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ARPA COBRA Premium Assistance

On July 26, 2021, the Internal Revenue Service (IRS) released Notice 2021-46 (Notice) to clarify lingering questions employer plan sponsors and other interested parties have been asking since the American Rescue Plan Act of 2021 (ARPA) became law this past March. The Notice supplements prior guidance the IRS released in May in Notice 2021-31 and addresses extended COBRA coverage periods, interaction with state continuation coverage and which entities can claim available IRS tax credits for providing Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) premium assistance to assistance eligible individuals (AEI).

Background

ARPA provides that individuals receiving, or eligible to receive, COBRA coverage during the period starting April 1, 2021, and ending September 30, 2021 (ARPA Premium Assistance Period), due to a qualifying event that is a reduction in hours of employment or an involuntary termination of employment (i.e., AEI) generally will not have to make premium payments for coverage during that period. Rather, in the case of insured or self-funded group health plans (other than multiemployer plans) subject to federal COBRA, the employer plan sponsor generally must make payment on behalf of an AEI. Then, the employer plan sponsor can take a corresponding tax credit against certain Medicare taxes it would normally remit quarterly to the IRS with Form 941.

Extended COBRA Periods

Certain qualified beneficiaries may be able to extend COBRA coverage beyond the standard 18-month maximum coverage period that applies following a reduction in hours or termination of employment. For example, individuals whom the Social Security Administration (SSA) determines to be disabled may elect coverage for up to a maximum of 29 months; certain other qualified beneficiaries who experience a second qualifying event may extend COBRA coverage for up to 36 months. Questions have arisen as to whether ARPA premium assistance applies to these extended COBRA coverage periods in situations where a potential AEI can, but has not, notified a plan or insurer that the individual intends to elect extended COBRA coverage.

The Notice provides that 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 during the ARPA Premium Assistance Period, 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. Thus, an individual who involuntarily terminated employment and elects COBRA continuation coverage effective October 1, 2019, would normally lose COBRA continuation coverage after March 31, 2021. However, if the individual receives a disability determination letter from the SSA on March 1, 2020, that states that the individual was disabled as of November 1, 2019, the individual can get up to 29 months of

COBRA coverage from October 1, 2019. COBRA would normally require an affected qualified beneficiary to notify the plan within 60 days of receiving the SSA disability determination letter. However, under emergency relief guidance from 2020, the individual has one year and 60 days from the date of the disability determination letter to notify the plan of the disability to extend COBRA continuation coverage. If on April 10, 2021, the individual notifies the plan of the disability determination and elects ongoing coverage from April 1, 2021, and assuming the individual is not eligible for other disqualifying group health plan coverage or Medicare, the individual is entitled to COBRA premium assistance during the portion of the extended COBRA coverage that falls during the ARPA Premium Assistance Period.

Early Termination of Premium Assistance

ARPA generally states that an AEI will lose the right to COBRA premium assistance if they are eligible for other disqualifying group health coverage or Medicare. ARPA also generally permits AEIs to get premium assistance for COBRA they might elect under a dental- or vision-only plan. The Notice clarifies that even if an AEI with just dental- or vision-only coverage becomes eligible for other disqualifying group health coverage or Medicare, the AEI can no longer receive premium assistance even if that coverage does not provide dental or vision benefits.

Comparable State Continuation Coverage

ARPA provides that certain comparable continuation coverage will qualify for premium assistance. The Notice instructs that even if comparable state coverage provides for continuation only for a subset of individuals (i.e., a state or local government unit), the coverage can still be eligible for premium assistance as long as it is comparable to federal COBRA. So, a state law that requires continuation of coverage for employees of a state or local government might be comparable coverage that entitles AEIs to premium assistance.

Who Can Claim Tax Credits for Premium Assistance

As noted above, entities that pay COBRA premiums on behalf of AEIs can generally claim a dollar-for-dollar tax credit against quarterly Medicare taxes. However, many questions have surfaced as to which entities might qualify for the credits. The Notice gives several examples that address the most common questions in this area.

Q&A 4 clarifies that the common law employer maintaining the plan under which premium assistance is available is the AEI's current common law employer for an AEI whose hours have been reduced or the former common law employer for AEIs who were involuntarily terminated with certain exceptions.

Q&A 5 provides that for state-mandated continuation coverage that is comparable to federal COBRA coverage and is subject to both federal and state continuation coverage, the common law employer is the entity entitled to receive the tax credit for the state-mandated coverage even if the AEI pays premiums directly to the insurer for state coverage after federal COBRA ends. Thus, the insurer does not claim the credit for such coverage.

Many employers have asked which entity can claim the credit if a group health plan (other than a multiemployer plan) covers employees of several members of a controlled group of companies under IRS rules.

Q&A 6 states that each member of a controlled group generally can claim the corresponding credit for its own AEI. So, the employer who actually pays the wages and remits taxes on behalf of an AEI will claim the tax credit.

On the other hand, when a plan covers employees of two or more unrelated employers, the Notice expands on prior guidance to explain that only the common law employer of the employee receiving premium assistance can properly claim the available tax credit. The Notice states that only in certain cases where an entity is a third-party payer 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 an unrelated employer client (e.g., a professional employer organization (PEO) or certified professional employer organization (CPEO)) would an entity other than the common law employer be entitled to claim the premium assistance tax credit.

Moreover, the Notice gives an example that will apply to Multiple Employer Welfare Arrangements (MEWAs) and will not allow them to claim the tax credit unless they also pay and report employment taxes for a participating employer whose employees receive subsidized COBRA coverage under the plan sponsored by the MEWA. The IRS states that the former employers individually will claim the tax credit for the coverage provided by the MEWA to their former employees who are AEIs receiving coverage from the MEWA.

Mergers and Acquisitions

COBRA recognizes certain qualified beneficiaries who gain COBRA rights as the result of a business reorganization as M&A Qualified Beneficiaries. COBRA rules specify whether a seller or buyer (or member of its respective controlled group) must provide COBRA coverage to M&A qualified beneficiaries. The Notice addresses which entity can claim a tax credit in these situations stating that, if the selling group is obligated under COBRA guidance to make COBRA continuation coverage available to M&A qualified beneficiaries after a business reorganization, the entity in the selling group that maintains the group health plan is entitled to claim the COBRA premium assistance tax credit. If the common law employer (which may be an entity in the buying group) is not obligated to make COBRA continuation coverage available to AEIs, the common law employer is not entitled to the COBRA premium assistance credit after the business reorganization.

SHOP Exchange Coverage

The Patient Protection and Affordable Care Act created the Small Business Health Options Program (SHOP) under which certain qualifying small employers can purchase insured group health coverage from a SHOP exchange for their respective employees. The Notice clarifies that these small employers can claim the premium assistance tax credit for AEIs who get COBRA under these plans if they are not subject to federal COBRA but only if:

- The employer participates in a SHOP exchange that offers multiple insurance choices to employees enrolled in the same small group health plan.
- 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.
- The participating employer has a contractual obligation with the SHOP exchange to pay all applicable COBRA premiums to the SHOP exchange.
- The participating employer would have received state mini-COBRA premiums directly from the AEI were it not for the COBRA premium assistance.

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 entitled to claim the premium assistance credit.

Conclusion

The Notice provides employers and other interested parties with helpful direction on certain tricky situations relating to ARPA COBRA premium assistance and the available tax credits. We expect further guidance as we get closer to the end of the ARPA COBRA Premium Assistance Period and will provide updates as necessary.

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