



## DOL Releases Model Notices and Other Resources Related to COBRA Premium Assistance

On April 7, 2021, the U.S. Department of Labor (DOL) released a [link to its webpage](#) dedicated to the COBRA premium assistance authorized under the American Rescue Plan Act, 2021 (ARPA), the third COVID-19 stimulus bill. The webpage includes model notices, [frequently asked questions](#), and related information. With the exception of the model notices, the guidance appears targeted towards impacted workers, leaving many employer-related questions unanswered. This alert summarizes the recent guidance and model notices.

### What does ARPA Provide and Who is an Assistance Eligible Individual?

Among other things, the ARPA provides a 100% subsidy for COBRA premiums for group health plans (other than health FSAs) from April 1, 2021 through September 30, 2021 for assistance eligible individuals (AEIs). AEIs are employees and their family members who are:

- eligible for, and enroll in, COBRA (or state mini-COBRA) due to a reduction in hours or **involuntary** termination of employment;
- not eligible for other group health plan coverage or Medicare; and
- still within their maximum COBRA continuation coverage period (generally, 18 months).

AEIs include individuals newly eligible for COBRA between April 1, 2021 and September 30, 2021, individuals who were in their COBRA election period as of April 1, 2021, and individuals who would be AEIs but whose COBRA coverage lapsed due to non-payment prior to April 1, 2021. AEIs also include any qualified beneficiaries, such as family members, who did not elect COBRA continuation coverage when first eligible. Generally, this means an employee (and their qualified beneficiaries) with a COBRA start date on or after November 1, 2019, would have one or more months of eligibility for the COBRA subsidy. Therefore, employers should identify any employees involuntarily terminated or whose hours were reduced on or after October 1, 2019, as potential AEIs.

In its guidance, the DOL provided a non-exhaustive list of examples of a “reduction in hours” that would make an impacted employee eligible for premium assistance, including a reduction due to (1) change in a business’s hours or operation, (2) transition from full-time to part-time, (3) taking a temporary leave of absence, or (4) participating in a lawful labor strike. To qualify as a reduction in hours (as opposed to a termination of employment) the DOL specified that individuals must remain an employee at the time hours are reduced, including during any leave of absence.

Further, the DOL clarified that if an AEI is eligible for coverage under a spouse’s plan (other than excepted benefits, a qualified small employer health reimbursement arrangement (QSEHRA), or a health flexible spending arrangement (FSA)), then they are not eligible for premium assistance; however, if they are currently enrolled in the Marketplace or other individual coverage, they can elect COBRA, drop their Marketplace or other individual coverage (prospectively), and receive the premium assistance.

The DOL also noted that individuals *may* be eligible for a special enrollment period to enroll in coverage through the Marketplace or to enroll in individual coverage after COBRA premium assistance ends.

### **How Much Time Does an AEI Have to Elect COBRA, and When is COBRA Effective?**

AEIs must be offered at least a 60-day window within which to elect COBRA coverage, which begins on the date an applicable required notice is provided to the AEI (on or after April 1, 2021).

COBRA coverage elected during the subsidy period will be effective April 1, 2021 (for qualifying events occurring prior to April 1), and employees are not required to elect retroactive to the date of their qualifying event or any other date prior to April 1, 2021, nor are they required to pay outstanding premiums for prior periods of coverage in order to secure premium assistance.

In its guidance, the DOL clarifies that the extension of certain deadlines due to the COVID-19 National Emergency, such as those articulated in EBSA Disaster Relief Notices from 2020 and 2021 and the joint rules issued by the DOL and IRS, does not apply to the 60-day window for AEIs to elect subsidized COBRA coverage. Accordingly, if an AEI misses the 60-day deadline to elect COBRA, none of the COVID-19 related extensions apply.

## **What Are the Notice Requirements?**

The ARPA requires employers (or insurers or plan administrators, as applicable) to provide certain notices to impacted employees and beneficiaries as summarized below.

- **[Model General Notice and COBRA Continuation Coverage Election Notice](#)**. Individuals who become eligible to elect COBRA during the subsidy period (i.e., they become COBRA eligible between April 1, 2021 – September 30, 2021) must be provided a notice that describes the availability of the premium assistance. The notice requirement may be satisfied by using the model notice linked above, amending existing notices, or by including a separate attachment. If an employer creates its own notice or amends existing notices, the notice must include the following:
  - the forms necessary for establishing eligibility for premium assistance;
  - the name, address, and telephone number to contact the plan administrator and any other person maintaining relevant information in connection with such premium assistance;
  - a description of the extended election period;
  - a description of the obligation of the qualified beneficiary to notify the plan when they are no longer eligible for a subsidy and the associated penalty for failure to do so;
  - a description, displayed in a prominent manner, of the right to a subsidized premium and any conditions thereon; and
  - a description of the option to enroll in different coverage if the employer so permits.

Insurers of fully-insured plans that are subject to state mini-COBRA (in lieu of federal COBRA) laws may use a separate, [Alternative Model Election Notice](#).

- **[Notice of Extended Election Period](#)**. Individuals who had a qualifying event (due to reduction in hours or involuntary termination) prior to April 1, 2021 and are in their COBRA election period on

April 1, 2021 (including any COVID-19-related extensions), or who would be AEIs but whose COBRA coverage lapsed due to non-payment prior to April 1, 2021 must be provided a Notice of Extended Election Period by May 31, 2021 and have 60 days to elect COBRA after the date the notice is provided to them.

- **Notice of Subsidy Expiration**. Within 15-45 days before an AEI's premium assistance expires, the AEI must be provided with a notice informing them that the subsidy period is ending, including the date the expiration and that the individual may be eligible for coverage without any premium assistance through COBRA or coverage under a group health plan. This notice, however, is not required if the subsidy is ending due to the individual becoming eligible for another group health plan or Medicare.
- **Summary of the COBRA Premium Assistance Provisions**. This must be attached to the model general notice and notice of extended election period. The Summary contains important information about the rules for premium assistance. To apply for premium assistance, AEIs must complete the "Request for Treatment as an AEI" form within the Summary and return it to their plan or employer. If an AEI has not yet elected COBRA continuation coverage, they may send this form along with their election form. If the AEI is already enrolled in COBRA, they may send this form in separately.

Similar to the deadline for AEIs to elect COBRA, the FAQ guidance states that the COVID-19 deadline extensions do not apply to the deadline for employers, insurers, or plan administrators to provide any of the above notices. Notably, the DOL indicated that excise taxes of up to \$100 per qualified beneficiary or \$200 per family per day may be imposed under the Internal Revenue Code if an employer or multiemployer plan fails to comply with the ARPA requirements.

### **Can AEIs Change Coverage Options?**

Under ARPA, employers may, but are not required to, allow AEIs to select new plans available to similarly situated active employees if the premium for such different coverage does not exceed the premium for coverage in which such individual was enrolled at the time such qualifying event occurred and the different coverage is not coverage consisting only of excepted benefits (e.g., dental or vision), or coverage under a health FSA or QSEHRA.

If an employer chooses to allow a change in coverage options, they must notify individuals of their opportunity to change coverage. Individuals have 90 days from the date they are notified by the employer of the option to elect a different plan to change their coverage.

### **How do Employers Access the Tax Credit for the COBRA Premium Assistance?**

Employers are entitled to an advanceable, refundable tax credit against Medicare payroll taxes (1.45%) to pay for coverage during the subsidy period. The DOL will provide forms and instructions for employers to apply for the credit, though the forms were not included in the COBRA premium subsidies webpage.

### **What Questions Remain?**

As referenced previously, the DOL's guidance is mostly targeted towards AEs. Therefore, many questions for employers remain. It is unclear when any further guidance will be issued at this time, though the hope is that some or all of the below will be addressed for the benefit of employers, insurers, and plan administrators:

- Further guidance for PEOs and multiemployer (union) plans;
- Instructions (and directions about the specific forms to be used) for employers to apply for tax credits;
- Guidance for companies that are undergoing or recently underwent a merger or acquisition; and
- Guidance for severance arrangements, though the DOL's Model General Notice includes a peculiar and vague instruction to individuals who receive a severance package from their former employer (wherein the employer pays some or all of the COBRA premiums), encouraging the former employee to contact the DOL "to discuss your options." As the model is just a model, employers may want to remove this provision when tailoring it for use.

### **Next Steps**

Employers have until May 31, 2021 to send their required General Notice or Notice of Extended Election Period to AEs. Accordingly, they should work with their COBRA administrator to ensure all AEs have been identified, that the administrator is prepared to timely provide all required notices, and that they have processes in place to identify AEs who are approaching their maximum coverage period, so they can be notified when assistance is ending. Further, if the employer intends to allow AEs to change their

coverage, they should work with the administrator to notify individuals and instruct them how to change their plan, as well as the applicable deadline to request the change.

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