

DOL FLIES ALONE: GUIDANCE ON THE 100% COBRA SUBSIDY UNDER THE AMERICAN RESCUE PLAN ACT OF 2021

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The American Rescue Plan Act of 2021 (“ARPA”) provides that, for the period from April 1, 2021 until September 30, 2021, if an individual’s Consolidated Omnibus Budget Reconciliation Act (“COBRA”) qualifying event is an involuntary termination of employment or a reduction of hours (each, an “Assistance Eligible Individual”), then 100% of the COBRA premium is paid by the employer, health plan, or insurer and the premium expense is reimbursed by the federal government through a refundable FICA tax credit. We previously summarized the COBRA subsidy provisions under ARPA in a blog post, available by [clicking here](#).

Guidance Provided: As expected, additional guidance implementing the COBRA subsidy was issued by the Department of Labor (“DOL”) on April 7, 2021 (the “Guidance”). The Guidance includes:

- A dedicated [COBRA subsidy website](#)
- A set of ARPA COBRA subsidy [frequently asked questions](#)
- Model notices, the use of which the DOL will consider to be good faith compliance COBRA and ARPA. These include:
 - A [model ARPA general notice and COBRA election notice](#)
 - A [model COBRA continuation coverage notice](#) in connection with the extended election periods
 - A [model alternative notice](#) for use with insured coverage subject to state “mini-COBRA” requirements
 - A [model notice of expiration of the COBRA subsidy](#) for plans to notify Assistance Eligible Individuals 15-45 days before expiration of their COBRA subsidy
 - A [summary of the COBRA subsidy provisions](#)

The Guidance addresses many of the questions surrounding the COBRA subsidy, while leaving key questions unanswered. Following is a summary of the key points of the Guidance for employers.

Assistance Eligible Individual

- While termination of employment qualifies for the COBRA subsidy only if it was involuntary, a reduction in hours qualifies for the COBRA subsidy regardless of whether it was voluntary or involuntary. For example, a reduction due to a change in a business's hours of operation, a change in status from full-time to part-time, a temporary leave of absence, and participation in a lawful labor strike all count as a qualifying reduction in hours.
- Involuntary termination for gross misconduct does not qualify for the COBRA subsidy.
- Although individuals are not Assistance Eligible Individuals if they are eligible for other group health coverage, such as through a new employer's plan or a spouse's plan, they may remain eligible to elect COBRA and receive the subsidy even if they are currently covered by individual health insurance or Medicaid.

Election Guidance

- The Guidance clarifies the additional COBRA election opportunity:
 - Any qualified beneficiary whose qualifying event was a reduction in hours or involuntary termination of employment prior to April 1, 2021, and who did not elect COBRA when it was first offered or who elected COBRA but is no longer enrolled (e.g., due to the failure to pay premiums) is eligible for a second opportunity to elect COBRA.
 - The additional election period does not extend the period of COBRA coverage beyond the original maximum period of COBRA coverage.
 - Individuals who elect COBRA may choose to begin coverage prospectively or, if their qualifying event was before April 1, 2021, effective as of April 1, 2021.
 - The second election opportunity applies only to federal COBRA and not any state level "mini-COBRA" coverage, although individuals who elect such "mini-COBRA" coverage are eligible for the COBRA subsidy.
- Individuals who are eligible for the COBRA subsidy but who paid in full for periods of COBRA coverage during the subsidy period will need to receive a credit against future payments (following the expiration of the subsidy period) or a refund.
 - Similarly, individuals who are required to make COBRA premium payments in order to receive fully- or partially-subsidized COBRA coverage under a severance agreement may

need to receive a refund or have the terms of their severance agreement amended so that their payments are not required during the subsidy period.

Notice Guidance

- The deadlines to provide the ARPA COBRA notices are unaffected by the extended deadline relief provided in EBSA Disaster Relief Notice 2021-01. The general COBRA deadlines, as extended by the EBSA Disaster Relief Notice 2021-01, however, continue to apply.
 - This means that a potential Assistance Eligible Individual whose qualifying event occurred prior to April 1, 2021, may (i) elect COBRA coverage effective April 1, 2021 or after, or (ii) elect COBRA coverage commencing from an earlier qualifying event if the individual remains eligible to make that election.
- COBRA notices provided to individuals with qualifying events prior to April 1, 2021, and during the period from April 1, 2021, to September 30, 2021, should include the forms necessary for an individual to apply for and receive the COBRA subsidy.
- The Guidance clarifies the COBRA notice requirements under ARPA:
 - A general notice must be provided to all qualified beneficiaries who have a qualifying event that is a reduction in hours or involuntary termination of employment from April 1, 2021, to September 30, 2021. The notice may be provided separately or with the COBRA election notice.
 - Employers must also provide notice to any Assistance Eligible Individual (or person who would be an Assistance Eligible Individual if COBRA was in effect) who had a qualifying event before April 1, 2021. Notice is not required for any individual whose maximum COBRA coverage period would have ended before April 1, 2021. This notice must be provided by May 31, 2021, and individuals will have 60 days from provision of the notice to elect COBRA.
 - Employers must provide notice of the expiration of the period of premium assistance 15-45 days before the premium assistance expires, which must include information that the individual may be eligible for coverage without any premium assistance through COBRA or coverage in the Health Insurance Marketplace.
- Normal COBRA penalties continue to apply to employers who fail to satisfy the COBRA and ARPA requirements.

Remaining Questions

- The Guidance does not address what qualifies as an “involuntary termination” for COBRA subsidy purposes (other than to exclude gross negligence).
- The Guidance does not address when an individual is considered “eligible” for other group health coverage or Medicare that would cause an individual eligibility for the COBRA subsidy to end. For example, if an individual was eligible for a special enrollment period under a spouse’s employer’s plan but failed to enroll, does the individual remain eligible for the COBRA subsidy?
- The Guidance does not explicitly permit employers to rely on an individual’s certification of their eligibility for the COBRA subsidy. Under the [Internal Revenue Service guidance interpreting the similar American Recovery and Reinvestment Act of 2009 \(“ARRA”\) COBRA subsidy provisions](#), an employer was required to make a “reasonable interpretation” based on the subsidy provisions and guidance of whether an “involuntary termination of employment” occurred and maintain documentation of its determination, including the employee’s certification of eligibility. Clarification of whether a similar “reasonable interpretation” requirement applies under ARPA or whether an employer may rely only on the former employee’s certification would be welcome.
- Notably, the Guidance was not jointly issued by the DOL and Department of Treasury and Internal Revenue Service. Instead, it is stated that the Department of Treasury and Internal Revenue Service have reviewed the frequently asked questions issued by the DOL and that they concur in their application. Assuming the interpretative guidance will follow the pattern of the ARRA guidance and the provisions authorizing implementing guidance under ARPA, additional guidance from the Internal Revenue Service may be expected.

Action Steps for Employers

1. Identify individuals who are COBRA qualified beneficiaries due to a reduction in hours or involuntary termination of employment before April 1, 2021. These individuals must receive notice of their extended COBRA election opportunity.
2. Review and update COBRA notices and procedures to address the ARPA requirements. The DOL’s model notices (linked above) may be used to comply with ARPA’s requirements or used as a guide to update an employer’s customized notices.
3. Provide the subsidy notice by May 31, 2021.
4. Identify and contact any individuals who may be eligible for a credit against future COBRA payments or a refund and any individuals whose severance terms will be impacted by the COBRA subsidy.

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