

## DOL's ARPA COBRA Subsidy Notices and FAQs: Stay Tuned for More

Alert

04.15.2021

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On March 11, 2021, President Biden signed the American Rescue Plan Act of 2021 (ARPA) into law. Under ARPA, certain employees and their dependents who lost group health coverage during the COVID-19 pandemic due to the employee's involuntary termination (other than for gross misconduct) or reduction of hours are allowed to temporarily receive fully-subsidized COBRA coverage between April 1, 2021 and September 30, 2021.

The COBRA subsidy is designed for individuals (i) who are currently enrolled in COBRA, (ii) who enrolled in COBRA previously and later dropped COBRA continuation coverage, or (iii) who previously declined COBRA continuation coverage. ARPA offers the last two groups a second chance to obtain COBRA coverage, even if their deadline for electing coverage or paying premiums has passed. Coverage must be provided to subsidy-eligible individuals (Assistance Eligible Individuals or AEIs) without the requirement to pay the COBRA premium, with the employer, insurer, or multiemployer plan providing the subsidy offsetting the cost by claiming a new federal tax credit.

AEIs must be notified of their right to the subsidy and when the subsidy is about to end, and ARPA required the Department of Labor (DOL) to draft model notices for these purposes. On April 7, 2021, the DOL issued guidance related to COBRA subsidies, consisting of frequently asked questions (FAQs), model notices and election forms.

The notices and FAQs provides some clues as to the work ahead for plan sponsors, administrators, insurers, and other service providers, but additional guidance is needed on such critical issues as who will qualify as an AEI. For example, more guidance is needed on the circumstances in which an employee will be considered to have had an involuntary termination and the process for making that determination. Absent

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clear guidance, employers, multiemployer plans and insurers could find themselves responsible for the subsidy without being eligible for a tax credit when they make a good faith determination that an individual is an AEI, or, alternatively, subject to excise taxes (or more) for not providing notice when they make a good faith determination that an individual is not an AEI. The IRS has promised guidance, which presumably will address this issue, along with others.

### FAQs

While the DOL's FAQs are largely geared toward individuals, focusing on how to obtain the COBRA subsidy and how the COBRA subsidy interacts with other types of health coverage that may be available, they do confirm a few points that will impact COBRA administration. The FAQs clarify that:

- An AEI may make the election for subsidized COBRA if the election is made within 60 days of receiving the required Notice. The coverage may begin April 1, 2021 or later (or prospectively from the date of a qualifying event if the qualifying event occurred after April 1, 2021), or upon an earlier qualifying event if the individual is eligible to make the election (with the subsidy beginning no earlier than April 1, 2021).
- While an individual is not an AEI if eligible for other group health coverage (generally a new employer's plan, a spouse's plan or Medicare), individuals currently receiving coverage through Medicaid or the marketplace may be AEIs. The FAQs also confirm that the COBRA subsidy also covers certain excepted benefits (dental and vision, but not health FSAs).
- Individuals who lose coverage due to a reduction in hours (and remain employed), whether the reduction is voluntary or involuntary, can be AEIs.
- Dependents of an employee terminated for gross misconduct cannot be AEIs.
- The extension of COBRA deadlines under EBSA Disaster Relief Notice 2021-01 does not apply to the notice and election periods related to the ARPA COBRA subsidy. (Failure to send required COBRA notices can result in an excise tax of up to \$100 per qualified beneficiary, not exceeding \$200 per family, per day.)
- COBRA subsidies apply to any continuation coverage required under state mini-COBRA laws; however, ARPA does not otherwise change the terms under which the coverage is available under state law.

### Model Notices

The DOL also issued the model notices that Congress required as a part of ARPA. Employers are not required to use the model notices; however, the DOL considers the appropriate use of the model notice to be good faith compliance with the notice requirements. The appropriate use of the model notice means that all of the specific information pertinent to the individual is included in the model notice (e.g. the correct dates, qualified beneficiaries, and group plan information). In addition to the model notices, the DOL also issued a Summary of COBRA Premium Assistance Provisions under ARPA, which contains

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information on the subsidy and forms for individuals to attest to meeting the conditions for eligibility for the COBRA subsidy and request treatment as AEI (i.e., receive the subsidy); this document should be sent with the General, Alternative, and Extended Election Notices to satisfy ARPA's notice requirements. Below is a summary of the pertinent information related to the model notices.

- **General Notice and Alternative Notice:** The general notice is used for any qualified beneficiary who loses coverage due to a reduction in hours or an involuntary termination between April 1, 2021 and September 30, 2021. An alternative notice is used for plans subject to state continuation coverage.
- **Extended Election Notice:** The extended election notice should be sent to all assistance eligible individuals who are still in the 18-month window. Employers must send the extended election notice before May 31, 2021 if the individual is currently enrolled in COBRA, enrolled in COBRA previously and later dropped COBRA continuation coverage, or previously declined COBRA continuation coverage.

**Notice of Expiration of Period of Premium Assistance:** The notice of expiration informs AEIs that the COBRA subsidy will soon be expiring and that the individual may be eligible for Medicaid, coverage through the marketplace, or unsubsidized COBRA continuation coverage. The notice of expiration must be sent 15 to 45 days before the COBRA subsidy expires.

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