

Employee Benefits and Executive Compensation

Additional ARPA COBRA Subsidy Guidance: IRS Issues Notice 2021-46

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On July 26, 2021, the IRS published Notice 2021-46 (the Notice), which supplements the guidance provided in Notice 2021-31 regarding the temporary Consolidated Omnibus Budget Reconciliation Act (COBRA) premium assistance¹ (COBRA subsidy) established by the American Rescue Plan Act of 2021² (ARPA or the Act). While the Notice is not as expansive as Notice 2021-31,³ it clarifies several lingering questions with respect to the availability of the Act's COBRA subsidy in "Q&A" format. Notably, the new Notice addresses more nuanced questions with regard to the COBRA subsidy, including extended COBRA continuation coverage periods, loss of eligibility for the COBRA subsidy, and which entities are eligible to claim the COBRA premium assistance credit.

This alert provides a brief summary of the additional questions and answers identified in the Notice that pertain to COBRA subsidy eligibility during the subsidy window. As was the case with Notice 2021-31, this guidance will help employers accurately determine who is an assistance eligible individual, and which entity is entitled to claim the COBRA premium assistance credit in respect of an assistance eligible individual. Like Notice 2021-31, the Notice does not cover all components of the Act's COBRA subsidy provisions. Government agencies may continue to promulgate additional COBRA subsidy guidance prior to the end of the subsidy window.

COBRA Subsidy: A Refresher

What is the COBRA Subsidy?

"Assistance eligible individuals" (AEIs) (as defined below) and their beneficiaries may be eligible to receive the Act's temporary COBRA subsidy. The relevant window during which such individuals can receive the subsidy is April 1, 2021 through September 30, 2021.⁴ During the subsidy window, an AEI is treated as though they paid the full amount of their COBRA premium for the specified coverage (i.e., 100%). The amount that the employer, insurer, or multiemployer plan pay in respect of this subsidy is refundable via a tax credit against its share of Medicare taxes under §6432 of the Code. The amount of the subsidy is not included in an AEI's gross income.

Who are Assistance Eligible Individuals?

The Act defines an Assistance Eligible Individual as an individual: (1) who is a qualified beneficiary with respect to a period of COBRA continuation coverage during the subsidy period (April 1, 2021 through September 30, 2021), (2) who is eligible for that COBRA continuation coverage by reason of a reduction of hours or involuntary termination (other than gross misconduct), and (3) who elects COBRA continuation coverage. A qualifying event other than a reduction in hours or an involuntary termination does not qualify someone for the COBRA subsidy.

How can a qualified beneficiary become an AEI?

An individual must: (1) be covered under the employer's group health plan on the day before the reduction in hours or involuntary termination of employment, and (2) lose eligibility for the coverage due to the reduction in hours or involuntary termination of employment.

When is the COBRA subsidy not available to an AEI?

If an individual is eligible for coverage under any other group health plan or Medicare, or if an individual becomes eligible for a group health plan or Medicare while receiving the subsidy, the assistance is unavailable or stops at that time. If an individual becomes eligible for other coverage while receiving the subsidy, the individual must notify the plan providing COBRA continuation coverage of their eligibility for other coverage, or otherwise be subject to a penalty of \$250 for each failure (the penalty can eventually equal the greater of \$250 or 110% of the subsidy improperly received after eligibility for it ended).

What about the extended election period?

As provided in the Act, those individuals who did not have a COBRA continuation coverage election in effect on April 1, 2021 but would have been AEIs had they made an election, or those who previously elected COBRA continuation coverage and discontinued it before April 1, 2021, are eligible for the subsidy. This group of AEIs is offered an “extended election period.” The extended election period continues for 60 days after the individuals receive notice of such election period. Notably, the subsidy period for these individuals will not continue past the maximum period of COBRA continuation coverage that would have been required had they elected COBRA continuation coverage initially upon the qualifying event or had not discontinued it.

For additional background on the COBRA subsidy, please refer to our earlier alerts on the Act, [“Compensation and Benefits Considerations in the American Rescue Plan Act of 2021”](#) and [“New ARPA COBRA Subsidy Guidance: IRS Issues Notice 2021-31.”](#)

COBRA Subsidy Eligibility: Subsequent Qualifying Events

Can a potential AEI whose period of COBRA continuation coverage may be further extended due a subsequent qualifying event – but who does not notify the plan or insurer of their intent to extend such coverage – remain eligible for the COBRA Subsidy?

Yes. If an individual’s first qualifying event was a reduction in hours or involuntary termination, and they are entitled to elect and remain on COBRA for an extended period of time due to a disability determination, second qualifying event, or an extension under State mini-COBRA, then they are eligible for the COBRA subsidy, provided that the additional periods of coverage fall between April 1, 2021 and September 30, 2021. This is the case even if the individual has not notified⁵ the plan or insurer of their intent to elect such extended COBRA continuation coverage before the start of the extended period.

End of COBRA Subsidy Eligibility upon Eligibility for Other Coverage

Does an AEI who previously elected COBRA continuation coverage for dental-only or vision-only coverage cease to be eligible for the COBRA subsidy if they become eligible for other coverage that does not provide dental or vision coverage?

Yes. If an AEI under these facts becomes eligible to enroll in other disqualifying group health plan coverage or Medicare, they lose eligibility for the COBRA subsidy – even if the new coverage does not offer dental or vision coverage. The new coverage need not include all of the benefits provided by the previously elected COBRA continuation coverage to disqualify the AEI from eligibility for the subsidy.

Clarification on Which Entity May Claim the COBRA Premium Assistance Credit

What is the general rule for determining the entity that is the common law employer maintaining the group health plan?

The common law employer for AEIs whose hours were reduced or who were involuntarily terminated is the employer that maintains the group health plan. That common law employer is the entity entitled to

claim the COBRA premium assistance credit, subject to certain exceptions, as further addressed in the Notice and in Notice 2021-31.

How is the entity entitled to claim the premium assistance credit determined when a plan other than a multiemployer plan covers employees of different common law employers?

If a group health plan other than a multiemployer plan covers two or more common law employers that are members of a single controlled group, then each common law employer in the controlled group is the COBRA subsidy payee entitled to claim the credit with respect to its AEs. The Notice reiterates that even though all members of a controlled group are treated as a single employer for benefit plan purposes, each member of the controlled group is a separate employer for employment tax purposes.

Which entity can claim the premium assistance credit in the event of a business reorganization (as described in §54.4980B-9) where the AEs who elect COBRA continuation coverage are also M&A qualified beneficiaries?

If the selling group remains obligated to make COBRA continuation coverage available to such M&A qualified beneficiaries after a business reorganization, the entity in the selling group that maintains the group health plan is the entity entitled to claim the credit. Importantly, even if the common law employer is an entity in the buyer group, if it is not the entity obligated to make the COBRA continuation coverage available to AEs in connection with the transaction, then the common law employer is not entitled to the credit after the business reorganization.

Please note that the Notice also discusses state continuation coverage, state agency-maintained health coverage, and plans offered through Small Business Health Options Programs. The Notice also includes guidance for determining which entity is entitled to claim the premium assistance credit in more nuanced situations (e.g., third-party payers). The foregoing topics are not the subject of this alert. If your company has questions about the employee benefits provisions of the Notice addressed herein, or any other questions about the Act or its related guidance, reach out to your Jenner & Block contact for assistance. The Employee Benefits and Executive Compensation Practice is reviewing regulatory and legislative guidance as it is released, and is monitoring the Act's practical effects on plan administration.

¹ The term "COBRA premium assistance" is used in the Notice. For clarity, this alert refers to this as the COBRA subsidy.

² H.R.1319, Pub. Law 117-2

³ For more information on the legislation promulgated in response to the COVID-19 pandemic, please see <https://jenner.com/library/publications/20982> and the resources located at <https://jenner.com/practices/447/library>.

⁴ Please note that some employers may have periods of coverage that are shorter than one month (such as two weeks). As a result, coverage may begin after April 1, 2021 and end after September 30, 2021 depending on the period with respect to which premiums would have normally been charged by the plan. See Q&A #43 in Notice 2021-31.

⁵ Please note that under the EBSA Emergency Relief Notices (as described in <https://jenner.com/library/publications/20982>), the individual would have one year and 60 days from the issuance of the disability determination letter to notify the plan of the disability and extend COBRA continuation coverage.

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