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IRS provides guidance on the American Recovery Plan Act **temporary COBRA premium subsidy**

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IRS Notice 21-31, issued May 18, 2021, provides helpful guidance in a Q&A format on the temporary COBRA premium subsidy enacted as part of the American Recovery Plan Act of 2021. This advisory highlights important details from that notice.

Overview

The subsidy is equal to 100% of COBRA premiums for coverage from April 1, 2021, through Sept. 30, 2021.

- Individuals are eligible for the subsidy if they qualify for COBRA due to a reduction in hours or an involuntary termination of employment and elect COBRA.
- Qualifying individuals are referred to as assistance-eligible individuals (AEIs).
- The subsidy for a particular AEI will end before Sept. 30 if the individual's COBRA coverage period ends before then or the individual becomes eligible for certain other group health plan coverage or Medicare.
- AEIs do not pay any COBRA premium while the subsidy is in effect.
- In most situations, the subsidy is paid to the employer through a refundable tax credit. In some situations, the refundable tax credit is paid to the group health plan or to the insurer providing the coverage.
- Certain individuals are eligible for a 60-day election period to make a new COBRA election. Plan sponsors were required to notify such individuals by May 31.

More background on the basics of the COBRA subsidy is in Aflac's advisory on the American Recovery Plan Act of 2021.

DEFINITIONS TO KNOW

In general, an **involuntary termination** 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, where the employee was willing and able to continue performing services.

Note: An employee-initiated termination qualifies as involuntary if the employee terminates employment for "good reason," meaning due to an employer action that results in a material negative change in employment analogous to a constructive discharge. Whether a termination is involuntary is based on the relevant facts and circumstances. The IRS guidance addresses a number of situations, including the following:

- If an employee resigns as a result of a material change in their geographic workplace, the termination would be considered involuntary (Q&A 28).
- An employer's decision not to renew an employment contract is generally considered an involuntary termination (Q&A 24).
- Retirement is generally not considered to be an involuntary termination but could be based on the particular facts and circumstances (Q&A 26).
- Death of the employee is not an involuntary termination.
- If the employer terminates an individual's employment when the individual is absent due to disability, it would generally be considered an involuntary termination (Q&A 25).

A **reduction in hours** does not have to be involuntary. Even though a termination of employment in some circumstances would not be involuntary, the circumstance might give rise to a reduction in hours that would qualify the individual for the credit. For example, if an employee leaves their job because they don't have adequate child care coverage due to COVID-19, that is not considered an involuntary termination. However, if the employee voluntarily reduces their hours for that reason or goes on leave while remaining an employee, they could qualify for the credit if the reduction in hours results in the loss of coverage.

Eligible health plans

The premium subsidy applies to all group health plans that are subject to federal COBRA continuation requirements or comparable state COBRA requirements, other than health flexible spending arrangements (FSAs). The following chart summarizes both the types of plans to which the subsidy applies and those to which it doesn't:

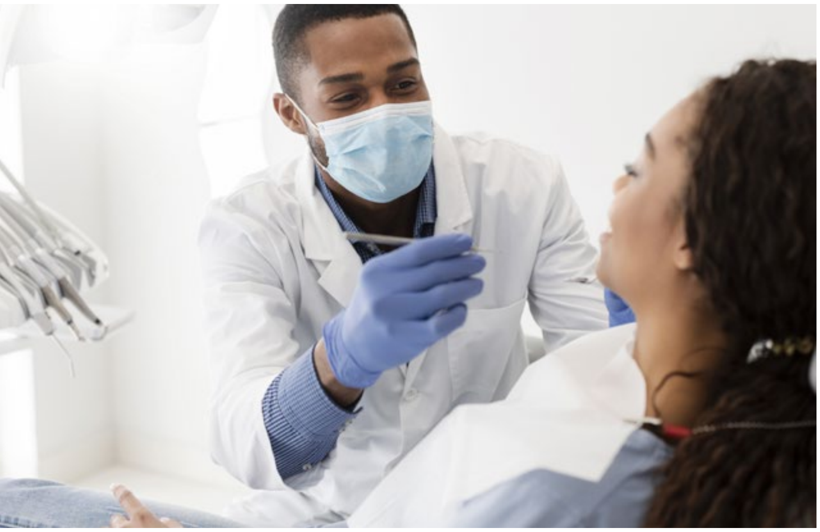
Subsidy applies to:	Doesn't apply to:
■ Group major medical health plans. ■ Excepted benefit group health plans, such as stand-alone vision and dental plans. ■ Health reimbursement arrangements (HRAs).	■ Nonhealth plans, such as accident, disability or life insurance. ■ Health FSAs. ■ Qualified small-employer health reimbursement arrangements (QSEHRAs).

Effective period

The subsidy is available to AEIs for periods of COBRA from April 1, 2021, through Sept. 30, 2021. The subsidy does not extend the otherwise applicable COBRA period.

The period of COBRA coverage for a reduction in hours or involuntary termination of employment is 18 months. However, COBRA provides that the COBRA period may be extended due to a determination of disability or a second qualifying event.

The IRS guidance (Q&A 17) addresses how an extension of the COBRA period beyond the original 18 months impacts eligibility for the subsidy. If the original qualifying event was an involuntary termination of employment or a reduction in hours and the individual's 18 months for that event ended before April 1, 2021, then the individual may still be eligible for a subsidy if still enrolled due to a disability extension or a second qualifying event that extends COBRA coverage into the subsidy period. This interpretation is different than under the prior credit enacted as part of the American Recovery and Reinvestment Act of 2009 (ARRA). Under COBRA, a second qualifying event would be applicable only to qualified beneficiaries other than the employee (i.e., the spouse or dependents).



Individuals eligible for other coverage

As noted above, an individual is disqualified from the COBRA subsidy if the individual is eligible for other group coverage or Medicare. The IRS Notice provides additional information on this issue. For example, an individual is not considered eligible for other group coverage if they are in a waiting period or if they cannot currently enroll in the coverage because enrollment is limited to an open enrollment period which closed prior to April 1, 2021. Eligibility only for excepted benefit coverage such as stand-alone dental or vision coverage, a health FSA or a QSEHRA does not disqualify an individual from the subsidy.

Who receives the tax credit

The following chart shows who receives the tax credit based on type of plan:

In the case of ...	the credit is paid to ...
a plan subject to federal COBRA (both self-funded and fully-insured plans),	the employer.
a multi-employer plan (established through the collective bargaining process),	the plan.
other fully insured plans,	the insurer (see note).

Insurers receive the tax credit only in very limited circumstances, such as a fully insured plan of a small employer that is exempt from federal COBRA requirements and covered by a state mini-COBRA law or fully insured church plans subject to state COBRA. In these limited instances, insurers will receive the tax credit even if an employer remits the state mini-COBRA premium to the insurer. A small employer that remits state mini-COBRA premiums to its insurer may wish to reach out to that insurer to see if the requirement to remit those premiums for AEIs will be waived during the subsidy period.

Claiming the credit

The credit is claimed using IRS Form 941, Employer's Quarterly Federal Tax Return. In anticipation of receiving the credit to which it is entitled, the person entitled to claim the credit may:

1. Reduce the deposits of federal employment taxes that it would otherwise be required to deposit, including withheld taxes.
2. Request an advance of the amount of the anticipated credit that exceeds the federal employment tax deposits available for reduction by filing Form 7200, Advance Payment of Employer Credits Due to COVID-19.

Individual certification of eligibility

Employers, or another person claiming the tax credit, may require individuals to certify that they had a reduction in hours or an involuntary termination and that not eligible for Medicare or group health plan coverage that would disqualify them from the credit. The employer, or another person claiming the credit, may rely on the self-certification unless they have actual knowledge that the certification is incorrect. The Department of Labor (DOL) Request for Treatment as an Assistance Eligible Individual may be used for this purpose, but employers and plan administrators may develop their own form.

Note: If an employer, or another person claiming the tax credit, does not require a certification from the individual, they must have some other documentation that substantiates eligibility for the credit. In most cases, the person claiming the credit will not have any other means of determining whether an individual is eligible for other group coverage or Medicare. Individuals who fail to notify an employer that they are eligible for disqualifying coverage are subject to a $250 fine, with higher penalties if the failure is fraudulent.

COVID-19 emergency relief deadlines

In response to the COVID-19 national emergency, the IRS and DOL previously issued emergency relief notices that extend certain deadlines for group health plans and plan participants during the COVID-19 outbreak period.

The COBRA subsidy guidance provides that those extended time periods do not apply to the 60-day deadline to elect subsidized COBRA coverage once an AEI receives notice of possible entitlement to the subsidy. For many AEIs, this is a shorter time period to elect unsubsidized COBRA than originally provided under the Emergency Relief Notices.

Additional issues

The IRS guidance addresses many other issues in 86 questions and answers organized by the following topics:

- Eligibility for COBRA premium assistance (Q&A 1-20).
- Reduction in hours (Q&A 20-23).
- Involuntary termination of employment (Q&A 24-34).
- Coverage eligible for COBRA premium assistance (Q&A 35-42).
- Beginning of COBRA premium assistance period (Q&A 43-46).
- End of COBRA premium assistance period (Q&A 47-50).
- Extended election period (Q&A 51-55).
- Extensions under the emergency relief notices (outbreak period issues) (Q&A 56-59).
- Payments to insurers under federal COBRA (Q&A 60).
- Comparable state continuation coverage (Q&A 61-62).
- Calculation of COBRA premium assistance credit (Q&A 63-70).
- Claiming the COBRA premium assistance credit (Q&A 71-86).

Conclusion

Q&As, from the IRS answer many questions that will help plan sponsors administer the COBRA subsidy. In some cases, however, answers may depend on particular facts and circumstances. Employers and other plan sponsors should consult with their own advisers as to how to apply the subsidy in their particular circumstances.

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