



Alerts

New COBRA Rules Require Employer Action, Impose Significant Noncompliance Penalties

April 13, 2021

Insights for Employers

The ability to continue group health plan coverage under COBRA following a separation from employment has been a fundamental feature of most employer group health plans for more than 35 years. Despite widespread availability, it is relatively unusual for a separated employee to elect COBRA coverage because the employee typically must pay 100% of the cost. However, in times of economic distress, government programs often have assisted affected workers by subsidizing their COBRA coverage. The recently passed American Rescue Plan Act provides similar assistance in response to the COVID-19 pandemic.

100% Premium Subsidy and New Eligibility Requirements

From April 1, 2021, through September 30, 2021, eligible, qualified beneficiaries will receive a 100% subsidy for the cost of COBRA continuation coverage. This subsidy applies to all types of coverage, including individual, employee plus spouse, or family coverage. Individuals eligible for assistance under this program are not required to pay their COBRA continuation coverage premiums during the subsidy period.

To be eligible for this new relief, individuals electing coverage must have experienced a qualifying event that is an involuntary termination of employment or reduction in hours that results in loss of group health plan coverage. In addition, the qualifying individual cannot be eligible for other group health coverage, such as through a spouse's plan.

Eligible individuals must elect their coverage by submitting an enrollment form. The election must be made within 60 days after receiving notice from their plan informing them of their eligibility for the new subsidy. Eligible individuals who do not elect continuation coverage within the 60-day period forfeit their right to elect subsidized COBRA continuation coverage.

New Employer Obligations to Notify Employees of COBRA Subsidy

The new COBRA subsidy program imposes several new obligations on employers who sponsor group health plans. First, the employer must provide notice to all eligible individuals of their rights to the new subsidy. Because the subsidy is available to anyone whose COBRA coverage period has not expired,

Attorneys

Anthony E. Antognoli

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employers are required to notify any participant who experienced a loss of coverage due to involuntary termination or reduction in hours on or after October 1, 2019. This notice must be provided no later than May 31, 2021.

Further, for those eligible individuals who elect COBRA, the employer must notify such individuals once their eligibility for the subsidy is set to expire.

The Department of Labor has issued model notices that employers may use to fulfill their notice requirements. Employers should also review and update their general COBRA notice and COBRA election notice to ensure compliance with the latest federal guidance on COBRA coverage, including the subsidy.

Penalties for failure to comply with the new requirements could be substantial. Employers and plans may be subject to an excise tax for failure to comply with the new COBRA continuation coverage rules. This tax could be as much as \$100 per qualified beneficiary, but not more than \$200 per family, for each day that the plan or employer is in violation of the COBRA rules.

Payroll Tax Credit to Offset the Cost of Coverage

To offset the cost of coverage provided by the new subsidy, employers can claim a tax credit on their quarterly tax returns. The credit is for 100% of the cost of coverage. Employers are not permitted to require that eligible individuals pay for the cost of coverage and then reimburse those employees after receiving the federal credit. Therefore, to the extent there are immediate out-of-pocket costs for providing the subsidized coverage, the employer will have to pay those costs while waiting for the tax credit to offset any expense it incurs. It is expected the IRS will issue further guidance on how an employer may request an advance credit of these costs.

The credit is applied toward the employer's share of the Medicare tax on a quarterly basis. Those employers who provide subsidized coverage will get a dollar-for-dollar offset against the employer portion of the Medicare tax (1.45% of payroll). If the cost of subsidized premiums exceeds that amount, the excess will be treated as an overpayment of Medicare tax and therefore is refundable.

The new credit will be available to all employers, including governmental employers. Special rules will apply to union health and welfare funds.

However, for those employers who have claimed payroll tax credits for "qualified wages" under earlier COVID-19 relief, a "double benefit" is not allowed. Thus, employers who receive a credit for the cost of health coverage paid under the Families First Coronavirus Response Act or the CARES Act cannot also receive a credit for the continuation coverage provided through this new COBRA subsidy.

Action Steps for Employers

The new COBRA subsidy is the latest in a series of legislative and regulatory changes related to group health plans made in response to the Covid-19 pandemic. In light of these changes, employers should:

- Prepare and distribute notices as required under the new law and ensure that those notices are provided to eligible individuals no later than May 31, 2021;
- Review and update their general COBRA election notice to describe the availability of the subsidy and inform participants of their rights to make a COBRA election to receive subsidized coverage;
- Verify that all COBRA-eligible participants, including those who have separated from service up to 18 months ago, have been provided notice of their rights under the new law; and
- Confirm with their third-party administrators that their health plan is satisfying its COBRA obligations.