

*Prepared by the Groom Law Group
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IRS Guidance On Temporary 100% COBRA Subsidy

On May 18, 2021, the Internal Revenue Service (“IRS”) issued Notice 2021-31, providing guidance relating to the temporary 100% COBRA subsidy created by the American Rescue Plan Act of 2021 (“ARPA”). Notice 2021-31 consists of 86 Q&As which cover a multitude of topics relating to the COBRA subsidy, and can be [found here](#). There is PEO-specific guidance in Notice 2021-31 that NAPEO believes is of critical importance to its member companies and their client employers.

The ARPA subsidy applies to COBRA qualified beneficiaries who had a qualifying event that was an involuntary termination of employment or reduction in hours (“Assistance Eligible Individuals” or “AEIs”), and applies to coverage periods beginning on April 1, 2021 and ending on September 30, 2021.

Under ARPA, the subsidized COBRA premiums will be reimbursed by the federal government through a refundable tax credit (applied against Medicare hospital insurance (HI) taxes) to the “person to whom premiums are payable” – also ARPA provides that in most circumstances, it will be the “employer maintaining the plan” that will be able to take the tax credit as the “person to whom premiums are payable,” assuming the plan is subject to federal COBRA.

The statutory language of ARPA raises unique issues for PEOs and their client employers, given the co-employment relationship. PEOs have been particularly focused on whether IRS would issue guidance specifically relating PEOs and other third party payers and how these ARPA tax credits would be administered.

In Q&A-82, the IRS specifically addresses whether a third-party payer, such as a PEO or CPEO, can be treated as the “person to whom premiums are payable” (referred to in the Notice as the “premium payee”) with regard to coverage provided under a health (medical, dental, or vision) plan sponsored by the PEO for the benefit of the employees it co-employs with its client employers. The IRS takes the position that a PEO *can* be treated as the premium payee with regard to a PEO-sponsored plan if the following three requirements are met:

- the PEO maintains the group health plan;
- the PEO is considered the sponsor of the group health plan and is subject to the applicable DOL COBRA guidance, including providing the COBRA election notices to qualified beneficiaries; and
- the PEO would have received the COBRA premium payments directly from the AEIs were it not for the COBRA premium assistance. (Note: We understand that many PEOs may contract with third party COBRA administrators or the like for COBRA administration. We do not believe this fact alone should cause the premiums to be no longer be payable “directly” from the AEI to the PEO for purpose of this third requirement.)

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If all three of these requirements are met, the PEO is able to claim the tax credit in its own name for PEO-sponsored coverage that is offered to client employers. The PEO will be responsible for forwarding the subsidized premiums to the insurer, and can apply for and receive a federal tax credit that will reimburse those premiums.

In situations where a PEO client employer sponsors its own plan (i.e., client-level plan) for the benefit of its own employees, Q&A-81 confirms that the client employer is the “premium payee” and can receive the premium assistance tax credit regardless of the fact that it uses a third-party payer (including a PEO or CPEO) to report and pay its federal employment taxes. Generally, this will require all PEOs (including CPEOs and non-certified PEOs) to file a Form 941 and separately report the credit allocable to the client employer on an accompanying Schedule R. We encourage you to review Q&A-81 carefully for more information regarding how a PEO or CPEO will claim the credit on behalf of its client employers.

Finally, Q-&As 83 and 84 confirms that a third-party payer that is claiming the credit on behalf of a premium payee (i.e. a client employer) must obtain from the premium payment any information necessary to accurately claim the credit, and must maintain records to substantiate eligibility for the credit.

There are a host of additional Q&As that will be of relevance/interest to many PEOs. NAPEO and its outside counsel are continuing to digest the guidance in Notice 2021-31.