

May 24, 2021

## Internal Revenue Service Releases COBRA Subsidy Guidance

On May 18, the Internal Revenue Service (IRS) issued Notice 2021-31 (Notice), the second set of agency guidance regarding the 100% COBRA premium subsidy (Subsidy) provided for under the American Rescue Plan Act (Act). As detailed in our prior [alert](#), the Subsidy is available to employees whose COBRA qualifying event was an involuntary termination of employment or reduction in hours, and the spouses and dependents of such employees (Assistance Eligible Individuals), for the period beginning April 1, 2021, and ending on the earliest of (i) September 30, 2021; (ii) the end of their COBRA coverage period; or (iii) the date they become eligible for another group health plan or Medicare.

Stretching over 40 pages and presented in question-and-answer format, the Notice addresses a host of issues to help with the administration of the Subsidy and to ensure that the "premium payee" (e.g., an employer maintaining a group health plan subject to Federal COBRA) receives its corresponding premium tax credit (PTC). It also addresses how the Subsidy interacts with the extended deadlines currently applicable to ERISA plan administration (including for COBRA) as a result of the COVID-19 pandemic. Since the Notice contains more than 80 questions and answers, the discussion below is a nonexhaustive summary of some key takeaways from the Notice.

### *Who Is Eligible for the Subsidy?*

The Notice provides much helpful guidance regarding who is an Assistance Eligible Individual and what constitutes an involuntary termination of employment or reduction in hours. For example:

- Eligibility for other group health coverage *before* April 1, 2021, does not prevent Subsidy eligibility if the individual has not been permitted to enroll in that other group health coverage on or after April 1, 2021. For example, a married individual who lost coverage as a result of an involuntary termination of employment on October 1, 2020, but did not enroll in his/her spouse's group health plan during an open enrollment period that ended December 1, 2020, is still an Assistance Eligible Individual. In contrast, if the spouse's group health plan has an open enrollment period from June 1, 2021, to June 30, 2021, with coverage effective July 1, 2021, the individual would not be an Assistance Eligible Individual for the period beginning July 1, 2021, regardless of whether he/she actually enrolled in the spouse's group health plan during the June 2021 open enrollment period.
- Individuals who have elected to remain on COBRA continuation coverage for an extended period of time (e.g., due to disability or a second qualifying event) are Assistance Eligible Individuals if (i) the extended coverage period falls between April 1, 2021, and September 30, 2021; *and* (ii) the original qualifying event was a reduction in hours or an involuntary termination of employment.
- An employee-initiated termination may be treated as an involuntary termination of employment for purposes of the Subsidy if, for example, the employer's actions (or inactions) result in a constructive discharge of the employee. However, an employee's resignation because of personal circumstances, such as concerns about workplace safety due to a health condition, will not be considered a constructive discharge absent an employer's failure to take a required action or provide a reasonable accommodation. In contrast, an employee-initiated termination for certain child care needs, such as a child care facility's closure due to COVID-19, may be considered a voluntary reduction in hours for which the Subsidy is available if the employee maintains the ability to return to work and the facts indicate that the qualifying event was a temporary leave of absence.

#### *What Do Employers Need to Know About the Premium Tax Credit?*

The Notice expressly states that the IRS may request that premium payees substantiate claims for the PTC. Fortunately, the Notice suggests helpful steps to ensure that the PTC can withstand IRS scrutiny. Specifically:

- Employers may request that individuals self-certify or attest to their status as Assistance Eligible Individuals (i.e., the COBRA qualifying event was an involuntary termination of employment or reduction in hours, and they are not otherwise eligible for disqualifying group health plan coverage or Medicare). Employers may rely on such attestation or self-certification unless they have actual knowledge that the attestation or self-certification is incorrect.

Self-certification will be particularly helpful to employers in terms of determining whether a former employee has other coverage available. Additionally, the Notice clarifies the amount of the PTC. For example:

- The amount of the PTC equals the COBRA premium that would have been charged absent the Subsidy and without regard to whether the qualified beneficiary is an Assistance Eligible Individual. For example, if an employer normally pays 50% of the COBRA premium, the PTC will equal 50% of the COBRA premium. Similarly, if an employer subsidizes the COBRA continuation coverage premium while the employee receives severance pay, the PTC will be limited to the rate actually paid by the Assistance Eligible Individual during the period the rate will be subsidized and will then convert to the full COBRA premium cost for the balance of the Subsidy period.

#### *How Does the Subsidy Interact With the Extended Time Frames?*

Broadly speaking, the Extended Time Frames allow COBRA elections and premium payments to be deferred until the earlier of 1-year from the date the election would otherwise have been due or 60 days after the end of the COVID-19 National Emergency's Outbreak Period. The Subsidy's notice requirements are not subject to the Extended Time Frames. Fortunately, the Notice illustrates how the timing differences between these COVID-19 relief initiatives interact. For example:

- If Assistance Eligible Individuals' COBRA qualifying event occurred before April 1, 2021, and they elect Subsidy coverage during their Extended Election Period, they must also elect or decline COBRA coverage retroactive to their loss-of-coverage date. However, the Extended Time Frame will still apply for purposes of the premium payments for the retroactive coverage. If payment is not timely made, then Assistance Eligible Individuals will be treated as having not elected retroactive coverage. If retroactive payments are only partially made, the plan may credit the partial payment to the earliest months in the coverage period.

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If you have questions about the Subsidy, the Extended Time Frames, the Notice or other benefits topics, please reach out to any of the attorneys in Day Pitney's Employee Benefits and Executive Compensation group.

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For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our [COVID-19 Resource Center](#).

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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