

HR Heads-up

PERIODIC UPDATES ON IMPORTANT HR LEGAL ISSUES

APRIL 13, 2021

Subsidized COBRA Coverage Now Available to Certain Individuals

The American Rescue Plan Act of 2021 places several new obligations on group health plan sponsors, which in many situations are employers, with respect to federal COBRA and state health insurance continuation laws. The most important change is that certain individuals are now eligible to enroll in continuation coverage and have their continuation coverage premiums 100% subsidized by the plan sponsor. The plan sponsor is then eligible for tax credits from the federal government to recoup the cost of this subsidy.

When the law was initially passed back in March of 2021, there were many unanswered questions regarding how these changes would be implemented in practice. On April 7, 2021, the Department of Labor (DOL) issued guidance and model notices for plan sponsors, including employers, that clarify some of these unanswered questions, which are available here: <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy>. Additional guidance and formal regulations are still expected, particularly with regard to the tax credits that are available under the law.

This article will focus on the following issues:

- Eligibility for COBRA subsidies and election of COBRA coverage
- Deadlines for COBRA coverage
- Required employer notices
- Claiming the tax credits
- Cautions for employers

Eligibility for COBRA Subsidies and Election of COBRA Coverage

Individuals are only eligible for COBRA subsidies (each, an “assistance eligible individual”) if they lost group health plan coverage because they had their hours reduced (voluntarily or involuntarily) or were involuntarily terminated (each, a “subsidy qualifying event”). The subsidy qualifying event does not need to be related to the COVID-19 pandemic. A voluntary resignation is not a subsidy qualifying event. Sometimes employees agree to resign instead of being terminated, and in such cases employers should analyze whether the “resignation in lieu of termination” should be deemed an involuntary termination. Employers should err on the side of caution and provide notice of potential eligibility for subsidies in close cases. If an individual with a close case elects COBRA coverage, employers can then review potential eligibility concerns prior to

providing the subsidies and applying for the tax credits.

Subsidies are not available for other COBRA qualifying events such as the death of a covered employee, a divorce, or a child ceasing to be a dependent child under the terms of the plan. Additionally, individuals ineligible for COBRA coverage because they were terminated for “gross misconduct” similarly are ineligible for subsidies. In practice, the “gross misconduct” standard is a difficult threshold for employers to prove. Thus, employers rarely rely on gross misconduct to deny COBRA election rights because improperly denying COBRA coverage can have serious implications for the employer, such as the employer potentially having to pay all of the healthcare costs of the individual and the individual’s qualified beneficiaries for the time period during which the individual was improperly denied COBRA coverage.

Individuals who have a subsidy qualifying event after April 1, 2021 and prior to September 30, 2021 can elect COBRA coverage and receive the subsidies. Additionally, any individual that had a subsidy qualifying event prior to April 1, 2021 is eligible for the subsidies so long as the individual’s period of eligibility for COBRA coverage has not expired. This generally means assistance eligible individuals who had a subsidy qualifying event as far back as October 1, 2019 can now elect COBRA coverage and receive subsidies effective on April 1, 2021—even if the assistance eligible individual declined COBRA coverage originally or elected COBRA coverage and then terminated that coverage as will be discussed more below. Assistance eligible individuals who have already elected COBRA coverage and have maintained COBRA coverage also became eligible for the subsidies on April 1, 2021.

Assistance eligible individuals lose their eligibility for COBRA subsidies if they become eligible for coverage under another group health plan, such as a plan sponsored by a new employer or a spouse’s employer or if they become eligible for Medicare. Assistance eligible individuals who are receiving COBRA subsidies must notify their COBRA plan sponsor if they become eligible for other coverage. Failure to do so can result in a tax penalty for those individuals.

An individual will cease to be an assistance eligible individual on the sooner of either (a) September 30, 2021; (b) the date the individual becomes ineligible for COBRA coverage; or (c) the date they become eligible for coverage under another group health plan.

For example, consider the scenario where an individual was laid off due to lack of work and lost health coverage as of January 1, 2020. The individual did not elect COBRA coverage and went without health insurance. On April 1, 2021, that individual becomes an assistance eligible individual starting April 1, 2021. The individual will no longer be an assistance eligible individual on June 30, 2021 because the individual will have reached the general 18-month limit for COBRA coverage.

Deadlines for COBRA Coverage

An assistance eligible individual has 60 days after receiving notice of eligibility for COBRA subsidies to elect subsidized COBRA coverage. As will be discussed in greater detail below, plan sponsors, including employers, must provide notices to potentially assistance eligible individuals no later than May 31, 2021. The required notice can be sent prior to that deadline. The 60 days starts upon receipt of the notice.

There is the potential for confusion regarding the 60-day deadline to elect subsidized COBRA coverage because earlier government actions dramatically extended the amount of time an individual has to elect non-subsidized COBRA coverage and pay premiums for COBRA coverage. Additionally, plan sponsors, including employers, should note that their deadline to provide regular COBRA election notices to qualifying individuals has not been extended. The previously-extended deadlines apply only to an individual’s election of (and paying the premiums for) non-subsidized COBRA.

If an individual wants to elect COBRA coverage for months prior to April 1, 2021, the individual must pay every month of COBRA premiums back to the initial COBRA qualifying event. However, if the individual elects COBRA coverage within 60 days of receiving the notice of eligibility for COBRA subsidies and only wants to start subsidized COBRA coverage on April 1, 2021, the individual does not have to pay premiums for months prior to April 1 (but the individual would not have health coverage under the group health plan prior to April 1, 2021 either).

Required Notices to Subsidy Eligible Individuals

Plan sponsors, including many employers, must give notice to individuals eligible for COBRA subsidies of their potential eligibility for subsidized COBRA coverage. These notices must contain specific requirements. Fortunately, the DOL has provided model notices that plan sponsors can use for this purpose. The DOL states that use of these model notices constitutes good faith compliance with the notice content requirements.

For assistance eligible individuals who have a subsidy qualifying event from April 1, 2021 through September 30, 2021, this notice can be provided alongside the standard COBRA election notice or provided separately. Plan sponsors, including many employers, must generally provide this notice within 14 days after receiving notice of the COBRA qualifying event. However, due to Wisconsin's continuation coverage law (Wis. Stat. § 632.897), Wisconsin employers should ensure that they provide this notice within five days of the loss of coverage. The model notice for this purpose is available here: <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/cobra/premium-subsidy/model-general-and-election-notice.pdf>.

Plan sponsors that are not subject to COBRA (such as employer-sponsored plans for employers with fewer than 20 employees) but are still subject to state continuation coverage (such as Wisconsin's continuation coverage law) must also provide notice of the availability of subsidies to assistance eligible individuals. The deadline for providing this notice is established by state law, which in Wisconsin means providing the notice within five days of the individual's loss of coverage. The model notice for this purpose is available here: <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/cobra/premium-subsidy/model-alternative-election-notice.pdf>.

Plan sponsors subject to COBRA must also provide notice to all assistance eligible individuals who had a qualifying event prior to April 1, 2021, but who have not exceeded their maximum COBRA coverage period (which is generally 18 months). In practice, this means employers will need to review their records back to October 1, 2019, determine if any individuals who lost coverage might be eligible for subsidies (based on the reason the individual lost coverage), and provide these assistance eligible individuals with notice and the opportunity to elect subsidized COBRA coverage effective April 1, 2021. This notice must be provided no later than May 31, 2021. The model notice for this purpose is available here: <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/cobra/premium-subsidy/model-extended-election-periods-notice.pdf>.

All plan sponsors must also provide notice to assistance eligible individuals who have elected subsidized COBRA that their eligibility for subsidies will expire. This notice must be provided no fewer than 15 days prior to expiration and no more than 45 days prior to expiration. As a reminder, subsidy coverage expires the earlier of September 30, 2021 or the individual reaching the end of their COBRA eligibility period (which is generally 18 months after the individual's initial qualifying event). Therefore, some assistance eligible individuals will need to receive the expiration notice earlier than others. The model notice for this purpose is available here: <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/cobra/premium-subsidy/notice-of-premium-assistance-expiration-premium.pdf>. This notice is not required to be sent to individuals who notify plan sponsors that they have become eligible for another group health plan.

Claiming the Tax Credits

Plan sponsors are eligible for tax credits to offset the cost of providing subsidized COBRA coverage to eligible individuals. Additional details are needed on the mechanics of claiming these tax credits, and regulations and guidance from the IRS are expected. However, here are the basics as they stand now.

In general, employers that sponsor COBRA-eligible plans will be responsible for the costs of the subsidized coverage. The employer will then take a tax credit against the employer's share of quarterly Medicare taxes. Self-insured employers and employers with insured plans will likely be responsible for these costs and eligible for these tax credits, but further guidance will hopefully provide clarity on whether there is a distinction between insured and self-insured employers on this issue. For employers that sponsor plans that are only eligible for state continuation coverage (which generally means employers with fewer than 20 employees), the insurance carrier appears to be the entity that must cover the cost of the subsidized coverage and would qualify for the tax credits against the insurance carrier's employer share of quarterly Medicare taxes. Employers should coordinate with their insurance carriers to ensure there is no confusion over who will be covering the cost of the subsidies and claiming the tax credits.

Cautions for Employers

Employers are obligated to provide the notices discussed above. However, it is not an employer's obligation to explain to individuals all of their health insurance options and help them select the option that will work best for them. Instead, employers should encourage individuals to seek their own legal advice or insurance counseling. In many cases, subsidized individual insurance coverage is also available through the federal and state marketplaces established by the Affordable Care Act. Employers are not in a position to assess which health care option will be better for a given individual.

Conclusion

Employers will want to consult with their insurance carriers, insurance brokers, and third-party administrators regarding these changes to COBRA, including the notice obligations. Employers should not assume that insurance carriers or third-party administrators will "take care of this" for them. Employers and insurance carriers should touch base to ensure they are on the same page regarding the process for paying premiums and receiving tax credits.

If you have questions regarding employers' obligations under these revisions to COBRA, please contact the author of this article or your Boardman Clark attorney.

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