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State Individual Mandates Include Employer Reporting Requirements

Employers providing health benefits to active employees, retirees, and their beneficiaries in certain states—including California and New Jersey—may need to satisfy special reporting requirements to support those states' individual health coverage mandates.

Background

Beginning in 2019, the Federal tax penalty for individuals who do not maintain Minimum Essential Coverage (MEC) was reduced to zero pursuant to the Tax Cuts and Jobs Act of 2017. Since then, California, New Jersey, Vermont, Rhode Island, and the District of Columbia have added their own individual coverage mandates. Massachusetts also has an individual mandate that predates the Affordable Care Act (ACA).

Because so many individuals have MEC through an employer, most of these states look to employers (or insurers, in certain cases) to confirm their residents are satisfying their individual mandates. In general, the state requirements piggyback on the Federal employer reporting obligations that are still in effect. Massachusetts has a separate form – the 1099-HC – that must be filed.

Here is a summary of some of the different state requirements.

State	Individual Mandate Effective Date	Employer Reporting Requirement	Deadline
California	January 1, 2020	Insurance providers are required to report health coverage information to the California Franchise Tax Board (FTB) annually. Employers are similarly required to report insurance information to the FTB by March 31, but only if their insurance providers do not report to the FTB. If insurance providers do not report, employers can satisfy their requirement by	The filing deadline is March 31. However, no penalty will apply if the return is filed on or before May 31. Otherwise, the penalty is $50 per individual who was provided health coverage.

		filing the federal Forms 1095-B and -C with the FTB.	
District of Columbia	January 1, 2019	Employers with group health plans covering DC residents generally must electronically file their 1095-Bs and/or 1095-Cs with the DC Office of Tax and Revenue.	The filing deadline is 30 days after the IRS deadline for filing 1095-Bs or 1095-Cs, including extensions. The IRS deadline is March 31 for electronic filers.
Massachusetts	January 1, 2006	Health insurance issuers typically file the Form 1099-HC with the Massachusetts Department of Revenue on behalf of employers sponsoring coverage. If an issuer is not filing the 1099-HC, it is the employer's responsibility instead.	The filing deadline is January 31.
New Jersey	January 1, 2019	Employers with self-insured plans covering New Jersey residents generally must electronically file their 1095-Bs and/or 1095-Cs with the New Jersey Division of Taxation.	The filing deadline for the 2020 tax year is March 31, 2021.
Rhode Island	January 1, 2020	Employers with self-insured plans covering Rhode Island residents generally must electronically file their 1095-Bs and/or 1095-C's with the Rhode Island Division of Taxation.	The usual filing deadline is January 31, but it was extended to March 31 for the 2020 tax year.
Vermont	January 1, 2020	None	None

Questions and Answers on the New COBRA Premium Subsidy

The COBRA premium subsidy included in the American Rescue Plan Act (ARPA) took effect on April 1, 2021, but the accelerated timeframe from enactment to effective date has resulted in many compliance-related questions being raised by employers, COBRA administrators, insurers, and other stakeholders.

In general, for the period from April 1, 2021 through September 30, 2021 (the "Applicable Period"), the bill provides that Assistance Eligible Individuals (AEIs) will not be required to pay any COBRA premiums. AEIs are those COBRA beneficiaries whose COBRA qualifying event was an involuntary termination of employment or reduction in hours. Employers are required to offer a 60-day Extended Election Period to individuals who would be AEI's during any part of the Applicable Period but for the fact they failed to elect COBRA or prematurely dropped COBRA coverage.

Employers (or insurers or multiemployer plans, in certain cases) will be able to claim an advanceable, refundable credit against their Hospital Insurance payroll tax liability to subsidize the COBRA premiums these AEIs otherwise would pay during the Applicable Period.

The Department of Labor (DOL) on April 7 issued a series of frequently asked questions (FAQs) on the COBRA premium subsidy, which includes some helpful guidance on some issues. However, a number of other issues likely will be addressed in forthcoming guidance from IRS. The FAQs can be found here.

What is an involuntary termination?

As noted, a COBRA beneficiary can only be an AEI if his or her qualifying event is "The termination (other than by reason of such employee's gross misconduct), or reduction of hours, of the covered employee's employment." See IRC § 4980B(f)(3)(B) and ERISA § 603(2). Additionally, the ARPA provides a specific exclusion for "voluntary terminations" of employment.

Distinguishing between voluntary and involuntary terminations will be essential to identifying who is and is not an AEI. The DOL's FAQs do not address this issue, but upcoming IRS guidance hopefully will. Until then, it could be helpful to refer to guidance the agencies issued on this same question for a previous COBRA premium subsidy.

Specifically, the IRS issued Notice 2009-27 to address a variety of issues raised by the COBRA subsidy included in the American Recovery and Reinvestment Act of 2009 (ARRA). According to Notice 2009-27, Q/A-1 through -9:

> An involuntary termination means a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the

employee's implicit or explicit request, where the employee was willing and able to continue performing services.

The Notice also specifically provides that a layoff with a right of recall or a temporary furlough is an involuntary termination, as is an employer's action to end the employment of someone who is out on sick or disability leave. A buy-out also can be an involuntary termination if the employer indicates that a certain number of employees will be terminated if enough do not accept the buy-out.

Furthermore, the Notice indicates that an employee's retirement could be an involuntary termination depending on the facts and circumstances. Specifically, if the employee knew she would be terminated if she did not retire, then the retirement is involuntary.

Of course, Notice 2009-27 is specifically applicable to the COBRA premium subsidy in the ARRA, and not to the ARPA. While the agencies might adopt the same or a similar definition of "involuntary termination" for purposes of the new COBRA premium subsidy, they do not have to. So, while it may be reasonable to look to Notice 2009-27 as a guide on this issue for now, employers will need to be prepared to make adjustments as needed when new guidance comes out.

Can an employee be an AEI even if his or her qualifying event was a voluntary reduction in hours?

As discussed above, the ARPA specifically excludes voluntary terminations of employment from being treated as a qualifying event that gives rise to AEI status. But what about voluntary reductions in hours?

The statutory language seems to indicate that both voluntary and involuntary reductions in hours can result in the individual being an AEI. Notice 2009-27 is not helpful on this point because the ARRA COBRA subsidy was only available for involuntary employment terminations, and not for reductions in hours – whether involuntary or otherwise.

DOL's FAQs do not make a specific distinction between "voluntary" and "involuntary" reductions in hours, which suggests that any reduction in hours resulting in a loss of eligibility for coverage will give rise to AEI status.

How far back do we have to go to determine who is eligible for the Extended Election Period?

Anyone who would be an AEI for any part of the Applicable Period but for the fact they failed to elect COBRA or dropped COBRA prematurely, is eligible for the Extended Election Period. Because AEIs by definition had a qualifying event of either an involuntary termination of employment or a reduction in hours, they generally would only be eligible for 18 months of COBRA coverage. That means anyone whose qualifying event occurred after October 1, 2019 could potentially be an AEI. Therefore, employers definitely should be going back that far when determining eligibility for the Extended Election Period.

What about someone whose 18 months would have expired before April 1, 2021, but would still be eligible for COBRA due to a disability extension or a second qualifying event? Strictly based on the statutory language, a good argument can be made that you would need to include these individuals as well. However, given the additional administrative complexity associated with identifying the likely small number of people who would fit into these categories, the agencies should issue guidance clarifying employers' responsibilities with respect to them.

DOL's FAQs do not address this issue.

Who gets to claim the tax credit?

For single-employer group health plans that are subject to the COBRA requirements in ERISA, the Internal Revenue Code, or the Public Health Service Act, the employer claims the credit.

For single-employer group health plans that are subject only to State COBRA laws, the employer claims the credit if any part of the plan is self-insured. But if the plan is fully-insured, the insurer gets the credit.

In the case of a multiemployer group health plan, the plan takes the credit.

Do Employers Have to Offer Paid Leave for Employees to Get the COVID Vaccine?

As more and more working-aged individuals become eligible for the COVID vaccine, some are asking what, if any, obligation employers have to offer paid leave for employees to go to their appointments and recover from any side effects.

A recent New York law requires employers to give employees up to four hours of paid leave (at the employee's regular rate of pay) for each COVID vaccine injection. This is in addition to any other legally mandated leave and is effective from March 13, 2021 through December 31, 2022. This leave must be available to all employees, and any discrimination or retaliation against an employee for exercising this leave right is prohibited.

Additionally, California has just enacted a new law providing up to 80 new hours of COVID supplemental paid sick leave to certain employees. The new law, which is effective from March 29, 2021 through September 30, 2021, specifically extends paid sick leave to employees who are unable to work or telework due to a COVID vaccine appointment or vaccine side effects. Employers cannot require employees to use other available leave before using COVID supplemental paid sick leave.

There are no federal laws requiring paid leave for COVID vaccines. However, the American Rescue Plan Act (ARPA) added time an employee takes to obtain the COVID vaccine and/or recover from any side effects to the definition of "qualified sick leave wages" for purposes of the temporary tax credit for paid sick leave. However, that is only relevant to private sector employers with less than 500 employees and certain governmental employers that choose to continue to follow the paid sick leave mandate enacted last year as part of the Families First Coronavirus Relief Act. The mandate itself expired on December 31, 2020, but the tax credits have been extended through September 30, 2021 for otherwise eligible employers that wish to continue taking them.

Additionally, updated guidance issued by the Centers for Disease Control and Prevention (CDC) encourages employers to "offer flexible, non-punitive sick leave options (e.g., paid sick leave) for employees with signs and symptoms after

vaccination." The CDC guidance, which includes useful information about employers' options with respect to COVID vaccinations, is available here.