

New COBRA Subsidy Requires Quick Action by Plan Sponsors

The American Rescue Plan Act of 2021 (ARPA), signed by President Biden on March 11, 2021, includes a number of provisions designed to assist workers impacted by the COVID-19 pandemic. Among them is a new COBRA premium subsidy that pays for 100% of the applicable COBRA premium for eligible individuals with respect to coverage periods beginning April 1, 2021 and ending Sept. 30, 2021. In order to comply with the law, employers will face a number of challenges and additional administrative responsibilities, including the identification of premium subsidy eligible individuals, contacting previously terminated employees not currently enrolled in COBRA but who are eligible for the premium subsidy, revising or supplementing existing COBRA notices, and satisfying new notice requirements.

Covered Plans and Eligible Individuals

What plans are required to comply with the premium subsidy requirements? The premium subsidy generally applies with respect to group health plans that are subject to the Employee Retirement Income Security Act (ERISA), Internal Revenue Code (Code) or the Public Health Service Act (PHSA), but does not apply to coverage under a health flexible spending arrangement provided pursuant to a cafeteria plan. In addition, plans not subject to ERISA, the Code or the PHSA, but subject to state law that provides comparable continuation coverage (e.g., New York's mini-COBRA law) are also covered by ARPA.

Who is entitled to the premium subsidy? Individuals entitled to the premium subsidy are referred to as assistance eligible individuals (AEIs). In order to be an AEI, an individual must have been eligible for COBRA due to the covered employee's involuntary termination of employment or reduction of hours, and the individual must elect COBRA. Qualified beneficiaries who are eligible for COBRA due to a voluntary termination of employment are not eligible for the premium subsidy (nor are individuals terminated for gross misconduct or whose qualifying event is anything other than involuntary termination of employment or a reduction in hours, such as children entitled to COBRA due to aging off coverage). An AEI must have been eligible for COBRA coverage during the period beginning on April 1, 2021 and ending Sept. 30, 2021.

Are individuals who previously declined COBRA coverage or discontinued COBRA coverage potentially eligible for the subsidy? Yes. If an individual whose COBRA qualifying event was either an involuntary termination of employment or reduction of hours either has not elected COBRA, or previously elected COBRA and discontinued COBRA coverage before April 1, 2021, the individual may elect COBRA continuation coverage pursuant to a special "second chance" election right. If elected, the subsidized coverage will commence April 1, 2021. Note that this rule differs from the normal COBRA rules which require the coverage to be effective as of the date of the original qualifying event.

This special election period begins on April 1, 2021 and ends 60 days after notice of the election period is provided. Plan administrators must provide this notice within 60 days of April 1, 2021.

Importantly, if COBRA is elected pursuant to this special election period, it does not extend the duration of the applicable COBRA period. That period continues to run from the date that would have applied if the individual had initially elected COBRA or, in the case of an individual who discontinued coverage, from the original COBRA commencement date. For example, a qualified beneficiary whose COBRA period would have normally run during the 18 month period commencing

July 1, 2020 and ending Dec. 31, 2021, does not have his or her maximum period extended to 18 months following the April 1, 2021 effective date applicable under the special election rules – the end date for the COBRA period would continue to be Dec. 31, 2021.

Duration of Premium Subsidy

What is the premium subsidy period? The premium subsidy is available with respect to any premium owed for a period of COBRA coverage beginning on April 1, 2021 and ending on Sept. 30, 2021. If an AEI has already paid the applicable premium for the month of April 2021, the AEI is entitled to a refund of the premium paid. The refund is due within 60 days of the date of payment.

Can the premium subsidy for an AEI end prior to Sept. 30, 2021? Yes. Premium subsidies do not apply with respect to an AEI for months of coverage beginning on or after the first date an AEI is eligible for coverage under another group health plan (other than coverage for excepted benefits, a health care flexible spending account, or a qualified small employer health plan) or Medicare. Premium subsidies are also not available for any period following the maximum period of continuation coverage required under COBRA for the AEI.

An AEI is required to notify the plan administrator of the group health plan if he or she is eligible for other disqualifying coverage and is subject to monetary penalties for failing to do so.

Alternate Plan Coverage Enrollment Option

May an AEI elect a different coverage option in connection with a COBRA election? Yes, but only if the employer permits such an election. A group health plan, may, but is not required to, permit an AEI to elect a different coverage option than the one the qualified beneficiary is enrolled in at the time of the qualifying event. Under normally applicable COBRA rules, a qualified beneficiary may only elect the coverage that is in effect immediately preceding the qualifying event, subject to the right to change coverage during open enrollment or in connection with a HIPAA special enrollment right. Under ARPA, the employer can permit an AEI to change his or her coverage option if: (1) the premium for the new coverage option does not exceed the premium for coverage in which the individual was enrolled at the time of the qualifying event (e.g., the AEI can elect less expensive coverage); (2) the different coverage is also offered to similarly situated active employees; and (3) the different coverage is not coverage that only provides excepted benefits (e.g., stand-alone dental or vision coverage), a qualified small employer health reimbursement arrangement, or a health flexible spending arrangement.

The election to change to an alternate coverage option must be made within 90 days of the date the AEI is notified of the alternative plan coverage enrollment option.

Notice Requirements

What notice requirements apply for individuals who become entitled to elect COBRA between April 1, 2021 and Sept. 30, 2021? For individuals who first become entitled to elect COBRA coverage between April 1, 2021 and Sept. 30, 2021, the plan administrator must provide a written notification regarding the availability of the COBRA premium subsidy and the option to enroll in an alternative plan coverage option, if permitted by the employer.

The additional notification must also include: (1) the forms necessary for establishing eligibility for premium assistance; (2) the name, address, and telephone number necessary to contact the plan administrator and any other person with relevant information regarding the premium subsidy; (3) a description of the special 60-day election period; (4) a description of the qualified beneficiaries' obligation to inform the plan administrator if the qualified beneficiary becomes eligible for disqualifying coverage; (5) a description, displayed in a prominent manner, of a qualified beneficiary's right to

a subsidized premium and any conditions on entitlement to the subsidized premium; and (6) a description of the qualified beneficiary's option to enroll in different coverage, if permitted by the employer.

This notice requirement may be satisfied by amending the employer's current COBRA notice or by supplementing the current notice with a separate notice. It is important to note that this notice requirement applies with respect to all COBRA election notices provided to qualified beneficiaries who become entitled to elect COBRA between April 1, 2021 and Sept. 30, 2021, and not just for those individuals whose COBRA qualifying event is an involuntary termination of employment or reduction in hours.

What notice requirements apply for individuals who became entitled to elect COBRA before April 1, 2021 and to individuals entitled to a second election period? Notice of the premium subsidy also must be provided to AEIs who became entitled to elect COBRA before April 1, 2021 and to individuals who did not have a COBRA election in effect on April 1, 2021 but who would be an AEI if they had elected COBRA, or who previously elected COBRA and discontinued coverage before April 1, 2021.

This notice must be provided within 60 days of April 1, 2021 and must include the same information as specified in the question above that applies to individuals who become entitled to elect COBRA between April 1, 2021 and Sept. 30, 2021.

What other new notices does ARPA require? Plan administrators must inform AEIs when the premium subsidy will end. This notice must be provided no more than 45 days, and no less than 15 days, prior to the premium subsidy expiration date. The notice must include, in prominent language, a statement that premium assistance will end soon and the exact expiration date. It also must include a statement that the individual may be eligible for unsubsidized COBRA or coverage through another group health plan. This notice is not required if the premium subsidy is ending because of an individual's eligibility for coverage under another group health plan or Medicare.

Will Model Notices be issued? Yes. The government agencies are required to issue model notices regarding the notice requirements described above. A model notice regarding the new COBRA election notification must be issued within 30 days of April 1, 2021, and a model notice regarding the expiration of an AEI's premium subsidy period must be issued within 45 days of April 1, 2021.

Payroll Tax Credit

How are employers and plans reimbursed for the premium subsidy amount? Most employers will be reimbursed for the premium subsidy by a new tax credit that applies against the employer's share of the Medicare hospital insurance tax. The credit is a dollar-for-dollar reimbursement of the COBRA premiums for AEIs that were waived pursuant to the ARPA subsidy. To the extent that the credit amount exceeds the employer's Medicare hospital insurance payroll tax, the excess amount may be claimed as a tax credit. ARPA also includes a provision indicating the credit may be advanced, pursuant to forms and instructions to be developed by the IRS.

The tax credit is available only to the person to whom premiums are payable. For most large plans, this means the employer. For fully insured small plans subject to state continuation laws and not federal COBRA, the tax credit is available to the insurer of the group health plan. For multiemployer plans, the person to whom the premium is payable is the plan. Employers requesting the credit may not also claim a credit on the same amount that is taken into account as qualified wages under the CARES Act or as a qualified health expense under the Families First Coronavirus Response Act or paid family leave acts under Sections 3131 and 3132 of the Internal Revenue Code.

Tax Impact on AEIs

Is the premium subsidy considered taxable income to an AEI? No. A premium subsidy provided to an AEI is not considered taxable income.

Next Steps

The new premium subsidy requirements will require plan administrators to quickly develop a compliance plan for satisfying its requirements. That compliance plan should involve identifying potential AEIs whose qualifying event date occurred in the past, but whose COBRA coverage period could include the April 1, 2021 through Sept. 30, 2021 premium subsidy period (i.e., individuals who previously were eligible for COBRA by virtue of an involuntary termination of employment or reduction of hours and who either didn't elect COBRA coverage initially or who dropped COBRA coverage prior to April 1, 2021). COBRA forms will either need to be revised or supplemented to comply with the new rules, and the new notice regarding the expiration of the subsidy period will need to be issued. Plan sponsors will need to work closely with their COBRA administrators, third-party administrators, and insurers to ensure compliance with the new requirements, as well as with payroll providers to claim the tax credit.

Given the complexity of the new rules, it is likely that the governmental agencies will issue clarifying guidance in the upcoming weeks. Such guidance will be welcome in a number of areas. For example, clarifying guidance would be helpful regarding whether certain of ARPA's requirements, such as the special second election opportunity, apply to plans not subject to the federal COBRA rules (e.g., small plans that are subject to New York's mini-COBRA law). Additionally, clarification with respect to how the tolling period requirements for COBRA election and premium payment periods that were recently updated under EBSA Disaster Relief Notice 2021-01 (summarized in the information memo that can be found here) apply with respect to the premium subsidy period is needed. Presumably, the tolling rules will continue to apply with respect to elections made on or after April 1, 2021, but may not apply to the new special second election rights created under ARPA.

If you have any questions, please contact [John C. Godsoe](#), any [attorney](#) in our [Employee Benefits and Executive Compensation practice](#) or the attorney at the firm with whom you are regularly in contact.



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