



ACA, HIPAA AND FEDERAL
HEALTH BENEFIT
MANDATES:

PRACTICAL

Q & A

The Affordable Care Act (ACA), the Health Insurance Portability and Accountability Act of 1996 (HIPAA) and other federal health benefit mandates (e.g., the Mental Health Parity Act, the Newborns and Mothers Health Protection Act, and the Women's Health and Cancer Rights Act) dramatically impact the administration of self-insured health plans. This monthly column provides practical answers to administration questions and current guidance on ACA, HIPAA and other federal benefit mandates.

Attorneys John R. Hickman, Ashley Gillihan, Carolyn Smith, Ken Johnson, Amy Heppner, and Earl Porter provide the answers in this column. Mr. Hickman is partner in charge of the Health Benefits Practice with Alston & Bird, LLP, an Atlanta, New York, Los Angeles, Charlotte, Dallas and Washington, D.C. law firm. Ashley, Carolyn, Ken and Amy are senior members of the Health Benefits Practice. Answers are provided as general guidance on the subjects covered in the question and are not provided as legal advice to the questioner's situation. Any legal issues should be reviewed by your legal counsel to apply the law to the particular facts of your situation. Readers are encouraged to send questions by E-MAIL to Mr. Hickman at john.hickman@alston.com.

IRS PROVIDES 86 ANSWERS TO 86 QUESTIONS ABOUT THE COBRA SUBSIDY (PART TWO)

On May 18, 2021 the Internal Revenue Service (IRS) issued [Notice 2021-31](#), providing 86 Q&As on the COBRA premium assistance subsidy under the American Rescue Plan Act of 2021 (ARPA). This guidance comes less than two weeks before the *May 31 deadline* to send the ARPA-required COBRA subsidy extended election notices. Notice 2021-31 is largely consistent with the guidance issued back in 2009 for the COBRA subsidy under the American Recovery and Reinvestment Act of 2009 (ARRA) but with a few differences.

READERS TAKE NOTE. BETTER LATE THAN NEVER: THE DEADLINE FOR ISSUING ARPA COBRA subsidy notices to assistance eligible individuals (AEIs) was May 31. Steps should be taken to ensure that notices are sent as required to minimize potential agency penalties and claims exposure. Any late or missed notices (especially in light of the evolving IRS guidance) should be sent out as soon as feasible.

THE ARPA COBRA SUBSIDY

The ARPA COBRA subsidy applies to certain individuals (referred to as “assistance eligible individuals” or AEIs) whose COBRA qualifying event was an involuntary termination of employment or a reduction in hours of employment.

This 100% COBRA subsidy is provided for the period April 1, 2021 to September 30, 2021. To be eligible for the COBRA subsidy, an AEI cannot be eligible for other group health plan coverage or Medicare.

AEIs also include qualified beneficiaries who are the spouse or dependent child of the AEI employee who also lost coverage because of the AEI employee’s involuntary termination of employment or reduction in hours.

Generally, an employer advances the subsidy and then recoups that advance through tax credits against the employer’s Medicare tax obligations.

Q&A SUMMARY

The IRS divided its 86 Q&As into the following sections: (1) Eligibility for COBRA Premium Assistance; (2) Reduction in Hours; (3) Involuntary Termination of Employment; (4) Coverage Eligible for COBRA Premium Assistance; (5) Beginning of COBRA Premium Assistance Period; (6) End of COBRA Premium Assistance Period; (7) Extended Election Period; (8) Extensions Under the Emergency Relief Notices; (9) Payments to Insurers Under Federal COBRA; (10) Comparable State Continuation Coverage; (11) Calculation of COBRA Premium Assistance Credit; and (12) Claiming the COBRA Premium Assistance Credit.

Q&As in categories 5-12 are covered in this Part Two of our article. Part One addressed Q&As in the first 5 categories above.

1. Beginning of COBRA Premium Assistance Period (Q&As 43–46)

Q&A 44 clarifies that even though an AEI might be eligible for the subsidy as of April 1, 2021, that AEI can elect subsidized COBRA coverage at a later date during the subsidy period (this Q&A was designed to facilitate moving off of individual coverage in a Marketplace plan and the way the ACA premium subsidies operate for Marketplace plans).

2. End of COBRA Premium Assistance Period (Q&As 47–50)

Q&A 50 confirms that the death of an AEI does not affect the entitlement of any spouse or dependent children who are also AEI qualified beneficiaries (and in fact may be a second qualifying event extending eligibility for that spouse and dependent children for the COBRA subsidy).

3. Extended Election Period (Q&As 51–55)

Q&A 51 is similar to prior DOL guidance providing that if an AEI had family coverage at the time of the involuntary termination of employment or reduction in hours but elects self-only COBRA, the other family members are eligible for the “second bite” at COBRA for subsidized coverage. Similarly, Q&A 55 provides that if an AEI at the time of involuntary termination of employment elected only some of the benefit options available but not others, then that AEI has a second

bite for those other benefit options for subsidized coverage.

For example, if an AEI had vision, dental, and medical coverage at the time of the involuntary termination of employment or reduction in hours but elected only medical coverage for COBRA, that AEI can now also election vision and dental for purposes of the subsidy in addition to medical. These contingencies should be addressed in any ARPA election forms.

Q&A 52 mirrors the DOL model notices and FAQs providing that the second bite at COBRA (extended election period) is not available under state mini-COBRA laws unless the state law provides for a similar extended election period.

4. Extensions Under the Emergency Relief Notices (Q&As 56–59)

In these Q&As, the IRS provided important guidance on the interaction of the 60-day extended election / second bite period under the ARPA COBRA subsidy and elections under the Outbreak Period.

First, **Q&A 57** is similar to prior DOL guidance stating that that the Outbreak Period extensions do not apply to the 60-day period to elect subsidized COBRA coverage under the second bite opportunity.

Q&As 56, 58, and 59 confirm that an AEI can elect just subsidized COBRA coverage or elect subsidized COBRA coverage and unsubsidized coverage for prior periods pursuant to the Outbreak Period guidance.

However, if within the 60-day ARPA extended election period for subsidized coverage *the AEI elects the subsidy but does not elect retroactive coverage*, the AEI will forfeit the right to retroactive coverage. This is true even if the election would not have otherwise been required under the prior Outbreak Period guidance.

Once retroactive coverage is elected, however, payment for that retroactive coverage will be subject to the Outbreak Period guidance. Premium payments for retroactive coverage will not be due until the Outbreak Period ends (or one year after payment would ordinarily have been due if earlier).

If the AEI then fails to pay those premiums, the employer can retroactively cancel COBRA coverage for periods for which the premiums are not paid (but, of course, not the subsidized period). Also under the Outbreak Period guidance, coverage can be suspended for the retroactive period until COBRA premiums are actually made.

Practice Pointer: *This one aspect of the Notice caught most by surprise and appears contrary to the prior Outbreak Period guidance. Indeed, it seems contrary to a sentence in the DOL model notices which states: “The election period for COBRA continuation coverage with premium assistance does not cut off an individual’s preexisting right to elect COBRA continuation coverage, including under the*



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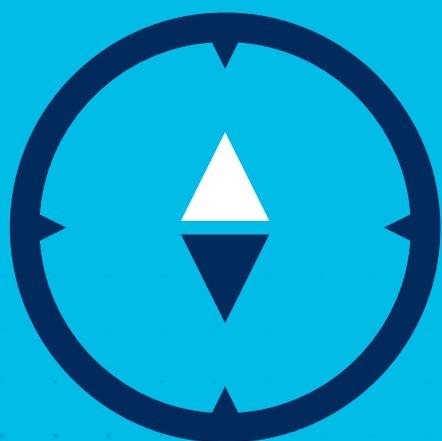
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extended timeframes provided by the Joint Notice and EBSA Disaster Relief Notice 2021-01.” It is likely this has not been communicated since most extended election notices were formalized or actually mailed before the IRS provided this guidance. On the other hand, if this guidance is ignored and COBRA elections are allowed pursuant to prior understandings of the Outbreak Period guidance, then there could be issues with stop-loss carriers for self-funded plans or carriers for fully insured plans.

5. Comparable State Continuation Coverage (Q&As 61–62)

Under state mini-COBRA, even if an employer pays the subsidized premium directly to the insurer, the employer still cannot take the Medicare tax credit. This is one of the limited instances where the carrier takes the tax credit. (Q&A 62)

6. Calculation of the COBRA Premium Assistance (Medicare Tax) Credit (Q&As 63–70)

Q&As 64–67 provide guidance on how the ARPA COBRA subsidy interacts with employers that are already providing a COBRA subsidy, and **Q&A 64** provides four different examples of this interaction. Consistent with ARRA guidance, if an employer provides a “true” subsidy (in other words, not the ARPA subsidy), then the amount of the Medicare tax credit is only the amount the AEI would be charged without the ARPA subsidy.

For example, if an employer otherwise charges COBRA beneficiaries 50% of the \$600 maximum COBRA premium, the AEI would only be charged \$300 and the employer could only take a \$300 tax credit.

Continuing with this example, if the employer subsidy ends and a COBRA beneficiary is otherwise required to pay \$600, then an employer's Medicare tax credit for an AEI would be \$600. In **Q&A 66**, the IRS provides an example where the maximum COBRA premium is \$1,000, but COBRA beneficiaries are only charged \$400. The employer increases the COBRA premium obligation to \$1,000 but provides AEIs with a \$600 taxable severance payment. The \$600 is not treated as an employer-provided COBRA subsidy, and the employer can take the full \$1,000 Medicare tax credit.

Practice Pointer. *Employers will want to carefully examine any existing “true” employer-provided COBRA subsidy to see whether that subsidy can be ended to take full advantage of the ARPA COBRA subsidy. It appears that employers can offer taxable incentives for an AEI to forgo any subsidy provided in a severance agreement or severance plan in order to take advantage of the ARPA COBRA subsidy.*

The Notice also makes clear that (other than a newborn or adopted children) AEIs only include individuals who were covered by a plan at the time of the involuntary termination of employment or reduction in hours.

For example, if an AEI had self-only coverage at the time of the involuntary termination of employment or reduction in hours but subsequently added a spouse or dependent children during a plan's open enrollment, neither that spouse nor dependent child would be AEIs (**Q&A 68, Example 3**).

While no additional family members can be added at open enrollment for purposes of the subsidy, new benefits can be elected and they will count for the subsidy.

As another example, if an AEI had only vision coverage immediately before an involuntary termination of employment or reduction in hours, that AEI could only elect vision coverage for COBRA. But if there is an intervening open enrollment when the AEI elects group medical and dental as well, then that group medical and dental coverage (in addition to vision) will be eligible for the subsidy. (**Q&A 69**)

7. Claiming the COBRA Premium Assistance (Medicare Tax) Credit (Q&As 71–86)

In **Q&A 75**, the IRS provides the methods of taking the Medicare tax credit either on the quarterly Form 941 employment tax return or an advance of the credit using Form 7200. [IRS Notice 2021-24](#) provides more detail.

If an individual is treated as an AEI eligible for the subsidy but that individual

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fails to inform the plan of other disqualifying coverage, then the employer will not have to refund any Medicare tax credit it has taken for that individual. **(Q&A 78)**

In **Q&A 79**, the IRS repeats the ARPA statutory rule that the Medicare tax credit is generally included in the gross income of the employer. Placing timing issues aside, this inclusion of income should not have any adverse tax effects on an employer because it should be able to deduct the payments that the credit is intended to reimburse (for example, the premium payments to the insurer in the case of a fully insured plan or the actual payment of benefits to the AEI in the case of a self-funded plan).

For a plan covered by federal COBRA (other than a collectively bargained multiemployer plan), the employer is the entity that takes the Medicare tax credit.

Q&A 81 clarifies that this is the general rule even if an employer uses a “third-party payer” such as a reporting agent, payroll service provider, professional employer organization, certified professional employer organization, or § 3504 agent to report and pay its federal employment taxes. **Q&A 82** contains an exception to this rule if the third-party payer meets the following three conditions: (1) it maintains the group health plan; (2) it is considered the sponsor of the group health plan and is subject to the applicable DOL COBRA guidance, including providing the COBRA election notices to qualified beneficiaries; and (3) it would have received the COBRA premium payments directly from AEIs if not for the COBRA subsidy. In that limited instance, the third-party payer will be entitled to the Medicare tax credit.

Practice Pointer: The rules regarding third-party payers can be complex. Q&A 81 contains even more guidance on the methods that third-party payers should use to claim the credit on behalf of their clients. The exception in Q&A 82 is narrow, but we believe that some multiple employer welfare arrangements, including association health plans, may be able to use the Q&A 82 exception in certain instances.

PRIMARY EMPLOYER TAKEAWAYS

- The deadline for issuing ARPA COBRA subsidy notices to AEIs was May 31. Steps should be taken to ensure that Notices are sent as required.
- Ensure that a process is in place to collect (and retain) AEI election (and certification) forms to support claimed Medicare tax credits.
- Use the Q&As to help you identify when there has been an involuntary termination of employment or a reduction in hours (whether voluntary or involuntary).
- It is important to analyze whether a dependent or spouse is eligible for the subsidy on a case-by-case basis.
- A spouse or dependent who was covered under a plan at the time of an involuntary termination of employment or reduction in hours is going to be an AEI even if the employee elected self-only COBRA coverage.

- On the other hand, a spouse or dependent who was not covered at the time of the involuntary termination of employment or reduction in hours but is added during open enrollment will not be an AEI eligible for the subsidy.
- A spouse or dependent whose initial qualifying event was a death, divorce, or dependent aging out will not be an AEI.
 - On the other hand, if the initial qualifying event was an involuntary termination of employment or reduction in hours and the second qualifying event was a death, divorce, or dependent aging out, then the spouse or dependent may be an AEI.
- Review any employer severance plan or severance agreements where a “true” employer subsidy is being offered to AEIs and see if that severance plan or severance agreement can be modified to take full advantage of the ARPA COBRA subsidy. Modifications could include taxable payments to AEIs to incentivize them into waiving any previous contractual promise for the employer subsidy.
- Understand how the Outbreak Period interacts with the 60-day extended election period (second bite) and make sure that AEIs know that if they make a subsidy election without making a retroactive election under the Outbreak Period for unsubsidized COBRA coverage, they will lose the right to unsubsidized coverage.
- Review the process for claiming the Medicare tax credit on Form 941 or 7200 and make sure document retention systems are in place to justify the credit in the case of audit. Use of an AEI attestation form is a best practice. It will be difficult if not impossible to prove that an AEI was not eligible for other disqualifying coverage without it. ■