IRS Answers Questions on COBRA Premium Assistance Credits

It's not always clear when an employee's departure was 'involuntary'

By Stephen Miller, CEBS
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The IRS recently provided new guidance for employers on the federal government's 100-percent premium subsidy to eligible COBRA health care enrollees, for coverage between April 1 and Sept. 30.

IRS Notice 2021-31 (https://www.irs.gov/pub/irs-drop/n-21-31.pdf), released May 18, answers questions raised by employers, plan administrators and health insurers regarding the COBRA subsidy's payroll tax credit. The subsidy was part of the American Rescue Plan Act (ARPA) (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/stimulus-bill-provides-cobra-subsidy-through-september.aspx) signed into law in March.

The subsidy applies to assistance eligible individuals (AEIs) who elect COBRA health care continuation coverage following a reduction in hours or an involuntary termination of employment. The subsidy also is available during the April through September coverage period for employees eligible to elect continuation coverage under state laws, sometimes referred to as "mini-COBRAs," even if employees have exceeded the 18 months of coverage generally available for COBRA under federal law.

Notice 2021-31 provides information to help employers, plan administrators and insurers understand the credit, including:

- How to calculate the credit.
- Which individuals are eligible.
- When the premium-assistance period is.

"The notice comes as plan sponsors and COBRA administrators are gearing up to issue required notices to subsidy-eligible individuals (https://www.morganlewis.com/pubs/2021/05/irs-issues-guidance-regarding-american-rescue-plan-act-cobra-subsidy)" as required by the ARPA, wrote Saghi Fattahian and Lindsay M. Goodman, attorneys in the Chicago office of Morgan Lewis.

By May 31, employers subject to COBRA must send a special election notice to AEIs who were still in their 18-month COBRA window in April 2021, explaining their eligibility to elect COBRA during the subsidy period and receive COBRA premium assistance.

Employers also must notify AEIs at least 15 days (but no more than 45 days) before their eligibility for the subsidy expires. For those who have not yet "run out the clock" on their COBRA eligibility, the subsidy expiration date is Sept. 30.

[Related SHRM article: DOL Issues COBRA Subsidy Guidance and Model Notices (www.shrm.org/ResourcesAndTools/hr-topics/benefits/Pages/DOL-issues-COBRA-subsidy-guidance-and-model-notices.aspx)*]*

Gray Areas Addressed

Below are some of the key questions the IRS answered in its new 41-page guidance, as noted by employee benefits attorneys and consultants.

WHEN DO EMPLOYEES LOSE COBRA ELIGIBILITY?

"ARPA requires AEIs receiving COBRA premium assistance to notify an employer if they become ineligible due to other group health coverage or Medicare (https://www.fisherphillips.com/news-insights/irs-employer-questions-regarding-cobra-premium-assistance.html)," wrote Carlton C. Pilger, an attorney in the Atlanta office of law firm Fisher Phillips. Notice 2021-31 "states that where an AEI fails to so notify an employer, the employer remains entitled to the credit received for that period of ineligibility, unless the employer knew of the individual's eligibility for the other coverage. If the employer learns that the individual is eligible for other coverage, it is not entitled to the credit from that point forward."

The notice requires an employer to "maintain records that substantiate its eligibility for the credit," Pilger noted. "An employer will be liable for employment taxes that are due because of any improper claim of premium assistance credits in accordance with their liability under the [tax code] and applicable regulations for the employment taxes reported on the federal employment tax return."

ARE THERE LIMITS ON ELECTING COBRA DURING THE SUBSIDY PERIOD?

Under the ARPA, a terminated worker who is eligible for assistance and who hadn't elected COBRA coverage by April 1, or who elected COBRA coverage but then discontinued it, may elect COBRA coverage during a special enrollment period starting April 1 and ending 60 days after the date on which the COBRA notification was delivered.

According to Edward Fensholt, senior vice president and director of compliance services at Lockton, a benefits brokerage and consultancy based in Kansas City, Mo., under its new guidance "the IRS effectively eliminated the possibility of a more-than-18-month lookback (https://www.lockton.com/insights/post/irs-weighs-in-on-arp-cobra-subsidies-and-offers-some-surprises) for individuals with COBRA extensions by requiring that any subsidy-eligible individual riding an extension into the April 1–Sept. 30 subsidy window must have elected COBRA when first offered, and kept that coverage in force."

WHEN IS A TERMINATION 'INVOLUNTARY'?

The guidance clarifies that "a determination of whether a termination of employment is 'involuntary' is based on the facts and circumstances," attorneys at national law firm Ice Miller pointed out. For example, they wrote, involuntary termination "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." However, "an involuntary termination generally would not include a retirement, death, or a resignation due to a child being unable to attend school or daycare due to COVID-19 closures."

The IRS "has offered a definition of 'involuntary termination of employment,' which largely comports to conventional wisdom but includes a couple head-scratching comments," Fensholt wrote. His advice in close cases—such as a termination after an employee failed to show up for work after several days—is to treat the termination as involuntary. "The chance of getting slapped with a COBRA penalty for not having offered the subsidy opportunity is greater than the IRS second-guessing you on having offered it," he said.

HOW IS THE MEDICARE TAX CREDIT DETERMINED?

In general, the amount of the Medicare tax credit is the amount of the COBRA premiums "not paid" by COBRA enrollees (https://millerjohnson.com/publication/irs-bites-into-cobra-subsidy-questions-under-arpa/), noted Tripp VanderWal and Brett N. Liefbroer, attorneys in the Grand Rapids, Mich., office of Miller Johnson. They explained, "In other words, if the employer does not subsidize the COBRA premiums for similarly situated COBRA [enrollees], the amount 'not paid' is the COBRA premium (plus the 2 percent administrative fee or 50 percent administrative fee during disability extensions)."

However, if the employer voluntarily subsidizes the COBRA premium for similarly situated COBRA enrollees who are not AEIs, then "the amount of the Medicare tax credit does not include any voluntary subsidy under a severance agreement."

WHAT IF EMPLOYERS HAVE NO TAX LIABILITY?

Tiffany D. Downs and Elverine (Rena) F. Felton, attorneys in the Atlanta office of FordHarrison, wrote that employers that do not have any employment tax liability "can still claim the credit on the Form 941 (https://www.fordharrison.com/the-irs-releases-faq-guidance-on-premium-assistance-for-cobra-coverage) for the quarter in which the premium payee becomes entitled to the credit."

In addition, they explained, "the notice clarifies that the premium payee may (1) reduce the deposits of federal employment taxes, including withheld taxes, that it would otherwise be requirec 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."

WHAT HAPPENS AFTER SEPT. 30?

"*Unsubsidized* COBRA automatically continues for an AEI who elects COBRA with the COBRA subsidy after Sept. 30, 2021," VandeWal and Liefbroer said. "Payment for COBRA after Sept. 30, 2021 will be due by the normal due date, as extended by EBSA Disaster Relief Notices 2020-01 and 2021-01."

[Related SHRM article: Agencies Revise—and Complicate—COBRA Deadline Extensions (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/agencies-revise-and-complicate-cobra-deadline-extensions.aspx)*]*

WHAT IF EMPLOYERS ARE NO LONGER SUBJECT TO COBRA DUE TO A DECREASE IN EMPLOYEES?

COBRA generally covers health plans maintained by private-sector employers with 20 or more full- and part-time employees. It also covers employee organizations or federal, state or local governments. State mini-COBRA laws often provide similar benefits for insured small employers not subject to federal COBRA.

The new guidance clarifies that "employers who had a decrease in employees, such that they are not subject to federal COBRA this year, still have to offer COBRA premium assistance based on their status as a larger employer in 2020 (https://www.nfp.com/about-nfp/Insights/Insights-Detail/initial-summary-of-irs-notice-2021-31) (for AEIs who were due an offer of COBRA in 2020)," according to NFP, an employer benefits broker and consultancy based in New York City.

COBRA Subsidy Can Increase Employers' Costs

Separately, NFP advised that the COBRA subsidy may increase costs for self-insured employers.

"Historically, only 10 percent of terminated employees elect COBRA (with cost being the primary deterrent)," the firm's analysis noted. "Since the subsidies provided by ARPA will allow employees who were or will be involuntarily terminated to continue coverage at no cost, it is reasonable for employers to be concerned (https://www.nfp.com/about-nfp/Insights/Insights-Detail/employee-benefits-annual-limits-estimated-medical-cost-impact-of-arpas-cobra-subsidies)" about cost implications.

For self-insured employers, NFP noted, "the impact to the budget will be the difference between the tax credit and the claims generated by the COBRA participants." On average "a COBRA participant costs 54 percent more than an active participant" in terms of medical claims.

"For fully insured employers, the only concern is cash flow with regard to the timing of the tax credits," NFP's analysis noted.

[SHRM members-only Express Request: ARPA: COBRA Premium Subsidy (4/1 - 9/30/21) (www.shrm.org/resourcesandtools/tools-and-samples/exreq/pages/details.aspx?erid=1676)*]*