

Premium Assistance for COBRA Benefits Part II

Notice 2021-46

This notice provides additional guidance on the application of § 9501 of the American Rescue Plan Act of 2021 (the ARP), Pub. L. 117-2, 135 Stat. 4 (March 11, 2021), relating to temporary premium assistance for Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) continuation coverage.¹

BACKGROUND

Following enactment of the ARP, the IRS addressed issues with respect to COBRA premium assistance for COBRA continuation coverage under the ARP in Notice 2021-31, 2021-23 IRB 1173. This notice supplements Notice 2021-31 and addresses additional issues. Terms used in this notice have the same meanings as those terms have in Notice 2021-31, unless indicated otherwise.

ELIGIBILITY FOR COBRA PREMIUM ASSISTANCE – EXTENDED COVERAGE PERIODS

Q-1. Is COBRA premium assistance available for a potential Assistance Eligible Individual whose original 18-month COBRA continuation coverage period has expired, but who is entitled to notify the plan or insurer, and has not yet done so, of the intent to elect COBRA continuation coverage for an extended period due to a disability determination, second qualifying event, or an extension under State mini-COBRA, to the extent the extended period of coverage falls between April 1, 2021 and September 30, 2021?

A-1. Yes. If the original qualifying event was a reduction in hours or an involuntary termination of employment, COBRA premium assistance is available to an individual who is entitled to elect COBRA continuation coverage for an extended period due to a disability determination, second qualifying event, or an extension under State mini-COBRA, to the extent the extended period of coverage falls between April 1, 2021 and September 30, 2021, even if the individual had not notified the plan or insurer of the intent to elect extended COBRA continuation coverage before the start of that period.

Example: An individual who was provided a COBRA general notice is involuntarily terminated and elects COBRA continuation coverage effective October 1, 2019; the individual's 18-month COBRA continuation period lapses March 31, 2021. On March 1, 2020, a disability determination letter is issued by the Social Security

¹ Employer-sponsored health plans generally are required to offer an employee, spouse, or dependent child covered by the plan the opportunity to continue coverage under the plan for a specified period of time after the occurrence of certain events that otherwise would have terminated the coverage (qualifying events). These continuation of coverage requirements, and the corresponding coverage (if elected), are often referred to as "COBRA continuation coverage" or "COBRA" requirements. The COBRA requirements were enacted originally as part of the Consolidated Omnibus Budget Reconciliation Act of 1985, Pub. L. 99-272 (April 7, 1986), and are set forth in § 4980B of the Internal Revenue Code.

Administration providing that the individual was disabled as of November 1, 2019. The disability determination entitles the individual to the 29-month extended COBRA continuation coverage. The individual fails to notify the plan of the disability determination by April 30, 2020, which is 60 days after the date of the issuance of the disability determination letter as required under § 4980B(f)(6)(C). However, under the Emergency Relief Notices, the individual has one year and 60 days from the issuance of the disability determination letter to notify the plan of the disability to extend COBRA continuation coverage. On April 10, 2021, the individual notifies the plan of the disability and elects ongoing coverage from April 1, 2021. Assuming the individual is not eligible for other disqualifying group health plan coverage or Medicare, the individual is an Assistance Eligible Individual and is entitled to the COBRA premium assistance.

END OF COBRA PREMIUM ASSISTANCE PERIOD – DENTAL AND VISION COVERAGE

Q-2. If an Assistance Eligible Individual previously elected COBRA continuation coverage with premium assistance for dental-only or vision-only coverage, does the individual cease to be eligible for COBRA premium assistance if the individual subsequently becomes eligible to enroll in other disqualifying group health plan coverage or Medicare that does not provide dental or vision benefits?

A-2. Yes. Eligibility for COBRA premium assistance ends when the Assistance Eligible Individual 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 the previously elected COBRA continuation coverage. For example, eligibility for Medicare, which generally does not provide vision or dental coverage, ends eligibility for premium assistance related to all previously elected COBRA continuation coverage, including previously elected dental-only or vision-only COBRA continuation coverage.

COMPARABLE STATE CONTINUATION COVERAGE – COVERAGE FOR A SUBSET OF STATE RESIDENTS

Q-3. Does a State continuation coverage program provide comparable coverage to COBRA continuation coverage for qualifying individuals if the State program covers only a subset of State residents (for example, only employees of a State or local government unit)?

A-3. Yes. A State program does not fail to provide comparable coverage to Federal COBRA continuation coverage solely because the program covers only a subset of State residents, as long as the program provides coverage otherwise comparable to Federal COBRA. For more information on comparable state continuation coverage, see Notice 2021-31, Q&A-61 and Q&A-62. Thus, a State law that provides continuation coverage only for employees of a State or local government unit may be comparable coverage that qualifies Assistance Eligible Individuals for COBRA premium assistance under the ARP.

CLAIMING THE COBRA PREMIUM ASSISTANCE CREDIT – ADDITIONAL CLARIFICATION ON THE ENTITY THAT MAY CLAIM THE CREDIT

Q-4. What is the general rule for determining which entity is the common law employer maintaining the plan, as described in Notice 2021-31, Q&A-72(2)?

A-4. The common law employer maintaining the plan is the current common law employer for Assistance Eligible Individuals whose hours have been reduced or the former common law employer for those individuals who have been involuntarily terminated from employment, which, in both cases, serves as the basis for the individual's eligibility for COBRA continuation coverage (collectively referred to as the common law employer). Generally, as described in Notice 2021-31, Q&A-72(2), when the requirements in § 6432(b)(2) are satisfied, the common law employer is the entity entitled to claim the credit, subject to the exceptions set forth in Notice 2021-31, Q&A-82 (as clarified in Q&A-8 of this notice), and in Q&A-9 and Q&A-10 of this notice.

Q-5. For a period of State-mandated continuation coverage that is comparable to Federal COBRA, if the plan is also subject to Federal COBRA (for example, a period of State-mandated continuation coverage that extends beyond the applicable Federal COBRA period), which entity is the premium payee entitled to claim the COBRA premium assistance credit?

A-5. For State-mandated continuation coverage that is comparable to Federal COBRA and is a group health plan subject to both Federal COBRA and the State-mandated continuation coverage, the common law employer is the premium payee entitled to claim the credit because the plan is subject to Federal COBRA. See Notice 2021-31, Q&A-72. Consequently, even if the State-mandated continuation coverage would require the Assistance Eligible Individual to pay the premiums directly to the insurer after the period of Federal COBRA ends, the insurer is not entitled to claim the COBRA premium assistance credit.

Q-6. If a group health plan (other than a multiemployer plan) subject to Federal COBRA covers employees of different common law employers that are members of a single controlled group, which entity is the premium payee entitled to claim the COBRA premium assistance credit?

A-6. If a 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 COBRA premium assistance credit with respect to its employees or former employees. Although all of the members of a 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, unless Notice 2021-31, Q&A-82 (as clarified in Q&A-8 of this notice) applies, or there is a business reorganization as described in Treas. Reg. § 54.4980B-9

and Q&A-9 of this notice.

Q-7. If a group health plan (other than a multiemployer plan) subject to Federal COBRA covers employees of two or more unrelated employers, which entity is the premium payee entitled to claim the COBRA premium assistance credit?

A-7. If a group health plan (other than a multiemployer plan) subject to Federal COBRA covers employees of two or more unrelated employers, the premium payee entitled to claim the premium assistance credit is the common law employer, unless Notice 2021-31, Q&A-82 (as clarified in Q&A-8 of this notice) applies or there is a business reorganization as described in § 54.4980B-9 and Q&A-9 of this notice.

Q-8. If an entity provides health benefits to employees of another entity, but it is not a third-party payer of those employees' wages, may it be treated as a third-party payer for purposes of applying Notice 2021-31, Q&A-82?

A-8. No. For purposes of Notice 2021-31, Q&A-82, a third-party payer is an entity that pays 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 client(s). As indicated in Notice 2021-31, Q&A-82, these entities are typically professional employer organizations (PEOs), certified professional employer organizations (CPEOs), or agents described in § 3504.

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 Assistance Eligible Individuals eligible for coverage provided by the MEWA. The MEWA is not the premium payee and is therefore not entitled to the COBRA premium assistance credit. Instead, as provided in Notice 2021-31, Q&A-72, and as clarified in Q&A-7 of this notice, Employer A and Employer B are the premium payees and are entitled to the COBRA premium assistance credit.

Q-9. If there is a business reorganization described in § 54.4980B-9, which entity is the premium payee entitled to claim the COBRA premium assistance credit for COBRA continuation coverage elected by Assistance Eligible Individuals who are also M&A qualified beneficiaries (as defined in § 54.4980B-9, Q&A-4) if the selling group (as defined in § 54.4980B-9, Q&A-2 or -3) remains obligated to make COBRA continuation coverage available to the M&A qualified beneficiaries?

A-9. If the selling group remains obligated under § 54.4980B-9, Q&A-8 to make COBRA continuation coverage available to M&A qualified beneficiaries after a business reorganization described in § 54.4980B-9, the entity in the selling group that maintains the group health plan is the premium payee entitled to claim the COBRA premium assistance credit. If, under § 54.4980B-9, Q&A-8, the common law employer (which may be an entity in the buying group (as defined in § 54.4980B-9, Q&A-2 or -3))

is not obligated to make COBRA continuation coverage available to Assistance Eligible Individuals, the common law employer is not entitled to the COBRA premium assistance credit after the business reorganization.

Q-10. If a group health plan maintained by an agency of a State government (State agency) that provides health coverage to employees of various agencies of the State and local governments within the State is subject to the Federal COBRA requirements under the Public Health Service Act, and Assistance Eligible Individuals would have been required to remit COBRA premiums directly to the State agency were it not for the COBRA premium assistance, which entity is the premium payee entitled to claim the COBRA premium assistance credit?

A-10. If a State agency is obligated to make COBRA continuation coverage available to employees of various agencies of the State and local governments within the State, and the Assistance Eligible Individuals would have been required to remit COBRA premium payments directly to the State agency were it not for the COBRA premium assistance, the State agency is the premium payee entitled to claim the COBRA premium assistance credit. In this case, the common law employer (if other than the State agency) would not be entitled to the COBRA premium assistance credit.

Q-11. 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), is the employer the premium payee entitled to claim the premium assistance credit?

A-11. Yes, but only in certain circumstances. If a fully insured plan that is not subject to Federal COBRA is offered by an employer through a SHOP exchange, the common law employer is treated as the premium payee and is therefore eligible to claim the premium assistance credit with respect to coverage in the plan if all of the following conditions are satisfied: (i) the employer participates in a SHOP exchange that offers multiple insurance choices to employees enrolled in the same small group health plan; (ii) 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; (iii) the participating employer has a contractual obligation with the SHOP exchange to pay all applicable COBRA premiums to the SHOP exchange; and (iv) the participating employer would have received the State mini-COBRA premiums directly from the Assistance Eligible Individuals were it not for the COBRA premium assistance.

If all four of these conditions are satisfied, 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 is, therefore, 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 the premium assistance credit, which is the general rule set forth in Notice 2021-31, Q&A-72.

DRAFTING INFORMATION

The principal authors of this notice are Jason Sandoval and Mikhail Zhidkov of the Office of Associate Chief Counsel (Employee Benefits, Exempt Organizations, and Employment Taxes). Other Treasury Department and IRS officials participated in its development. For further information on the provisions of this notice in general, contact Jason Sandoval at (202) 317-5500 (not a toll-free number). For further information on topics addressed in the section of this notice titled Claiming the COBRA Premium Assistance Credit – Additional Clarification on the Entity that May Claim the Credit, contact Mikhail Zhidkov at (202) 317-4774 (not a toll-free number).