



Complicated Issues Under the COBRA Subsidy Rules

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Agenda



This webinar will focus on recent IRS guidance under ARPA in addressing the following issues:

- The COBRA subsidy eligibility requirements.
- The meaning of Involuntary termination and reduction in hours, which are alternate preconditions for COBRA subsidy eligibility.
- The health and welfare benefits to which the subsidy applies.
- The application of the extended eligibility period to state continuation coverage.
- The interaction between COBRA eligibility and ACA stability periods.
- COBRA extensions under the emergency relief guidance.

Background – COBRA Relief



American Rescue Plan Act (ARPA)

- Signed into law 3/11/21.
- Contains provisions for a federal government subsidy for continuation coverage under the Consolidated Budget Reconciliation Act of 1985 (COBRA) starting 4/1/21.
- DOL FAQ Guidance Issued 4/7/2021 with [Model notices](#)
- IRS FAQ Guidance in Notice 2021-31 issued 5/18/21 (<https://www.irs.gov/pub/irs-drop/n-21-31.pdf>) provides further clarification

Emergency Relief - The DOL/IRS joint rule issued 5/4/20 extended deadlines effective 3/1/20 for HIPAA Special Enrollment elections, claims submissions/procedures, and COBRA elections/premium payments. Also provided employers relief from meeting ERISA/IRC notice deadlines and allowed electronic distribution if acting in good faith. Supplemental guidance issued 2/26/21 limits extension of participant deadlines to earlier of one year or 60 days following end of public health emergency. (“Outbreak Period”).

ARPA Overview



- ARPA COBRA premium assistance overview
 - 100% subsidized coverage for “assistance eligible individuals”
 - Premium assistance available for periods of continuation coverage beginning on or after 4/1/21 and currently ending 9/30/21
 - Coverage continues after 9/30 for remainder of COBRA period at cost of qualified beneficiary if subsidy not extended
 - Employer or entity paying the COBRA subsidy may claim a payroll tax credit to offset cost
 - New election period for certain Assistance Eligible Individuals (AEI) who previously declined, cancelled or lost COBRA coverage for nonpayment/group health eligibility (“Extended Election Period”)
 - New COBRA notice requirements – due by 5/31/21
 - [Model notices](#) available on DOL website



ELIGIBILITY FOR COBRA PREMIUM ASSISTANCE

Who qualifies as a qualified beneficiary for purposes of becoming an AEI?

In order to be a qualified beneficiary who is eligible to become an Assistance Eligible Individual, an individual must

- (1) be covered under the group health plan on the day before the reduction in hours or involuntary termination of the covered employee's employment,
- (2) lose eligibility for the coverage due to the reduction in hours or involuntary termination of the covered employee's employment, and
- (3) be a qualified beneficiary under federal or state COBRA laws.*

**Note: voluntary extensions of COBRA to individuals who are not qualified beneficiaries under applicable COBRA (e.g. domestic partners who are not tax dependents for federal COBRA) are not AEIs*

Who qualifies as an Assistance Eligible Individual?



An **Assistance Eligible Individual (AEI)** is any individual who

- (1) Is a qualified beneficiary as a result of
 - (A) the reduction of hours of a covered employee's employment or
 - (B) the involuntary termination of a covered employee's employment (other than by reason of an employee's gross misconduct),
- (2) is eligible for COBRA continuation coverage for some or all of the period beginning on or after 4/1/21, through 9/30/21, and
- (3) elects the COBRA continuation coverage

AEI includes qualified beneficiaries who are the spouse or dependent child of the employee who had the reduction in hours or involuntary termination of employment resulting in a loss of coverage

COBRA premium assistance: Who is NOT eligible?



- Qualified beneficiaries who are receiving COBRA coverage due to a qualifying event other than a reduction in hours or involuntary termination of employment.
- Individuals whose termination of employment was for “gross misconduct.”
 - Fact-specific and can be a high standard that varies by jurisdiction.
- Qualified beneficiaries who are, or who become, eligible for Medicare or another group health plan such as 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)).
- Qualified beneficiaries whose maximum continuation coverage ended before April 1, 2020.

Can an individual become an AEI more than once?



Yes – prior treatment as an AEI does not disqualify a qualified beneficiary who again meets the AEI requirements on a later date.

Example: An employee is involuntarily terminated from Employer A on 4/1/21, elects COBRA and becomes an AEI on 4/1. On 7/1/21, the individual becomes eligible for and enrolls in coverage under GHP of spouse's employer, which causes loss of AEI status as to Employer A. On 8/1/21, the spouse has an involuntary termination of employment they lose coverage. The individual and spouse become qualified beneficiaries due to the loss of coverage and elect COBRA continuation coverage with the GHP sponsored by the spouse's employer. The individual and spouse become AEIs with respect to COBRA continuation coverage spouse's plan as of 8/1/21.

**Another example from the IRS indicates the employee also retains a COBRA/subsidy right from Employer A as long as employee elects other GHP coverage before electing COBRA under former employer's GHP.*

Should employers require individuals to self-certify or attest that they are eligible for premium assistance?

Yes – employers wishing to claim the tax credit must obtain the self-certification or attestation for its records

- Employees may claim termination was involuntary and employer can rely on this self-certification unless it has knowledge to the contrary
- Employers may rely on an individual's attestation regarding eligibility for disqualifying group health plan or Medicare
- Employers may rely on other evidence to substantiate eligibility

**DOL model notices include a self-certification/application for the subsidy to be completed by the AEI*

When does premium assistance begin?



- ARPA COBRA premium assistance will begin:
 - As of the first applicable period of continuation coverage beginning on or after 4/1/21
 - a period of coverage is a monthly or shorter period with respect to which premiums are normally charged (e.g. weekly, bi-weekly or monthly), so for a bi-weekly plan with the last two weeks of coverage period beginning 3/28 and ending 4/10, the first applicable coverage period qualifying for the subsidy is the period of coverage beginning 4/11/21
 - As of the beginning of a period of continuation coverage beginning on or after the date of the AEI's election (an AEI may waive retroactive coverage for any period prior to the election to receive COBRA premium assistance, including periods prior to 4/1/21)
- Elections may be made after 9/30/21 for COBRA coverage and premium subsidy retroactive to the first period of coverage beginning after 4/1 if made within the 60-day election period

When will premium assistance end?



- ARPA COBRA premium assistance will end on the earlier of:
 - Period of continuation coverage ending 9/30/21.
 - Last day of a maximum COBRA coverage period that ends between 4/1/21 and 9/30/21; ARPA does not extend maximum COBRA coverage period (*but note subsidy available for coverage longer than 18 months due to disability, second qualifying events or state law extensions for qualified beneficiaries who previously elected COBRA and remain covered*).
 - The date that an AEI becomes eligible for another group health plan (other than excepted benefits, QSEHRA or health FSA) or Medicare.
 - Individuals must notify employer of other coverage eligibility or face penalty
 - \$250 or 110% of assistance amount if fraudulent.

If an AEI is eligible for other GHP prior to 4/1/21, but on and after 4/1/21 is not permitted to enroll, is premium assistance available?



Yes: COBRA premium assistance is available to a potential AEI until the individual is permitted to enroll in coverage under any other group health plan (including during a waiting period for any other plan) during the subsidy period.

Example 1: An individual's employment was involuntarily terminated with Employer A as of 1/1/20, but he did not elect COBRA or exercise HIPAA Special Enrollment right to enroll in spouse's employer's plan. On 11/1/20, the individual became eligible to, but did not, enroll in spouse's plan during OE for coverage as of 1/1/21. OE ended 12/1/20 and individual has not been permitted to enroll in coverage under GHP of spouse since that date. Under these facts, the individual is not considered eligible for coverage under spouse's GHP until the first available OE period on or after 4/1/21. Conclusion – individual may elect COBRA under Employer A's GHP and receive premium assistance until next OE.

If an AEI is eligible for other GHP prior to 4/1/21, but on and after 4/1/21 is not permitted to enroll, is premium assistance available?



Example 2: Same facts as Example 1, except that the spouse's group health plan has an open enrollment period from 6/1/21, to 6/14/21, with coverage elected during the open enrollment period beginning 7/1/21. The spouse does not elect coverage for the individual under the plan of the spouse's employer, and the individual continues COBRA continuation coverage under the plan of Employer A. Under these facts, COBRA premium assistance is not available for the individual's COBRA continuation coverage under the plan of the individual's former employer for periods of coverage beginning on or after 7/1/21 (the date on which the individual was first eligible to enroll in the group health plan of the spouse's employer).

If an AEI is eligible for other GHP prior to 4/1/21 due to the Emergency Relief and HIPAA Special Enrollment, but is not enrolled on or after 4/1/21, is premium assistance available?



NO – unlike Examples #1 and #2, if an AEI retains a HIPAA Special Enrollment election right for retroactive coverage in another GHP, no premium assistance is available.

Example 3: An individual's employment is involuntarily terminated as of 10/1/20 and she qualifies for a HIPAA Special Enrollment in spouse's employer's GHP due to loss of coverage, but chooses not to enroll. Under the Emergency Relief Notices, the individual remains eligible to elect COBRA continuation coverage or enroll in the spouse's plan as of 4/1/21. Additionally, on 11/1/20, the individual was eligible to enroll in her spouse's plan under that plan's annual OE. The OE ended 11/1/20. However, the individual remained eligible to enroll in coverage under the spouse's plan under the HIPAA special enrollment rules due to the Emergency Relief Notices. Thus, the individual is not eligible for premium assistance as an AEI under former employer's plan.

What are some general rules regarding impact of other coverage on premium assistance?



- Eligibility to enroll in other GHP coverage or Medicare beginning on or after 4/1/21 (enrollment not required) disqualifies AEI from premium subsidy (*remember impact of Emergency Relief for retroactive HIPAA Special Enrollment rights under GHP*)
- An individual currently enrolled in Medicare who becomes a qualified beneficiary as the result of a reduction in hours or involuntary termination of employment may be eligible to elect COBRA but is not eligible for COBRA premium assistance
- Individuals with Exchange coverage are eligible for COBRA premium assistance (but cannot receive both COBRA subsidy and premium assistance in Exchange).
- If eligible coverage under other GHP is COBRA coverage, individual is not disqualified from receiving premium subsidy
- Other GHP does not have to meet ACA minimum value and affordability standards to disqualify individual from subsidy
- Retiree coverage will not be considered disqualifying coverage unless offered under a separate plan.



REDUCTION IN HOURS

What qualifies as a reduction in hours for ARPA subsidy purposes?*



- A voluntary reduction in hours (e.g. employee requests to work part-time)
- Leaves of absence not covered by FMLA or USERRA (e.g. personal leave or medical leave not FMLA eligible)
- A furlough in which employee is reasonably expected to return to work - whether or not initiated by the employer or elected by employee as part of a window program
- Work stoppage as a result of lawful strike or lockout initiated by employer

**Remember that the reduction in hours must cause a loss of coverage to trigger COBRA*

How does the ACA impact COBRA subsidy during LOA or as a result of other reductions in hours?



- Eligibility vs. ACA Penalty Reporting to IRS
 1. Month to Month Method - not FT if not credited with 130 hours in a month – paid vs. unpaid hours
 2. Look-Back Measurement and Stability Period Method – FT During Stability Period, which includes LOA or PT status
 - Employees in a stability period during calendar year 2021 (or a stability period including 4/1/21 through 9/30/21) may not be eligible for COBRA (or subsidized GHP coverage) if employer uses Look-Back Measurement and Stability Period Method for eligibility
 - New FT EEs considered under Month to Month until work a full measurement period
 - Evaluate each employee under ACA regulations
- ❖ *Employees on paid or protected (FMLA, e.g.) leave are generally credited with imputed hours of service under ACA and can extend eligibility under both methods*



INVOLUNTARY TERMINATION OF EMPLOYMENT

What is an involuntary termination of employment for ARPA purposes?

- ***A severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee's implicit or explicit request, where the employee was willing and able to continue performing services.***
- Facts and circumstances control rather than the designation of the termination as voluntary or a resignation by the employer or in a severance agreement.
 - *For example, if a termination is designated as voluntary or as a resignation, but the facts and circumstances indicate that the employee was willing and able to continue performing services, so that, absent the resignation, the employer would have terminated the employee's services, and that the employee had knowledge that the employee would be terminated, the termination is involuntary.*
- Includes termination for "good reason" and constructive discharge

Does involuntary termination of employment include an employer's action to end an individual's employment while the individual is absent from work due to illness or disability?

Maybe - if before the action there is a reasonable expectation that the employee will return to work after the illness or disability has subsided.

- Note – the mere absence from work due to illness or disability before the employer has taken action to end the individual's employment is not an involuntary termination of employment, but if coverage is lost as a result of the leave of absence, the individual could be eligible for the subsidy.
- Key is whether at the time of termination there is a reasonable expectation employee will return to work – the termination must meet the definition of “involuntary termination”

What other circumstances generally are considered involuntary terminations?

- Terminations for cause (other than gross misconduct)
- Resignation as the result of a material change in the geographic location of employment (“good reason”)
- Participation in a window program as defined in IRS regulations (§1.3121(v)(2)-1(b)(4)(v)) under which employees with impending terminations of employment are offered severance
- A termination initiated by the employee in response to an involuntary and material reduction in hours that did not result in a loss of coverage (“good reason”)
- Employer’s decision not to renew an employee’s contract, including for an individual whose employer is a staffing agency



What circumstances are not considered involuntary terminations?



- Retirement or death of employee
- Employee-initiated termination of employment because a child is unable to attend school or because another childcare facility is closed due to the COVID-19 National Emergency
- Departure for personal reasons (e.g. concerns over workplace safety due to health condition of the employee or a family member, inability to locate daycare, or other similar issues) unless the employer failed to take a required action or provide a reasonable accommodation



COVERAGE ELIGIBLE FOR COBRA PREMIUM ASSISTANCE



What group health plans are subject to the ARPA subsidy?



- Any group health plans, including most excepted benefits, sponsored by private-sector employers or unions and subject to federal COBRA under ERISA.
 - Stand-alone dental and vision
 - HRAs (including HRAs integrated with individual coverage, but not QSEHRAs)
 - Medical
 - EAPs
 - Separate retiree coverage
- Plans sponsored by state or local governments and subject to COBRA under the Public Health Service Act (PHSA).
- Group plans subject to state mini-COBRA laws (e.g., small group insured plans not subject to federal COBRA).

What coverage is not eligible for the ARPA subsidy?



- QSEHRAs
- Individual coverage
- Group health plans that are not subject to either Federal COBRA or State mini-COBRA (e.g. self-insured church plans or self-insured small employer plans not subject to Federal COBRA (e.g. HRA of employer under 20 employees))
- Coverage voluntarily offered by employer to an individual that is not eligible to be a qualified beneficiary under Federal COBRA or State mini-COBRA
- Health FSAs funded with salary reductions (i.e. not an HRA)

What if the plan in which the AEI was enrolled is no longer available?



- The AEI must be offered the opportunity to elect the plan that a similarly situated active employee would have been offered that is most similar to the prior plan, even if the premium for the current plan is greater than the premium for the previous plan.
- However, no premium subsidy is available if employer voluntarily allows AEI to enroll in other coverage as allowed by ARPA (i.e. an open enrollment type election) and AEI selects coverage that is more expensive than prior coverage, even if prior plan not available

IRS Example: An individual is an AEI who was enrolled in a plan with an \$800 per month COBRA premium at the time of the qualifying event. Three other coverages are offered to active employees similarly situated to the individual. The COBRA premiums for the other coverages are \$700, \$750 or \$1,000 per month. The individual may enroll in the \$700 or \$750 per month options with COBRA premium assistance. Since this employer has adopted the ARPA rule allowing individuals to change coverage, the individual may enroll in the \$1,000 per month coverage option, but that coverage will not be eligible for the COBRA premium assistance. *[Note: IRS doesn't address what happens if the \$1,000 plan is the closest benefit option, but due to annual increase is now more expensive]*

(Note - the higher premium amount is covered if the election for the different benefit package is required by law or in connection with open enrollment changes required by Treas. Reg. § 54.4980B-8, Q&A-2(c))



SPECIAL ISSUES STATE CONTINUATION COVERAGE

Can State continuation coverage program qualify for a subsidy if the period is longer or shorter than the 18 months required by Federal COBRA?

Yes.

- A different period of State continuation coverage (e.g. 6 months) does not by itself mean a State program fails to provide comparable coverage to Federal COBRA continuation coverage to qualify for ARPA subsidies.
- State programs providing for different qualifying events, different qualified beneficiaries, or different maximum premiums generally do not fail to provide comparable coverage solely for those reasons.
- State continuation coverage that exceeds the federal COBRA coverage period can still qualify for the ARPA subsidy if the individual was previously enrolled and became eligible for continuation coverage due to an involuntary termination or a reduction in hours. This even applies to extended continuation coverage in states like New York and Connecticut that provide for additional continuation coverage after federal COBRA coverage has been exhausted.

In the case of an insured plan subject to State mini-COBRA requiring insurer to provide continuation coverage, is the employer eligible for the tax credit if it pays the full premium to the insurer?

No - In the case of an insured plan subject solely to State mini-COBRA law with respect to the requirement to provide continuation coverage, the “premium payee” eligible for the tax credit is the insurer providing the coverage under the group health plan.

- This is true even if the employer is required by the insurer or state law to make monthly premium payments for COBRA to the insurer during the subsidy period.
- The IRS acknowledges this requirement is an administrative issue and further guidance is expected.

Is the ARP extended election period available to an individual if the continuation coverage is provided only under State law (and not Federal COBRA)?

No. The ARPA extended election period applies only to a group health plan that is subject to Federal COBRA.

- States must adopt an extended election period for ARPA subsidies to apply to an individual who previously declined to enroll in State mini-COBRA coverage
- An AEI for State mini-COBRA must already have elected continuation coverage for a period that extends beyond 4/1/21 or become eligible for continuation coverage as an AEI on or after 4/1/21 to qualify for a premium subsidy under State mini-COBRA.



EXTENSIONS UNDER THE EMERGENCY RELIEF NOTICES

How does ARPA impact rights under the Emergency Relief for retroactive COBRA elections and employer relief?



- For individuals with a qualifying event prior to 4/1/21, the ARPA notice of Extended Election triggers a 60-day election period
 - If the qualified beneficiary elects COBRA continuation coverage with COBRA premium assistance under ARPA, the individual must also elect or decline COBRA continuation coverage retroactive to the loss of coverage, if eligible, within 60 days “of receipt” of notice. If decline, Emergency Relief election right for retroactive coverage lost after the 60-day period runs.
 - Normal COBRA elections are 60 days from date on notice – IRS and DOL guidance refers to 60-day period commencing upon “receipt” of notice of the ARP extended election period. IRS Example in Notice 2021-31 calculates 60 days from “receipt” of notice – administratively challenging!
 - If the qualified beneficiary elects retroactive COBRA continuation coverage, the qualified beneficiary may be required to pay COBRA premiums for periods of coverage beginning before April 1, 2021, but Emergency Relief applies to premium payments.
 - Failure to pay premiums for retroactive COBRA when due under Emergency Relief (45 or 30 days from expiration of earlier of one year from due date or 60 days following end of the declared COVID-19 public health emergency) allows for retroactive cancellation of coverage for unpaid periods, but does not impact ARPA subsidy election under the Extended Election Period.
- For employers, the Emergency Relief does not apply to the ARPA notice requirements (due May 31, 2021).



IRS Example of Extended Election Period/Emergency Relief



Example: An individual has a qualifying event that is an involuntary termination of employment on March 1, 2021, and receives the COBRA election notice the same day. The individual receives the notice of the ARP extended election period on May 31, 2021, and elects COBRA continuation coverage with COBRA premium assistance starting April 1, 2021. Assuming the Outbreak Period has not ended, the individual does not remain eligible after July 30, 2021 (60 days from the receipt of the individual's notice of the ARP extended election period), to elect COBRA continuation coverage starting March 1, 2021, despite the extensions available under the Emergency Relief Notices.



Final Questions

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Thank You

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