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On July 26, 2021, the IRS released Notice 2021-46 providing additional guidance on the 2021 COBRA premium assistance (or “COBRA subsidy”). The 2021 COBRA subsidy was included as part of the American Rescue Plan Act (“ARP”). This IRS guidance is coming relatively late, with only two months remaining in the COBRA subsidy period.

Background

Assistance eligible individuals (“AEIs”) who are COBRA qualified beneficiaries (“QBs”) because of an involuntary termination of employment or a reduction in hours receive a 100% COBRA subsidy for the period of April 1, 2021 through September 30, 2021.

The subsidy expires the earlier of:

- The first date that the AEI is eligible for other group health plan coverage or Medicare;
- The end of the maximum COBRA period; or
- September 30, 2021.

Employers are eligible to recoup the cost of the subsidy as a payroll tax credit.

Employers and their COBRA administrators must issue notices with respect to the subsidy.

This latest guidance from the IRS includes a series of FAQs that provides additional information to employers, health insurers, and plan administrators on the COBRA subsidy. While the guidance does not answer all outstanding questions related to the COBRA subsidy, it does provide helpful clarification on the availability of the COBRA subsidy for extended coverage periods, loss of the COBRA subsidy for dental and vision coverage, and which entity may claim the COBRA subsidy tax credit.

Eligibility for COBRA Premium Assistance – Extended Coverage Options

Q: Is the COBRA subsidy available for an AEI eligible for an extended period of COBRA continuation coverage due to a disability determination, second qualifying event, or state mini-COBRA?

Yes. The IRS confirmed that for those AEIs who are eligible to continue COBRA coverage beyond 18 months due to a disability determination, second qualifying event, or an extension under state mini-COBRA, such individuals will also be considered AEIs (absent eligibility for other group coverage or Medicare) to the extent the additional coverage period falls between April 1, 2021 and September 30, 2021.

End of the COBRA Subsidy – Dental and Vision Coverage

Q: If an AEI elects COBRA continuation coverage for only dental and/or vision coverage and receives a COBRA subsidy, does the AEI cease to be eligible for the COBRA subsidy if they subsequently become eligible for other group health plan coverage or Medicare that does not provide dental or vision benefits?

Yes. The AEI's COBRA subsidy for all plans ends when the individual becomes eligible for coverage under any other disqualifying group health plan or Medicare. As a result, an AEI that becomes eligible for Medicare will lose eligibility for the COBRA subsidies for dental, vision, and dental coverage despite most Medicare plans' limited coverage of dental or vision benefits. The same holds true for an AEI that becomes eligible for other group medical coverage where the AEI's new plan sponsor does not offer vision or dental benefits, or if the benefits provide less coverage than the COBRA plans in which the AEI is currently enrolled.

It is important to note that the subsidy requirements terminate once an AEI becomes eligible for a form of disqualifying coverage. The AEI does not need to enroll in the coverage to lose the subsidy.



Claiming the COBRA Subsidy Payroll Tax Credit

As described in ARP and subsequent guidance, the funding to offset the additional expense of subsidized COBRA coverage for AEIs comes in the form of a payroll tax credit. With respect to federal COBRA, the common law employer sponsoring the plan will generally receive the payroll tax credit. Carriers claim the credit with respect to fully insured plans that are not subject to federal COBRA but are subject to a state mini-COBRA law.

In Notice 2021-46, the IRS provides additional clarification on the entity that may claim these credits and specifies certain situations where the right to claim the COBRA subsidy payroll tax credit falls to any entity other than the common law employer of the AEI.

Q: Who is the common law employer maintaining the plan?

The common law employer maintaining the plan is the current common law employer for an AEI whose hours have been reduced or the former common law employer for those AEIs who have been involuntarily terminated from employment.

Q: Who may claim the COBRA payroll tax credit when the group health plan is subject to both federal COBRA and the state mini-COBRA coverage?

The common law employer maintaining the plan is entitled to claim the payroll tax credit when the state mini-COBRA coverage is comparable to federal COBRA and the group health plan is subject to both laws. Therefore, even if the state mini-COBRA coverage would otherwise require the AEI to pay the premiums directly to the insurer during the period of state-mandated coverage after federal COBRA coverage ends, the insurer is not entitled to claim the COBRA subsidy payroll tax credit.

Q: Which entity is entitled to claim the COBRA subsidy payroll tax credit when a group health plan subject to federal COBRA covers employees of different common law employers who are members of the same controlled group?

When a 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 entitled to claim the payroll tax credit with respect to its employees or former employees who are AEIs. While all members of a controlled group are treated as a single employer for employee benefit purposes, each member is a separate common law employer for employment tax purposes.

Q: In the event of business reorganizations, which entity is entitled to claim the COBRA payroll tax credit for AEIs who are merger and acquisition qualified beneficiaries (“M&A QBs”) if the selling group remains obligated to provide COBRA continuation coverage?

When the selling group remains obligated to provide COBRA continuation coverage to M&A QBs after a business reorganization, the entity in the selling group that maintains the group health plan is entitled to claim the COBRA subsidy payroll tax credit.

The FAQs above highlight some of the information contained in Notice 2021-46. The guidance also provides clarification as it relates to who claims the payroll tax credit in a Multiple Employer Welfare Plan (“MEWA”) and Professional Employer Organizations (“PEOs”), certain government plans and small market group plans purchased through the Small Business Health Options Program (“SHOP”). Review the guidance for further details.

Employer Action

Employers should continue to work with their COBRA administrators to ensure compliance with the ARP COBRA subsidy. Employers may need to engage payroll or tax professionals for assistance in claiming the tax credits.