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## IRS Releases Long-Awaited COBRA Subsidy Guidance

Late in the afternoon of May 18, 2021, the IRS released its long-awaited guidance on the COBRA subsidy created by the American Rescue Plan Act of 2021 (ARPA). The guidance, [IRS Notice 2021-31](#), is predominantly in question-and-answer format. It addresses eighty-six specific questions related to the ARPA COBRA subsidy. The associated answers address many, though not all, of the outstanding COBRA subsidy application quandaries. The "new" information gleaned from this notice is detailed below.

Before diving in, a word on vocabulary—the IRS guidance expressly acknowledges the complexity of the terminology and concepts associated with the ARPA COBRA Subsidy. The guidance includes some newly defined terms to help plan administrators and other advisors. These include:

"Assistance Eligible Individual" or "AEI"	A COBRA qualified beneficiary eligible for COBRA between April 1, 2021 and September 31, 2021, resulting from a reduction in hours or involuntary termination of employment, is an AEI. An AEI may not be eligible for coverage under another group health plan or Medicare.
"COBRA Continuation Coverage"	Continuation coverage available under the federal COBRA law -OR- a state program that provides coverage comparable to the federal COBRA law.
"COBRA Premium Assistance"	The temporary premium assistance available under ARPA (i.e., the COBRA subsidy).
"Federal COBRA"	COBRA continuation coverage under the Internal Revenue Code, ERISA, and the Public Health Service Act.
"ARP Extended Election Period"	The new election right created by ARPA (i.e., the "second bite at the apple").

### Eligibility for COBRA Premium Assistance

- It is possible to become an AEI more than once. For example, suppose a person qualifies as an AEI due to an involuntary termination and elects subsidized coverage on April 1, 2021. On June 1, 2021, this individual loses AEI status due to eligibility for another group plan through a new employer. Then the



employee loses group health plan eligibility through their new employer on August 1, 2021, due to another involuntary termination. In that case, the person is an AEI again.

- Employers may require individuals to self-certify or attest to their eligibility for the COBRA Premium Assistance. Employers are not technically required to do so. Still, as a practical matter, businesses will need to document eligibility as part of the tax credit that will ultimately pay for the subsidy. Presumably, the [Summary of the COBRA Premium Assistance and Request For Treatment as an Eligible Individual Form](#) in the DOL's model ARPA notice will satisfy this requirement.
- Employers may rely on individual attestations of eligibility (including loss of coverage because of a reduction in hours or involuntary termination of employment) unless the employer has **actual knowledge** an individual's attestation is incorrect.
- No qualifying events trigger a right to the COBRA subsidy other than involuntary termination or reduction of hours. Other qualifying events including death, divorce, voluntary termination, etc., do not trigger subsidy rights. If an individual is already eligible for COBRA when they experience a reduction in hours or involuntary termination of employment, they are not an AEI.
- Suppose an AEI obtains a benefits-eligible position through a new employer. In that case, their eligibility for the subsidy lasts until the day that coverage could start, even if they do not elect the new coverage. Said differently, an AEI remains eligible for assistance during the waiting period for coverage under a new employer-sponsored plan.
- Sometimes a COBRA period extends beyond the typical timeframe (due to a disability extension, secondary qualifying event, or more extended applicable state law requirement). If the individual with extended COBRA is otherwise an AEI, then they can still qualify for Premium Assistance during that extension.
- The subsidy does not apply to individuals given access to extended COBRA-like coverage by their employer but who are not technically entitled to COBRA. A classic example of this type of situation would be a plan that offers domestic partner coverage.
- An AEI remains eligible for the subsidy even if they are not "up-to-date" on their COBRA payments.

### Reduction in Hours

- A reduction in hours does not have to be involuntary for an individual to qualify for Premium Assistance.
- A furlough or temporary work stoppage can qualify for this purpose.
- Note that the guidance does not specifically address what happens if the reduction in hours is due to an unprotected leave of absence. The DOL has seemingly taken the position that it would trigger the

subsidy; however, without assurance from the IRS, it is not possible to determine if employers would ultimately be able to claim the tax credit if subsidized coverage was extended under these circumstances.

### Involuntary Termination of Employment

- Employers must determine if a termination of employment is involuntary based on the facts and circumstances. For this purpose, involuntary termination is "severance from employment due to the independent exercise of the employer's unilateral authority to terminate the employment, other than due to the employee's implicit or explicit request, where the employee was willing and able to continue services."

Examples include:

<b>Involuntary Termination</b>	<b>Not Involuntary Termination</b>
Employer ending employment due to the employee's absence from work due to illness or disability.	Employee's absence from work due to an illness or disability before the employer takes action to end the employment relationship.
A situation where the employer would have terminated an employee's employment relationship but deciding to "retire."	Retirement.
Involuntary termination for cause.	Termination for "gross misconduct"—in this case, no COBRA right is triggered.
Employee's termination of employment due to general concerns about workplace safety if the employee can demonstrate that the employer's actions (or inactions) result in a material adverse change to the employment relationship (i.e., constructive discharge).	Employee-initiated termination of employment due to general concerns about workplace safety.
Resignation because of a material change in the geographic location of employment.	Employee-initiated termination of employment due to the health condition of a family member, inability to find daycare, or similar issues (unless employer refuses to provide reasonable accommodations).
Employee participation in a qualified early retirement program.	Death of an employee.
Failure to renew contract where the employee is willing and able to continue the relationship under similar terms.	Completion of a contract if, at all times, when the services were performed, it was understood that the contract had a set term and would not be renewed.
Employee-initiated termination of employment in response to a material reduction in hours.	



### Coverage Eligible for COBRA Premium Assistance

- Premium Assistance is available for dental-only and vision-only plans (including circumstances when the AEI never enrolled in medical coverage through the employer).
- Premium Assistance is also available for traditional health reimbursement arrangements (HRAs) and individual coverage health reimbursement arrangements (ICHRAs). It is not available for qualified small employer health reimbursement arrangements (QSEHRAs).
- If an employer no longer offers the same plans, an AEI must get the opportunity to elect the plan available to active employees that is most similar to their previous plan. This new plan will qualify for the subsidy even if the premium is greater than the premium in the initial plan.

### Beginning of COBRA Premium Assistance Period

- The Premium Assistance Period begins as of the first coverage period beginning on or after April 1, 2021.
- AEIs may elect coverage retroactively to the beginning of the Premium Assistance Period or prospectively.
- Even if an employer is no longer subject to Federal COBRA (i.e., they dropped to under 20 employees), they are still required to administer the subsidy if the applicable qualifying event occurred while they were subject to Federal COBRA.
- The subsidy can apply to coverage elected after September 30, 2021—but only with respect to coverage associated with periods before September 30, 2021.

### End of COBRA Premium Assistance Period

- The Premium Assistance Period ends on the earliest of: (1) the first date the AEI becomes eligible for coverage under another employer-sponsored major medical plan or Medicare; (2) the date the individual ceases to be subject to COBRA; or (3) the end of the last period of coverage beginning on or before September 30, 2021.
- If an AEI fails to notify their employer that they no longer qualify for the subsidy, they could be subject to a penalty of \$250 per failure to notify (or, if more, and the failure was fraudulent, 110% of the subsidy they should not have received). The penalty does not apply if the failure to report is based on reasonable cause and not willful neglect.

### Extended Election Period

- The extended election period or "second bite at the apple" does not apply to State continuation laws unless expressly provided for under applicable state law.



- An AEI may elect coverage as of April 1, 2021 (or prospectively at the time of the election), even if this creates a coverage gap. Presumably, many AEIs could elect coverage going back further in time (perhaps as far back as the initial coverage loss due to the Outbreak Period). However, once an AEI makes an election, otherwise applicable election rights terminate. Put another way, if the AEI elects a coverage date later than the date of their loss of coverage, then they will have a coverage gap and will not be afforded another opportunity to elect coverage for that gap.
- If an AEI elects COBRA coverage under an HRA, the subsidy applies to expenses incurred during the Premium Assistance Period only.
- Suppose an individual previously elected coverage under some, but not all, of the lines of COBRA coverage they were eligible for, the new election right applies to the other lines of coverage.

#### Payments to Insurers Under Federal COBRA

- If an insurer typically collects Federal COBRA premiums on behalf of employers, they must treat AEIs as having paid in full. Notwithstanding the contractual arrangement between the employer and the insurer, the employer is responsible for paying the insurer for this coverage. The employer can then seek reimbursement from the Federal government.

#### Comparable State Continuation Coverage

- The subsidy applies to state continuation coverage in states where the maximum continuation period differs from Federal law.
- Where state continuation coverage applies, the insurer, not the employer, is responsible for fronting premium dollars and seeking reimbursement from the Federal government. In this case, the employer may not take the tax credit.

#### Calculation of COBRA Premium Assistance Credit

- An employer (or insurer in the case of state continuation coverage) is entitled to a tax credit equal to what the AEI otherwise would have paid for COBRA coverage. Generally, this is 102% of the premium or equivalent.
- The tax credit does not cover any extra administrative fees (such as the added costs to the employer of administering these new rules).
- For an ICHRA, the Premium Assistance Credit limit is 102% of the amount paid by the employer in premiums.



- If the employer helps to offset the cost of COBRA (such as in the case of severance) they cannot claim that amount as part of the tax credit. The employer can only be reimbursed for what the AEI would actually be required to pay for the coverage.
- To avoid this result, employers are permitted to stop their subsidies towards COBRA effective April 1, 2021. However, if they do so, they must treat all similarly situated individuals the same.
- The IRS also provides a workaround for this issue by noting that the employer can still maximize the federal subsidy and pay an employee what was otherwise intended using taxable compensation.

### How Employer Subsidies Work

For purposes of these examples, assume 102% of the applicable premium for COBRA coverage is \$1,000/month.

<u>Example 1</u>	The employer pays for half of the premium (i.e., \$500), and the qualified beneficiary is otherwise required to pay \$500 for coverage.	The employer is eligible for an ARPA tax credit of \$500.
<u>Example 2</u>	Before April 1, 2021, the employer paid half of the premium. Effective April 1, 2021, the plan charges <b>all</b> qualified beneficiaries \$1,000 per month.	The employer is eligible for an ARPA tax credit of \$1,000.
<u>Example 3</u>	Same facts as Example 2. In addition, beginning April 1, 2021, the employer provides a taxable severance benefit of \$600 to AEIs.	The employer is eligible for an ARPA tax credit of \$1,000.

### Claiming the COBRA Premium Assistance Credit

As a refresher, the following entities are responsible for “fronting” the cost of the subsidy and then claiming reimbursement via a tax credit.

Type of Plan	Premium Payee (i.e., entity entitled to the tax credit)
Multiemployer plan	The plan itself
Plan subject to Federal COBRA	The common law employer maintaining the plan
Plan subject to State continuation coverage but not fully-insured	The common law employer maintaining the plan
Fully-insured plan subject to State continuation coverage	The insurer



- A premium payee is entitled to claim the tax credit as of the date the AEI elects coverage for any period of subsidized coverage that began before that date. After that, the payee can claim it as of the first day of each subsequent coverage period.
- The premium payee claims the credit using Form 941, Employer's Quarterly Federal Tax Return. In anticipation of filing this return, the payee can: (1) reduce the deposits of federal employment taxes, **including withheld taxes**, that it would otherwise be required to make up to the amount of the anticipated credit; and (2) request an advance of the amount of the anticipated credit that exceeds those amounts using Form 7200, Advance Payment of Employer Credits Due to COVID-19. Form 7200 may be filed after the close of the payroll period in which the payee became entitled to the credit.
- Form 7200 must be filed by the earlier of: (1) the day the quarterly tax return for the applicable period is filed; or (2) the last day of the month following that quarter.
- Use Form 941 to claim the credit even when a payee has no employment tax liability. The guidance includes specific instructions on how to complete Form 941 in these circumstances.
- Suppose an AEI fails to give proper notification that they are no longer eligible for the subsidy. In that case, the payee still may claim the credit unless the payee learns the AEI has other coverage.
- Detailed instructions are available when an employer relies on a third-party payer, such as a PEO, to submit their taxes.

### Additional Issues

The new guidance ends with a statement indicating that the Treasury Department and IRS “are aware of certain additional issues related to the COBRA premium assistance provisions.” It also promises they are “continuing to consider these issues and the possibility of issuing guidance with respect to them.” It is undoubtedly the case that many more questions remain. It is also the case that this guidance provides many long-sought-after answers. We will continue to monitor developments carefully and bring any additional information to you as it becomes available.

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