



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.

ELIGIBLE INDIVIDUALS

1. Who is eligible for the subsidy?

- a. 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.
- b. 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 employees who voluntarily asked to reduce their hours be AEIs?

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

3. Are spouses and dependents eligible for premium assistance?

- a. 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.
- b. 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. What is the difference between involuntary and voluntary termination?

- a. The current agency guidance does not clarify the distinction between involuntary vs. voluntary termination, nor does it provide any examples.



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5. 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.

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

a. No specific definition of "involuntary" that would create an exception applies. We believe that the employee would be assistance-eligible based on the information we have received to date.

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

a. 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.

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

a. 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 does not need to be involuntary.

9. Is a temporary employee whose contract with the employer expires eligible for the subsidy due to involuntary termination?

a. This will likely depend on the specific facts and circumstances. Prior IRS guidance under IRS Notice 2009-27 (which addressed COBRA premium assistance under the 2009 American Recovery and Reinvestment Rights Act, or ARRA) states that "an involuntary termination may include the employer's failure to renew a contract at the time the contract expires, if the employee was willing and able to execute a new contract providing terms and conditions similar to those in the expiring contract and to continue providing the services." It is not clear whether the IRS is taking a similar approach under the ARPA in 2021.



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

a. The ARPA does not 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.

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

a. The DOL guidance uses an October 1, 2019 qualifying event date as an example of individuals who may still be within their maximum COBRA continuation coverage period (which is usually 18 months) for purposes of notice distribution. However, due to extended coverage periods under state continuation coverage or COBRA total disability extensions, it is possible a qualified beneficiary may have had a qualifying event prior to October 1, 2019 and remain within their continuation coverage period under state or federal law.

- i. Employers need to look for anyone whose COBRA coverage would have started on or after December 1, 2018 because if they are entitled to 29 months of COBRA coverage it would include the coverage period beginning on or after April 1, 2021, which is a month for which the premium subsidy is available.
- ii. Note: For employees whose COBRA coverage would have started between December 1, 2018 and October 30, 2019 due to an involuntary termination or a reduction in hours, they would have COBRA coverage remaining as of April 1, 2021 only if they received the 11-month disability extension.
- iii. If an employer has no one who received a disability extension, they should look for individuals whose COBRA coverage started on or after November 1, 2019. Eighteen months of COBRA coverage starting on November 1, 2019 would end on April 30, 2021.

12. Will a second qualifying event impact how far back employers should look for qualifying events?

a. Possibly. If a qualified beneficiary who elects COBRA experiences a second qualifying event within their initial continuation coverage period, their COBRA coverage may be extended. For example, if an employee who experienced an involuntary termination of employment elected COBRA for the employee and family in January 2019, the COBRA coverage would expire at the end of June 2020. However, if the former employee and spouse divorce prior to June 2020, the ex-spouse's COBRA coverage is extended an additional 18 months (i.e., until the end of 2021). Under the plain language of the law, the ex-spouse is an AEI and would be eligible for the premium assistance. Additional guidance on this topic would be useful.

13. When does the subsidy period begin and end?

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



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14. Can the subsidy period end early?

- a. Yes. The premium assistance will end before September 30, 2021 if:
- The AEI becomes eligible for another group health plan or Medicare; or
 - The AEI reaches the end of their maximum COBRA continuation coverage period.

15. What is “other coverage?”

- a. 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). The AEI need not enroll in the other coverage –merely being eligible is enough to cause a loss of premium assistance.
- b. There is no guidance yet regarding the timing of the eligibility for other coverage and how that timing impacts the availability of the premium assistance. For example, if a former employee who is an AEI was eligible for and could have enrolled in another employer’s plan effective February 1, 2021 but did not enroll in the other employer’s plan and is not currently able to do so, it is not clear whether the former employee will be able to receive the premium subsidy.

16. 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?

- a. 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 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).”

- b. 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.

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

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



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SPECIAL ELECTION PERIOD

- 18. Is there a separate election period under the ARPA?**
- a. 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.
- 19. Is the premium assistance “automatic,” or must the qualified beneficiary affirmatively elect COBRA?**
- a. 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
- 20. How much time does the individual have to elect the COBRA subsidy?**
- a. 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.” (See FAQ 21.)
- 21. How does the separate election period interact with the previously extended COBRA election period from 2020?**
- a. The time periods contained in the ARPA (e.g., for making an election during the second election period) are not extended during the Outbreak Period established by the DOL and IRS Joint Notice and additional Notice 2021-01.
- 22. 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?**
- a. No. A premium-assistance eligible qualified beneficiary may prospectively elect COBRA coverage beginning April 1, 2021.
- 23. Can an individual elect COBRA retroactively prior to April 1, 2021?**
- a. 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 Joint 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 removes an individual’s preexisting right to elect COBRA.



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

a. 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 for the 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.

COVERED PLANS & EMPLOYERS

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

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

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

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

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

b. 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 provisions of the State continuation coverage programs. For example, the ARPA does not provide a special election period of electing state continuation coverage.



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

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

b. 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

28. 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.

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

a. The employer-plan sponsor for self-insured and fully-insured plans subject to COBRA as contained in the PHSA, ERISA, or the Internal Revenue Code.

b. The "plan" in the case of multiemployer plans.

c. The insurer for insured plans not included above.

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

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

NOTICES

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

a. 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.



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31. Are there any new notice requirements under the ARPA? (cont.)

- 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.
 - a. Must be provided within 60 days following April 1, 2021 (i.e., by May 31, 2021).
- ii. 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.

32. 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.

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

a. 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.

34. Are model notices available?

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

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