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Guidance Issued on the 2021 COBRA Subsidy

Charmaine Naut | CME Benefit Consulting, LLC. | 610-265-9677 | cnaut@cme-group.com

On April 7, 2021, the Department of Labor (“DOL”) issued FAQs regarding implementation of the 2021 COBRA premium assistance (or “COBRA subsidy”). The 2021 COBRA subsidy was included as part of the American Rescue Plan Act (“ARP”).

Background

The COBRA subsidy is available to 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 – 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. It is anticipated that more information on the payroll tax credit is expected in future IRS guidance. New notifications are required with the first compliance date of May 31, 2021.

Guidance

The latest guidance includes a series of FAQs as well as model notices that can be used for compliance with the 2021 COBRA subsidy. The guidance provides some helpful direction, but unfortunately, it does not answer all the questions related to the 2021 COBRA subsidy. Prior guidance related to the 2009 COBRA subsidy may be helpful; however, it should be noted that the DOL and IRS may not use the same interpretation of these issues as it relates to the 2021 subsidy. We anticipate further guidance will be forthcoming.

General Information

Which plans does the COBRA premium assistance apply to?

- All group health plans sponsored by private-sector employers or employee organizations (unions) subject to COBRA under ERISA.
- Group health plans sponsored by state and local governments subject to the continuation of coverage provisions under the Public Health Service Act.
- Group health insurance required under state “mini-COBRA” laws.

COBRA does not apply to plans sponsored by the federal government or by churches and certain church-related organizations (however, an insured group health plan sponsored by a church may be subject to state “mini COBRA” and therefore could be eligible for premium assistance).

The FAQ simply states that the subsidy applies to “all group health plans” and does not specifically address which types of group health plan coverage. Based on the 2009 COBRA subsidy, it would appear the subsidy would be available for the following coverage:

- major medical
- dental
- vision
- health reimbursement accounts (“HRAs”)

Likely, the subsidy will not apply to health flexible spending arrangements (“FSAs”). It is not clear whether the subsidy would be available for employee assistance plans (“EAPs”), onsite clinics that provide more than just first aid or telemedicine. Further guidance is necessary.

Who is eligible to receive the COBRA premium assistance?

An AEI is a COBRA qualified beneficiary who meets the following requirements during the period from April 1, 2021 through September 30, 2021:

- eligible for COBRA continuation coverage by reason of a qualifying event that is a reduction in hours or an involuntary termination of employment (not including a voluntary termination); and
- elects COBRA continuation coverage.

The FAQ clarifies that a reduction in hours for this purpose includes reduced hours due to change in a business’s hours of operations, a change from full-time to part-time status, taking a temporary leave of absence, or an individual’s participation in a lawful labor strike, as long as the individual remains an employee at the time that hours are reduced.

It should be noted that the FAQ does not provide a definition for “involuntary termination.” Based on 2009 guidance, it would appear an involuntary termination may include:

- the employer’s failure to renew a contract at the time the contract expires, if the employee was willing and able to execute a new contract providing terms and conditions similar to those in the expiring contract and to continue providing the services.

- an employee-initiated termination from employment if the termination from employment constitutes a termination for good reason due to employer action that causes a material negative change in the employment relationship for the employee.
- a layoff period with a right of recall or temporary furlough period.
- an employer's action to end an individual's employment while the individual is absent from work due to illness or disability.
- termination for cause (except for gross misconduct).

An individual will not be eligible for premium assistance if eligible for:

- other group health coverage, such as through a new employer's plan or a spouse's plan (not including excepted benefits, a qualified small employer health reimbursement arrangement (QSEHRA), or a health FSA); or
- Medicare.

Note however, an individual may qualify for premium assistance if the individual has coverage through the Marketplace or Medicaid. However, by enrolling in subsidized COBRA continuation coverage, the individual will lose eligibility for premium tax credits with respect to individual coverage in the Marketplace.

How long does the subsidy last?

The COBRA subsidy can last from April 1, 2021 through September 30, 2021. However, it will end earlier if the AEI:

- becomes eligible for another group health plan, such as a plan sponsored by a new employer or a

spouse's employer (not including excepted benefits, a QSEHRA, or a health FSA), or Medicare; or

- reaches the end of the maximum COBRA continuation coverage period.

AEIs must notify the plan if they become eligible for coverage under another group health plan or for Medicare. Failure to do so can result in a tax penalty of \$250 (or if the failure is fraudulent, the greater of \$250 or 110% of the premium assistance provided after termination of eligibility). No penalties apply if the failure is due to reasonable cause and not due to willful neglect.

The FAQ does not clarify what "eligible for other group health plan coverage" means but the Summary of COBRA Premium Assistance Provisions (set forth under Model Notices located at www.dol.gov/cobra-subsidy) states that "eligibility for other coverage is determined regardless of whether you take or decline the other coverage. However, eligibility for coverage does not include any time spent in a waiting period." Based on the 2009 guidance, this would generally mean the individual was eligible for and able to enroll in the other group health plan coverage. Further guidance is necessary including how this interacts with the Outbreak Period extensions and special enrollment rights.

Who is eligible for a "second chance" for COBRA continuation of coverage?

A COBRA QB whose qualifying event was a reduction in hours or an involuntary termination of employment prior to April 1, 2021 may have an additional enrollment opportunity (as a "second chance AEI") when the individual:

- did not elect COBRA continuation of coverage when it was first offered prior to that date, or

- elected COBRA but is no longer enrolled (for example, an individual dropped COBRA because he or she could not continue to pay premiums).

These “second chance AEIs” must receive a notice of extended COBRA election period informing them of this opportunity. This notice must be provided by May 31, 2021 and individuals have 60 days after the notice is provided to elect COBRA.

It is important to note that the additional election period does not extend the period of COBRA continuation coverage beyond the original maximum period (generally 18 months from the employee’s reduction in hours or involuntary termination, or under the extended election rule, 18 months measured from the date of the loss of coverage associated with the qualifying event).

COBRA continuation coverage with premium assistance elected in this additional election period begins with the first period of coverage beginning on or after April 1, 2021. Individuals can begin their coverage prospectively from the date of their election, or, if an individual has a qualifying event on or before April 1st, choose to start their coverage as of April 1st, even if the individual receives an election notice and makes such election at a later date. In either case, the subsidy is only available for periods of coverage from April 1, 2021 – September 30, 2021.

The FAQ clarifies that the extended deadline relief related to the Outbreak Period does not apply to the 60-day notice or election periods related to the COBRA subsidy. The Outbreak Period began March 1, 2020 and ends 60 days after the announced end of the National Emergency. The relief effectively delays due dates and timeframes associated with certain benefit plan requirements, including the 60-day COBRA initial election period. The relief is measured on a participant-by-participant basis

and is the earlier of (1) one-year from the date the relief first applied or (2) the end of the Outbreak Period. Since this relief does not apply with respect to the COBRA subsidy, AEIs should elect COBRA within the timeframes required under ARP. For example, an AEI who receives the required election notice on May 31, 2021 must elect coverage by July 30, 2021.

What happens if a state has a “mini-COBRA” continuation requirement?

ARP does not change any requirement of a state “mini-COBRA” program. ARP only allows AEIs who elect continuation coverage under state insurance law to receive premium assistance from April 1, 2021 through September 30, 2021. It also allows AEIs to switch to other coverage offered to similarly situated active employees if the plan allows it, provided that the new coverage is no more expensive than the prior coverage.

Premiums

Do AEIs need to apply for the premium assistance?

Employers should provide AEIs with the required notice of eligibility to elect COBRA continuation of coverage and receive the COBRA subsidy. This notice includes all forms necessary for enrollment, including forms to indicate that the individual(s) qualify as an AEI. These forms should be timely remitted to the employer.

How do AEIs receive the COBRA subsidy?

The premium assistance is not paid to AEIs. Rather, AEIs do not pay any of the COBRA premium for the period of coverage from April 1, 2021 – September 30, 2021.

Employers will receive reimbursement through the COBRA premium assistance tax credit (further guidance

expected on this). For premium assistance provided through state “mini COBRA,” the carrier will receive reimbursement.

Can an individual requested to be treated as an AEI?

Yes. Employers may receive a “Request for Treatment as an Assistance Eligible Individual” from an individual who believes he or she may be an AEI but has not received a notice from the employer. This form is attached to the Summary of COBRA Premium Assistance Provisions. If an individual makes such a request, plans should not collect premium payments from AEIs and subsequently ask them to seek reimbursement for periods of coverage beginning on or after April 1, 2021 and preceding the date on which an employer sends an election notice if an individual has made an appropriate request for such treatment.

If an AEI has been enrolled in COBRA since December 2020, must his or her paid premiums be refunded?

No. The COBRA subsidy only applies to premiums for coverage periods from April 1, 2021 – September 30, 2021. There is no subsidy available for the period from December 2020 – March 2021.

If, however, the AEI paid in full for a period of COBRA beginning on or after April 1, 2021 through September 30, 2021 the employer will need to either provide a credit or refund. Employers should take care not to collect premiums for AEIs during the subsidized period.

Can an AEI be charged an “administrative fee?”

No. AEIs cannot be required to pay any part of what they would otherwise pay for their COBRA continuation coverage, including any administration fee that would otherwise be charged.

Notices

What are the notice requirements for employers?

The DOL released model notices to meet this requirement, which can be found at www.dol.gov/cobra-subsidy.

- Updated General Notice for qualifying events from April 1, 2021 – September 30, 2021. A general notice to all qualified beneficiaries who have a qualifying event that is a reduction in hours or an involuntary termination of employment from April 1, 2021 through September 30, 2021. This notice may be provided separately or with the COBRA election notice following a COBRA qualifying event. To use this notice properly, the plan administrator must fill in the blanks with the appropriate plan information. When distributing the model notice, the plan administrator should include the attachment Summary of COBRA Premium Assistance Provisions (found under Model Notices). The Summary contains information on ARP and forms to elect or discontinue the premium assistance in order to satisfy the notice requirements of ARP.
- Notice of extended COBRA election period to all AEIs who had a qualifying event before April 1, 2021. A notice of the extended COBRA election period must be furnished to any AEI (or any individual who would be an AEI if a COBRA continuation coverage election were in effect) who had a qualifying event before April 1, 2021. This requirement does not include those individuals whose maximum COBRA continuation coverage period, if COBRA had been elected or not discontinued, would have ended before April 1, 2021 (generally, those with applicable qualifying events before October 1, 2019). This notice must be provided by May 31, 2021. To use this notice properly, the plan administrator must fill in the

blanks with the appropriate plan information. When distributing the model notice, the plan administrator should include the attachment Summary of COBRA Premium Assistance Provisions.

- **Notice of expiration of the COBRA subsidy.** AEIs must be provided with a notice of expiration of periods of premium assistance explaining that the premium assistance for the individual will expire soon, the date of the expiration, and that the individual may be eligible for coverage without any premium assistance through COBRA continuation coverage or coverage under a group health plan. Coverage may also be available through Medicaid or the Health Insurance Marketplace. This notice must be provided 15-45 days before the individual's premium assistance expires. It appears this notice must be provided when the premium subsidy is set to expire due to the end of the maximum COBRA coverage period or the end of the premium assistance period (Sept. 30, 2021).

While employers are not required to use the Model Notices, it is usually a best practice as, when appropriately modified, the DOL considers their use to be in good faith compliance with the content requirements for COBRA and ARP.

Failure to satisfy the COBRA continuation of coverage requirements may result in an excise tax of \$100/qualified beneficiary/day for each day in violation of COBRA (but not more than \$200/family/day).

It is important to note that the extended deadline relief related to the Outbreak Period does not apply to the notices or the election periods related to COBRA premium assistance available under ARP. Therefore, plans and issuers must provide the notices according to the timeframes specified in ARP.

The DOL issued an Alternative Model Notice for use by insured coverage subject to state "mini-COBRA" requirements.

Changing Coverage

Can an AEI change his or her COBRA coverage option from the coverage in place at the time of the qualifying event?

In general, COBRA continuation coverage provides the same coverage that the individual had at the time of the qualifying event. However, under ARP, an employer may (but is not required to) offer AEIs the option of choosing other coverage. Changing coverage will not cause an individual to be ineligible for the COBRA premium assistance, provided that:

- the COBRA premium charged for the different coverage is the same or lower than for the coverage the individual had at the time of the qualifying event;
- the different coverage is also offered to similarly situated active employees; and
- the different coverage is not limited to only excepted benefits, a QSEHRA, or a health FSA.

If the plan permits AEIs to change coverage options, the plan must provide notice of their opportunity to do so (included in the model notices). Individuals have 90 days to elect to change their coverage after the notice is provided.

Can an AEI add additional family members who were originally eligible for COBRA, but declined to enroll?

Each COBRA QB may independently elect COBRA continuation coverage. If a family member did not elect

COBRA continuation coverage when first eligible and that individual would be an AEI, that individual has an additional opportunity to enroll and qualify for the premium assistance. However, this extended election period does not extend the maximum period of COBRA continuation coverage.

If an AEI is currently enrolled in Marketplace coverage, can he or she cancel individual coverage in order to receive the COBRA subsidy?

Yes. If AEIs want to end the coverage they are currently receiving through the Marketplace (such as through Healthcare.gov) to enroll in COBRA continuation coverage with premium assistance, they can do so, but only on a prospective basis.

Employer Action

Employers should:

- identify eligible AEIs by looking back to individuals who would have been COBRA eligible beginning on or after Nov. 1, 2019 as a result of a reduction in hours or involuntary termination of employment.
- work with COBRA vendors, if applicable, to coordinate a plan.
 - The first deadline is May 31, 2021. The Notice of Extended COBRA Election Period must be issued to all AEIs with a qualifying event prior to April 1, 2021 by this date. Make sure to include the Summary of COBRA Premium Assistance Provisions under ARP.
- Update COBRA election notices to reflect the subsidy language included in the Model Notice for new COBRA events between April 1, 2021 through September 30, 2021. Make sure to

include the Summary of COBRA Premium Assistance Provisions under ARP.

- Ensure the vendors are prepared to issue subsidy expiration notices.
- Discuss what to do if COBRA premiums are received from AEIs for the months April – September 2021 and whether a refund or credit may be necessary.
- Prepare how to respond in the event you (or the COBRA vendor) receive a “Request for Treatment as an Assistance Eligible Individual.”
- Discuss tax credits with payroll departments and tax advisors.
- Await further guidance and consider reviewing the 2009 guidance for direction.

It is expected that the IRS will also issue guidance, including information for employers to claim the payroll tax credit associated with the COBRA subsidy.