

NEWS ALERT

EMPLOYEE BENEFITS



IRS Issues Additional Guidance on the COBRA Premium Subsidy and Related Tax Credit

By Melanie N. Aska and Erek M. Sharp | August 3, 2021

On July 26, 2021, the IRS issued [Notice 2021-46](#), which provides additional Q&A guidance on the temporary 100% COBRA premium subsidy (and the related tax credit) provided by the American Rescue Plan Act of 2021 (the ARP, enacted on March 11, 2021). Under the ARP, the COBRA premium subsidy is available to any assistance eligible individual (AEI) who loses employer-sponsored group health coverage due to a reduction in hours or involuntary termination of employment and whose COBRA continuation coverage period overlaps the six-month COBRA subsidy period (April 1, 2021 to September 30, 2021) to any extent.

Notice 2021-46 supplements earlier guidance provided in [IRS Notice 2021-31](#) (a set of 86 Q&As issued on May 18, 2021) and also addresses additional issues.

Notice 2021-46 contains 11 Q&As covering the following four topics:

- **Eligibility for the COBRA Premium Subsidy During Extended Coverage Periods.** Notice 2021-46 provides that if an AEI's original COBRA qualifying event was a reduction in hours or an involuntary termination of employment, the 100% COBRA premium subsidy would be available to an AEI who is entitled to elect COBRA continuation coverage for an extended period due to a disability determination, a second qualifying event, or an extension under State mini-COBRA, to the extent the extended coverage period overlaps the six-month subsidy period (April 1, 2021 to September 30, 2021), even if the AEI had not notified the group health plan or insurer, before the start of the subsidy period, of his or her intent to elect extended COBRA continuation coverage.

Example. An individual who was provided a COBRA general notice is involuntarily terminated from employment and elects COBRA continuation coverage effective October 1, 2019. The individual's initial, 18-month COBRA continuation period lapsed on March 31, 2021. On March 1, 2020, the Social Security Administration (SSA) issued a disability determination letter providing that the individual was disabled as of November 1, 2019. The SSA's disability determination entitles the individual to the 29-month extended COBRA continuation coverage period. The individual fails to notify his former employer's group health plan of the SSA's disability determination by April 30, 2020, which was 60 days after the SSA issued the disability determination letter, as required under Internal Revenue Code Section 4980B(f)(6)(C). However, under the COVID-19-related Emergency Relief Notices issued jointly by the Department of Labor, the Department of the Treasury, and the IRS (the Agencies), the individual has one year and 60 days from the March 1, 2020 issuance date of the SSA's disability determination letter to notify the group health plan of the disability to

extend COBRA continuation coverage. On April 10, 2021, the individual notifies the group health plan of the disability and elects ongoing COBRA continuation coverage from April 1, 2021. Assuming the individual is not eligible for other disqualifying group health plan coverage or Medicare, the individual is an AEI and is entitled to the 100% COBRA premium subsidy.

Comment: This is the first time that the IRS has issued guidance stating that even if an AEI's initial 18-month COBRA continuation coverage period has ended, if the AEI is still entitled, due to the extended election deadline provided under the Agencies' Emergency Relief Notices, to elect extended COBRA continuation coverage, the AEI will be eligible for the 100% COBRA premium subsidy to the extent that his or her extended COBRA continuation coverage period overlaps the six-month COBRA premium subsidy period (April 1, 2021 to September 30, 2021).

- **End of the COBRA Premium Subsidy Period – Dental and Vision Coverage.** Notice 2021-46 also clarifies that if an AEI previously elected COBRA continuation coverage, with the 100% COBRA premium subsidy, for dental-only or vision-only coverage, he or she will cease to be eligible for the subsidy when he or she becomes eligible for coverage under any other disqualifying group health plan or Medicare, even if the other coverage does not include all of the benefits provided by his or her previously-elected COBRA continuation coverage. For example, eligibility for Medicare, which generally does not provide vision or dental coverage, will end an AEI's eligibility for the 100% COBRA premium subsidy related to all of his or her previously-elected COBRA continuation coverage, including his or her previously-elected dental-only or vision-only COBRA continuation coverage.
- **Comparable State (Mini-COBRA) Continuation Coverage – Coverage for a Subset of State Residents.** Notice 2021-46 confirms that a State (mini-COBRA) continuation coverage program does not fail to provide comparable coverage to Federal COBRA continuation coverage (and thus makes AEIs eligible for the 100% COBRA premium subsidy) solely because the State mini-COBRA program covers only a subset of State residents, as long as the State mini-COBRA program provides coverage that is otherwise comparable to Federal COBRA continuation coverage. Thus, a State law that provides State mini-COBRA continuation coverage only for employees of a State or local government unit may be comparable coverage that qualifies AEIs for the 100% COBRA premium subsidy.
- **Claiming the Tax Credit for the 100% COBRA Premium Subsidy – Additional Clarification on the Entity that May Claim the Tax Credit.** Notice 2021-46 also provides guidance on claiming the COBRA premium subsidy tax credit provided under Internal Revenue Code Section 6432, as added by the ARP, including the following:
 - The common law employer maintaining the group health plan (and thus the entity – the “premium payee” – generally eligible to claim the tax credit) is the current common law employer for AEIs whose hours have been reduced or the former common law employer for AEIs who have been involuntarily terminated from employment.
 - For State-mandated (mini-COBRA) continuation coverage that is comparable to Federal COBRA continuation coverage and is a group health plan subject to both Federal COBRA and the State mini-COBRA, the common law employer is the premium payee entitled to claim the tax credit because the plan is subject to Federal COBRA. As a result, even if the State mini-COBRA program would require the AEI to pay premiums directly to the insurer after the period of Federal COBRA continuation coverage ends, the insurer is not eligible to claim the tax credit.
 - 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 the premium payee entitled to claim the tax credit with respect to its employees or former employees. Although all of the members of the controlled group are treated as a single employer for employee benefit purposes, each member is a separate common law employer for employment tax purposes. Therefore, the common law employer is the premium payee entitled to claim the credit (subject to certain exceptions, relating to third-party payers and business reorganizations).

- If a group health plan (other than a multiemployer plan) subject to Federal COBRA covers employees of two or more *unrelated* employers, each common law employer is the premium payee entitled to claim the tax credit with respect to its employees or former employees (subject to the same exceptions, relating to third-party payers and business reorganizations).
- If an entity provides health benefits to employees of another entity, but is *not* a third-party payer of those employees' wages (that is, it is *not* an entity – such as a professional employer organization (PEO), a certified professional employer organization (CPEO), or a Code Section 3504 agent – that pays those employees' wages subject to Federal employment taxes and reports those wages and taxes on an aggregate employment tax return that it files on behalf of its clients), then that entity may not be treated as a third-party payer for purposes of the COBRA premium subsidy tax credit and therefore is not the premium payee eligible to claim the tax credit.

Example. Employer A and Employer B participate in a Multiple Employer Welfare Arrangement (MEWA) that neither pays wages subject to employment taxes nor reports wages and taxes on an aggregate employment tax return on behalf of Employer A and Employer B. Certain former employees of Employer A and Employer B are AEIs eligible for coverage provided by the MEWA. The MEWA is not the premium payee and therefore is not entitled to claim the COBRA premium tax credit. Instead, Employer A and Employer B are the premium payees and are entitled to claim the tax credit with respect to their respective former employees.

- If a group health plan maintained by a State government agency (State agency) and subject to Federal COBRA requirements under the Public Health Service Act provides health coverage to employees of various agencies of the State and local governments within the State, and if the AEIs would have been required to remit COBRA premiums directly to the State agency were it not for the 100% COBRA premium subsidy, then the State agency is the premium payee entitled to claim the tax credit. The common law employer (if other than the State agency) would not be entitled to claim the tax credit.
- If a fully insured plan that is not subject to Federal COBRA is offered by an employer through a Small Business Health Options Program (SHOP) exchange, the common law employer is treated as the premium payee and therefore is eligible to claim the tax credit with respect to the coverage in the plan if all of 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 participating employer with a single premium invoice, aggregates all premium payments, and then allocates and pays the applicable premium amounts to the insurers;
 - The participating employer has a contractual obligation with the SHOP exchange to pay all applicable COBRA premiums to the SHOP exchange; and
 - The participating employer would have received the State mini-COBRA premiums directly from the AEIs were it not for the 100% COBRA premium subsidy.

If all four of these conditions are met, then the insurer of a plan that is not subject to Federal COBRA is not treated as the premium payee with respect to coverage in the plan and therefore, is not eligible to claim the credit. However, in all other cases of a fully-insured plan subject solely to State mini-COBRA, the insurer (and not the common law employer) is the premium payee entitled to claim the tax credit, which is the general rule set forth in IRS Notice 2021-31, Q&A-72.

- Finally, if there is a business reorganization described in IRS Regulations Section 54.4980B-9 (that is, a stock sale or an asset sale), and if the selling group remains obligated (under IRS Regulations Section 54.4980B-9, Q&A-8) to make COBRA continuation coverage available to the merger and acquisition (M&A) qualified beneficiaries after the business reorganization, the entity in the selling group

that maintains the group health plan is the premium payee and therefore is eligible to claim the tax credit. If, under IRS Regulations Section 54.4980B-9, Q&A-8, the common law employer (which may be an entity in the buying group) is not obligated to make COBRA continuation coverage available to AEIs, then the common law employer is not entitled to claim the tax credit after the business transaction.

A premium payee that is entitled to claim the 100% COBRA premium subsidy tax credit claims that credit by reporting the credit (both the nonrefundable and refundable portions of the credit, as applicable) and the number of AEIs receiving the COBRA premium subsidy on the designated line(s) of its federal employment tax return(s), usually, Form 941 (Employer's Quarterly Federal Tax Return). The Instructions for Form 941 (Rev. June 2021) explain that although the COBRA premium subsidy is available for periods of coverage beginning on or after April 1, 2021 through periods of coverage beginning on or before September 30, 2021, premium payees may claim the COBRA premium subsidy tax credit on Forms 941 filed for the second, third or fourth quarter of 2021, depending on when the premium payee becomes entitled to the credit. Forms 941 filed for the second quarter (i.e., April, May and June) of 2021 generally must be filed by July 31, 2021 (but if timely deposits were made in full payment of taxes for the second quarter, then the Form 941 may be filed by August 10, 2021, i.e., the 10th day of the second month following the end of the second quarter). The IRS issued Notice 2021-46 on July 26, 2021, just five days before the general July 31, 2021 due date for Form 941 for the second quarter of 2021. It would have been helpful if the IRS had issued Notice 2021-46 earlier, which might have spared some filers from scrambling to make 11th-hour corrections or amendments to their Forms 941 for the second quarter of 2021.

If you have questions about IRS Notice 2021-46 or how it might affect your business, or if you have other questions relating to the 100% COBRA premium subsidy or the related tax credit, please contact Melanie N. Aska, Counsel, at 617-457-4131 or maska@murthalaw.com or Erik M. Sharp, Partner, at 203-772-7772 or esharp@murthalaw.com.