices for the ARP COBRA Subsidy (4/12/2021).

IRS guidance on involuntary termination of employment

The IRS provided some guidance on what constitutes an “involuntary” termination of employment. As a general principle, “[a]n involuntary termination of employment means 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.” Q&A-24. The determination as to whether an employee has had an involuntary termination is based on facts and circumstances.

The IRS considers a termination to be voluntary (and the COBRA qualified beneficiaries to be ineligible for the COBRA subsidy) if an employee terminates employment because: (1) he or she is unable to arrange for child care (Q&A-31); or (2) he or she has “general concerns about workplace safety” (Q&A-30). As explained in Q&A-30:

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, generally will not rise to the level of being analogous to a constructive discharge absent the employer’s failure to either take a required action or provide a reasonable accommodation.

Retirement is not an involuntary termination unless the circumstances indicate that, absent the retirement, the employee knew that the employer would have terminated the employee’s employment. Q&A-26. The IRS also confirmed that the death of the employee is not treated as an involuntary termination. Q&A-33.

IRS guidance on eligibility for other non-excepted group health coverage

An individual is not an AEI (and is not eligible for the COBRA subsidy) if he or she is eligible for non-excepted group health coverage. Examples of non-excepted group health coverage are a medical plan or an individual coverage health reimbursement arrangement (HRA). Examples of excepted group health coverage are a dental, vision, or employee assistance plan, or a health flexible spending account (FSA).

An individual is eligible for other non-excepted group health coverage when, on or after April 1, 2021, he or she actually has the option to enroll in that other group health coverage. Q&A-9. Coverage that was available before April 1, 2021, but is not available on or after April 1, 2021, does not count. Q&A-10.

The availability of other group health coverage as of April 1, 2021 is impacted by the Outbreak Period extension of deadlines. Due to the Outbreak Period extension of deadlines, a special enrollment period that is normally 30 days is extended to 30 days plus one year. As explained in Q&A-9, Example 3:

An individual's employment was involuntarily terminated and as a result the individual lost health coverage on October 1, 2020. The individual received a COBRA notice on October 1, 2020. The individual qualified for a special enrollment period for loss of coverage under the group health plan of the spouse's employer. Under the Emergency Relief Notices, the individual remains eligible to elect COBRA continuation coverage or enroll in the spouse's plan. Additionally, on November 1, 2020, the individual was eligible to enroll in the spouse's plan under that plan's annual open enrollment period. The open enrollment period for the spouse's plan ended December 1, 2020. However, the individual remains eligible to enroll in coverage under the spouse's plan under the loss of coverage special enrollment period due to the Emergency Relief Notices. Under these facts, the individual is considered eligible for coverage under the plan of the spouse's employer due to the special enrollment period for loss of coverage as extended by the Emergency Relief Notices. Therefore, while the individual could elect COBRA continuation coverage from the former employer's plan, the individual may not receive COBRA premium assistance as an Assistance Eligible Individual under the plan of the individual's former employer.

Of course, a plan sponsor will not typically know whether an individual is eligible for other group health coverage. Luckily, a plan sponsor may rely on the individual's attestation (on the DOL's Request for Treatment as an AEI or other documentation) "unless the employer has actual knowledge that the individual's attestation is incorrect." Q&A-6. The plan sponsor should obtain and retain an attestation or other documentation to support its claim for a tax credit. Q&A-7.

IRS guidance on the group health coverage for which the COBRA subsidy is available

The COBRA subsidy is available for all group health coverage which the AEI lost as a result of the reduction in hours or involuntary termination, including excepted benefits such as dental and vision coverage. Q&A-35. However it does not include a health FSA, qualified small employer HRA (QSEHRA) or any benefits not subject to COBRA. Q&A-35 and Q&A-40.

The COBRA subsidy is available for the specific group health plan options that an AEI had at the time of the reduction in hours or involuntary termination. The COBRA subsidy is not available for higher cost group health plan options. Q&A-41. There are two exceptions. First, if the plan sponsor no longer offers the original option, the plan sponsor must offer the most similar current option and the COBRA subsidy is available for that option even if it is higher cost. Q&A-42. Second, the COBRA subsidy is available for a higher cost option if the AEI changes to the higher cost option in connection with a special enrollment event, other life event or open enrollment. Q&A-69.

The COBRA subsidy is not available for the incremental cost of covering an individual who is offered continuation coverage but who is not an AEI (such as a domestic partner). Q&A-68.

IRS guidance on the start of subsidized COBRA

If an AEI's COBRA qualifying event is between April 1, 2021 and September 30, 2021, the COBRA subsidy starts immediately after the loss of coverage.

If an AEI's COBRA qualifying event was before April 1, 2021, the COBRA subsidy typically starts as of April 1, 2021. However, while the plan sponsor must make subsidized COBRA available starting as of April 1, 2021, the IRS has now told us that an AEI has the option to waive subsidized COBRA for the period between April 1, 2021 and his or her actual election. Q&A-44. Why would an AEI want to waive one, two or three months of free COBRA coverage? Q&A-13 explains that "[a]n individual who elects COBRA continuation coverage (with or without COBRA premium assistance) and who is enrolled in coverage through a Health Insurance Exchange with advance payments of the premium tax credit (APTC) may be required to repay the APTC for the overlap months." Q&A-44 includes the following example illustrating the point:

An individual's employment was involuntarily terminated and as a result the individual lost health coverage on October 1, 2020. The individual received the COBRA election notice on October 1, 2020. The individual enrolls in an individual health insurance policy on the Health Insurance Exchange, effective on November 1, 2020. The individual receives the notice of the ARP extended election period on May 1, 2021. At that time, the individual is not eligible to enroll in any other group health plan or Medicare. The individual may elect COBRA continuation coverage either retroactively to October 1, 2020, retroactively to April 1, 2021, or prospectively. The individual elects COBRA continuation coverage prospectively from June 1, 2021, and contacts the Health Insurance Exchange to end the Exchange health insurance policy as of May 31, 2021. The individual is an Assistance Eligible Individual as of June 1, 2021. Because there is no overlapping coverage, the individual is not required to repay any [Advance Premium Tax Credit] when the individual files his or her 2021 tax return.

Note that the DOL model Extended Election Notice does not address or include any election mechanism for an AEI's option to waive COBRA coverage for the period between April 1, 2021 and an AEI's actual election. Presumably, it is up to the AEI to reach out to the plan sponsor to request the delay.

An AEI whose reduction in hours or involuntary termination was before April 1, 2021 may have two overlapping open COBRA election periods. These are:

(1) The 60-day Extended Election Period, running from receipt of the Extended Election Notice, during which the AEI may elect subsidized COBRA coverage starting April 1, 2021; and

(2) The COBRA election period following the loss of coverage associated with his or her reduction in hours or involuntary termination. This election period is normally 60 days running from the date that the plan sponsor sent a COBRA election notice. However, while the Outbreak Period extension of deadlines remains in effect, the 60 days is extended to 60 days plus one year.

The two overlapping election periods give an AEI the option to start COBRA coverage as of: (a) April 1, 2021 (with the COBRA subsidy); and/or (b) the date of loss of coverage associated with the reduction in hours or involuntary termination (without the COBRA subsidy). The IRS now appears to be saying that an election of subsidized COBRA coverage as of April 1, 2021 may also operate as an election of unsubsidized COBRA coverage starting as of the original loss of coverage. Q&A-56. That would start the clock on the deadline for the payment of premiums for COBRA coverage as of the original loss of coverage (which, while the Outbreak Period extension of deadlines remains in effect, is presumably another 45 days plus one year). Further clarification from the IRS on this point would be welcome.

IRS guidance on the end of subsidized COBRA

An AEI's COBRA subsidy ends on the earliest of: (1) the day that the AEI becomes eligible for other non-excepted group health coverage or Medicare; (2) the last day of the AEI's COBRA period; or (3) September 30, 2021.

The AEI is supposed to report eligibility for other group health coverage to the plan sponsor and is subject to a tax penalty if he or she fails to do so. Q&A-49. However, an AEI's failure to report eligibility for other group health coverage to the plan sponsor does not impact the plan sponsor's tax credit. Q&A-78 provides that "[i]f an [AEI] fails to provide notice that the individual is no longer eligible for the COBRA premium assistance due to eligibility for other disqualifying group health plan coverage or Medicare, the [plan sponsor] is still entitled to the credit received for that period of ineligibility, unless the [plan sponsor] knew of the individual's eligibility for the other coverage."

If the last day of an AEI's 18-month COBRA period falls between April 1, 2021 and September 30, 2021 and the AEI's 18-month COBRA period is extended to 29 months due to Social Security disability or 36 months due to a second qualifying event, then those additional months are part of the AEI's COBRA period. Q&A-17. It is less clear whether there are circumstances under which the COBRA subsidy might be available to a COBRA qualified beneficiary whose original 18-month COBRA period (due to a reduction in hours or involuntary termination) ended before April 1, 2021 but whose extended COBRA period continues past April 1, 2021. Further clarification from the IRS on this point would be welcome.

There is an exception to the September 30, 2021 COBRA subsidy end date that would permit an AEI's COBRA subsidy to extend for some days into October 2021: if COBRA premiums are not normally paid by calendar month, the COBRA subsidy can continue to the last day of the last period of coverage beginning on or before September 30, 2021. Q&A-47.

If an AEI's COBRA period extends past the end of the COBRA subsidy, the AEI will need to pay COBRA premiums if he or she wants to continue COBRA coverage. If the Outbreak Period extension of deadlines is still in effect, the extension will apply to the deadline for each monthly payment. Q&A-48.

As a reminder, a plan sponsor must send a Notice of Expiration of Period of Premium Assistance to AEIs receiving the COBRA subsidy. That notice must be sent 15 to 45 days before an AEI's COBRA subsidy period is set to expire due to (a) the September 30, 2021 global end of the subsidy, or (b) the exhaustion of the individual's COBRA period.

IRS guidance on the plan sponsor's tax credit

The entity entitled to the tax credit is generally the employer sponsoring the group health coverage or the multiemployer plan offering the group health coverage. The IRS calls this entity the "premium payee." Q&A-70.

A premium payee's tax credit is equal to the amount of COBRA premiums not paid by the AEIs due to the COBRA subsidy under the ARP. Q&A-63. Q&A-75 explains:

A premium payee claims the credit by reporting the credit (both the nonrefundable and refundable portions of the credit, as applicable) and the number of individuals receiving COBRA premium assistance on the designated lines of its federal employment tax return(s), usually Form 941, Employer's Quarterly Federal Tax Return.

In anticipation of receiving the credit to which it is entitled, the premium payee may (1) reduce the deposits of federal employment taxes, including withheld taxes, that it would otherwise be required to deposit, up to the amount of the anticipated credit, and (2) request an advance of the amount of the anticipated credit that exceeds the federal employment tax deposits available for reduction by filing Form 7200, Advance Payment of Employer Credits Due to COVID-19.

Premium payees are not entitled to a tax credit for COBRA premiums that they are already subsidizing, just for the amounts that AEIs are obligated to pay. For example, if an employer is subsidizing an AEI's COBRA premiums pursuant to a severance agreement, the plan sponsor's tax credit is limited to the amount that the AEI was still obligated to pay. As stated in Q&A-64, "[t]hus, absent the [ARP] premium assistance, if the premium that the employer would have charged to an [AEI] is less than the maximum COBRA premium—for example, if the employer would have subsidized the coverage by paying all or part of the premium—the credit is equal to the amount that the employer actually would have charged to the [AEI]." (While not unexpected, this interpretation will be a disappointment to employers that subsidize COBRA for former employees.) If, instead of subsidizing COBRA premiums, an employer provides separate taxable payments to an AEI and the AEI is obligated to pay the full COBRA premium, the employer is entitled to a credit for the full COBRA premium. Q&A-66.

If an employer has been charging an individual on COBRA coverage less than the full COBRA premium, it may be possible to increase the charge to the full COBRA premium. Q&A-65. However before making such a change, the employer would need to consider the terms of its severance policy, a severance agreement with the employee (if any) and the potential impact of Code Section 409A.

A plan sponsor will need to be able to document that a potential AEI actually qualifies as an AEI. As noted above, a plan sponsor should obtain and retain attestations or other documentation from individuals claiming AEI status for purposes of claiming the tax credit. Plan sponsors are permitted to rely on individuals' attestations. Q&A-4 through Q&A-7.

Final thought

Most plan sponsors (and their COBRA administrators) had to implement procedures for administering the COBRA subsidy weeks ago. Now those procedures will need to be revisited and adjusted to conform to details revealed in IRS Notice 2021-31.