

FAQs on the COBRA Subsidies and Election Rights Under the American Rescue Plan Act of 2021

Executive Summary

On March 11, 2021, President Biden signed into law the American Rescue Plan Act of 2021 (“ARPA”), which contains certain changes related to the Consolidated Omnibus Budget Reconciliation Act of 1985 (otherwise known as “COBRA”). As we described in our [Employee Benefits Update dated March 12, 2021](#), ARPA provides a 100% COBRA premium subsidy to “assistance eligible individuals” (known as “AEIs”) for a temporary period of time from April 1, 2021 through September 30, 2021; permits “second chance” extended COBRA elections for certain AEIs who waived COBRA coverage or let their COBRA coverage lapse; and imposes new COBRA notice obligations on employers and health plans.

This newsletter answers some of the most frequently asked questions about complying with the ARPA COBRA changes.



PART I: THE BASICS

What plans are subject to these new ARPA COBRA rules?

The COBRA premium subsidy and the extended COBRA elections under ARPA apply to all group health plans sponsored by employers with 20 or more employees, just like the right to continue group health plan coverage under regular COBRA does. This means that the ARPA COBRA rules apply to:

- Group medical plans
- Group prescription drug plans
- Group vision plans
- Group dental plans

In addition, most health flexible spending accounts, as well as some employee assistance plans and wellness programs, are also considered “group health plans” subject to COBRA, and thus must comply with the ARPA COBRA rules. However, popular programs such as dependent care flexible spending accounts and health savings accounts are not considered “group health plans,”

and therefore they are not subject to the COBRA premium subsidy or new extended election period rules.

The ARPA COBRA premium subsidy also applies to small group health plans that are subject to state mini-COBRA laws; however, these small plans are not covered by other features of ARPA, like the “second chance” extended election periods, and they remain subject to all of their respective state law requirements.

Who qualifies as an AEI eligible for subsidized COBRA coverage and the extended COBRA election period?

AEIs are COBRA qualified beneficiaries who meet the following criteria:

- They are eligible for COBRA because of a reduction in hours or an involuntary termination of employment; and
- They are eligible for continuation coverage for some or all of the time between April 1-September 30, 2021 (even if they did not elect it during their initial election period, or if they elected COBRA coverage but let it lapse); and
- They elect COBRA coverage; and
- They are not eligible for Medicare or for other group health coverage, such as through a new employer’s or spouse’s plan (not including excepted benefits, a qualified small employer health reimbursement arrangement, or a health flexible spending account).

When is a COBRA qualified beneficiary not an AEI?

- When the COBRA qualifying event is a voluntarily termination of employment.
- When the employee’s involuntary termination of employment is for “gross misconduct”. However, we urge caution in applying this rule, because courts have set a very high standard about what conduct rises to the level of “gross misconduct” such that it would negate a person’s right to COBRA continuation coverage.
- When the COBRA qualifying event is the employee’s death or divorce, or because a dependent no longer satisfies the dependent eligibility requirements.

If an employee’s employment is terminated involuntarily, but the employee and employer agree to characterize the employee’s termination as “voluntary”, in order to help the employee secure a new job, does the employee still qualify as an AEI?

Yes, because the underlying facts support the position that the former employee’s employment was terminated involuntarily despite the “window dressing” that may be used to support the former employee’s job search.

PART II: THE COBRA SUBSIDY

How does the COBRA subsidy work?

The employer absorbs the cost of COBRA coverage for each AEI and is then reimbursed, through a credit on its quarterly payroll taxes. The AEI does not receive a direct payment of the subsidy.

Does the subsidy apply just to employees who qualify as AEIs, or can dependents also be AEIs?

The subsidy applies to all COBRA qualified beneficiaries who meet the requirements to be AEIs, not just the employee who experienced the reduction in hours or the involuntary termination of employment.

How long does the COBRA subsidy last?

Under ARPA, it lasts from April 1 – September 30, 2021, but it can be cut off earlier depending on when an individual's COBRA coverage would otherwise end, or if the AEI becomes eligible for coverage under Medicare or another group health plan (not including excepted benefits, a qualified small employer health reimbursement arrangement, or a health flexible spending account).

Does the COBRA subsidy extend the maximum COBRA period?

No. The subsidy period does NOT extend the maximum COBRA period for an AEI.

Will the subsidy period be extended after September 30, 2021?

Not at this time, unless Congress passes additional legislation to extend it, similar to what was done several times during the Great Recession, when the 65% COBRA subsidy originally enacted as part of the American Recovery and Reinvestment Act of 2009 was extended twice by subsequent legislation.

What happens to an AEI's COBRA coverage after the subsidy ends?

Each AEI can continue their COBRA coverage, but they will need to pay, on time, the full amount of the COBRA premium that is due, plus any COBRA administrative fee that may be charged, or else they risk losing their COBRA coverage.

What happens if an AEI, who has been receiving subsidized COBRA coverage, turns 65 and becomes eligible for Medicare?

The AEI will no longer qualify for subsidized COBRA coverage after becoming eligible for Medicare, even if the individual does not enroll in Medicare right away. However, non-subsidized COBRA coverage can continue until he actually enrolls in Medicare, or until the end of his maximum COBRA coverage period, whichever occurs first.

What does it mean to become “eligible” for another group health plan or Medicare?

It means that the AEI has met all of the eligibility criteria for the other group health plan or Medicare; government guidance has clarified that it does NOT mean that the AEI must have enrolled in the other group health plan or Medicare.

How does the COBRA subsidy work when the involuntarily-terminated employee signs a severance agreement that includes a lump-sum payment intended to represent six months of COBRA premiums?

Because the former employee could keep the cash lump-sum payment as part of their overall severance package and not use it to elect COBRA coverage at all, the employer will not be eligible to receive a payroll tax credit for the payment.

How does the COBRA subsidy work when a terminated employee signs a severance agreement that includes a voluntary commitment by the employer to pay the former employee’s COBRA premiums for a period of time?

Assuming that the former employee timely elects their COBRA coverage, it is not clear whether the employer’s commitment to pay for this COBRA coverage will qualify for the payroll tax credit, which is intended to cover the cost of COBRA premiums that otherwise would have been paid by the employee. Further guidance is expected on this point. In the meantime, employers should ensure that there is sufficient other consideration to support any release from claims that may be included in the severance agreement.

Will AEIs who have been enrolled in COBRA continuation coverage since before April 1, 2021 receive a refund of premiums that have been paid for coverage before April 1, 2021?

No. The subsidy for COBRA premiums only applies to premiums for coverage between April 1, 2021 through September 30, 2021.

PART III: THE “SECOND CHANCE” EXTENDED COBRA ELECTION PERIOD

Who is eligible for the “second chance” COBRA election opportunity?

An AEI whose COBRA-qualifying event was a reduction in hours or an involuntary termination of employment prior to April 1, 2021, and who either did not elect COBRA continuation coverage when it was first offered, or who elected COBRA continuation coverage and then later dropped it, but in either case who would otherwise be in their COBRA period.

Under the extended election opportunity, do AEIs have the option to enroll in a different coverage option?

Maybe – it depends on the employer. Employers may (but are not required to) allow AEIs to enroll in another plan coverage option, as long as: (i) the premium cost does not exceed the premium cost of the previous coverage at the time of termination; (ii) the coverage offered is also offered to similarly situated active employees; and (iii) the coverage does not provide excepted

benefits, is not a qualified small employer health reimbursement arrangement, and is not a flexible spending arrangement.

How much time does an AEI have to enroll in COBRA coverage under the “second chance” extended election rules?

Qualifying AEIs may make a special election within 60 days of receiving the required notice informing them of their eligibility. The COVID-related extensions that generally apply to COBRA elections do NOT apply to the “second chance” notices, elections related to COBRA subsidies, or the extended COBRA election period.

When does COBRA coverage begin after an AEI elects COBRA during the extended election period?

The AEI has the choice of electing COBRA coverage that begins April 1, 2021 (or prospectively from the date of the qualifying event if it occurred after April 1, 2021), or electing retroactive coverage that begins earlier—from the date of their original COBRA qualifying event—as long as their election can still be made under the extended election time frames available as a result of the COVID-19 national public health emergency. If an AEI elects retroactive COBRA coverage, they will be fully responsible for the COBRA premiums for coverage before April 1, 2021, but the subsidy will apply for any periods of COBRA coverage between April 1st-September 30th 2021.

PART IV: NEW NOTICES

What are the different types of notices required under ARPA?

ARPA requires that an employer provide notices regarding the availability of the premium subsidy, the new “second chance” election opportunity, and the expiration of the subsidy. To help employers satisfy these obligations, the Department of Labor (“DOL”) issued the following model notices:

- [General Notice and COBRA Continuation Election Coverage Notice](#)
- [Notice of Extended Election Period](#)
- [Alternative Notice](#)
- [Notice of Expiration of Period of Premium Assistance](#)
- [Summary of COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021](#)

While the DOL guidance also describes the required content of the notices, we recommend that employers, or their COBRA vendors, use the model notices rather than create their own, since the use of the model notices should be interpreted by the DOL as good faith compliance with the notice requirements.

Who receives which notice?

Notice of Extended Election Period, plus Summary under ARPA	AEIs who are still in the 18-month COBRA window and (i) are currently enrolled in COBRA; (ii) enrolled in COBRA previously and later dropped coverage; or (iii) previously declined COBRA
General Notice and COBRA Continuation Election Coverage Notice, plus Summary under ARPA	Qualified beneficiaries who lose coverage due to a reduction in hours or an involuntary termination between April 1 and September 30, 2021
Alternative Notice	Group health plans subject to state continuation coverage (mini-COBRA)
Notice of Expiration of Period of Premium Assistance	AEIs whose premium assistance is scheduled to expire in 45 to 15 days

What are the guidelines regarding the notices?

AEIs who are eligible for the “second chance” COBRA election opportunity must receive the Notice of Extended Election Period by May 31, 2021.

For individuals who lose coverage due to a reduction in hours or involuntary termination of employment between April 1, 2021 and September 30, 2021, the General Notice and COBRA Continuation Election Coverage Notice may be sent with the regular COBRA notice by inserting the notice language into the current notice document, or by including a separate notice into the COBRA election package.

The Notice of Expiration of Period of Premium Assistance must be sent to AEIs, in writing, 45 to 15 days before their COBRA premium subsidy will end. This notice does not need to be provided to AEIs who cease to be eligible for the COBRA premium subsidy because they became eligible under another group health plan or Medicare.

Do AEIs have any notice obligations?

Yes. If an AEI fails to notify the plan administrator if he or she becomes eligible for other group health plan coverage or Medicare, the AEI will be subject to a tax penalty of \$250 per failure. If the AEI intentionally failed to notify the plan, the penalty could be the greater of \$250 or 110% of the premium subsidy the AEI received after eligibility for the subsidy ended. However, there is a “reasonable cause” exception to these penalties, so that if the AEI failed to inform the plan administrator of eligibility for other coverage due to reasonable cause and not willful neglect, any penalties should be abated.



To discuss COBRA compliance under the American Rescue Plan Act of 2021, or any other employee benefits matters, please contact any member of our Employee Benefits and Executive Compensation Group below. Also, you can find additional information on the COBRA premium subsidy at <https://www.dol.gov/COBRA-subsidy>.

IslerDare PC
Your workplace, our insight

1945 Old Gallows Road
Suite 650
Vienna, VA 22182
(703) 748-2690

1111 East Main Street
Suite 1605
Richmond, VA 23219
(804) 489-5507

Andrea I. O'Brien
aobrien@islerdare.com

Vi D. Nguyen
vnguyen@islerdare.com

Jeanne Floyd
jfloyd@islerdare.com

Ashley Hedge
ahedge@islerdare.com