Latest COBRA Subsidy Guidance May Prompt Filing Amendments

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The IRS recently issued guidance clarifying the rules for how employers can claim the tax credit for the 100% COBRA premium subsidies available under the American Rescue Plan Act of 2021 (ARPA). Notably, the new COBRA subsidy guidance contains clarifications to previous IRS guidance issued in May that may result in changes to the way the ARPA COBRA subsidies will be paid and reimbursed. This could require employers and plan sponsors to amend their Form 941 IRS filings.

Eligibility for COBRA Subsidies During Extended Coverage Periods

Employers and plan sponsors may now need to look back more than 18 months for an assistance eligible individual's (AEI) extended second election opportunity. Under the previous guidance, employers would not have needed to look back more than 18 months.

The new guidance explains that if an AEI's original 18-month COBRA continuation coverage has expired but the AEI is entitled to elect extended continuation coverage, the AEI can still qualify for the subsidy for the extended period if it falls between April 1, 2021 and September 30, 2021. AEIs may be eligible for extended continuation coverage due to a disability determination, second qualifying event, or an extension under a state mini-COBRA law.

New COBRA subsidy guidance may require employers and plan sponsors to amend IRS filings.

As clarified in the new guidance, the AEI would remain eligible for the COBRA subsidy even if they had not notified the plan or insurer of their intent to elect extended COBRA coverage before the start of that period. The IRS previously indicated that an individual entitled to elect extended continuation coverage would have to remain enrolled in and receiving COBRA coverage on April 1, 2021 in order to be treated as an AEI that is eligible for the subsidy.

Clarification on who can Claim the COBRA Subsidy Tax Credit

The guidance clarifies the rules pertaining to which entity can claim the tax credit in connection with the ARPA subsidies. As a result, some plan sponsors that thought that they would qualify as premium payees, and therefore, be eligible to claim the tax credit, may now no longer be able to do so.

For example, if a group health plan (other than a multiemployer plan) subject to federal COBRA covers employees of two or more members of a controlled group, then *each* common law employer member is a premium payee entitled to claim the tax credit for its respective employees or former employees, with some exceptions.

Additionally, the Guidance clarifies that if a plan is subject to both state-mandated continuation coverage and federal COBRA, then the common law employer is the "premium payee" eligible to claim the tax credit (and not the insurer).

Accordingly, even if state-mandated continuation coverage would require an AEI to pay premiums directly to the insurer after the continuation coverage period for federal COBRA ends, the insurer is still not entitled to claim the tax credits for the subsidies.

Other Significant COBRA Subsidy Guidance Clarifications

The new guidance included additional rule clarifications related to which entity can claim the tax credit, and how these rules apply to dental and vision coverage and state continuation coverage.

Since the new guidance may also change how plan sponsors have been determining whether individuals are AEIs, employers and plan sponsors should now consider if they need to change their previously implemented COBRA policies to align with the new guidance.

The last-minute nature of the rule clarifications in the new guidance is unfortunate since employers and plans sponsors have now spent several months reviewing and implementing these subsidy rules based on the ARPA statute and May guidance and may now need to amend their quarterly Form 941 filing.

As always, please connect with your benefits broker and compliance team on any questions.

For full details on the latest COBRA subsidy guidance, please see the July 30 Compliance Alert on the Compliance Resource Page. ■

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