



A Summary for Employers on the COBRA Subsidy Under The American Rescue Plan of 2021 (ARPA)

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The American Rescue Plan Act of 2021 (ARPA) became law on March 11, 2021. This legislation focuses on helping Americans respond to the current pandemic and offers COBRA premium subsidies to certain workers eligible for COBRA coverage. The COBRA subsidy period runs for six months, from April 1, 2021, to September 30, 2021. To help employers administer the COBRA subsidy, the Department of Labor (DOL) on April 7 issued guidance in the form of frequently asked questions (FAQs) and model COBRA notices and supplemental disclosures. As of this writing, the Internal Revenue Service (IRS) is also developing its guidance in this space.

As to how employers comply with these temporary mandated COBRA subsidy requirements, we address this legislation's highlights and provide you with the following summary.

Who is Eligible for a COBRA Premium Subsidy? Employees who elect COBRA coverage and whose hours were reduced or who were involuntarily terminated (not as a result of "gross misconduct") during the COBRA subsidy period and their dependents are eligible for the subsidy. ARPA refers to these individuals as "assistance eligible individuals" or AEIs. (We refer to AEIs here as "eligible employees.") Someone who has voluntarily terminated their employment is not eligible for the COBRA subsidy. Whether an employment termination on account of disability or for "good reason" (as defined in an employment agreement) qualifies as an "involuntary termination" must await future agency guidance.

Eligible employees also include individuals who previously experienced a reduction in hours or involuntary termination (not as a result of "gross misconduct") prior to April 1, 2021 and whose statutory maximum COBRA coverage period has not yet concluded, but either did not elect COBRA coverage or elected but then discontinued coverage or allowed it to lapse due to nonpayment of premium. These eligible employees must be offered a special COBRA election

period that begins on April 1 and ends 60 days after notice of such election is provided to the individual.

What About Employees Eligible for Other Plan Coverage? Employees who may satisfy the eligibility requirements for a COBRA subsidy premium remain ineligible if they are eligible for other group health coverage (excluding health flexible spending arrangements (FSAs)) through a new employer's plan or spouse's plan, or if they qualify for Medicare. The individuals whose health coverage is through the Marketplace under the Affordable Care Act (ACA) or through Medicaid are also eligible for the COBRA premium subsidy but do not qualify for a premium tax credit, advance payments of the premium tax credit, or the health coverage tax credit for the period they receive COBRA premium subsidy assistance.

Which Group Health Plans are Subject to the COBRA Subsidy? Fully insured and self-insured group health plans that either are subject to COBRA or the continuation coverage requirements under state law ("mini-COBRA" laws). Depending upon the specific state continuation law, there may be differences between eligibility, election rights, and some notices that otherwise apply to federal COBRA. For this reason, we suggest that you consult with us if you are complying with the premium subsidy requirements applicable to a mini-COBRA provision.

When Does the COBRA Subsidy Period Begin? Eligible employees may begin their coverage prospectively from the date of their election or, in the case of a qualifying event on or before April 1, 2021, chose to start coverage as of April 1, even if they received their new election notice and make their election at a later date. However, in either situation, the premium assistance is only available for coverage periods from April 1, 2021, through September 30, 2021.

When Does the COBRA Subsidy Period End? Eligible employees are entitled to receive the COBRA premium subsidy until the earlier of September 30, 2021, or the end of their COBRA continuation period. For this purpose, the COBRA continuation period includes the maximum period for an election under the extended election period rules. The DOL may assess a penalty of \$250 per failure on individuals who become eligible for other group health plan coverage but fail to notify a health plan under which the employee is receiving COBRA premium assistance that they are no longer eligible for it. If the failure results from fraud, the penalty is the greater of \$250 or 100% of the premium assistance provided after the termination of eligibility. Eligible employees whose COBRA coverage period extends beyond September 30, 2021, are responsible for paying the monthly COBRA premium amounts for continued coverage under the health plan.

What is the Effect of COBRA Premium Subsidy on State Coverage Programs? The requirements under any state law continuation program ("mini-COBRA") remain unchanged. The subsidy assistance applies to any employee eligible for and elects continuation coverage under state law for the period from April 1, 2021, through September 30, 2021

When are Eligible Employees Notified of the COBRA Premium Subsidy? Eligible employees who experience a reduction in hours or involuntary termination from April 1, 2021 through September 30, 2021 must receive a general notice of their eligibility for the COBRA subsidy. This notice may be provided separately or as part of the COBRA election notice. Eligible employees who experienced a qualifying event prior to April 1, 2021 must receive notice of their extended

COBRA election period by May 31, 2021. The DOL has confirmed that the extended COVID-19 related COBRA election periods established earlier in the year do not apply to the premium subsidy notice or election period deadlines.

In addition to notice of eligibility and election, the employee is also entitled to receive notice as to when their COBRA premium subsidy will expire, including the expiration date, and if applicable, notice alerting the employee that COBRA coverage after September 30, 2021, may continue without premium assistance. This notice must be provided 15-45 days before the individual's COBRA premium subsidy period expires.

COBRA election notices that are furnished from April 1, 2021, through September 30, 2021, that do not include information regarding the availability of COBRA premium assistance are not complete, and the 60-day election period will not be measured until an ARPA compliant election notice is furnished.

The DOL FAQs, COBRA and mini-COBRA notices on premium subsidy assistance, and summary disclosure of COBRA premium assistance provision are available to download at: <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy>.

How are COBRA Premium Payments Subsidized by an Employer? During the Cobra subsidy period, eligible employees are not required to remit payment of their COBRA premiums. These premiums are funded entirely through tax credits and refunds issued in most cases to the employer. It is unclear who will claim the tax credit where coverage is provided under a multiple employer welfare arrangement (MEWA) or association health plan. Responsible entities may claim a refundable payroll tax credit equal to the aggregate value of unpaid COBRA premiums on their quarterly payroll tax filing. If such COBRA premium costs exceed the payroll tax liability, they can request an additional refund. The IRS has been directed to issue guidance on the credit and refund process, which may address the unanswered questions relating to the “responsible entity” who may claim these credits or refunds depending upon the type of health plan providing the COBRA coverage.

Suppose an eligible employee pays out-of-pocket COBRA premiums that are subject to the premium assistance provisions. In that case, the plan must reimburse that amount within 60 days after the premium payment is made.

Which Agencies Are Expected to Issue More Guidance? Are There Penalties for Employer Noncompliance? ARPA authorizes the DOL and IRS to jointly issue regulations or other guidance as needed to carry out the statute's COBRA-related provisions. The DOL and Department of Health and Human Services (HHS) are authorized to issue regulations or guidance regarding the requirements involving the COBRA premium assistance notices. Employers are expected to fully comply with the requirements of the COBRA premium subsidy provisions of ARPA. In its FAQs, the DOL has noted that employers and plans are subject to Code excise taxes for a failure to comply with these requirements in an amount of up to \$100 per COBRA beneficiary for each day that a plan or employer violates COBRA's requirements.

Employer COBRA Subsidy Compliance Checklist

- Identify the COBRA qualified beneficiaries who are eligible to receive the COBRA premium subsidy (AEIs). This group may include former employees.
- Update existing COBRA notices and, if applicable, include in the notice provisions relating to your state mini-COBRA law.
- Arrange for eligible employees to receive notice of their eligibility and election rights within the required timeframes (by May 31, 2021 for eligible employees with qualifying events prior to April 1, 2021). Prepare internal records to establish when notices were sent and to whom.
- Review and update as necessary your internal administrative procedures (including coordination with the insurance company or third-party administrators) for compliance with ARPA's COBRA premium subsidy provisions.
- Review with your company accountant the tax credit credits and refund requirements and procedures that should be followed to ensure employer recapture of COBRA subsidy premium payments made on behalf of eligible employees.

The firm will continue to monitor these legal developments and provide you with updated information and analysis as additional guidance becomes available. Pending further guidance please contact us if you need more information on the mechanics of how to comply with these provisions or if you are interested in having us review your administrative procedures, including the proper use of the model COBRA notices.

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