



March 12, 2021

COBRA Subsidies Are Revived

The American Rescue Plan Act of 2021, signed by President Biden on March 11, 2021, (“ARPA”) includes generous provisions granting eligible individuals who have lost their jobs (and their family members) the right to continue their employer group health plan coverage at no cost during the period from April 1, 2021 to September 30, 2021 (“**ARPA Subsidized COBRA**”). Employers and plan administrators need to be ready to comply by month-end. Some of the key terms of these new COBRA rules are set forth below. You should also stay tuned for additional guidance and model notices to be issued by various governmental agencies.

What Plans Must Comply?

All group health plans that are subject to COBRA continuation coverage requirements must provide ARPA Subsidized COBRA, except health FSAs offered through a Code Section 125 cafeteria plan.

As ARPA is currently written, the “applicable plans” would include dental and vision plans and health reimbursement accounts (HRAs) and those employee assistance plans (EAPs) that are subject to COBRA. However, we believe it’s likely that further guidance will be issued that will narrow this group of plans.

Who is Eligible for the Subsidy?

There are two types of “assistance eligible individuals” (“**Assistance Eligible Individuals**”):

Individuals Who First Become Eligible for COBRA Between 4/1/21 and 9/30/21

Any qualified beneficiary (as defined in COBRA - this generally includes the covered employee and each of his or her family members who are enrolled in coverage through the covered employee, each of whom has his or her own right to elect COBRA) who becomes eligible for COBRA continuation coverage during the period from April 1, 2021 to September 30, 2021 due to a qualifying termination is eligible for ARPA Subsidized COBRA.

A “qualifying termination” includes a termination of a covered employee’s employment or reduction of hours, but does not include:

- a termination due to gross misconduct, or
- a voluntarily termination of employment.^[1]

To be entitled to the ARPA Subsidized COBRA, the Assistance Eligible Individual must actually elect COBRA coverage.

Special Enrollment for Individuals Previously Eligible for COBRA

A special enrollment period (“**Special Enrollment Period**”) was included in ARPA to allow any qualified beneficiary who would have qualified as an Assistance Eligible Individual if he or she had elected COBRA coverage prior to April 1, 2021 and any qualified beneficiary who previously elected COBRA coverage that would have qualified him or her for the ARPA Subsidized COBRA, but discontinued that coverage before April 1, 2021, to qualify as an Assistance Eligible Individual if that individual timely elects the ARPA Subsidized COBRA during the Special Enrollment Period. This group of individuals gets a “second bite of the apple,” but only if the individual elects COBRA coverage during the Special Enrollment Period, which begins April 1, 2021 and ends 60 days after the plan administrator notifies him or her of this Special Enrollment Period. Anyone in this group of Assistance Eligible Individuals who elects COBRA during this Special Enrollment Period will begin COBRA coverage on April 1, 2021, but their COBRA coverage will not continue past the date that their maximum COBRA coverage period would have otherwise expired if they had elected COBRA when originally available.

How Do These New Rules Interact with Recent COBRA Deadline Extensions?

Many qualified beneficiaries were given extended election rights pursuant to EBSA Disaster Relief Notice 2021-01 ([see our prior alert here](#)) that could allow them up until as late as one year after their original COBRA deadline to make a COBRA election and to pay the corresponding premiums.

The ARPA Subsidized COBRA rules do not prevent these qualified beneficiaries from waiting to elect COBRA. However, to the extent that a qualified beneficiary wishes to have his or her COBRA coverage paid for under the ARPA Subsidized COBRA rules, the qualified beneficiary must elect such COBRA coverage during the Special Enrollment period.

What Coverage Must be Provided?

Normal COBRA rules apply to the type of coverage that must be offered. However, employers may allow Assistance Eligible Individuals a special right to elect, within 90 days after notice of this right is provided to them, to enroll in COBRA coverage that is offered to similarly-situated active employees at the time of election and that is the same as or different than the coverage in which they were enrolled at the time of their qualifying event, provided such coverage has an equal or lower premium. This different coverage cannot be an excepted benefit, a qualified small employer health reimbursement arrangements (QSEHRA), or a health flexible spending arrangement (health FSA). This is an optional provision for employers.

How Long Does the ARPA Subsidized COBRA Last?

The ARPA Subsidized COBRA is available for coverage periods beginning on and after April 1, 2021 and ending September 30, 2021, but ends earlier if:

- the Assistance Eligible Individual becomes eligible (regardless of enrollment) for coverage under another group health plan (other than an excepted benefit, a QSEHRA, or a health FSA) or Medicare; or
- the Assistance Eligible Individual's maximum COBRA coverage period expires.

The Assistance Eligible Individual has a duty to notify the plan if he or she ceases to qualify for the ARPA Subsidized COBRA due to other coverage. Except where the Assistance Eligible Individual can show the failure was due to reasonable cause and not to willful neglect, an Assistance Eligible Individual who fails to notify the plan as required may be subject to a penalty of \$250 for each failure (or, where fraudulent, it may increase to 110% of the premium assistance provided after he/she was no longer eligible).

Who Pays the Subsidy & How Do They Claim Tax Credits?

The Assistance Eligible Individual is treated as having paid in full the amount of the COBRA premium. Depending on the circumstances, this leaves either the employer, the plan, or the insurer with responsibility for covering the cost of the ARPA Subsidized COBRA coverage and for submitting the claim for tax credits. We expect that further guidance will clarify who can actually file for the tax credits and how to do so. We do know, however, that if the tax credit exceeds the taxes owed with respect to that quarter, the excess is refundable. There is also a procedure to claim an advance on the credit.

No credit can be claimed for amounts that have already been taken into account as qualified wages for purposes of employee retention credits under the CARES Act or qualified health plan expenses under the sick leave and paid family leave provisions of the FFCRA.

As part of the tax credit provisions, the statute of limitations on assessments attributable to credits has been extended to 5 years. Special relief is provided from penalties for failure to make deposits where determined to be due to an anticipated credit.

What Notice Obligations Apply?

COBRA Notices that are sent to individuals who become eligible to elect COBRA between April 1, 2021 and September 30, 2021 must include additional written notifications regarding the availability of premium assistance. Additional notices must be provided by the plan administrator within 60 days following April 1, 2021 to anyone who already qualifies as an Assistance Eligible Individual as of April 1, 2021. ARPA instructs the DOL to issue a model notice for this purpose within 30 days after enactment.

Other COBRA notices will be subject to additional content requirements (these may be satisfied by amending existing notices or through a separate notice), which will be issued by the Secretaries of Treasury and Labor.

At least 15 and not more than 45 days prior to the date their COBRA subsidy is expiring, plan administrators must notify Assistance Eligible Individuals that their ARPA Subsidized COBRA is expiring, the exact date, and alternatives for continuing coverage, except where ARPA Subsidized COBRA is expiring due to eligibility for other group health plan or Medicare. The DOL is instructed to issue a model notice for this purpose within 45 days after enactment.

Is More Guidance Coming?

ARPA directs the Secretary of Treasury to issue additional guidance on reporting tax credits, credits claimed by multiemployer plans, procedures to claim advance credits, and the possibility that third party payors (such as PEOs, CPEOs, and 3504 agents) may be able to claim the credits.

Also note that anyone receiving the COBRA subsidy does not count against an employer's health coverage tax credit (HCTC), for those employers who otherwise qualify.

What Should Employers and Plan Administrators Do Now?

- Check with each "applicable plan's" COBRA administrator to make sure it is prepared to handle notice obligations in a timely manner and discuss how COBRA premiums (if any) must be submitted to insurers (if any).
- If you serve as COBRA administrator, work with your legal counsel and other advisors (a) to prepare the required ARPA COBRA notices; (b) to identify your group of potential Assistance Eligible Individuals to whom notices must be provided; and (c) to set up a procedure to distribute the required expiration notices.
- Make sure that you are tracking the applicable premiums for ARPA Subsidized COBRA so that, if available to you, you will have the information that you will need to claim tax credits.
- Stay tuned for additional guidance and model notices.

The Nelson Mullins Employee Benefits Group is ready to assist with questions or compliance steps. Please contact one of our Employee Benefits attorneys or the Nelson Mullins attorney with whom you work. For additional information on COVID-19 related issues, please visit the [Nelson Mullins COVID-19 resource page](#).

[1] Note that the ARPA statute appears to limit this exclusion to the individual who terminated employment, but we believe this is merely a drafting error and expect future guidance to clarify that all family members of the individual who voluntarily terminates employment are also excluded.

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