

# compliance ALERT

## IRS Issues COBRA Subsidy Guidance Less Than A Week Before Tax Credit Filing Deadline

July 30, 2021

### Action Required:

- Review the new guidance.
- Make changes to (or amend) your organization's Form 941 filing if necessary.
- Review previously implemented COBRA policies to ensure alignment with the new guidance.

On July 26, the IRS 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 guidance contains clarifications to previous IRS [guidance](#) issued in May (see our [eAlert](#)) that may require employers and plan sponsors to make last-minute changes to (or amend) their Form 941 IRS filings for claiming these tax credits, which are due on August 2, 2021.

Specifically, as a result of this new guidance, some plan sponsors that thought that they would qualify as premium payees, and therefore, be eligible to claim the tax credit, will now no longer be able to do so.

The most significant clarifications are related to:

- Eligibility for Subsidies During Extended Coverage Periods;
- Clarification on Entity Claiming the Tax Credit;
- Dental and Vision Coverage; and
- State Continuation Coverage.

Since the new guidance may 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.■

↓ Full Explanation Follows ↓

## IRS Issues COBRA Subsidy Guidance Less Than A Week Before Tax Credit Filing Deadline

On July 26, the IRS issued [guidance](#) (“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 Guidance contains clarifications to previous IRS [guidance](#) issued in May (see our [eAlert](#)) that may require employers and plan sponsors to make last-minute changes to (or amend) their IRS filings for claiming these tax credits, which are due on August 2, 2021.<sup>1</sup>

### How Does the Guidance Change the Law?

While the new Guidance doesn’t change the law, it explains the IRS’ interpretation of it, and in this case, appears to reconsider the [guidance](#) it issued in May (the “May Guidance”), which can result in changes to the way the ARPA COBRA subsidies will be paid and reimbursed. What follows is a summary of the most significant clarifications in the new Guidance:

### Eligibility for Subsidies During Extended Coverage Periods

The Guidance explains (in Q&A #1) that if an assistance eligible individual’s (“AEI’s”) original 18-month COBRA continuation coverage has expired, but the AEI is entitled to elect extended continuation coverage (whether due to a disability determination, second qualifying event, or an extension under a state mini-COBRA law), the AEI can still qualify for the subsidy for the extended period of coverage if it falls between April 1, 2021 and September 30, 2021, even if the AEI had not notified the plan or insurer of the intent to elect extended COBRA coverage before the start of that period. Notably, this is the first time that the IRS has explained that part of the rule that says that the AEI is eligible for the subsidy *even if he/she has not yet notified the plan or insurer of his/her intent to elect extended COBRA continuation coverage before the start of that time period*.

More specifically, in Q&A #17 of the May Guidance, the IRS explained this rule, but indicated that an individual who has experienced a second qualifying event, disability extension or state mini-COBRA extension would have to remain enrolled in and receiving COBRA coverage on April 1, 2021 in order to be treated as an AEI. Under the May Guidance, employers would not have needed to look back more than 18 months for the extended second election opportunity. By issuing this new part of the rule, it appears that the IRS has reconsidered its prior interpretation of the rule, and as a result, employers and plan sponsors now may need to look back more than 18 months for the extended second election opportunity.

### Clarification on Entity Claiming the Tax Credit

The Guidance clarifies the rules pertaining to which entity can claim the tax credit in connection with the ARPA subsidies, and among other clarifications, explains the following:

- The Guidance clarifies (in Q&A #4) that for purposes of determining the common law employer maintaining the plan (and thus, the entity that is eligible to claim the tax credit, with some exceptions), the “common law employer” is defined as the common law employer for AEIs whose hours have been reduced or the former common law employer for those individuals who have been involuntarily terminated.
- 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 that is a member of the controlled group is a premium payee entitled to claim the tax credit for its respective employees or former employees, with some exceptions pertaining to third-party payers and business reorganizations (in Q&A #6).

Additionally, the Guidance clarifies the circumstances (in Q&A #11) for when an insurer for a plan that is not subject to federal COBRA will not be able to claim the tax credit for the ARPA subsidies.

### Dental and Vision Coverage

The Guidance additionally clarifies (in Q&A #2) that if an AEI had previously elected COBRA coverage for dental-only or vision-only coverage, ARPA subsidy eligibility ends when the AEI becomes eligible for any other disqualifying group health plan or Medicare, *even if the disqualifying coverage does not include all of the benefits provided by the previously elected COBRA continuation coverage*. As a result, eligibility for Medicare would end eligibility for the ARPA subsidy for previously elected vision-only or dental-only COBRA coverage, even though Medicare may not offer dental or vision coverage.

<sup>1</sup> The Form 941 filing for the second quarter is due on July 31, 2021, but since that falls on a Saturday this year, it will be due on August 2, 2021.

## State Continuation Coverage

Finally, the new Guidance confirms (in Q&A #3) that state continuation coverage provides comparable coverage to COBRA continuation coverage (and thus, allows AEIs to obtain the subsidy) even if the state program only covers a portion or subset of state residents, such as employees of a state or local government.

The Guidance further clarifies (in Q&A #5) that if a plan is subject to both state-mandated continuation coverage and federal COBRA, the common law employer is the “premium payee” eligible to claim the tax credit (and not the insurer). Even if the state-mandated continuation coverage would require the 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.

## How does the Guidance Affect Employers and Plan Sponsors? What Should They Do Next?

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 now, as a result of these new rule clarifications, may need to quickly revise or amend their quarterly Form 941 filing (with its fast-approaching deadline only days away). For example, some plan sponsors that thought that they would qualify as premium payees, and therefore, be eligible to claim the tax credit, will now no longer be able to do so.

Further, since the new Guidance may 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 comport with the new Guidance.■

**If you have any additional questions,  
please call your Corporate Synergies  
Account Manager or 866.CSG.1719.**



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