

CLIENT ALERT

June 1, 2021

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IRS GUIDANCE ON COBRA SUBSIDY

PART III: CLAIMING THE PREMIUM ASSISTANCE CREDIT

By Cynthia A. Moore

Under the American Rescue Plan Act of 2021 (“ARPA”), a 100% COBRA subsidy is available to qualified beneficiaries who lose coverage due to an involuntary termination of employment or reduction in hours. The subsidy is available for the period of April 1, 2021 through September 30, 2021, if the individual is not eligible for other group health plan coverage or Medicare. For more information, please refer to our prior Client Alerts on the new COBRA subsidy which may be accessed [here](#) and [here](#).

On May 18, 2021, the IRS issued Notice 2021-31, which provides helpful guidance on a number of issues in the form of 86 FAQs. Part I of our series of Client Alerts on the new COBRA subsidy (which may be accessed [here](#)) addressed the following issues:

1. When has an “involuntary” termination of employment occurred?
2. What events may constitute a “reduction in hours” for purposes of eligibility for the subsidy?
3. Which group health plans must be offered to assistance eligible individuals?

Our Client Alert Part II (which may be accessed [here](#)) addresses:

- When is a qualified beneficiary an Assistance Eligible Individual?
- What rights are available if a potential Assistance Eligible Individual has the right to an extended election period?

This final Part III addresses issues in connection with the premium assistance credit available to the person to whom premiums are payable for COBRA continuation coverage.

ARPA amended the Internal Revenue Code (the “Code”) to provide that the person to whom premiums are payable for continuation coverage is allowed a “premium assistance credit” for each calendar quarter against the tax imposed by Code Section 3111(b) (the 1.45% Medicare portion of the FICA tax) of an amount equal to the premiums not paid by Assistance Eligible Individuals for COBRA coverage because of the subsidy. If the amount of the credit in a calendar quarter is greater than the tax due (after reduction for other credits), the excess is treated as a tax overpayment that can be refunded. The credit claimed during the taxable year is included in the premium payee’s gross income for that year.

Who may claim the premium assistance credit?

The person who is allowed to claim the premium assistance credit is:

1. the multiemployer plan, in the case of a group health plan that is a multiemployer plan;
2. the common law employer maintaining the plan, in the case of a group health plan (other than a multiemployer plan) that is (a) subject to federal COBRA, or (b) that is self-funded; and
3. the insurer providing the coverage, in the case of any other group health plan not described in (1) or (2) (generally, fully insured coverage subject to State continuation coverage requirements).

Notice 2021-31 refers to this person as the “premium payee.” In most cases, the employer-group health plan sponsor will be the person entitled to claim the credit. This Client Alert discusses the employer’s right to claim the premium assistance credit, but keep in mind that the premium payee could be a multiemployer plan or insurer as described above.

What is the amount of the premium assistance credit?

The credit for a quarter is generally equal to the COBRA premium for similarly situated qualified beneficiaries who are not Assistance Eligible Individuals if the employer does not subsidize the COBRA premium for other qualified beneficiaries, including the 2% administrative cost (i.e., 102% of the COBRA premium.)

Is the credit reduced if the employer subsidizes the COBRA premium?

Yes. The credit is reduced if the employer pays a portion of the COBRA premium for other qualified beneficiaries who are not Assistance Eligible Individuals. For example, if an employee who is involuntarily terminated on March 31, 2021, elects COBRA and pays the active employee rate of \$200 per month for three months and is then charged the full COBRA premium of \$1,000 per month, the credit is \$200 for three months (April, May, and June) and \$1,000 for the next three months (July, August, and September) if the former employee continues to be an Assistance Eligible Individual.

If the COBRA premium is currently less than the maximum allowed amount, can a plan increase the amount it charges for COBRA coverage?

Yes. The COBRA regulations permit a plan to increase the COBRA premium if the plan is currently charging less than the maximum permitted amount (102% of the premium.)

What is the credit amount if the qualified beneficiary group includes both Assistance Eligible Individuals and non-Assistance Eligible Individuals?

The credit can only be claimed with respect to Assistance Eligible Individuals. If the family members who are qualified beneficiaries include one or more individuals who are not Assistance Eligible Individuals, the premium is first allocated to the Assistance Eligible Individuals and then to non-Assistance Eligible Individuals. For example, if an employee is an Assistance Eligible Individual and the covered spouse is not an Assistance Eligible Individual, the credit would be limited to the COBRA premium for employee-only coverage.

How is the premium assistance credit calculated for an individual coverage health reimbursement arrangement (HRA)?

The credit for an individual coverage HRA is limited to 102% of the amount actually reimbursed in the month with respect to each Assistance Eligible Individual. Thus the credit may not be the same each month because each qualified beneficiary's actual reimbursement must be tracked for the month to calculate the credit.

When does the employer become entitled to the credit?

When an Assistance Eligible Individual makes the COBRA election, the employer is entitled to the credit for the periods of coverage that began before that date. For each subsequent coverage period, the credit may be claimed as of the first day of that period of coverage.

Example: The period of coverage is the calendar month. An Assistance Eligible Individual makes a COBRA election on June 17, 2021, effective on April 1, 2021. As of June 17, 2021, the employer is entitled to a credit equal to the COBRA premium not paid by the Assistance Eligible Individual for April, May, and June. The credit can then be claimed as of July 1, August 1, and September 1 for the months of July, August, and September.

If the employer is the premium payee and uses a third party as its COBRA administrator, it will need to stay in close touch with the COBRA administrator to keep track of when a COBRA election is made by an Assistance Eligible Individual and thus when the related credit may be claimed.

How does the employer claim the premium assistance credit?

The employer claims the credit by reporting the credit (the amount of unpaid COBRA premiums with respect to Assistance Eligible Individuals), and the number of individuals receiving a COBRA subsidy on the appropriate lines of its federal employment tax return. Usually, this is Form 941, Employer's Quarterly Federal Tax Return.

The employer may:

1. reduce its deposits of federal employment taxes, including withheld taxes, that it would otherwise be required to deposit, up to the amount of the anticipated credit; and
2. request an advance of the anticipated credit that exceeds the federal employment tax deposits available for reduction by filing Form 7200, Advance Payment of Employer Credit Due to COVID-19.

As of the date of this Client Alert, Form 7200 has been updated to add appropriate lines to be used to claim an advance of the premium assistance credit, but Form 941 has not yet been updated.

Does an employer need to refund the credit if an Assistance Eligible Individual does not notify it that the Assistance Eligible Individual is no longer eligible for the subsidy because he/she became eligible for other group health plan coverage or Medicare?

No, as long as the employer does not know of the individual's eligibility for the other coverage.

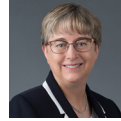
May an employer claim the premium assistance credit for amounts that are taken into account under other COVID relief provisions?

No. An employer may not claim a premium assistance credit for amounts that are taken into account as:

- Qualified wages or qualified health care expenses under the CARES Act;
- Qualified sick leave wages under the Emergency Paid Sick Leave Act (Code Section 3131);
- Qualified family leave wages under the Emergency Family and Medical Leave Expansion Act (Code Section 3132); or
- The employee retention credit claimed by an employer who is subject to closure by government order due to COVID-19 (Code Section 3134).

If you have any questions about the COBRA subsidy, please contact Cynthia A. Moore or any other member of Dickinson Wright's Employee Benefits and Executive Compensation Group. Cyndi can be reached at (248) 433-7295 or cmoore@dickinsonwright.com.

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