

IRS Guidance on Claiming Refundable COBRA Premium Subsidy Tax Credit

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The Internal Revenue Service (IRS) has released two pieces of guidance, [Notice 2021-31](#) and [Notice 2021-46](#) (the Guidance), discussing the COBRA subsidy provisions of the American Rescue Plan Act (ARP). See our initial alert on the substantive aspects of the Guidance, “IRS Releases Guidance on COBRA Subsidies,” [here](#). Under the Guidance, the IRS provides much-needed details on how multiemployer plans, employers with self-insured plans, or insurers (Payees), can claim the COBRA subsidy tax credit (the Credit) to offset mandatory payment of fully subsidized premiums for certain COBRA qualified beneficiaries. Notice 2021-46 also provides helpful information to identify the common law employer for this purpose. This updated Guidance is helpful in light of the upcoming July 31, 2021 deadline for filing Form 941 for Q2.

The Guidance provides three methods for claiming the Credit for employers paying the premium or reimbursing employees for premiums for coverage periods April 1 through September 30:

- 1. Request a Refund for Amounts Paid in COBRA Premiums Exceeding Federal Employment Tax Liability:** The employer may claim the Credit through an employment tax refund on the applicable employment tax return, generally Form 941, Employer’s Quarterly Federal Tax Return. Under this method, the employer reports the amount of the Credit and number of individuals receiving the COBRA subsidy on the Form and the employer may receive a refund or a credit towards employment taxes for the next quarter employment tax liability.
- 2. Withhold Employment Taxes Equal to the Amount of the Credit:** Employers are permitted to withhold Federal employment tax payments up to the amount of the Credit for the COBRA Premium subsidy and will not be subject to a penalty for failure to deposit. However, tax deposits cannot be withheld for a period of COBRA Premium coverage that has not yet started. In addition, under [Notice 2021-24](#), employers are instructed to first reduce deposits by the amount of any anticipated paid sick or family leave and employee retention credits before withholding in anticipation of the Credit.
- 3. Request an Advance from the IRS:** Employers can use Form 7200, *Advance Payment of Employer Credits Due to COVID-19*, to request an advance of the Credit. However, Form 7200 can only be submitted if the anticipated COBRA Premium subsidy is greater than the employer’s Federal employment tax liability. In other words, the employer must first reduce employment taxes in an amount equal to the Credit before requesting the advance on any remaining balance.

As with method two, an advance cannot be requested for a period of coverage that has not yet started; however, Form 7200 can be filed at the end of the payroll period in which the employer became entitled to the Credit. In addition, note that Form 7200 must be submitted before the earlier of (1) the date the Form 941 for the applicable quarter is filed, or (2) the last day of the month following that quarter. The employer must also report the advance payment received and *claim* the tax credit on Form 941.

Income Tax Consequences: Finally, note that the value of the Credit is included in gross income to the employer. However, an employer generally could also claim a deduction for this amount. The amount of the COBRA premium assistance is not taxable to the COBRA qualified beneficiary in receipt of the benefit.

Winston Takeaway: Given the potential administrative challenges with accurately calculating the exact amount of COBRA premium tax subsidy and employment tax liabilities, most employers will consider simply filing a Form 941 to claim the COBRA Premium tax credit. Form 941 and Instructions have been updated for this purpose. Employers for whom waiting for reimbursement poses a hardship should be careful to accurately assess employment tax liability for each quarter and closely follow the timing rules on when employment taxes can be withheld and the advance claimed.

Please contact a member of the Winston & Strawn Employee Benefits and Executive Compensation team for further information.

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