



SLEVIN & HART, P.C.

Benefits Update

New IRS Guidance on COBRA Premium Subsidy

June 28, 2021

The Internal Revenue Service (“IRS”) recently issued Notice 2021-31 (“Notice”) providing additional guidance on the temporary 100% COBRA premium subsidy under the American Rescue Plan Act of 2021 (“Act”). As discussed in our April 9, 2021 Benefits Update, [available here](#), the Act provides for a 100% COBRA premium subsidy between April 1, 2021 and September 30, 2021 for individuals who lose coverage due to a reduction in hours or involuntary termination of employment (“Assistance Eligible Individuals” or “AEIs”). The Notice provides several key clarifications concerning the COBRA subsidy.

Eligibility for the COBRA Subsidy

Involuntary Termination of Employment Defined. An involuntary termination of employment for purposes of COBRA subsidy eligibility is a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee’s implicit or explicit request to be terminated. The determination of whether a termination is involuntary is based on the facts and circumstances of a particular case. For example, an employee’s resignation due to an involuntary material reduction in hours would constitute an involuntary termination, but an employee’s termination for gross misconduct would not. The Notice provides that retirement generally is considered a voluntary termination unless the facts and circumstances indicate that, absent the employee’s decision to retire, the employer would have terminated the employee, the employee was willing and able to continue employment, and the employee had knowledge that they would be terminated absent the retirement.

Self-Certification or Attestation of Eligibility. A plan may, but is not required to, obtain a self-certification or attestation of COBRA subsidy eligibility from any individual requesting subsidized COBRA. Unless the plan has actual knowledge that the individual’s attestation is incorrect, it may rely on this self-certification to determine whether the individual is an AEI.

Secondary Qualifying Events. Under federal law, in some cases, individuals may have their 18-month COBRA continuation coverage period extended if they become disabled or experience a second qualifying event while covered under COBRA. In these situations, if the individual’s initial COBRA qualifying event was a reduction in hours or an involuntary termination of employment and their COBRA extension continues into the period between April 1, 2021 and September 30, 2021, that individual would be eligible for the COBRA premium subsidy for the period of the 18-

month extension that falls within the subsidy period, provided that individual has remained covered under COBRA since the initial COBRA election.

Termination of Eligibility. Individuals are not eligible for subsidized COBRA coverage if they are, or become, eligible for coverage under any other group health plan or Medicare. The Notice clarifies that if the other coverage for which the individual is eligible is COBRA continuation coverage under another plan, that other COBRA coverage will not disqualify the individual from eligibility for the premium subsidy. In addition, if the other coverage is retiree health coverage offered under the same plan as the COBRA coverage, the availability of retiree coverage does not disqualify a potential AEI from receiving the subsidy for COBRA premiums under the active plan coverage. However, if the individual is offered retiree health coverage under a separate group health plan (such as a standalone retiree-only plan), the individual is not eligible for the COBRA subsidy under the plan for active participants.

Plans Eligible for Subsidy. The Notice clarifies that the premium subsidy is available for coverage under vision-only or dental-only group health plans, as well as health reimbursement arrangements and retiree health coverage, provided the retiree coverage is offered under the same plan as the coverage made available to similarly situated active employees.

Failure to Elect Retroactive Coverage Could Waive the Right to Such Coverage

The Notice clarifies that AEIs who: (i) experienced a qualifying event prior to April 1, 2021; (ii) receive notice from the plan of the Act's extended COBRA election period; and (iii) elect COBRA coverage with premium assistance, must also elect or decline COBRA coverage retroactive to their original qualifying event within 60 days of receiving notice of the extended election period, regardless of any existing COVID-19 deadline extension. If an AEI who elects subsidized COBRA does not also elect any available retroactive unsubsidized COBRA coverage within the same 60-day window, the AEI cannot later elect such unsubsidized COBRA coverage.

Reimbursement of Subsidized Premiums

Claiming the Tax Credit. The entity that provides the COBRA coverage and normally would receive the premium payments from qualified beneficiaries ("premium payees") may seek a reimbursement of subsidized COBRA premiums through a credit against its quarterly payroll taxes. The IRS has clarified that premium payees must claim the credit by reporting the amount of the subsidized premiums, and the number of individuals receiving subsidized COBRA, on the designated lines of the payee's employment tax return, usually IRS Form 941, Employer's Quarterly Federal Tax Return. Premium payees also may request an advance refund of the anticipated credit amount using IRS Form 7200, Advance Payment of Employer Credits Due to COVID-19, and any advance payments received by the payee must be reported on Form 941.

Plans Without Employees. If a plan does not have any employment tax liability (e.g., because it does not have employees), the plan still will use the Form 941 to claim its credit.

Amount of the Tax Credit. The amount of the credit that may be claimed each quarter equals the premiums not paid by AEIs for COBRA coverage during the quarter, based on the premium amount charged for COBRA coverage to other similarly situated qualified beneficiaries. If a plan would have subsidized an individual's COBRA coverage by paying all or part of the premium, the amount of the credit must be equal to the amount that would have actually been charged to the individual.

Documentation Requirements. In order to request a reimbursement of premiums subsidized, the premium payee must maintain documentation substantiating each individual's classification as an AEI.

AEIs Failing to Inform Plan of Ineligibility. If an AEI fails to inform the premium payee that the AEI is no longer eligible for the COBRA subsidy because of eligibility for other group health plan coverage or Medicare, the payee is still entitled to receive a credit from the federal government for the subsidy it provided to the individual during any period of ineligibility, provided the payee did not know of the individual's ineligibility.

Please contact Slevin & Hart for more information about how the Act's COBRA provisions impact your plan.

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