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IRS Provides Additional Guidance on the COBRA Subsidy

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On May 18, 2021, the IRS issued 86 FAQs regarding implementation of the 2021 COBRA premium assistance (or “COBRA subsidy”) and corresponding tax credit under the American Rescue Plan Act (“ARPA”). The FAQs provide helpful guidance explaining employer obligations regarding the COBRA subsidy for Assistance Eligible Individuals (“AEI”).

In addition, the guidance provides some helpful clarification with respect to the Emergency Relief Notices which requires plans to disregard certain periods beginning March 1, 2020 until 60 days after the announced end of the National Emergency (the “Outbreak Period”). This Emergency Relief runs until the earlier of:

- One year from the date the applicable person was first eligible for the relief; or
- 60 days after the announced end of the National Emergency (this date has not been announced).

The following provides highlights from the FAQs and is not an exhaustive summary. Employers should carefully review this guidance in full to understand their obligations.

Eligibility for COBRA Premium Assistance

ARPA provides a temporary 100% COBRA Subsidy to AEIs between April 1, 2021 and September 30, 2021. An AEI is:

- A COBRA qualified beneficiary (“QB”) as a result of a reduction in hours or the involuntary termination of a covered employee’s employment other than by reason of an employee’s gross misconduct;
- Eligible for COBRA for some or all of the period beginning April 1, 2021, through September 30, 2021; and
- Elects COBRA continuation coverage.

This includes QBs who are the spouse or dependent child of the employee who had the reduction in hours or involuntary termination of employment resulting in a loss of coverage, as well as the employee.

Other notable eligibility provisions include:

- An individual can become an AEI more than once.

- Employers may require AEIs to self-certify or attest to their status as an AEI as a result of an involuntary termination of employment or reduction in hours or with respect to their eligibility status for other group health plan coverage or Medicare. Employers must retain records of self-certification, attestation or other documentation that the individual was eligible for the COBRA subsidy to substantiate the tax credit. An employer may rely on an individual's attestation unless the employer has actual knowledge that such attestation is incorrect.
- COBRA subsidy is available to an AEI until the individual is permitted to enroll in other group health plan coverage (including during a waiting period for other group health coverage). COBRA coverage is not considered other group health plan coverage.
 - Outbreak period relief, which extends the timeframes to request special enrollment in a spouse's group health plan coverage, may provide an enrollment opportunity in other group health plan coverage that will eliminate COBRA subsidy eligibility.
- An individual currently enrolled in Medicare who is a COBRA QB as a result of an involuntary termination of employment or reduction in hours is not eligible for the COBRA subsidy.
- A reduction in hours or involuntary termination of employment that follows an earlier qualifying event (e.g., divorce) does not make the QB from the first qualifying event an AEI.
 - This is a notable clarification from the IRS. Employers will need to carefully review the original COBRA qualifying event ("QE") for all individuals with a current COBRA election who are in a disability extension or have extended COBRA due to a second QE to determine whether the original QE was a reduction in hours or an involuntary termination of employment. If it was, then the subsidy may be available.
- An AEI is not eligible for the COBRA subsidy if the individual is offered retiree coverage under a separate group health plan that is not COBRA coverage.
- The subsidy is limited to premiums attributable to COBRA coverage for AEIs. For this purpose, a COBRA QB is the employee, the employee's spouse or dependent child of the employee who was covered by the plan on the day before the QE. If an individual does not meet the definition of a federal COBRA QB, the individual's coverage is not eligible for premium assistance (even though the individual may continue to be eligible under the plan terms or as required under state law). For example, a domestic partner is not a COBRA QB and continuation of coverage for a domestic partner is not eligible for the subsidy.

Reduction in Hours

An AEI will qualify for COBRA subsidy:

- whether the reduction in hours is voluntary or involuntary,
- due to a furlough (defined as a temporary loss of employment or complete reduction in hours with a reasonable expectation of return to employment or resumption of hours) whether the employer initiated the furlough, or the individual participated in a furlough process analogous to a window program, or
- as the result of a lawful strike initiated by employees or their representatives or a lockout initiated by the employer, as long as at the time the work stoppage or the lawful

If the original qualifying event was a reduction in hours or an involuntary termination of employment, the COBRA subsidy is available to AEIs who have elected and remained on COBRA for an extended period due to a disability determination, second qualifying event, or an extension under state mini-COBRA, to the extent the additional periods of coverage fall between April 1, 2021, and September 30, 2021. This does not apply with respect to "second chance" COBRA elections.

strike commences the employer and employee intend to maintain the employment relationship.

Involuntary Termination of Employment

An 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. Whether a termination of employment is involuntary is based on the facts and circumstances.

According to the FAQs, an involuntary termination of employment includes:

- Employee-initiated termination for good reason due to employer action that results in a material negative change in the employment relationship (i.e., constructive discharge).
- An employer's decision not to renew an employee's contract if the employee was otherwise willing and able to continue the employment relationship and was willing either to execute a contract with terms similar to those of the expiring contract or to continue employment without a contract.
- An employer's action to end an individual's employment while the individual is absent from work due to illness or disability, if before the action there is a reasonable expectation that the employee will return to work after the illness or disability has subsided.
- An employee-initiated termination of employment due to an involuntary material reduction in hours or as a result of a material change in the geographic location of employment.
- Involuntary termination of employment for cause (but not gross misconduct).

An involuntary termination of employment does not include:

- Death of the employee.
- Voluntary retirement.
- The expiration of a contract when the parties understood at the time the expiring contract was entered into, and at all times when services were being performed, that the contract was for specified services over a set term and would not be renewed.
- 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.
- An employee's termination of employment due to general concerns about workplace safety.

Coverage Eligible for COBRA Premium Assistance

The FAQs clarify that the COBRA subsidy is available for any group health plan coverage except a health FSA offered under a cafeteria plan and a qualified small employer HRA ("QSEHRA"). This includes:

- Vision plans
- Dental plans; and
- HRAs, including individual coverage HRAs ("ICHRAs").

Other notable coverage provisions include:

- Retiree health coverage may be treated as COBRA continuation coverage for which COBRA premium subsidy is available, but only if the retiree coverage is offered under the same group health plan as the coverage made

available to similarly situated active employees.

- If an employer no longer offers the health plan that previously covered the AEI, the individual must be offered the opportunity to elect the plan that a similarly situated active employee would have been offered that is most similar to the previous plan that covered the individual, even if the premium for the plan is greater than the premium for the previous plan. In this case, the other coverage elected by the individual is eligible for the COBRA subsidy, regardless of the premium for that coverage.

Beginning of COBRA Premium Assistance

AEIs are entitled to receive COBRA premium assistance as of the first applicable period beginning on or after April 1, 2021 depending on the period for which premiums would have been normally charged by the plan (e.g., monthly if charged monthly). COBRA subsidy is available from April 1, 2021 through September 30, 2021 even if the AEI elects COBRA after September 30, 2021 if the election is made within the 60-day election window.

- An AEI electing COBRA coverage under the second chance election period may waive COBRA for any period before electing to receive the COBRA subsidy.
 - For example, a “second chance” AEI is not required to elect COBRA subsidy for April and May to receive COBRA and the subsidy prospectively beginning June 2021.
- Employers that are no longer subject to COBRA (i.e., a small employer) may need to provide COBRA coverage under the second chance election if the qualifying event occurred when the employer was subject to COBRA. This is an important consideration for small employers (fewer than 20 employees) who may have been subject to COBRA for calendar year 2020 but are not subject to COBRA in 2021.

End of COBRA Premium Assistance Period

An AEI is eligible for the COBRA subsidy until the earlier of:

- The first date the AEI is eligible for other group health plan coverage or Medicare;
- The date the individual ceases to be eligible for COBRA; or
- The end of the last period of coverage beginning on or before September 30, 2021.

The FAQs clarify:

- Once subsidized COBRA coverage ends, COBRA continuation automatically continues with payment due according to the terms of the plan (taking into account Outbreak Period relief).
 - An AEI that fails to provide notice that they are no longer eligible for COBRA subsidy may be subject to a tax penalty of \$250.
 - Greater of \$250 or 110% of the subsidy if the failure to provide notice is fraudulent.
 - The death of an employee/AEI who had a reduction in hours or involuntary termination of employment does not end subsidy eligibility of the spouse or dependents.

Extended Election Period

ARPA provides an extended election period (also referred to as a “second chance” election) for AEIs to enroll in COBRA coverage with the COBRA subsidy if they are still within the 18 months of COBRA coverage based on their loss of coverage date. This second chance election opportunity only applies to federal COBRA coverage (not state “mini-COBRA”).

The FAQs clarify:

- An employee's spouse and/or dependents that did not elect COBRA coverage when the employee experienced an involuntary termination of employment or reduction in hours can elect COBRA under this second chance opportunity and are eligible for the COBRA subsidy.
- An AEI whose QE occurred before April 1, 2021 and has an open COBRA election period (including Outbreak Period relief) but has not yet elected COBRA may elect COBRA coverage retroactively to the loss of coverage, but their subsidy will not apply for coverage before April 1, 2021.
- An AEI that had been offered COBRA for medical, dental, and vision and elected only dental and vision must be offered the second chance election for medical coverage.

Extensions Under the Emergency Relief Notices

An AEI that is eligible to elect retroactive COBRA coverage prior to April 1, 2021 due to Outbreak Period relief must elect COBRA subsidized coverage (April 1, 2021 – September 30, 2021) within 60 days of receiving the second chance election notice and must also elect or decline retroactive COBRA coverage at this time.

Any AEI that elects COBRA coverage with subsidy but declines to elect retroactive COBRA coverage during their 60-day second chance election period may not elect retroactive COBRA coverage at a later date.

To simplify this, an AEI who is eligible to elect COBRA coverage for the period prior to April 1, 2021 under the Outbreak Period relief must do so in connection with their ARPA election. Failure to make the election for retroactive coverage at this time will preclude the AEI from a future election opportunity (even if the election window would otherwise be open under the Outbreak Period rules).

Additionally:

- The AEI may be required to pay for coverage prior to April 1, 2021.
- Outbreak Period relief applies to payments for retroactive coverage and employers may credit partial and/or late payments from a QB to the earliest period of COBRA coverage for which payment is due before April 1, 2021.

Comparable State Continuation Coverage

Continuation coverage under a state mini-COBRA law that provides a different maximum length of continuation coverage, has different QEs, different QBs, or different maximum premiums does not fail to provide comparable benefits solely for those reasons. Additionally, an employer may not claim the tax credit for subsidy for continuation coverage under a state mini-COBRA law that requires an insurer to provide the continuation coverage.

Calculation of COBRA Premium Assistance Credit

The amount of the COBRA subsidy credit is the premium that would have been charged to an AEI in the absence of the premium assistance and does not include any amount of contribution that the employer would have otherwise provided. If the COBRA premium actually charged to COBRA QBs is \$400, then the tax credit will be \$400 regardless of the actual cost of COBRA coverage. The FAQ includes examples of severance arrangements and how the tax credit may apply.

Additionally:

- If a plan increases the cost of COBRA premiums for similarly situated employees and QBs, the COBRA subsidy tax credit will apply to the increased amount.
 - This is true even if the employer provides a separate taxable payment to the AEI.

- The COBRA premium tax credit applies with respect to QBs as defined under federal COBRA rules. For example, a registered domestic partner may have COBRA rights under a state mini-COBRA law but is not an AEI and no COBRA subsidy tax credit will be available for their coverage.
- The COBRA subsidy tax credit does not cover the incremental additional cost for COBRA coverage for individuals that are not AEIs.
 - If the cost of COBRA coverage for all AEIs and non-AEIs does not exceed the cost of COBRA coverage for AEIs alone (as under family coverage) then the COBRA subsidy tax credit is the full cost of COBRA coverage.
- The COBRA subsidy tax credit may increase if the AEI changes coverage from the benefit package the AEI had on the day before the qualifying event to a higher cost option during open enrollment (as allowed under normal COBRA rules).
- The COBRA premium subsidy tax credit for continuation coverage of an HRA is limited to 102% of the amount actually reimbursed to the AEI.

Claiming the COBRA Premium Assistance Credit

The Premium Payee is eligible to claim the COBRA subsidy tax credit. An employer subject to federal COBRA is the Premium Payee. This includes government employers. The carrier is the Premium Payee with respect to fully insured coverage subject to state mini-COBRA. The COBRA subsidy tax credit is claimed for any covered period for which the Premium Payee will pay after an AEI has elected coverage. A COBRA subsidy tax credit cannot be claimed before the coverage period begins.

To receive the credit, employers can reduce deposits of federal employment taxes, including withheld taxes, that they would otherwise be required to deposit, up to the amount of the anticipated credit. Depending on whether the entire credit is received by reducing deposits, employers may credit against Medicare payroll taxes to reimburse the cost for the COBRA subsidy:

- On their Quarterly Form 941; or
- By filing Form 7200, Advance Payment of Employer Credits Due to COVID-19.
 - If employer deposits are reduced to zero in anticipation of receiving the credit, the employer may request an advance of the amount of the anticipated credit that exceeds the federal employment tax deposits available for reduction.

A Premium Payee may not claim a COBRA subsidy tax credit for any amounts that were taken into account for credits as wages under the CARES Act or qualified health plan expenses under the FFCRA.

The guidance further clarifies:

- A Premium Payee is still entitled to the COBRA subsidy tax credit if an AEI fails to report that they are no longer eligible for the COBRA subsidy unless the Premium Payee learns that the AEI is no longer eligible for the COBRA subsidy.
- COBRA subsidy tax credits are included in Premium Payee gross income for the taxable year.

The FAQ includes additional details on how to claim the COBRA subsidy tax credit when using a third-party payer (e.g., a reporting agent, payroll service provider, PEO or CPEO). This summary does not detail these issues.

Employer Action

If you have not already done so, work with COBRA administrators to ensure the Notice in Connection with Extended Election Period and Summary of COBRA Premium Assistance Provisions are provided to AEIs by the May 31, 2021 deadline.

Employers may need to engage payroll or tax professionals for assistance with tax requirements related to reporting and claiming tax credits.

Verify proper election notice and payment procedures are in place for the subsidy period as well as for retroactive COBRA coverage under the second chance election opportunity.

Ensure certification or attestation of AEI eligibility is maintained as this can be relied upon for claiming COBRA subsidy tax credits.

Careful coordination with COBRA administrators and payroll vendors is important to ensure they understand requirements in this guidance and can implement and communicate this information to affected participants.