

Employee Benefit Plan Review

Ask the Experts

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NEW COBRA SUBSIDY

Q I have read that companies are required to provide subsidized COBRA starting April 1, 2021 and that companies may recover the cost of the subsidized coverage by reducing payroll taxes. I have a few questions on the new COBRA subsidy as it applies to my company's health plans.

First, how long does the COBRA subsidy period last?

Second, does the COBRA subsidy apply to vision, dental, and flexible spending plans or only to group medical plans?

Third, does the COBRA subsidy apply to employees who quit or retire or only to employees who are laid off?

Fourth, does the COBRA subsidy apply to covered family members who lose coverage due to the employee's death or due to divorce?

Fifth, does the COBRA subsidy apply to employees who left before April 2021 who declined COBRA and employees who currently are receiving COBRA or only to employees who leave employment after April 1, 2021?

A The American Rescue Plan Act of 2021 (the "ARP"), which was signed into law by President Biden on March 11, 2021 provides that certain employees and their covered dependents may elect to receive fully subsidized continuation of coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended ("COBRA").

The COBRA subsidy period is limited to the period from April 1, 2021 through September 30, 2021, but is subject to earlier termination if the eligible employee becomes covered under certain another group health plan or Medicare or the employee's 18 month COBRA period expires ("COBRA subsidy period"). It is possible that the COBRA subsidy may be extended past September 30, 2021 through subsequent legislation.

The subsidy applies to group health plans and dental and visions plans, but does not apply to flexible spending plans.

Employers will be reimbursed for the COBRA subsidies through claiming a tax credit against the employer's share of the 1.45 percent Medicare payroll taxes. The U.S. Treasury Department is expected to provide additional guidance and forms for employers to claim the tax credit.

The COBRA subsidy applies to employees and their covered dependents who lose coverage as a result of an employee's involuntary termination of employment (other than due to gross misconduct) or a reduction in hours who would otherwise be eligible for COBRA for any part of the COBRA subsidy period and who elect COBRA coverage ("assistance eligible individuals" or "AEIs"). The COBRA subsidy does not apply to employees who leave voluntarily or who retiree. The COBRA subsidy does not apply to individuals who would be eligible for COBRA due to a qualifying event other

than the involuntary termination of employment, for example, a qualifying event due to death, divorce, or loss of dependent status.

The COBRA subsidy must be made available to AEIs whose coverage was terminated due to an involuntary termination of employment (other than due to gross misconduct) and who would otherwise be entitled to COBRA coverage as a result of such involuntary termination for any portion of the COBRA subsidy period.

As a practical matter, an employee whose employment was involuntarily terminated (other than due to gross misconduct) on, or reduced after, November 1, 2019 may be eligible for the COBRA subsidy, since the employee's 18-month period of COBRA coverage would not expire until September 30, 2021.

The COBRA subsidy must be made available not only to AEIs who are on COBRA as of April 1, 2021 or who become eligible for COBRA during the COBRA subsidy period, but also to AEIs who previously declined COBRA coverage or who elected COBRA and subsequently cancelled coverage. Group health plans are required to provide a special election period during which AEIs may elect the COBRA subsidy.

COBRA SUBSIDY SPECIAL ENROLLMENT RIGHTS

Q I have read that our group health plan must notify participants of their rights to the new COBRA subsidy. What notices should our plan provide, when should it provide them, and have model forms of notice been provided?

A Group health plan administrators are required to provide several notices to participants regarding the new COBRA subsidies enacted by the APR. These notices include updated existing COBRA notices, notice to AEIs who were eligible to elect COBRA coverage prior to April 1, 2021 of special enrollment rights,

and notice of the end of the COBRA subsidy period.

On April 7, 2021, the DOL issued model notices. The model forms of COBRA notices and related Frequently Asked Questions (“FAQs”) may be found here: <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy>.

Updated COBRA Notices

Your group health plan's COBRA notices must be updated to include:

- The forms required to determine eligibility for the COBRA subsidy;
- The name, address, and telephone number of the plan administrator and any other person maintaining relevant information on the COBRA subsidy;
- A description of the special 60-day enrollment period (see below);
- A description of the AEI's obligation to notify your plan of the AEI's coverage under another employer's plan or Medicare and the penalty that may be imposed on the AEI for failing to provide that notice;
- A description of the AEI's right to the COBRA subsidy and any conditions that apply to the COBRA subsidy (this information must be prominently displayed); and
- If your plan will allow AEIs to enroll in different coverage, a description of the different coverage rights.

Notices to AEIs Entitled to COBRA Coverage Before April 1, 2021

Your plan administrator must notify AEIs who previously declined or terminated COBRA coverage of their right to elect COBRA coverage during the COBRA subsidy period and their right to the COBRA subsidy. This notice must be provided no later than May 31, 2021.

Notice of End of COBRA Subsidy Period

Your plan administrator must notify each AEI prior to the end of the AEI's COBRA subsidy period. This notice must inform the AEI that the AEI's COBRA subsidy period will be ending and that the AEI may be eligible for unsubsidized COBRA coverage or coverage under another group health plan. The notice must be provided at least 15 days before and no more than 45 days before the end of the AEI's subsidized COBRA.

WELLNESS INCENTIVE GUIDANCE

Q In a recent column, you noted that the EEOC proposed guidance on wellness incentives that would limit many wellness incentives to a de minimis amount. What is the status of the EEOC's proposed regulations? Are they still in effect and how do they permit wellness incentives for COVID-19 vaccines?

A In January 2021, the U.S. Equal Employment Opportunity Commission (“EEOC”) proposed rules regarding wellness incentives under the Americans with Disabilities Act (“ADA”) and Genetic Information Nondiscrimination Act (“GINA”). The EEOC's proposed rules would have limited participatory wellness incentives to no more than a de minimis amount. The EEOC's proposed rules did not address wellness incentives for COVID-19 vaccinations specifically.

In late January 2021, President Biden's chief of staff issued an executive memorandum requesting that certain proposed rules be withdrawn pending further reconsideration. On February 11, 2021, the EEOC formally withdrew the proposed wellness incentive rules. It is expected that the EEOC will reconsider wellness incentives and issue new guidance in the future. The EEOC has not yet issued further guidance on wellness incentives generally or offering wellness incentives for COVID-19 vaccinations. 🌟

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