

PUBLICATION

UPDATE: Administrative Guidance Issued Regarding Implementation of COBRA Subsidies

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The American Rescue Plan Act of 2021 (ARPA) includes a subsidy structure that is designed to fully subsidize COBRA for employees and family members losing group health plan coverage due to an involuntary termination of employment or reduction in hours. The 100 percent subsidy (Subsidy) begins April 1, 2021 and runs through September 30, 2021. The premiums are to be paid by employers, who can recover these payments via a refundable tax credit on their quarterly payroll taxes. On April 8, 2021, the Department of Labor (DOL), issued guidance and model notices that clarified some areas of uncertainty. This alert provides updates to our March 12 alert.

COBRA Basics and Background

Federal law, under the Consolidated Omnibus Budget Reconciliation Act, or COBRA, allows employees to continue their employer-provided health insurance for up to 18 months after they lose their jobs due to layoffs, whether because those individuals were fired, because they quit, or because their hours are reduced below the employer's minimum to receive benefits. To retain employer-based coverage as permitted under COBRA, those individuals must pay up to the full premium negotiated by their former employer plus a two percent administration charge. Although the COBRA premium may be less than individuals could secure on the private market, these premiums are often still a significant expense. The economic impacts of the COVID-19 pandemic have placed health care coverage at risk for many laid-off or furloughed employees and their families, and ARPA's provisions regarding COBRA are intended to address this issue.

Effect of ARPA on Impacted Employees

Who Is Assistance Eligible?

An "assistance eligible individual," or AEI, is a COBRA qualified beneficiary who lost health coverage due to involuntary termination of employment or reduction in hours and is not otherwise eligible for or covered under other group health coverage. The COVID-related tolling of COBRA deadlines that began March 1, 2020, makes determining whether a person is an AEI more complicated. The DOL guidance provides that an AEI is an individual who satisfies all of the following conditions:

- Loses coverage on account of **involuntary** termination of employment by the employer or reduction in hours occurring on or after October 1, 2019;
 - An employee who voluntarily terminated employment will not be an AEI. A reduction in hours would include events such as reduced hours due to change in a business's hours of operations, a change from full-time to part-time status, taking of a temporary leave of absence, or participation in a lawful labor strike, as long as the individual remains an employee at the time that hours are reduced.
- Elects COBRA continuation coverage;

- The Subsidy is available to any AEI currently enrolled in COBRA coverage plus those who elect COBRA coverage in the "special election period" described below.
- Is NOT eligible for Medicare; AND
- Is NOT eligible for "Other Coverage" under another group health plan, such as a plan sponsored by a new employer or a spouse's employer.
 - "Other Coverage" does not include excepted benefits, a qualified small employer health reimbursement arrangement (QSEHRA), or a health flexible spending arrangement (FSA). However, Medicaid coverage or individual health insurance coverage, such as through an Exchange Marketplace, will not prevent status as an AEI.

What is the "Special Election Period"?

Group health plans must offer a special election to AEIs whose qualifying event occurred prior to April 1, 2021, and who either did not elect COBRA when it was first offered or who elected COBRA but is no longer enrolled. Notice of the special election period must be provided by May 31, 2021. AEIs have 60 days after the notice is provided to elect COBRA. Note that this special election period does not extend the period of COBRA continuation coverage beyond the original maximum period (generally 18 months).

What Benefits Are Available?

AEIs receive up to six months of free COBRA premiums or free state mini-COBRA premiums if the plan is exempt from Federal COBRA. The coverage period is from April 1, 2021 to September 30, 2021, but the benefits end earlier if the individual's maximum period of COBRA coverage (generally 18 months) ends earlier than September 30, 2021 or the individual becomes eligible for coverage under another group health plan or Medicare.

For AEIs enrolling in COBRA during the Special Election Period, the AEIs can begin their coverage prospectively from the date of their election or retroactively to April 1, 2021, even if the individual receives an election notice and makes such election at a later date.

For AEIs already enrolled in COBRA coverage as of April 1, 2021, the AEI will receive a premium holiday for the period of April 1, 2021 through September 30, 2021. If the AEI has already paid the COBRA premium(s) for any of the covered months, the amount can be credited to future months of COBRA coverage or refunded to the AEI.

Individuals are responsible for notifying employers about a change in their eligibility for coverage and are subject to a penalty of \$250, and in the case of intentional failure to notify, the greater of \$250 or 110 percent of premium assistance provided after loss of eligibility, for failure to do so. Also, subject to the employer's discretion, eligible individuals may elect to enroll in a different group health plan covered by their employer within 90 days following COBRA notice receipt if the alternative coverage has a premium that is not greater than the current premium, among other restrictions.

Effect of ARPA on Employers

Is ARPA Permissive or Mandatory?

The language of ARPA is mandatory regarding the payment of premiums on behalf of AEIs by employers but permissive as to allowing employees the option to change coverage.

What Are the Notice Requirements to Assistance Eligible Employees?

AEIs must receive a notice describing the COBRA Premium Subsidy and Special Election Period by May 31, 2021. Model notices are available on the DOL's website via this [link](#).

How is Reimbursement for Premiums Paid Obtained?

Employers will obtain reimbursement for the Subsidy under ARPA through a payroll tax credit against the particular employer's quarterly taxes. If the credit exceeds the amount of payroll taxes due, the credit will be refundable when employers submit Form 941. The credit could also be advanced under rules that will be set by the Treasury Department. We are still awaiting guidance from Treasury on tax credits. It is worth noting that ARPA was a reconciliation bill that only allocates \$10 million in implementation funding for this subsidy, so availability of those funds, particularly regarding refunds and advances, should be closely monitored.

Final Observations

The specific procedures to employers to obtain payroll tax credits for premiums has not yet been addressed in the DOL guidance. Additional guidance is expected from Treasury that should provide employers more details on how to assure reimbursement for the premium Subsidy payments. In the meantime, employers should work with their COBRA administrators and third party administrators to begin providing the DOL notices to those employees (and their covered dependents) who lost health coverage on account of an involuntary termination or reduction in hours that occurred on or after October 1, 2019. For more information about this or any other benefits issue, contact the authors or your Baker Donelson attorney.

On April 13th, Baker Donelson hosted a complimentary webinar on this topic. [Click here](#) to watch.