



# Once More, With Feeling: IRS Issues Further Clarifying Guidance Regarding COBRA Premium Assistance

## Overview

The following general summary is intended to educate employers and plan sponsors on the potential effects of recent government guidance on employee benefit plans. This summary is not and should not be construed as legal or tax advice. The government's guidance is complex and very fact specific. As always, we strongly encourage employers and plan sponsors to consult competent legal or benefits counsel for all guidance on how the actions apply in their circumstances.

On July 26, 2021, the Internal Revenue Service (IRS) released additional guidance in the form of 11 questions-and-answers that expand upon earlier Q&A guidance (published on May 18, 2021<sup>1</sup>) addressing the COBRA premium assistance provisions of the American Rescue Plan Act of 2021 (ARPA). IRS Notice 2021-46<sup>2</sup> addresses – among other things – the availability of the premium assistance to individuals eligible for an extension who had not yet elected it; whether premium assistance for vision or dental-only coverage ends due to eligibility for other health coverage that does not include vision or dental benefits; availability of premium assistance under comparable state law that limits continuation coverage to government employees; whether employers may claim the premium assistance tax credit if the SHOP exchange requires employers to pay COBRA premiums and which party may claim the premium assistance tax credit in situations involving parties other than an insurer or former common law employer providing the COBRA coverage.

Below, we have summarized the Q&As addressed in Notice 2021-46. The following overview of the information is not exhaustive. We encourage you to read the full notice to ensure that you have a complete understanding of the information included in Notice 2021-46.

For a refresher of the definitions and rules regarding the COBRA premium assistance and special election period available under ARPA, please review our previous compliance alert on the topic<sup>3</sup>.

## Extended Coverage Periods

Assistance Eligible Individuals (AEIs) whose original 18-month maximum COBRA eligibility period (by virtue of the reduction of hours or involuntary termination of employment qualifying events) have expired, but are otherwise entitled to an extension of the maximum continuation coverage period by virtue of a Social Security disability determination, second 36-month qualifying event, or state continuation coverage provisions are eligible to receive COBRA premium assistance to the extent that the extended continuation coverage period falls between April 1, 2021 and September 30, 2021 (the "Subsidy Period"). This is true even if the AEI has yet to provide notification otherwise required by the group health plan before the start of the Subsidy Period.

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<sup>1</sup> <https://www.irs.gov/pub/irs-drop/n-21-31.pdf>

<sup>2</sup> <https://www.irs.gov/pub/irs-drop/n-21-46.pdf>

<sup>3</sup> [HealthEquity Compliance Alert ARPA COBRA Subsidy \(3-12-2021\)](#)

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For example, a COBRA qualified beneficiary who was involuntarily terminated elected COBRA coverage for herself and her spouse effective January 1, 2020; their maximum 18-month COBRA eligibility end date would end June 30, 2021. The former employee and her spouse divorce May 31, 2020. Generally, the ex-spouse would be required to provide notice of this second qualifying event within 60 days of the qualifying event or, if later, the date coverage would be lost<sup>4</sup> (i.e., July 30, 2020). However, due to the IRS and Department of Labor (DOL) having extended various deadlines applicable to participants and plan administrators – including the deadlines for notifying the plan of qualifying events during the COVID-19 Outbreak Period beginning March 1, 2020 and ending 60 days after the yet-to-be-announced end of the COVID-19 emergency<sup>5</sup> – the ex-spouse would have until July 30, 2021 (i.e., one year from July 30, 2020) to notify the group health plan of the divorce and request an extension of his continuation coverage to a period of up to 36 months from January 1, 2020 (i.e., until December 31, 2022). Provided this notification is provided timely, this ex-spouse – who is an AEI by virtue of the former employee’s involuntary termination of employment – would be entitled to receive the COBRA premium assistance for the Subsidy Period.<sup>6</sup>

## End of Subsidy Period

ARPA provides that, if an AEI becomes eligible for other group health coverage<sup>7</sup> or Medicare prior to September 30, 2021 (or reaches the end of her/his maximum COBRA coverage period), her/his entitlement to the premium assistance ends. The IRS clarifies that eligibility for the subsidy ends even if the other disqualifying coverage does not include the same benefits provided under the continuation coverage.

For example, an AEI’s eligibility to receive premium assistance would end for a dental or vision-only election of continuation coverage if that AEI becomes eligible for Medicare even though Medicare generally does not offer dental or vision benefits.

## Comparable State Continuation Coverage

State continuation coverage is deemed to provide coverage comparable to federal COBRA and therefore qualifies AEIs covered by that state continuation coverage to be eligible to receive premium assistance even if the state program covers only a subset of state residents (e.g., as employees of a state or local government unit).

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<sup>4</sup> 26 USC § 4980B(f)(6)(C); 29 USC § 1166(a)(3); 42 USC § 300bb-6(3); 26 CFR § 54.4980B-6, Q&A-2(a); 29 CFR § 2590-606-3(c)(1)

<sup>5</sup> See the “Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak” (available at <https://www.federalregister.gov/documents/2020/05/04/2020-09399/extension-of-certain-timeframes-for-employee-benefit-plans-participants-and-beneficiaries-affected>) and the DOL Employee Benefits Security Administration Disaster Relief Notice 2021-01 (available at <https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2021-01.pdf>)

<sup>6</sup> NOTE: IRS Notice 2021-31, Q&A-17 provided that, if an individual is originally on continuation coverage by virtue of an involuntary termination of employment or reduction of hours and has subsequently remained on continuation coverage due to a second qualifying event, such as a divorce, a Social Security 11-month disability determination, or an extension under applicable state continuation laws, the subsidy will be available for those coverage periods falling during the ARPA subsidy period. However, IRS Notice 2021-46 expanded on this to clarify that an AEI would not have to be enrolled in continuation coverage on April 1, 2021 to receive the premium assistance.

<sup>7</sup> Not including excepted benefits such as standalone dental or vision plans, employee assistance programs, Health FSAs, Health Reimbursement Arrangements (HRAs), Qualified Small Employer HRAs.

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## Claiming the Credit

Generally, the current (for those AEIs who experienced a reduction in hours) or former (for those AEIs who experienced an involuntary termination of employment) common-law employer is the “premium payee” (defined in Notice 2021-31 as “the “person to whom premiums are payable”) that is entitled to claim the tax credit<sup>8</sup> for COBRA premiums not paid by an AEI due to the subsidy.

The IRS further clarifies that, if a plan is subject to both federal COBRA and state-mandated continuation coverage, the common law employer is the “premium payee” eligible to claim the tax credit (*not* the insurer, even if such state-mandated continuation coverage would require an AEI to remit premiums directly to the insurer for continuation coverage periods following the expiration of federal COBRA).<sup>9</sup>

If a group health plan (other than a multiemployer plan) subject to federal COBRA provisions covers employees of two or more members of a controlled group, each common law employer in that controlled group is a “premium payee” with respect to that common law employer’s current or former employees.

If a group health plan (other than a multiemployer plan) subject to federal COBRA provisions covers employees of two or more unrelated employers, the “premium payee” is the respective common law employer, subject to certain exceptions.

The IRS also provides guidance with respect to determining the “premium payee” eligible to claim the tax credit in the case of Multiple Employer Welfare Arrangements (MEWAs), during business reorganizations in which the selling group remains obligated to make COBRA coverage available to AEIs who are also M&A qualified beneficiaries<sup>10</sup>, group health plans maintained by state government agencies that offer COBRA continuation coverage to their employees by virtue of the Public Health Service Act and fully-insured group health plans not subject to COBRA that are offered by employers through a Small Business Health Options Program (SHOP).

## Conclusion

Group health plans have undoubtedly worked quickly and furiously to implement the various facets of the premium assistance provisions of ARPA since they were first introduced in March 2021. AEIs have been identified, required notices have been mailed, and subsidies have been applied. With the second quarterly Form 941 due on July 31, 2021, premium payees are beginning to claim their corresponding tax credits. However, these additional Q&As from the IRS have further clarified potential “pain points” or items warranting further explanation and provide welcome information. As noted above, the government’s guidance is complex and fact-specific, and we encourage employers and plan sponsors to consult their legal or benefits advisors for all guidance on how the guidance applies in their circumstances.

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<sup>8</sup> “The common law employer maintaining the plan, in the case of a group health plan, other than a multiemployer plan, that is (a) subject to Federal COBRA, or (b) under which some or all of the coverage is not provided by insurance (that is, a plan that is self-funded, in whole or in part)” [Notice 2021-31, Q&A-72(2)]

<sup>9</sup> This is a noteworthy distinction from Notice 2021-31, Q&A-62, in which the IRS confirmed (consistent with 2009’s Notice 2009-27 addressing the premium assistance provisions of the American Recovery and Reinvestment Act of 2009 [ARRA]) that it will only permit the insurer – not the employer – to claim the payroll tax credit for fully-insured group health plans subject only to state law (e.g., self-insured small employer plans not subject to federal COBRA).

<sup>10</sup> See 26 CFR § 54.4980B-9