



## COBRA Changes Under the American Rescue Plan Act of 2021

On March 11, 2021, President Biden signed the American Rescue Plan Act of 2021 (“ARPA” or “the Act”) into law. Among the Act’s many economic stimulus provisions is a temporary subsidy for COBRA coverage that will undoubtedly be a significant benefit for individuals who lost health coverage during the pandemic, but which is just as certain to be a tremendous administrative burden for employers and group health plans.

### Overview

The Act includes premium assistance covering 100% of the cost of COBRA continuation coverage for certain “assistance eligible individuals” (“AEIs”) under group health plans. The premium assistance is available to AEIs for the six-month period from April 1, 2021, through September 30, 2021 (or any portion of that six-month period during which an AEI has continuation coverage).

Certain AEIs will have a second chance to elect COBRA on a prospective basis if they did not initially do so, or if they elected but terminated COBRA coverage early. Plan sponsors also may permit AEIs to elect different coverage options in certain circumstances. AEIs who have already paid premiums for the period that premium assistance is available will be entitled to a refund of those premiums. Updated COBRA notices are required to implement these provisions of the Act.

The employer (or the plan, in the case of multiemployer group health plans) must provide the subsidy and may claim a tax credit against certain quarterly employment taxes for COBRA premiums that otherwise would have been paid by the AEIs who receive the premium assistance. The ARPA subsidy also applies to fully insured group health plans that are not subject to COBRA (e.g., because the

employer typically employs fewer than 20 full-time employees), but which are subject to state continuation laws. For those plans, the insurer must provide the subsidy and is entitled to claim the tax credit.

Generally, the amount of the tax credit in a quarter cannot exceed the amount of the tax owed in that quarter, but the credit is refundable and treated as a tax overpayment. As noted below, we expect more guidance to clarify the credit/refund process for multiemployer group health plans, which may not generally pay employment taxes.

## **Who is an AEI?**

Generally, an AEI is a COBRA qualified beneficiary (“QB”) whose qualifying event is either an involuntary termination of employment (excluding termination for gross misconduct) or a reduction of hours, and who:

- Is currently covered by COBRA and whose coverage period includes at least some portion of April 2021; or
- First becomes eligible for COBRA on or after April 1, 2021 (or any time during the premium assistance period ending September 30, 2021) and elects COBRA coverage.

An individual who is still within his or her original 18 months of potential COBRA coverage also can be an AEI – and thus entitled to the ARPA subsidy – even if he or she previously elected COBRA and dropped it, or if he or she declined to elect COBRA at the time of his or her involuntary termination or reduction in hours. If an individual previously elected coverage and could have continued it through some portion of April 2021 but discontinued COBRA coverage early, or if the individual did not previously elect COBRA but could have done so and continued coverage through some portion of April 2021, the individual is an AEI.

These AEIs can elect COBRA coverage on a prospective basis during an extended election period that begins on April 1, 2021, and ends 60 days after a new required election notice is provided to the AEI. Such coverage would be effective only on and after April 1, 2021 (not retroactively to the date of the qualifying event), and would extend only through the maximum COBRA continuation period measured from the date of the original qualifying event.

The AEI population outlined above includes QBs who first became covered by COBRA on November 1, 2019, or later (or who would have been covered effective November 2019 or later if they had elected COBRA). For example, April 2021, would be the 18<sup>th</sup> month of COBRA coverage for a QB whose coverage was first effective (or would have been effective) in November 2019.

## **COBRA Coverage Period for Assistance Eligible Individuals**

Although the Act gives certain AEIs a second chance to make a COBRA election during the extended election period, it does not extend the maximum period of coverage available to those AEIs. The maximum period of coverage is still determined by the nature of the qualifying event (*e.g.*, 18 months for a loss of coverage caused by a termination of employment or reduction in hours).

For example, an AEI who was involuntarily terminated and first eligible for COBRA beginning November 2019, is still eligible for only 18 months of continuation coverage, measured from the date of that qualifying event. If that individual is currently covered by COBRA, or he or she makes a prospective election allowed by the Act, April 2021 (the 18<sup>th</sup> month of the individual's initial COBRA period) is the only month he or she is eligible for the premium assistance under the Act.

## **Required Notices**

In order to take advantage of the COBRA premium subsidy, AEI's must be made aware of it. This will require plan administrators to modify one existing COBRA notice (at least temporarily) and distribute two new notices.

**Updated Standard Election Notice.** Plan administrators will be required to update the plan's standard COBRA election notice to include information about the availability of premium assistance, any forms required to establish eligibility for the premium assistance, and the qualified beneficiary's obligation to notify the administrator if he or she ceases to be eligible for the subsidy (*i.e.*, if they become eligible for other group health coverage or Medicare).

**Second Election Period Notice.** Plan administrators also will be required to provide a new notice of the extended election period and premium assistance to AEIs who now have a second opportunity to elect prospective COBRA coverage. This

“Extended Election Notice” must be sent to affected AEs no later than May 31, 2021. AEs will have up to 60 days after the notice is provided to make a second COBRA election.

**Note:** The DOL is expected to issue model Election and Extended Election Period Notices by April 10, 2021 (30 days after the enactment of the Act) to assist plan administrators in implementing these requirements.

**Notice of Expiration of Premium Assistance.** Plans also will be required to notify AEs when their COBRA premium assistance is about to expire. This new notice must include additional information about the availability of continued coverage without the subsidy. (This notice is not required if the AE’s coverage is terminating due to his or her eligibility for other group health plan coverage or Medicare). The expiration notice must be provided at least 15 but not more than 45 days before the premium assistance expires.

**Note:** The DOL is expected to issue a model Notice regarding the expiration of the premium assistance by April 25, 2021 (45 days after the enactment of the Act).

**AE Notice to Plan of Eligibility for Other Coverage.** AEs are required to provide notice to the plan if they become eligible for other group health plan coverage or Medicare. In certain circumstances, they may be subject to financial penalties for failing to do so.

## **Overlap Between the Act and Outbreak Period Guidance**

It is important to note that some individuals who are eligible to elect prospective coverage with premium assistance beginning April 2021 under the Act also may still be able to elect COBRA coverage retroactive to their initial COBRA eligibility date pursuant to the Outbreak Period guidance currently in effect (as long as their individual 12-month tolling period has not yet expired). (We explained the Outbreak Period relief, under which certain notice and election deadlines are tolled during the COVID-19 National Emergency, in a prior blog [post](#).) Any such retroactive coverage would not be covered by the Act, however, and no months prior to April 2021 are eligible for the premium assistance. A QB making an election under the Outbreak Period guidance would be required to pay the regular COBRA premiums for any retroactive COBRA coverage effective prior to April 1, 2021 (subject to the same

Outbreak Period relief and extended deadlines for premium payments). Plan sponsors and third-party administrators will need to carefully consider both sets of guidance in administering COBRA.

## **What to do Right Now**

The ARPA COBRA subsidy is already effective, as are the new notice requirements. Plan sponsors therefore should take some immediate steps to comply. Here are a few suggested action items, as we wait for additional guidance from the regulatory agencies.

**Coordinate with TPAs, COBRA administrators, and insurers.** The statutory obligation to provide COBRA coverage and distribute COBRA notices falls on the plan administrator, which is typically the employer that sponsors the group health plan. Most employers outsource this obligation to other vendors, such as a COBRA administrator, third-party administrator (for self-funded plans), or insurer. Employers should coordinate with such vendors and verify (preferably in writing) which party will be responsible for issuing the new and revised COBRA notices.

**Wait for model notices.** The Department of Labor is required to issue model notices describing the various subsidy rules before the end of April. We recommend that employers wait for the model notices, which may include instructions or guidance that resolves some of the questions left open by the Act.

**Determine who is an AEI under your plan.** Plan sponsors should identify the plan's AEIs so they can act quickly once the DOL issues model notices. Among other things, this will require employers to review employee terminations over the past 18 months and determine whether they were voluntary or involuntary.

**Determine whether any AEIs are owed a refund of COBRA premiums.** The Act provides that AEIs who are eligible for the COBRA subsidy, but who have already paid COBRA premiums for months in which the subsidy is available, must be issued a refund of the amounts paid within 60 days after the date on which the premium was paid. The entity that received the premium payment (e.g., the employer or the insurer) is responsible for issuing the refund. The refund obligation is most likely to apply to qualified beneficiaries who paid their April COBRA premium early.

**Decide whether to allow AEIs to enroll in a different coverage option.** Plans may allow AEIs to enroll in a coverage option that is different from the option in which they were enrolled at the time of the initial loss of coverage. This is a departure from the standard COBRA enrollment rules, which only permit QBs to enroll in the same coverage they had at the time of their qualifying event. The option to enroll in different coverage is only available to AEIs if the other coverage option is offered to similarly situated active employees, and if it is not more expensive than the option in which the AEI was enrolled at the time of the qualifying event. Employers are not required to give AEIs this additional coverage option, but may choose to add it. If they do, AEIs will have up to ninety days in which to change coverage options.

## **More Guidance Needed**

Anything that sounds as simple as “free COBRA” is destined to be complex in its administration. We expect the IRS and DOL to issue guidance in the coming weeks to address some of those administrative complexities. For instance, employers need additional guidance for obtaining the payroll tax credits to which they are entitled, and multiemployer plans need to understand how they are to claim those credits.

Moreover, the Act says very little about how the Outbreak Period relief applies to the notice obligations and deadlines specifically applicable to the COBRA subsidy. While one would assume that those deadlines and obligations are *not* tolled during the Outbreak Period, further clarification would be helpful.

## **KEY UPCOMING DATES**

- First month of COBRA eligible for premium assistance – April 2021
- DOL to issue Model Election and Extended Election Period Notices – April 10, 2021
- DOL to issue Model Notice of Expiration of Premium Assistance Subsidy – April 25, 2021

Stay tuned! We expect to provide additional updates on these topics as the model notices and additional guidance are issued.

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