



## Employee Benefits News

March 30, 2021 (Updated April, 14, 2021)

### No Fooling Around: New Six-Month COBRA Subsidy Starts April 1 Requires Immediate Action

The American Rescue Plan Act of 2021 (“ARPA”) includes a temporary 100% subsidy for COBRA health care continuation coverage (including under state mini-COBRA statutes) to “assistance eligible individuals” (“AEIs”). This subsidy is not elective but is *required* to be provided to AEIs, and employers, multiemployer trustees and insurers (collectively, the “plan sponsor”) may be surprised by the financial commitment they must make and the degree to which they must be involved to ensure this COBRA subsidy is provided to AEIs. See our separate ARPA COBRA subsidy implementation plan (attached) for an outline of the preliminary actions that plan sponsors should consider taking to meet the ARPA COBRA subsidy requirements. These preliminary actions may need to be supplemented as guidance is released.

Under the ARPA COBRA subsidy, AEIs (including covered family members) pay nothing—zip, zero, zilch—of their COBRA premium from April 1, 2021, through Sept. 30, 2021, or until eligibility for the subsidy ends, if earlier. In addition, the subsidy is not included in the AEI’s gross income for federal tax purposes. The COBRA premium (including the 2% administrative fee if applicable) for the subsidy period must be advanced by the employer (or by the plan in the case of a multiemployer plan, or the insurer in the case of very small fully insured plans not subject to federal COBRA). To obtain reimbursement for the COBRA premium advanced by the plan sponsor for this period, the plan sponsor may receive a refundable credit against payroll taxes, provided the plan sponsor takes steps to procure these credits. Also, any COBRA premiums paid by an AEI for coverage during the applicable subsidy eligibility period must be refunded to the AEI within 60 days of the date of payment.

It should be noted that only the portion of the COBRA premium otherwise payable by an AEI is eligible for the subsidy. This means that any additional subsidy voluntarily provided by a plan sponsor is ignored (e.g., if a plan sponsor normally subsidizes 10% of the COBRA costs, then the plan sponsor would be entitled to a refundable credit against payroll taxes for the 90% of the COBRA costs—that is, solely the portion the AEI otherwise would have been obligated to pay). Given the short duration of the ARPA COBRA subsidy period, plan sponsors will need to consider whether any design changes to their severance programs, through which a voluntary subsidy is often provided, will be worth the effort and to make certain that there otherwise is adequate consideration for any applicable separation agreements entered into by a terminating employee. It may be worth a discussion with the plan sponsor’s financial and tax advisors, as well as with employment counsel.

#### Recommended First Step – Identify the AEIs

One of the preliminary actions required is identifying who are the AEIs. An AEI is a “qualified beneficiary” (“QB”) who is eligible for COBRA continuation coverage during the subsidy period due to involuntary termination from employment (other than for gross misconduct) or reduction of work hours and who elects COBRA coverage. An AEI includes not only individuals who have COBRA coverage actually in effect at any time during the subsidy period, but also includes individuals who would have COBRA coverage in effect at any time during the subsidy period if (i) they had chosen to elect COBRA coverage or (ii) their COBRA coverage had not been discontinued earlier in time. **Brownstein Comment:** At a minimum, any individual who became a QB on or after Nov. 1, 2019, must be examined to determine if they are an AEI. Guidance is needed as to what constitutes involuntary termination for purposes of the ARPA COBRA subsidy. It also is unclear whether reduction of hours must be involuntary. Guidance also is needed to clarify whether an AEI would include a QB who has COBRA coverage during the subsidy period as a result of a second qualifying event (e.g., covered employee involuntarily terminated prior to Nov. 1, 2019, but there was a subsequent divorce giving the

spouse up to 36 months of coverage, which extended period includes the subsidy period). See our separate ARPA COBRA subsidy implementation plan (attached) for the specific steps we suggest you should take.

### **Some AEIs May Be Ineligible for the Subsidy, or Their Eligibility May Terminate Early**

An AEI's eligibility for the subsidy ends before Sept. 30, 2021, if the AEI is (i) eligible for Medicare, (ii) eligible for another group health plan (even if the AEI is not actually covered by that plan), or (iii) at the end of the AEI's maximum COBRA coverage period. "Other group health plan coverage" does not include, among others, FSAs, QSEHRAs, excepted benefits under Code §9831(d)(2), limited scope benefits.

**AEI Must Give Notice of Eligibility for Other Plan Coverage.** The AEI is required to notify the plan of the AEI's eligibility for "other plan coverage." An AEI's failure to notify the plan could result in the AEI being assessed a \$250 penalty. That penalty increases, in the event the failure is fraudulent, to the greater of (i) \$250 or (ii) 110% of the subsidy provided after termination of eligibility. The penalty may be waived if the failure by the AEI to give this notice was due to reasonable cause and not due to willful neglect.

### **More Guidance and Model Notices**

ARPA requires the DOL, IRS and HHS to provide model notices and guidance on the ARPA COBRA subsidy. The first guidance is due within 30 days after enactment of ARPA—April 11, 2021. We expect the content of the model notices and the guidance will be partially based on the model notices and guidance previously issued in connection with the COBRA subsidy that had been enacted under the American Recovery and Reinvestment Act of 2009, but revised to reflect the current subsidy provisions.

### **How We Can Help**

Please contact one of us or your regular Brownstein attorney for answers to your questions about this new COBRA subsidy.

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**Immediate Action Required  
ARPA COBRA SUBSIDY IMPLEMENTATION PLAN**

This action plan is based on the provisions of Section 9501 of the American Rescue Plan Act of 2021 (H.R. 1319, March 11, 2021) and subject to the model notices and guidance on the ARPA COBRA subsidy required to be issued by the DOL, IRS and HHS.

<b>Step</b>	<b>Deadline</b>	<b>Action</b>	<b>Details / Comments</b>
A.	ASAP	Determine if the group health plan provides coverage to which the subsidy applies	The subsidy generally applies to all group health plan coverage that is subject to COBRA (e.g., medical, dental, vision benefits provided by employers, whether fully insured or self-funded, and by multiemployer plans). The subsidy also applies to (i) continuation coverage provided under a plan maintained by a federal or state government and (ii) continuation coverage required by state law to be comparable to COBRA for group health plans that are not subject to federal COBRA (e.g., plans covering fewer than 20 employees).
B.	ASAP	Identify the COBRA Qualified Beneficiaries (“QBs”) who could be Assistance Eligible Individuals (“AEIs”)	<p><i>An AEI is an individual who (i) is COBRA eligible after Oct. 31, 2019, by reason of a participant’s involuntary termination of employment or reduction of work hours, and (ii) has COBRA in effect (or is eligible under the second chance election described below).</i></p> <ol style="list-style-type: none"> <li>1. Identify all individuals who, from Nov. 1, 2019, to present, became QBs eligible to elect health care continuation coverage under the plan in accordance with federal COBRA, state mini-COBRA laws, or the Public Health Service Act.</li> <li>2. Of the QBs in item 1, identify which individuals had a COBRA qualifying event on account of a participant’s (i) termination from employment or (ii) reduction of working hours.</li> <li>3. Of the QBs in item 2, examine the facts and circumstances and compile a list of the QBs who are entitled to COBRA due to the participant’s involuntary termination of employment or reduction of work hours. These are the potential AEIs.</li> </ol> <p>Be certain to document the rationale as to why an individual was included or excluded from the AEI category so that there is a contemporaneous record of the analysis in the event an individual files a benefit claim, or the plan is audited by the government.</p> <p>More guidance is needed as to what constitutes “involuntary” termination, and whether a reduction of hours must be involuntary, so the initial review should be reexamined after guidance is issued. Plans may continue to deny COBRA eligibility for “gross misconduct” (but remember, this often is difficult to prove, and you should examine the plan document to see if that is a stated reason for denying COBRA coverage generally).</p>
C.	ASAP	Identify the AEIs from Step B who are eligible for the subsidy	<ol style="list-style-type: none"> <li>4. Of the QBs in item B.3, identify those who have COBRA coverage currently in effect. These should be provided the subsidy, unless they are ineligible (see below).</li> </ol>

Step	Deadline	Action	Details / Comments
D.	ASAP	Identify the AEIs from Step B who may be eligible for the “extended election period”	5. Of the QBs in item B.3, identify those who would have COBRA coverage currently in effect if (i) they had elected COBRA coverage or (ii) they had not terminated their COBRA coverage early. This group may be eligible for the “extended election period.”
E.	ASAP	Determine which AEIs from Step B are eligible for the ARPA subsidy  Also establish a process to identify and add newly eligible AEIs	<p>ARPA subsidy is available with respect to COBRA coverage provided to a participant and the participant’s spouse and dependent children, even if the participant did not elect COBRA coverage or had died, as long as the otherwise applicable COBRA coverage period would be in effect sometime during April through September 2021.</p> <p>An AEI’s eligibility for the subsidy ends when the AEI is (i) eligible for Medicare, (ii) eligible for other group health plan coverage (even if not actually covered by that plan), or (iii) at the end of the AEI’s maximum COBRA coverage period.</p> <p>“<i>Other group health plan coverage</i>” does not include, among others, FSAs, QSEHRAs, excepted benefits under Code §9831(d)(2), limited scope benefits.</p> <p>Assuming the general notice about the availability of the COBRA subsidy will be required to be widely distributed to all individuals who were eligible for COBRA on and after Nov. 1, 2021, plans will need to be prepared to address benefit claims from individuals seeking the subsidy.</p>
F.	ASAP	Determine who is the proper party to collect the subsidy via payroll tax credit	<p>The following parties have the right to collect the subsidy via payroll tax credit:</p> <ol style="list-style-type: none"> <li>1. The employer that sponsors the plan, except as provided in items 2 and 3, below.</li> <li>2. The plan, in the case of multiemployer plans.</li> <li>3. The insurer, in the case of small fully insured plans that are not subject to federal COBRA rules, but subject to state continuation requirements.</li> </ol> <p>Guidance has been promised regarding when third parties, such as PEOs, are involved.</p>
G.	ASAP	Discuss with third-party payroll provider and third-party COBRA provider as to what, if any, assistance will be provided	It may be necessary or desirable to amend the current services contract or enter into a supplement agreement with these parties with regard to any services they may provide with respect to this subsidy.
H.	ASAP	Modify COBRA premium billing system so that AEIs are charged 0% of the COBRA premium for the subsidy period	During the period of subsidized coverage from April 1, 2021, through Sept. 30, 2021, unless eligibility is terminated earlier due to (i) eligibility for other group health plan coverage, (ii) eligibility for Medicare, or (iii) the regularly applicable COBRA coverage period ends, an AEI is not required to pay the COBRA premium the AEI otherwise would have had to pay. It will be important to monitor when this subsidy terminates for an AEI, in order to end the subsidy and to not claim a payroll tax refund for any amounts applicable to that AEI after the subsidy ends.

Step	Deadline	Action	Details / Comments
I.	ASAP	Determine how the ARPA COBRA subsidy will interplay with any employer-provided COBRA subsidy	<p>Only the portion of the COBRA premium otherwise payable by an AEI is eligible for the ARPA subsidy. This means that any additional subsidy voluntarily provided by a plan sponsor is ignored. Given the short duration of the ARPA COBRA subsidy period, plan sponsors will need to consider whether any design changes to severance programs or employment agreements, through which the plan sponsor may provide a voluntary subsidy, will be worth the effort.</p> <p><u>Recommendations:</u></p> <ul style="list-style-type: none"> <li>Plan sponsors should discuss with their financial and tax advisors to determine which is better—the payroll tax credit related to the ARPA subsidy or the corporate tax deduction related to the plan sponsor-provided subsidy.</li> <li>Plan sponsors should discuss with employment counsel any COBRA subsidy negotiated under separation agreement that involves the subsidy period and how that may be affected by the ARPA subsidy requirement and/or how that might affect the payroll tax credit to which the plan sponsor may be eligible.</li> <li>When considering severance arrangements, employers should consult with employment counsel as to the impact on the enforceability of any general waiver and release obtained in return for the consideration of any voluntary subsidy.</li> </ul> <p>Depending on decisions made, the employer may need to amend severance programs and employment agreements, notify affected employees of how the ARPA subsidy will be coordinated with the employer subsidy (and may need to obtain employee consent). Publicly traded companies may need to also consider whether any SEC-related disclosure is required.</p>
J.	April 1, 2021	ARPA COBRA subsidy begins for those AEIs initially eligible for it	If an AEI pays all or part of the COBRA premium for any month for which the AEI is eligible for the subsidy, the plan sponsor must repay that amount to the AEI within 60 days of the date of payment.
K.	April 11, 2021	Deadline for DOL/IRS/HHS to provide model notices	DOL, IRS and HHS are required to provide model notices for (i) the General Notice (see Step M) and (ii) the Extended Election Period (see Item).
L.	April 25, 2021	Deadline for DOL/IRS/HHS to provide a Model Notice of Expiration of Period of Premium Assistance	<p>The plan administrator must provide to each AEI a written notice in clear and understandable language that: (1) the premium assistance for such individual will expire soon and the prominent identification of the date of such expiration; and (2) such individual may be eligible for coverage without any premium assistance through (a) COBRA continuation coverage or (b) coverage under a group health plan. This notice of expiration must be provided not more than 45 days or fewer than 15 days before the end of the subsidy period.</p> <p>Model notice to be provided by DOL, IRS and HHS within 45 days of ARPA enactment on March 11, 2021. Thus, the deadline is April 25, 2021.</p>

Step	Deadline	Action	Details / Comments
M.	May 31, 2021 (within 60 days of April 1, 2021)	Deadline to provide the required general notice about the subsidy  Revise COBRA notice OR Prepare a separate supplemental notice	<p><u>Purposes of General Notice:</u> (1) to advise of the availability of the COBRA subsidy and (2) to advise of the option to enroll in different coverage if the plan permits AEIs to elect enrollment in different coverage.</p> <p><u>Deadline:</u> The General Notice must be distributed within 60 days of April 1, 2021, that is, by May 30, 2021. We recommend that you wait for model notice to be issued. The model notice is due by April 11, 2021.</p> <p><u>Who Receives the General Notice:</u> While we need guidance, we expect that the plan will be required to distribute the General Notice to all individuals who became QBs on or after Nov. 1, 2019.</p> <p><u>Contents of General Notice:</u> The notice must be “in clear and understandable language” and must include the following information:</p> <ol style="list-style-type: none"> <li>a. The forms necessary for establishing eligibility for premium assistance;</li> <li>b. The name, address and telephone number to contact the plan administrator and any other person maintaining relevant information in connection with the premium assistance;</li> <li>c. A description of the extended election period;</li> <li>d. A description of the obligation of the QB to give notice of eligibility of other group health plan coverage and the penalty for failure to carry out the obligation;</li> <li>e. A description, displayed in a prominent manner, of the QB’s right to a subsidized premium and any conditions on entitlement to the subsidized premium; and</li> <li>f. A description of the option of the QB to enroll in different coverage if the employer permits such QB to elect to enroll in such different coverage.</li> </ol> <p>This new information can be added to the current COBRA notice or, alternatively, this information can be provided in a separate supplemental notice.</p>
N.	May 31, 2021	Deadline to provide the required Notice for Extended Election Periods	<p>Individuals who otherwise would be AEIs but are not actually covered by COBRA on April 1 through Sept. 30, 2021, must be given a second chance to elect COBRA coverage for the subsidy period applicable to them. The extended election can be made any time between April 1, 2021, and the 60th day after the revised general COBRA notice (Step M) is received by the individual.</p> <p>If the election is made, the second chance coverage becomes effective on the effective date of the subsidy applicable to the AEI. The AEI is not required to pay the COBRA premium for the otherwise applicable COBRA coverage period prior to April 1, 2021 (but neither is the plan required to pay for any group health expenses incurred prior to April 1, 2021).</p> <p><u>Notice for Extended Election Periods.</u> DOL will be issuing a model notice for providing information about the extended election rights of any AEI (or any individual who would be an AEI if a COBRA election were in effect) who (1) had a qualifying event at any time from Nov. 1, 2019, and (2) either did not elect COBRA or who elected, but subsequently discontinued, COBRA continuation coverage.</p> <p>Guidance is needed as to whom and how this notice should be distributed.</p>

Step	Deadline	Action	Details / Comments
O.	60th day after Notice for Extended Election Periods is received by AEI	Extended election period ends	Example: June 16, 2021, if revised COBRA notice received on April 17, 2021
P.	ASAP after the IRS issues appropriate guidance	Set up a process to recoup subsidy through credit against the employer's portion of Medicare taxes (assuming employer is the correct party to claim the credit (see Step F above))	The employer recoups the subsidy by claiming a refundable credit equal to the subsidy against the employer's share of the Medicare tax (the 1.45% portion of FICA paid by the employer).  We believe that the credit will be made via Form 941. We expect that the IRS will issue revised instructions to Form 941 regarding the COBRA subsidy and a revised Form 941.
Q.	Aug. 2, 2021  Quarterly due date of Form 941 for 2d calendar quarter 2021	File Form 941 for the preceding calendar quarter to obtain credit for COBRA subsidy provided against employer's portion of Medicare taxes	While more guidance is needed, we expect that the employer will be required to report on each Form 941 for the calendar quarter in which the COBRA subsidy is provided the total dollar amount of, and the number of AEIs receiving, the subsidy.  <i>Open Item:</i> How multiemployer plans and insurers will accomplish this reporting.
R.	60 days from date of payment of COBRA premium for any month in which AEI is eligible for the subsidy	Refund due to AEI if full COBRA premium charged for any month from April 1, 2021, through Sept. 30, 2021, in which AEI is eligible for the subsidy  Determine who is the appropriate party to receive the refund	Any COBRA premium paid by an AEI for any month in which the AEI is eligible for the subsidy must be refunded within 60 days of date of payment.
S.	90th day after notice of availability of alternative coverage	Alternative coverage option election deadline	<p><u>This is optional.</u> The plan may offer alternative group health coverage.</p> <p><u>Conditions:</u></p> <ul style="list-style-type: none"> <li>a. The employer must decide whether it will permit AEIs to enroll in alternative coverage;</li> <li>b. The alternative coverage must be offered to active employees;</li> <li>c. The premium for the alternative coverage does not exceed the premium for coverage in which the AEI was enrolled at the time of the original qualifying event; and</li> <li>d. The alternative coverage cannot consist solely of "non-core coverage" (such as dental, vision, counseling or referral services, health flexible spending, or coverage under an on-site medical facility that consists primarily of first aid services, prevention and wellness care or similar care, whether separately or combined).</li> </ul> <p><i>Open Item:</i> The ARPA does not address whether alternative coverage may be elected retroactively or only prospectively.</p>

Step	Deadline	Action	Details / Comments
T.	Sept. 14, 2021	Last day on which to distribute the Notice of Expiration of Period of Premium Assistance to AEIs	<p>The plan administrator must provide to each AEI a written notice in clear and understandable language that: (1) the premium assistance for such individual will expire soon and the prominent identification of the date of such expiration; and (2) such individual may be eligible for coverage without any premium assistance through (a) COBRA continuation coverage or (b) coverage under a group health plan.</p> <p>This notice of expiration must be provided not more than 45 days or fewer than 15 days before the end of the subsidy period.</p> <p>Guidance is needed on how this notice may be distributed and delivered.</p> <p>By April 25, 2021, the DOL, IRS and HHS must issue a model notice for this purpose.</p>
U.	Sept. 30, 2021	Subsidy ends for all AEIs	<p>Note that the subsidy ends on the earliest of:</p> <ul style="list-style-type: none"> <li>(a) AEI's eligibility for other plan coverage,</li> <li>(b) AEI's eligibility for Medicare, or</li> <li>(c) the end date of the applicable maximum COBRA coverage period, or</li> <li>(d) Sept. 30, 2021.</li> </ul> <p>The maximum COBRA coverage period may itself end early. Specifically, COBRA coverage ordinarily ends when the qualified beneficiary becomes <u>covered</u> under another group health plan or becomes <u>entitled</u> to Medicare. In contrast, the subsidy ends when the AEI becomes <u>eligible</u> under another group health plan or <u>eligible</u> for Medicare, regardless of whether the AEI is covered by the other group health plan or Medicare.</p> <p>The individual receiving the subsidized COBRA coverage must notify the employer if and when he becomes eligible for coverage under another group health plan or eligible for Medicare. An individual who fails to provide this notice may be subject to a penalty tax equal to \$250. If failure to notify is due to the participant's fraud, the penalty is the greater of \$250 or 110% of the subsidy that had been provided but shouldn't have been.</p> <p>With regard to second chance elections, the maximum COBRA period is determined from the date on which COBRA coverage would have begun if the individual had elected COBRA when originally given the election right and not from the date COBRA begins under the second chance election.</p>
V.	Oct. 1, 2021	COBRA continuation coverage period may continue	<p>After the subsidy period ends on Sept. 30, 2021, QBs whose maximum COBRA coverage period has not yet expired may continue their COBRA coverage provided they timely pay the premiums for the ongoing coverage.</p>
W.	Nov. 1, 2021 Quarterly due date of Form 941 for third calendar quarter 2021	File Form 941 for the third calendar quarter 2021 to obtain credit for COBRA subsidy provided against employer's portion of Medicare taxes	See Steps P and Q, above.