

## COBRA Subsidies

We have been getting many questions regarding COBRA subsidies under the American Rescue Plan Act of 2021 (“ARPA”), which we answer later in this article. We are awaiting much needed guidance from the government, so some answers are less clear than others. First, let’s go over the basics:

1. ARPA provides for 100% federal subsidies for COBRA coverage.
  - For COBRA coverage for the period April 1, 2021 to September 30, 2021 (the “subsidy period”).
  - Assistance Eligible Individuals (“AEIs”) do not pay premiums for coverage during the subsidy period.
  - Employers/Plan Administrators/Insurers will be reimbursed for COBRA premiums during the subsidy period through a tax credit.
2. An AEI, is a COBRA qualified beneficiary who lost health coverage due to involuntary termination of employment or reduction in hours and:
  - The qualifying event is during the subsidy period;
  - is currently enrolled in COBRA coverage;
  - are in an election period; or
  - whose original COBRA period of coverage would not yet have expired had the individual previously elected COBRA
3. An individual is not eligible for the premium assistance if they are:
  - eligible for other group health coverage, such as through a new employer’s plan or a spouse’s plan (not including excepted benefits, a qualified small employer health reimbursement arrangement (QSEHRA), or a health flexible spending arrangement (FSA)), or
  - eligible for Medicare.
  - termination of employment was for gross misconduct
4. ARPA also provides for a special enrollment opportunity for AEIs:
  - AEIs must be given another opportunity (a “special enrollment period”) to elect COBRA beginning April 1, 2021 through 60 days following the date they receive notice of the special enrollment period.
  - AEIs may also be given the option to enroll in a less expensive option.
5. Notices must be provided to AEIs:
  - Election notices for qualifying events that occur during the subsidy period must include information regarding the availability of the subsidy and the ability to elect a less expensive option, if applicable.
  - Notices of the new subsidy and ability to enroll in a less expensive option, if applicable, must be provided to AEIs whose qualifying event occurred prior to April 1, 2021 (and who are still within their COBRA maximum coverage period), no later than May 30, 2021.
  - Model notices have been issued by DOL

And now to the excellent questions we are seeing from plan sponsors, service providers, and other advisors:

Q&A-1 Does this obligation include dental and vision, or just medical insurance?

*The COBRA premium assistance provisions apply to all group health plans, just like regular COBRA coverage, other than health FSAs. Make sure you know which programs are group health plans. Look at EAPs, wellness, etc. This may differ for state mini-COBRA, for example, in California, Cal-COBRA only applies to medical benefits.*

*See: [Don't Get Bit by the COBRA](#)*

Q&A-2 If a former employee declines coverage at a new place of employment, does eligibility end?

*If the former employee is eligible for other group health coverage, whether through a new employer's plan or a spouse's plan (not including excepted benefits, a qualified small employer health reimbursement arrangement or a health flexible spending arrangement) or Medicare, they are not eligible for the new subsidy. Also note that ERISA claims procedures will apply to denials of this benefit and the DOL includes the phone number to contact DOL for assistance in its model notices.*

Q&A-3 Does the employee have an obligation to provide notice of eligibility for new coverage? How will this be enforced?

*Yes. Individuals who fail to comply with this notice obligation may be penalized at \$250 for each failure, except if the failure is intentional, the penalty is the greater of \$250 or 110% of the amount of the subsidy. Penalties will not be assessed if the failure to notify was due to reasonable cause and not willful neglect.*

Q&A-4 When else is a former employee not eligible?

*Remember, the subsidy is for involuntary terminations. So, if the qualifying event is death, divorce, eligibility for Medicare, voluntary termination, or terminated for gross misconduct, and that is a very high standard, then the subsidy and special enrollment opportunity are not available. Voluntary reduction in hours appears to create eligibility though it is not clear. Also, be aware of situations where a "voluntary termination" is actually an involuntary termination, i.e., "constructive discharge."*

Q&A-5 Are there any parallel requirements on the state level?

*The COBRA subsidies do apply to group health insurance coverage under "comparable state continuation coverage" (state "mini-COBRA" laws), such as Cal-COBRA (all but six states have a mini-COBRA law). There are some differences however:*

- Assistance Eligible Individuals ("AEIs") must meet state law mini-COBRA eligibility which might be narrower than federal COBRA.*
- No special enrollment for mini-COBRA, so must already be eligible to enroll or already enrolled.*
- Notices will generally be responsibility of the insurer.*

Q&A-6 Is the premium assistance payment made to the employee? No. The employee will not pay for the premium in the first place, it is paid by the employer (or insurer in the case of state mandated coverage) and the employer (or insurer) will receive a tax credit.

Q&A-7 May I charge an administration fee to the employee?

*No, AEIs are charged nothing during the subsidy period, although the subsidy will include reimbursement of any administrative fee to the employer during the subsidy period.*

Q&A-8 How will the company receive credit for the premium assistance?

*Premiums will be reimbursed through a payroll tax credit on quarterly Medicare taxes.*

Q&A-9 How do I handle eligible employees who have already made payments?

*If the payments were for coverage during the subsidy period, those payments should be refunded. Usually a COBRA premium overpayment can be corrected through a refund, or credited against future coverage, but AEIs are not to be charged for premiums during the subsidy period.*

Q&A-10 Does the employer have an affirmative obligation to look back and determine whether there are eligible former employees? Does this mean we have to go and find former employees? What if we don't know where to find them now?

*COBRA requires that measures be taken that are "reasonably calculated to ensure actual receipt of the notice." So, reasonable efforts should be used and this is based on facts and circumstances.*

*A recent case held that failure of employer to provide updated address it received from the employee to the COBRA administrator did not meet that standard (Newton v Prator). Another court held that mailing to the last known address provided by the employee (even though employer might know of another address was not) (Friedman v. Dynamic Healthcare).*

*Although the DOL has not extended the same duties to find missing participants that apply to retirement plans to COBRA, the guidance issued in that context is instructive:*

- *Periodically contact participants and beneficiaries to confirm or update their contact information.*
- *Include contact information change requests in plan communications.*
- *Flag undeliverable mail or email and uncashed checks for follow-up.*
- *Maintain an online platform that participants can use to update contact information.*
- *Keep communications clear and use plain language and offer non-English language assistance where appropriate.*
- *Encourage contact through websites and toll free numbers.*

- *If the plan or sponsor or COBRA Administrator's name changed, clearly mark envelopes and correspondence with the original plan's name for participants who separated before the name was changed.*

See: [The DOL Offers Guidance on How to Keep Track of Your Plan Participants \(Part 1\)](#)

See: [Webinar](#)

Q&A-11 What if only the former employee elected coverage, but the whole family was eligible?

*As qualified beneficiaries, the family will have a special enrollment period and may elect coverage.*

Q&A-12 Does premium assistance apply to only the employee, or are dependents covered too?

*It applies to all qualified beneficiaries who are AEIs.*

Q&A-13 Should any additional language regarding COBRA and ARPA of 2021 be put in Employment Agreements and/or Separation Agreements?

*This is not likely needed. Generally, would not include in an employment agreement. If a separation agreement during the subsidy period includes payment for COBRA, you may want to specify in the agreement whether the separation COBRA subsidy will be in addition to the ARPA subsidy or if it will include the ARPA subsidy, but it should not be part of the consideration. For prior separation agreements, consult with counsel.*

Q&A-14 I have a COBRA Administrator, so do I have to do anything, or can I leave it up to them?

*Any fiduciary with authority to delegate this type of function also has some duty to monitor the person contracted to provide the services. Also, check the services agreement, it may be outside the services they provide, or they may charge you additional fees for the additional service. At the very least, best practice to mitigate risk is to confirm (and document that you have confirmed) that they are carrying out these responsibilities and will do so in a timely and competent manner.*

See: [10 Questions to Ask Before Signing That New Service Agreement](#)

Q&A-15 Does the COBRA subsidy extend the maximum COBRA period?

*No. The maximum COBRA period (generally 18 months) is not extended, all this law does is subsidize premiums for this portion of the coverage. So, if the maximum coverage period ends in June 30<sup>th</sup>, then it ends June 30<sup>th</sup>, with subsidized premiums for April, May & June.*

See: [U.S. Department of Labor](#)

Q&A-16 Can we limit that enrollment only to a less expensive option? Or are they able to change to ANY available plan option?

*No, the coverage offered cannot be limited to a less expensive option. The participant must be able to keep the coverage they had. However, less expensive options may be offered in the plan sponsor's discretion.*

Q&A-17 Can the notices be emailed to AEIs?

*Yes. They can be provided by email or other electronic method under the processes approved by the DOL for electronic disclosures. However the procedures for qualified beneficiaries who are not employees or who are employees, but have no access to a computer at work, may make this impractical.*

Q&A-18 If the Employer provided a subsidy at the time of termination, can that be counted? i.e. we paid for 3 months of COBRA after termination. Is our ARPA obligation 3 months remaining?

*It depends on when the employer subsidy began. If the employer subsidy was for the first three months of the subsidy period, then the remaining three months would be subsidized under the ARPA subsidy. Whether the employer would get a tax credit for the three months of voluntary employer subsidy is not clear. We expect guidance from the Internal Revenue Service on tax issues soon.*

Q&A-19 Do you have guidance on what is considered an involuntary termination?

*This is a facts and circumstances matter that should be discussed with counsel.*