



EMPLOYER FAQ

COBRA Subsidies Under the ARPA

Due to a variety of remaining questions surrounding the COBRA subsidies provided under the [American Rescue Plan Act of 2021 \(ARPA\)](#), the Hays Research and Compliance Department has put together the following compilation of frequently asked questions (FAQ). The FAQ summarizes the key information in the recently released [Department of Labor's \(DOL\) FAQ](#) and includes common questions we have seen from clients. While the DOL FAQ focused primarily on providing information to affected employees, many of the common concerns facing employers are highlighted below. There remains a significant number of unanswered questions following the release of the DOL's guidance. Until the DOL and IRS provide additional information and clarification, employers are encouraged to work with their legal counsel with respect to determining how the ARPA's COBRA subsidy provisions apply to their businesses.

UPDATE: The following Employer FAQ now includes updates reflecting the recently issued guidance found within [IRS Notice 2021-31](#).

ELIGIBLE INDIVIDUALS

1. Who is eligible for the subsidy?

The COBRA premium assistance is available for “assistance eligible individuals (AEIs).” An AEI is a COBRA qualified beneficiary who is eligible for COBRA by reason of a qualifying event that is a reduction in hours or an involuntary termination of employment and elects COBRA continuation coverage.

Assistance eligibility includes AEIs who:

1. Experience a new qualifying event after April 1, 2021 and before September 30, 2021;
2. Previously elected COBRA, whose previous COBRA coverage was discontinued and who are currently in the coverage period;
3. Are still within their election period, who have not elected COBRA, and who are currently in the COBRA coverage period; or
4. Are currently enrolled in COBRA coverage.

2. Can an individual become an AEI more than once?

Yes. An individual who meets the requirements of an AEI is treated as an AEI regardless of whether the individual was also treated as an AEI at an earlier date (such as under a prior employer). For example, an employee whose employment was involuntarily terminated by Employer A on September 30, 2020 is an AEI with respect to Employer A. The former employee is hired by Employer B on May 1, 2021 and is enrolled in Employer B's health coverage June 1, 2021. His hours are reduced on July 5, 2021 and he loses eligibility for coverage under Employer B on July 31. The individual is eligible for premium assistance under Employer A's plan from April 1 through May 31, 2021 and under Employer B's plan from August 1 through September 30, 2021. (*New* Q/A-3)



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3. Are spouses and dependents eligible for premium assistance?

Yes. The COBRA subsidy also applies to affected spouses and dependents who are entitled to COBRA coverage due to an employee's reduction in hours or involuntary termination of employment.

Spouses and dependents who are entitled to COBRA due to other qualifying events (e.g., an employee's voluntary termination of employment, divorce, death of the employee, or a child ceasing to be a dependent) **are not** eligible for premium assistance.

4. Are employees who are not U.S. citizens eligible for the subsidy?

The ARPA doesn't provide any language regarding the citizenship of the employee. If the employee would normally be eligible for COBRA and met the requirements of an AEI, then it appears they could be eligible for the subsidy.

INVOLUNTARY TERMINATION & REDUCTION IN HOURS

5. What is the difference between involuntary and voluntary termination?

An involuntary termination of employment 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." (*New Q/A-24*)

6. What about gross misconduct?

If the employee's termination of employment was due to gross misconduct, the employee and any dependents will not qualify for COBRA continuation coverage. Employees who are not offered COBRA coverage due to this exclusion are not eligible for the premium assistance. Whether the employee's actions met a standard of gross misconduct will be based on the employer's own policies and the determination should be made in consultation with the employer's legal counsel. gross misconduct is not defined in legislation or guidance.

7. Is an employee who is terminated for cause (other than gross misconduct) eligible for the premium assistance?

Yes, involuntary termination of employment includes involuntary termination for cause. Agency guidance does not provide a definition of "termination for cause," so employers should consult with legal counsel when making distinctions between termination for cause and gross misconduct. (*New Q/A-27*)



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8. Is an employer's decision not to renew an employee's contract an involuntary termination?

Generally, yes. An employer's decision to not renew an employee's contract is considered an involuntary termination if "the employee was otherwise willing and able to continue the employment relationship and was willing either to execute a contract with terms similar to those of the expiring contract or to continue employment without a contract.

However, if the parties understood at the time they entered into the expiring contract, and at all times when services were being performed, that the contract was for specified services over a set term and would not be renewed, the completion of the contract without it being renewed is not an involuntary termination of employment." (*New* Q/A-34)

9. Does an involuntary termination of employment include retirement?

Generally, no. A retirement is a voluntary termination of employment. (*New* Q/A-26)

However, the retirement is an involuntary termination of employment if the facts and circumstances indicate that:

- Absent retirement, the employer would have terminated the employee,
- The employee was willing and able to continue employment; and
- The employee had knowledge that they would be terminated absent the retirement.

10. Is death of an employee an involuntary termination for purposes of the COBRA subsidy?

No. The death of an employee is not an involuntary termination or reduction in hours that would result in the spouse and dependent children of the employee being potential AElS. (*New* Q/A-33)

11. What if the employer involuntarily reduces the employee's hours and the employee quits?

For purposes of the COBRA subsidy, an employee-initiated termination of employment in response to an involuntary material reduction in hours in which the employee retains coverage is treated as an involuntary termination of employment. It is not clear what would be considered a "material" reduction. (*New* Q/A-32)



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12. What are some examples of a reduction in hours?

The DOL guidance provides that a qualifying event that is a reduction in hours may include:

- i. Reduced hours due to change in a business's hours of operations,
- ii. a change from full-time to part-time status, including loss of coverage at the end of a stability period,
- iii. Taking of a temporary leave of absence, or
- iv. An individual's participation in a lawful labor strike as long as the individual remains an employee at the time hours are reduced.

13. Can employees who voluntarily ask to reduce their hours be AEIs?

Yes. AEIs may include employees who had either a voluntary or involuntary reduction in hours.

14. Is an individual on disability leave eligible for the subsidy?

If the leave of absence is a reduction of hours that results in a loss of coverage, the individual could be an AEI eligible for the subsidy. A COBRA qualifying event due to a reduction in hours need not be involuntary.

If an employer takes action to terminate an employee's employment while the employee is absent from work due to illness or disability, that will constitute an involuntary termination (and the employee will be an AEI), so long as prior to the termination there was a reasonable expectation that the employee would return to work after the illness or disability has subsided. (New Q/A-25)

15. How far back must an employer look for applicable qualifying events?

The DOL guidance uses an October 1, 2019 qualifying event date as **an example** of when individuals may still be within their maximum COBRA continuation coverage periods (usually, 18 months) for purposes of notice distribution. However, IRS guidance confirms that AEIs whose continuation coverage has been extended due to a Social Security Administration disability determination, a second qualifying event, or an extension under state continuation law are entitled to premium subsidies if the extended continuation coverage period overlaps with the period of time covered by the premium subsidy. (New Q/A-17)

- i. Employers need to look for anyone whose federal COBRA coverage would have started on or after December 1, 2018 because if they are entitled to 29 months of COBRA coverage due to a disability extension, the coverage would include the coverage period beginning on or after April 1, 2021, which is a month for which the premium subsidy is available.
- ii. Employees also need to look for anyone whose federal COBRA coverage would have started on or after May 1, 2018 because if they were entitled to 36 months of COBRA coverage due to a second qualifying event, the coverage would include the coverage period beginning on or after April 1, 2021, which is a month for which the premium subsidy is available.
- iii. If the employer's plan is subject to state continuation coverage requirements, the applicable look-back date will depend on the length of continuation coverage available following an involuntary termination of employment or a reduction in hours.



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COBRA SUBSIDY PERIOD

16. When does the subsidy period begin and end?

The COBRA premium assistance applies to the period of coverage beginning April 1, 2021 through September 30, 2021.

17. Can the subsidy period end early?

Yes. The premium assistance will end before September 30, 2021 if:

- i. The AEI becomes eligible for another group health plan or Medicare;
- ii. The AEI reaches the end of their maximum COBRA continuation coverage period.

18. Does the timing of eligibility for other group health plan coverage or Medicare impact the AEI's eligibility for the COBRA subsidy?

Yes. Eligibility for coverage under a group health plan or Medicare will disqualify an AEI from receiving a subsidy only if the AEI has an ability to enroll in the coverage. Mere eligibility, without the current ability to enroll in the other coverage, does not disqualify the AEI from receiving the subsidy. This means an employee in a waiting period who is not able to enroll in the other coverage is still eligible for the subsidy. (*New Q/A-9*)

19. What is "other coverage?" Does it include COBRA coverage?

The DOL guidance clarifies that other group health plan coverage includes a plan sponsored by a new employer or a spouse's employer (not including excepted benefits, a QSEHRA, or a health FSA).

However, while eligibility for coverage under another group health plan generally disqualifies an AEI from receiving the subsidy, the AEI will not be disqualified from the subsidy if the coverage for which the AEI is eligible under the other plan is COBRA coverage. (*New Q/A-11*)

20. Does the rule regarding eligibility for other coverage apply to HIPAA special enrollments?

Yes. If, due to the extension of the HIPAA special enrollment periods during the Outbreak Period, an AEI retains the current right to enroll in another group health plan pursuant to HIPAA special enrollment (such as the group health plan sponsored by a spouse's employer), the AEI is disqualified from receiving the subsidy. (*New Q/A-9, Ex. 3*)

21. Does enrolling in a group health plan following the AEI's initial qualifying event disqualify the AEI from receiving the COBRA subsidy?

Enrolling in another group health plan does not affect eligibility for premium assistance for any part of the subsidy period that coverage under the other group health plan is not in effect. (*New Q/A-10*)



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22. Does eligibility for retiree coverage disqualify a potential AEI from the COBRA subsidy?

Possibly. If the retiree coverage is offered under the same group health plan, the offer of retiree coverage will not impact eligibility for the subsidy. If the potential AEI is offered retiree coverage that is not COBRA continuation coverage and is coverage under a separate group health plan than the one under which COBRA coverage is offered, the individual will not be eligible for the subsidy. (*New Q/A-18*)

23. If a premium-assistance individual is currently enrolled in COBRA and has already paid premiums for part of the assistance period, does the plan administrator have to reimburse the employee for the cost they have already paid?

If a premium-assistance eligible individual paid his or her April COBRA premium, the plan sponsor should return the premium in the form of either a credit against future COBRA premiums or a refund. From the DOL FAQs About COBRA Premium Assistance: “If you were eligible for premium assistance, but paid in full for periods of COBRA continuation coverage beginning on or after April 1, 2021 through September 30, 2021, you should contact the plan administrator or employer sponsoring the plan to discuss a credit against future payments (or a refund in certain circumstances).”

24. Will the end of an individual's COBRA subsidy period be a status change or special enrollment event?

Maybe. The end of the premium assistance period itself is not a status change or HIPAA special enrollment event. However, if an AEI's subsidy ends due to the exhaustion of their maximum COBRA continuation coverage period, they may be eligible for special enrollment. Employers must keep in mind that *eligibility* for other coverage will result in the individual becoming ineligible for the COBRA subsidy.

Individuals that lose their COBRA subsidy on September 30, 2021 will have a special enrollment event on the Marketplace.

SPECIAL ELECTION PERIOD

25. Is there a separate election period under the ARPA?

Yes. The ARPA provides a special election period beginning April 1, 2021. An AEI who does not have a COBRA election in effect as of April 1, 2021 may elect COBRA during this special election period for purposes of receiving the premium assistance.

26. Is the premium assistance “automatic,” or must the qualified beneficiary affirmatively elect COBRA?

Both current COBRA participants and AEIs not already enrolled must make an active election and affirm in writing they are not eligible for another group health plan or Medicare to receive subsidized coverage.

27. How much time does the individual have to elect the COBRA subsidy?

Individuals have 60 days after receiving the relevant notice to elect COBRA continuation coverage with premium assistance. This special election period is not extended as a result of the “Outbreak Period.”



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28. How does the separate election period interact with the previously extended COBRA election period from 2020?

If the AEI received a COBRA election notice for the original qualifying event prior to April 1, 2021 and the original election period remains open (e.g., due to the extension during the Outbreak Period), the original election period will expire no later than 60 days following receipt of the notice of the ARPA extended election period. (*New* Q/A-56)

29. Must an individual retroactively elect and pay continuation premiums back to their initial qualifying event, if prior to April 1, 2021, to receive the premium assistance?

No. A premium-assistance eligible qualified beneficiary may prospectively elect COBRA coverage beginning on or after April 1, 2021. (*New* Q/A-44)

30. Can an individual elect COBRA retroactively prior to April 1, 2021?

Yes, but they will not receive the subsidy for any period prior to April 1, 2021. A qualified beneficiary who experienced a qualifying event prior to April 1, 2021 and is still within their extended COBRA election period (under the 2020 point Notice and EBSA Notice 2021-01) may still have a right to elect COBRA retroactively to the date of their qualifying event. The qualified beneficiary would be responsible for paying the applicable premium for months prior to April 1, 2021. The right to elect COBRA with premium assistance is a separate right from the right to elect COBRA under the extended election period. Nothing in the ARPA cuts off an individual's preexisting right to elect COBRA.

See also FAQ #28 regarding the deadline for electing the retroactive COBRA coverage.

31. If an AEI elects retroactive COBRA coverage by exercising the initial COBRA election rights, will failure to pay the retroactive COBRA premium disqualify the AEI from the subsidy?

No. If an AEI elects retroactive COBRA coverage by exercising an initial COBRA election right (e.g., during the extended original election period), the termination of the retroactive COBRA coverage for failure to pay premiums does not impact the right to receive COBRA coverage and subsidies during the period of time covered by the COBRA subsidies. (*New* Q/A-58)

32. Can an enrolled individual switch to a different coverage option under the same employer?

A group health plan may choose to allow qualified beneficiaries to enroll in coverage that is different from the coverage they had at the time of the COBRA qualifying event. The change in coverage options under the same employer will not cause the individual to lose eligibility for the COBRA subsidy, provided that (cont on pg. 8)



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32. Can an enrolled individual switch to a different coverage option under the same employer? (cont)

A group health plan may choose to allow qualified beneficiaries to enroll in coverage that is different from the coverage they had at the time of the COBRA qualifying event. The change in coverage options under the same employer will not cause the individual to lose eligibility for the COBRA subsidy, provided that:

- i. The COBRA premium charged for the different coverage is the same or lower than the cost of coverage the qualified beneficiary had at the time of the qualifying event;
- ii. The different coverage is also offered to similarly situated active employees; and
- iii. The different coverage is not limited to only excepted benefits, a QSEHRA, or a health FSA.

33. How does a COBRA coverage election during the special election period under the ARPA apply in the case of an HRA?

If an AEI elects COBRA coverage under an HRA during the special election period provided by ARPA, the AEI will “have access to the same level of reimbursements during COBRA continuation coverage as was available immediately before the qualifying event.” (*New Q/A-54*)

COVERED PLANS & EMPLOYERS

34. What employers are subject to the COBRA premium assistance requirements?

All employers subject to Federal COBRA as contained in ERISA, the Internal Revenue Code, and the PHSA. This includes private sector employers, public sector employers (other than the federal government), and employee organizations (unions). It does not include employers that qualify for COBRA’s small employer exemption.

Employers that sponsor plans subject to State continuation coverage requirements that are comparable to Federal COBRA (e.g., state mini-COBRA statutes).

35. Under what plans is the COBRA premium assistance available?

For employers subject to Federal COBRA, all group health plans (as defined under COBRA) except health flexible spending accounts provided through a Section 125 cafeteria plan.

- i. This includes stand-alone dental and vision plans.
- i. This also includes HRAs, most EAPs, on-site/near-site medical clinics, and stand-alone telehealth and ehealth programs. It is possible future agency guidance may change this result.

For employers subject to state continuation coverage laws, any plan subject to the state law (which can vary from state to state).

The ARPA does not change any state continuation coverage provisions. For example, the ARPA does not provide a special election period for individuals covered by plans that are only subject to state continuation coverage and not federal COBRA continuation.



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36. Are voluntary plans subject to the COBRA premium assistance requirements?

ARPA does not make an exception for voluntary (employee paid) group health plans. We believe voluntary dental and vision plans are eligible for the subsidy.

However, if the voluntary plan is not a group health plan, such as an accident or critical illness indemnity benefit, there is no COBRA continuation coverage available and therefore no premium relief.

PREMIUM PAYMENTS & TAX CREDITS

37. Does the tax credit available to employers cover the 2% COBRA administrative fee?

Yes, an employer may take into account the 2% administration fee allowed under COBRA.

38. Who is responsible for paying the COBRA premium on the AEI's behalf and claiming the tax credit?

- The employer-plan sponsor for self-insured and fully-insured plans subject to COBRA as contained in the PHSAs, ERISA, or the Internal Revenue Code.
- The "plan" in the case of multiemployer plans.
- The insurer for insured plans not included above.

39. If an employer is a small employer (not subject to the ACA employer shared responsibility requirement), are they still required to provide the subsidy?

Yes, as long as the employer is subject to COBRA or comparable state continuation law.

40. How does an employer's prior agreement to subsidize COBRA affect the COBRA subsidy under the ARPA?

If the employer is subsidizing an AEI's COBRA premiums (e.g., pursuant to a severance agreement), the ARPA tax credit can be claimed only for the unsubsidized portion of the COBRA premium that would otherwise be paid by the AEI. However, the employer might be able to increase the COBRA premium and then claim the tax credit for the full premium. (*New* Q/As-64, 65, and 66)



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41. How is the COBRA premium allocated for purposes of the tax credit when the COBRA coverage for one or more AEIs also covers one or more individuals who are not AEIs?

In the event non-AEIs are receiving COBRA coverage along with AEIs (e.g., because a COBRA participant has enrolled additional dependents during an open enrollment period or continuation coverage is provided to individuals who do not qualify as COBRA qualified beneficiaries), the subsidy and tax credit are available only for the AEIs. To the extent the total continuation premium exceeds the premium that would apply if only AEIs were enrolled in the continuation coverage, the excess is not covered by the ARPA subsidy. (*New* Q/A-68)

42. Does the premium assistance apply to the increased premium if the plan allows AEIs to change coverage from the benefit package that covered the individual before their qualifying event to a different benefit package with higher COBRA premiums?

The subsidy is available for the full COBRA premium if an AEI changed COBRA coverage during an open enrollment period, even if he or she moved to a more expensive coverage option. (*New* Q/A-69)

NOTICES

43. Are there any new notice requirements under the ARPA?

Yes. The ARPA includes three separate notices regarding premium assistance.

- i. General Notice – Provided to all qualified beneficiaries who have a qualifying event that is a reduction in hours or an involuntary termination of employment from April 1, 2021 through September 30, 2021.
 1. May be provided separately or with the COBRA election notice following a COBRA qualifying event.
- ii. Notice of Extended Election Period – Provided to any AEI (or individual who would be an AEI if a COBRA election were in effect) who had a qualifying event before April 1, 2021. Does not include individuals whose maximum COBRA period has expired.
 1. Must be provided within 60 days following April 1, 2021 (i.e., by May 31, 2021)
- iii. Notice of Expiration of Premium Assistance – Provided to individuals 15-45 days prior to their premium assistance expiring. Not required for AEIs whose premium assistance is ending due to eligibility for other coverage or exhaustion of maximum COBRA period.



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44. What information must the notices include?

Per the DOL guidance, the notices must include the following information:

- i. The forms necessary for establishing eligibility for the premium assistance;
- ii. Contact information for the plan administrator or other person maintaining relevant information in connection with the premium assistance;
- iii. A description of the additional election period (if applicable to the individual);
- iv. A description of the requirement that the Assistance Eligible Individual notify the plan when he/she becomes eligible for coverage under another group health plan (not including excepted benefits, a QSEHRA, or a health FSA), or eligible for Medicare and the penalty for failing to do so;
- v. A description of the right to receive the premium assistance and the conditions for entitlement; and
- vi. If offered by the employer, a description of the option to enroll in a different coverage option available under the plan

45. What if an employee's address changed—where should the notices be sent?

The ARPA does not specifically address this issue. However, DOL COBRA notice provisions provide that sending notices to the employee's last known address via first-class mail is sufficient.

46. Are model notices available?

Yes. DOL has developed model notices that are available [here](#).

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