

Regulatory Update – Outline

May 2021

Legislation and regulations are subject to change. This guidance is current as of the date of this publication.

COBRA Subsidy – Notice Reminder

New Qualified Beneficiaries

Employers (or their COBRA administrators) should ensure the new model Election Notice is sent to qualified beneficiaries who lose coverage following a reduction in hours or an involuntary termination of employment between now and September 30, 2021.

Existing Qualified Beneficiaries

Employers (or their COBRA administrators) must send a notice by **May 31, 2021** to those individuals who triggered a COBRA continuation right following a reduction in hours or an involuntary termination of employment and are still in their maximum coverage period. This includes current COBRA participants as well as those who must be offered a second chance election.

COBRA Subsidy – IRS Guidance Highlights

Assistance Eligible Individuals (AEIs)

A COBRA continuation right triggered by the following events may provide an opportunity to take advantage of the COBRA subsidy:

- Involuntary or voluntary reduction in hours; or
- Involuntary termination of employment, which is interpreted broadly (see Q&A #24 – 34 of IRS Notice 2021-31).

Eligibility for other group health plan coverage or Medicare, but not excepted benefits, makes individuals ineligible for the COBRA subsidy. If the individual cannot actually enroll (e.g., due to a waiting period, or outside open enrollment), it does not count as eligibility. However, if a HIPAA special enrollment right still exists due to the Outbreak Period, the individual is eligible. Eligibility for other coverage prior to April 1, 2021 will not count as disqualifying if the individual is not eligible for other group health plan coverage or Medicare as of April 1, 2021. Retiree coverage is disqualifying coverage if it is provided under a separate retiree plan rather than allowing individuals to continue on the same plan they had in place prior to retirement.

Coverage Requirements

The COBRA subsidy is available for any group health plan coverage that was lost when the qualifying event occurred, but not health FSAs.

If coverage that was lost is no longer available due to changes in the employer's offering, the employer should offer the coverage most similar to individual's previous coverage, even if that similar coverage is more expensive. The employer is also permitted to offer less expensive options, but offering a more expensive option (an upgrade from the coverage that is most similar) would not qualify for a payroll tax credit.

The COBRA subsidy must be offered back to April 1, 2021 to those who elect, but individuals who elect to take advantage of the COBRA subsidy could choose to delay the effective date if desired (e.g., to align with dropping individual health coverage).

2nd Chance Election

For plans subject to federal COBRA, individuals who triggered a continuation right prior to April 2021 and are still in their maximum coverage period, but who are not currently COBRA participants, must be given the opportunity to enroll effective April 1, 2021 (a second chance to elect COBRA). It is only necessary to look back 18 months to determine who must be offered this option. Individuals who have an extended maximum coverage period (e.g., due to a disability extension, 2nd qualifying event, or state continuation extension) must be covered as a COBRA participant as of April 1, 2021 to take advantage of the COBRA subsidy.

Plans subject to only state continuation are not required to offer the 2nd chance election. The COBRA subsidy must only be offered to current COBRA participants and those who experience a qualifying event between now and Sept. 30, 2021. However, for states that choose to offer a similar 2nd chance option, individuals may be permitted to take advantage of the COBRA subsidy and a payroll tax credit would be available.

Payroll Tax Credit

For plans subject to federal COBRA, the employer will be able to collect a payroll tax credit via Form 941. Entities that do not file a Form 941 normally can use it for this purpose. For plans subject to state continuation, the carrier will be able to collect a payroll tax credit. Additional guidance is available in the IRS notice for employers who use third party payers.

Employers who subsidize some or all of the COBRA premium (e.g., due to a severance agreement) can only claim a payroll tax credit for the portion of the premium the COBRA participant would have been asked to pay.

Dependent Care Assistance Programs (DCAPs) – Adjusted 2021 Limit

For the 2021 calendar year only, participants may contribute up to \$10,500 (rather than \$5,000) into a DCAP. The IRS confirmed that any unused amounts from the previous plan year that remain available due to an expanded carryover or extended grace period do not impact the ability to contribute and receive reimbursement of up to \$10,500 on a tax-favored basis during 2021 in addition to any unused amounts from the previous plan year.

PPE Reimbursement

IRS announcement 2021-07 indicates that COVID-related PPE (e.g., masks, hand sanitizer, sanitizing wipes) may be reimbursed as a qualifying medical expense on a tax-favored basis by a health FSA, HRA or HSA retroactively to January 2020.

Outbreak Period Guidance

The following deadlines occurring March 1, 2020 – the end of the Outbreak Period (i.e., the National Emergency + 60 days) are extended for up to one year or the end of the Outbreak Period, whichever occurs sooner:

- Notice of HIPAA special enrollment rights;
- ERISA claims (including run-out periods for HRAs and health FSAs); and
- COBRA elections and payments.

The National Emergency is still in effect.

Compliance with these extensions is not optional.

For HIPAA special enrollment rights that are requested beyond the normal 30 or 60-day deadline, when the coverage must be made effective 1st of the month following receipt of notice except in the case of a birth or adoption, in which case the coverage must be retroactive to the date of birth or adoption.

Employer Mandate & Reporting

The IRS is currently enforcing assessments and penalties for the 2018 calendar year. Employers may receive any of the following notices:

- Letter 226J proposes §4980H assessments for applicable large employers.
- Letter 5005-A assesses reporting penalties for employers who failed to timely file Forms 1094 and 1095.
- Letter 5699 indicates no reporting was received by an employer who is assumed to be an applicable large employer based on the number of Form W-2s filed.

Letter 226J Tips:

1. Check the ESRP Summary Table that appears midway through the Letter 226J to determine whether the IRS is proposing an assessment under §4980H(a), §4980H(b), or a combination of the two. The assessment is per month.
 - An assessment under §4980H(a) indicates the employer failed to mark “Yes” on Form 1094-C to let the IRS know coverage was offered to at least 95% (or all but 5, if greater) of full-time employees and their dependents for the month. If coverage was offered to 95%, the employer must let the IRS know that coverage was offered as required.
 - An assessment under §4980H(b) indicates the employer reported that some full-time employees were not offered minimum value, affordable coverage. See Form 14765 for more details.
2. Whether the IRS proposed an assessment under §4980H(a) or (b), make sure to review Form 14765 to see if coding can be updated for any of the employees listed.

Premium Tax Credits & Special Enrollments

Premium Tax Credit (PTC) Amount

The PTC available to help pay for individual health coverage through a public Exchange is greatly increased for 2021 and 2022, meaning many individuals will be able to pay less for the same coverage. For those with a household income between 133 – 400% of FPL, the percentage of income that they can be required to be contributed toward coverage was decreased. For those with a household income of 400% of FPL or above, who previously were not eligible for PTCs, the income cap is 8.5%.

Special Enrollment

In addition to more PTC availability, the opportunities to enroll outside of the normal open enrollment window is also expanded. There is a broad special enrollment period available for most public Exchanges February 15 – August 15, 2021. In addition, it was recently clarified that the end of an employer or government COBRA subsidy also triggers a special enrollment for individuals to move to individual health coverage.

Employer Impact

For small employers, it may be more advantageous to offer unaffordable coverage and allow employees and their family members to qualify for the PTCs. Small employers (<50 FTEs) are not required to offer affordable coverage.

For applicable large employers (50 or more FTEs), the §4980H(b) affordability percentage remains unchanged at 9.83% for 2021. However, for employers who do not offer affordable coverage to all full-time employees, the risk of assessment under §4980H(b) – approx. \$340/month – may be higher for 2021 and 2022.

Mental Health Parity – Comparative Analysis

Most group health plans offering mental health and/or substance use disorder benefits are subject to the mental health parity rules and must provide such benefits in parity with medical/surgical benefits. Such plans are now also required to prepare a comparative analysis documenting compliance for any non-quantitative treatment limitations (NQTLs). The analysis does not need to be submitted annually, but instead is completed and kept in the employer's files to be provided if requested (e.g., by a federal or state agency, or by plan participants).

For fully-insured plans, the analysis is handled by the carrier; but for self-funded plans, the employer is responsible for ensuring the analysis is completed and available for review (perhaps with the help of a TPA or other third party). The DOL's Self-Compliance Tool describes NQTLs on pp. 19-21. It then goes on to provide a 4-step process for analyzing NQTLs on pp. 21-28. Applying and documenting the 4 steps for each of the plan's NQTLs should generally satisfy the comparative analysis requirements. You can find the tool here: <https://www.dol.gov/sites/dolgov/files/EBSA/laws-and-regulations/laws/mental-health-parity/self-compliance-tool.pdf>

COVID Vaccine Incentives

Employers who offer an incentive to employees choosing to get the COVID vaccine should consider the wellness rules.

HIPAA Wellness Rules

Regardless of whether the incentive is tied to a group health plan, an incentive tied to a vaccine may be health-contingent because health status could prevent some individuals from participating (e.g., pregnancy, hemophilia). The recommendation is to: (i) offer a reasonable alternative standard or waive the requirement for those who cannot participate because of a health reason; and (ii) limit the incentive to no more than 30% of the total cost of health coverage.

EEOC Wellness Rules

The latest EEOC FAQs indicate vaccines obtained from a third party without employer involvement may not be subject to EEOC rules. However, the conservative approach is to: (i) offer a reasonable accommodation for those who have religious or disability-related objections to vaccines; and (ii) not be too aggressive with incentives.

PCORI Fees

Most group health plans, including HRAs, are subject to PCORI fees (but not excepted benefits). PCORI fees for fully-insured plans are handled by the carrier, but employers must pay PCORI fees for self-funded plans.

The PCORI fee must be reported on Form 720, Line 133, no later than July 31 in the year following the end of the plan year. The fees are as follows for plans required to report by July 31, 2021:

- \$2.54/covered life for plan years ending in January – September 2020.
- \$2.66/covered life for plan years ending in October – December 2020.

ACA Out-of-Pocket (OOP) Maximum

For 2022, group health plan participants cannot be asked to pay more than \$8,700 for single coverage and \$17,400 for family coverage for any essential health benefits received in-network.

HSA in 2022

In 2022, a qualifying HDHP cannot have a deductible of less than \$1,400 for single coverage and \$2,800 for family coverage (unchanged from 2021). In addition, a qualifying HDHP cannot have an out-of-pocket (OOP) maximum exceeding \$7,050 for single coverage and \$14,100 for family coverage.

The annual contribution limit for 2022 is increased slightly to \$3,650 for single HDHP coverage and \$,7300 for family HDHP coverage. The contribution limit is always applied on a calendar year basis.

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