

IRS Releases New COBRA Subsidy Guidance. . . With Less Than A Week Until Forms 941 Are Due!

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On July 26, 2021, the IRS released [Notice 2021-46](#) (the “Notice”), which provides new guidance on the 100% COBRA premium subsidies (the “Subsidies”) and the related tax credit under the American Rescue Plan Act of 2021 (March 11, 2021) (“ARP”). The Notice supplements previous guidance provided under Notice 2021-31, and addresses additional issues. See our previous [alert](#) for a detailed analysis of Notice 2021-31.

The Notice contains some unexpected surprises, which is unfortunate because plans and issuers have spent the past few months implementing the Subsidy in good faith based on the statute and guidance in Notice 2021-31, and they now may need to make amendments and/or last minute changes to their Form 941 filings, with only a few days remaining until the July 31 due date. For example, certain insurers and plan sponsors that thought they would qualify as premium payees, and thus be eligible to claim the tax credit, may longer be able to.

The Notice provides guidance relating to four topics in the form of 11 Q&As. We provide a summary of the key guidance in each of the four topics below.

Eligibility for Subsidy During Extended Coverage Periods

The Notice states, for the first time, that if an assistance eligible individual’s (“AEI’s”) original 18-month COBRA continuation coverage has expired, but the AEI is entitled to elect extended continuation coverage, the AEI can still qualify for the Subsidy for the extended period of coverage if it falls between April 1, 2021 and September 30, 2021. An AEI might be eligible for extended continuation coverage due to a disability determination, second qualifying

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event, or an extension under State mini-COBRA. This is the case even if the individual has not yet notified the plan or insurer of his/her intent to elect extended COBRA continuation coverage before the start of that period. This Notice provides an example illustrating how the Subsidy election interacts with the emergency relief provided for in the Joint Relief and EBSA Disaster Notice 2021-1. See our previous [alert](#) for a more detailed description of the Joint Relief and EBSA Disaster Relief Notice 2021-1.

GROOM INSIGHT: This is an expansion of the IRS' earlier guidance on this topic. Specifically, in Notice 2021-31, Q&A-17, the IRS indicated that an individual who has experienced a second qualifying event or disability extension would have to remain enrolled in and receiving COBRA coverage on April 1, 2021 in order to be treated as an AEI. Under this interpretation, employers would not have needed to look back more than 18 months for the extended second election period, if the AEI was not enrolled in and receiving coverage on April 1, 2021. The IRS apparently reconsidered this position after it published Notice 2021-31, and employers now may need to look back more than 18 months for the extended second election opportunity.

Dental and Vision Coverage

The Notice additionally clarifies that if an AEI previously elected COBRA continuation coverage for dental-only or vision-only coverage, Subsidy eligibility ends when the AEI becomes eligible for *any* other disqualifying group health plan or Medicare, even if the disqualifying coverage does not include all of the benefits provided by the previously elected COBRA continuation coverage. So, eligibility for Medicare, for example, would end eligibility for the Subsidy for previously elected dental-only or vision-only COBRA continuation coverage, even though Medicare may not offer dental or vision coverage.

State Continuation Coverage

- The Notice confirms that State continuation coverage provides comparable coverage to COBRA continuation coverage (and thus permits AEIs to access the Subsidy) even if the State program only covers a subset of state residents (for example, only employees of a state or local government).
- The Notice additionally provides that if a plan is subject to both State-mandated continuation coverage and Federal COBRA, the common law employer is the "premium payee" eligible to claim the tax credit (and not the insurer). And, even if the State-mandated continuation coverage would require the AEI to pay premiums directly to the insurer after the period of Federal COBRA ends, the insurer *is still* not entitled to claim the COBRA premium assistance.

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GROOM INSIGHT: This guidance was unexpected, as many plans and insurers had relied on the guidance previously provided in 2009 in connection with the 65% COBRA premium subsidy under the American Recovery and Reinvestment Act (“ARRA”), which permitted the insurer in certain instances to be treated as the premium payee. While the IRS position on this issue is consistent with the statutory language of ARP, this could result in a situation where an employer could be entitled to the premium assistance tax credit even if the employer is not fronting the premium cost for the continuation coverage. Also, it is not clear how the employer will have the information necessary to apply for the tax credit if the carrier is administering the Subsidy without the employer’s involvement.

Claiming the Tax Credit

The Notice also provides further technical guidance on claiming the tax credit in connection with the Subsidy, the most notable of which is summarized below:

- For purposes of determining the common law employer maintaining the plan (and thus the entity generally eligible to claim the tax credit as described in Notice 2021-31, Q/A 72(2), subject to certain exceptions), the “common law employer” is the common law employer for AEIs whose hours have been reduced or the former common law employer for those individuals who have been involuntarily terminated.
- If a group health plan (other than a multiemployer plan) subject to Federal COBRA covers employees of two or more members of a controlled group, *each* common law employer that is a member of the controlled group is a premium payee entitled to claim the tax credit for its respective employees or former employees (subject to certain exceptions regarding third-party payers and business reorganizations).
- If an employer offers a fully insured plan that is not subject to Federal COBRA through a Small Business Health Options Program (SHOP), the common law employer is the premium payee entitled to claim the tax credit, if the following four conditions are satisfied:
 - The employer participates in a SHOP exchange that offers multiple insurance choices to employees enrolled in the same small group health plan;
 - The SHOP exchange provides the employer with a single premium invoice, aggregates all premium payments, and then allocates and pays the applicable premium amounts to insurers;
 - The employer has a contractual obligation with the SHOP exchange to pay all applicable COBRA premiums to the SHOP Exchange; and
 - The employer would have received the State mini-COBRA premiums directly from the AEIs were it not for the Subsidy.

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Assuming these four conditions are satisfied, then the insurer of a plan that is not subject to Federal COBRA is not treated as the premium payee, and therefore is not eligible to claim the tax credit. The Notice goes on to clarify, however, that in all other cases of a fully-insured plan *solely* subject to State mini-COBRA, the insurer (and not the common law employer) is the premium payee entitled to claim the tax credit.

If you have any additional questions, please contact your Groom attorney, and we would be happy to discuss these issues with you further.

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