

NEW COBRA RULES TAKE EFFECT APRIL 1, 2021

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1. Subsidized COBRA benefits

As of April 1, 2021, the American Rescue Plan Act of 2021 (“ARP”) includes up to six months of free COBRA coverage for anyone who is an Assistance Eligible Individual (“AEI”). There are strict deadlines, with penalties, for plan administrators who do not act fast enough.¹ Even employers too small for federal COBRA, but covered by state mini-COBRA laws, need to comply.

2. The DOL has developed model forms and information in FAQ format.

The US Department of Labor (“DOL”) has already developed forms and notices, but they will need customization. Our brief initial advice, with deadlines and links to 5 key documents, is in Section 8.

¹ The Employer or a Committee is the Plan Administrator in most cases, even when a TPA is used. Employers with TPAs should verify that they are following the new ARP requirements.

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3. Which plans are covered ?

Any group health plan covered by COBRA or state mini-COBRA is covered.

Dental and vision plans are covered by ARP unless they are provided under an “excepted benefits” Section 125 flexible spending account.

An HRA is covered unless it is a QSEHRA, a qualified small employer HRA which gives premium assistance to employees for individual or family coverage they purchase through an ACA Exchange.

True “voluntary” plans with health benefits are not covered by the new ARP rules (or ERISA or COBRA), but only if they meet strict guidelines where benefits are purchased with employee after-tax dollars and employer involvement is extremely limited.

Note: Special rules, which are not clear yet, apply to “issuers” of state law mini-COBRA plans that cover employers who are too small to be under federal COBRA. See Section 10 for a preview. The balance of this article applies to those larger employers who are subject to federal COBRA.

4. What is an “AEI Event” and who are AEIs ?

An AEI Event is either of the following events which triggers COBRA continuation rights: a reduction in hours or an involuntary termination of employment.

There are two classes of AEIs:

1. Individuals who lose coverage in the period from April 1, 2021 through September 30, 2021 due to an AEI Event. Spouses and dependents covered at the time of the AEI Event are also AEIs.
2. Individuals who lost coverage prior to April 1, 2021 due to an AEI Event, whether they accepted or declined COBRA. Spouses and dependents covered at the time of the AEI Event are also AEIs.

Note: Unenrolled family members at the time of the coverage loss are not AEIs, although they can be added to a Plan in a later open enrollment period under normal COBRA rules and without ARP cost relief. DOL FAQ # 7.

Not yet clear is the case of a newly born or adopted child after the AEI Event. We believe they will be considered AEIs with free coverage rights, due to their special enrollment rights under COBRA rules and the spirit of ARP, and hope for future Guidance to confirm that.

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5. How long does the COBRA subsidy last?

1. The subsidy itself is available from April 1 through September 30, 2021. *ARP* does not extend COBRA's maximum coverage period.

Example: Joe was terminated involuntarily on December 1, 2019. His 18 month COBRA period ends May 31, 2021.

- Joe's *ARP* subsidy covers April and May, 2021. *ARP* does not give him added COBRA rights past May 31, 2021.
 - Joe does not get a refund for his costs for COBRA coverage prior to April 1, 2021.
2. The subsidy must stop as soon as an AEI is eligible for other group coverage, such as:
 - the plan of a new employer,
 - the plan of a spouse's (or partner's) employer,
 - an HRA linked to an employer plan or a QSHERA that assists purchase of individual insurance through an ACA Exchange,
 - Medicare

Important: *COBRA typically does not end until there is other coverage in force, and that remains the law, but not for the *ARP* subsidy. Mere eligibility for other coverage, even if expensive, cuts off the right to the *ARP* subsidy.*

Note: *Eligibility for Medicaid or an ACA Exchange does not prevent an AEI from dropping that coverage and electing *ARP* coverage with a former employer, but this seems impractical for such a short period of time. Medicaid is free and a person who drops coverage with an ACA Exchange will not get reimbursed for past coverage costs (and may also not claim an ACA affordability credit for months when covered under *ARP*'s free COBRA).*

6. Employers may allow new coverage options for those already on COBRA

An employer is permitted (not required) to allow AEIs who are already on COBRA to elect a different plan option than the one in which they had been enrolled at termination, but only if the premium cost is the same or less. For example, an employer who offers PPO and HMO options could allow COBRA participants who elected a PPO to switch to HMO. A switch from HMO to PPO would not be allowed in the typical situation where PPO is more expensive. This extra complication may not be worthwhile, and we don't recommend it in most cases.

7. What is an involuntary termination?

We expect future guidance will be similar to what IRS decided in 2009 in Notice 2009-27.²

“A severance from employment is due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee’s implicit or explicit request, where the employee was willing and able to continue performing services.”

1. This would include cosmetic “resignations” which are involuntary terminations in reality.
2. “Good reason” resignations, when an employer materially and unilaterally changes the conditions of employment would also be involuntary terminations if IRS follows its 2009 rationale.
3. It’s unclear if an employer can rely on an employee’s self-attestation that the termination was involuntary. The 2009 guidance required the employer to independently determine that, and that makes sense unless new guidance changes the IRS position. Otherwise, every quit for a good reason in the employees mind could be considered an involuntary termination.
4. There is no ARP assistance for involuntary terminations due to “gross misconduct,” but employers would rarely use this standard due to the legal uncertainties.

8. Employer Notice requirements: a roadmap.

DOL has developed important model notices and forms which can be accessed at this link: <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy>. Here is a roadmap.

1. AEI Events from April 1 through September 30, 2021.
 - Use the “Model ARP General Notice and COBRA Continuation Coverage Election Notice.”
 - Enclose with it the “Summary of the COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021.”

Note: There’s more than a summary in the “Summary.” The Summary includes are two key forms: (1) the form an AEI must fill out and return within 60 days to claim ARP relief, and (2) the form the AEI must return to notify that other coverage has become available and that the ARP subsidy must stop.

² The American Recovery and Reinvestment Act of 2009 (ARRA), in the economic crisis of that time, offered a 65% discount for up to 9 months of COBRA for involuntarily terminated employees

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Deadlines: Employers usually have 44 days to distribute COBRA Notice and election forms, but good faith issues can defer that until 60 days after the CORONA Virus Disaster is declared at an end. 44 days could be difficult timing for AEI Events that have already occurred and where the initial forms have not been distributed. We believe that distributing by May 31, 2021, even if later than 44 days from the AEI Event, will be acceptable, but recommend 44 days from the AEI Event when possible.

AEIs who claim the relief have 60 days from receipt to respond. The premium relief is not automatic. Although Disaster Relief extensions are available for COBRA elections, there is no ARA eligibility unless the form is returned within 60 days.

2. AEI Events prior to April 1, 2021 (the “second chance to elect COBRA”).
 - The forms say to use the “Model Notice in Connection with Extended Election Period” for terminations prior to April 1, 2021.

Note: if a termination occurred prior to April 1, 2021 and the initial COBRA forms have not yet been distributed, we believe it would be better to distribute the “Model ARP General Notice and COBRA Continuation Coverage Election Notice.” (The instructions don’t make this clear.)

- Enclose with it the “Summary of the COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021.” This includes the form for the AEI to claim ARP relief within 60 days of receipt.

Deadline: Employers must send an election notice to this group by May 31, 2021. AEIs have 60 days from receipt to respond.

Issue: How far back do you have to go to determine AEIs? Is it the 18 months ending on April 1, 2021? That’s logical, but what about an AEI who was terminated before October 1, 2019, was disabled, and has extended rights beyond 18 months that extend into the ARP free zone of April 1 – September 30, 2021. What about death and rights of beneficiaries whose second event rights extend into the ARP free zone? We do not think ARP Events preceding the 18 months (e.g., events before October 1, 2019) will trigger ARP rights for the second event extended COBRA period, but Guidance is needed.

3. **Advance notice that the ARP subsidy will end.** A notice must go to AEIs receiving the premium subsidy in a 15 - 45 day window **before** the premium subsidy ends. The Notice must include information about ways to obtain alternate coverage, including non-subsidized COBRA, if available. This Notice is not necessary for AEIs whose subsidy stops because of their eligibility for other coverage, but is required for all others,

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including those whose assistance ends on September 30, 2021 simply because of the statute.

- Use the “Model Notice of Expiration of Premium Assistance.”

4. **Notice of right to change coverage options.** If an employer decides to allow this feature, which we describe in Section 6 of this memo, there is a special form within the “Model Notice in Connection with Extended Election Period.” Participants have 90 days to elect a new coverage option. For those who make a second chance election of COBRA, the Participant must complete that election within 60 days. (So confusing, and one of several reasons for employers not to offer the change of coverage option.)

Note: If a change in coverage option is offered, the statute does not require this to be retroactive but Guidance is silent. A retroactive election makes no sense because it would then be necessary to refund excess premiums and to reprocess claims. This ambiguity in the Guidance is another reason for plans not to offer the change in coverage option.

5. **Special “Model Alternative Notice” for mini-COBRA small employers.** This notice is so broadly drafted, it needs customization. Do not use it in its present form without careful guidance. See Section 10.

9. **Claiming the Employer tax credit**

Employers must front the cost of the coverage, and then claim a refundable credit against Medicare payroll tax to offset the cost. The payroll tax credit cannot exceed the 1.45% tax which the employer pays for Medicare. (There is no credit against the additional .9% charged for salaries over \$200,000, because that is charged to the employee.) ARP costs in excess of the 1.45% can be treated as a tax overpayment and claimed as a refundable amount with the employer’s annual tax return. The statute also allows the IRS to issue guidance (not yet released) permitting advances of the tax credit. Guidance has not yet been issued for tax exempt employers who cannot recover the full amount with payroll tax returns and who only file 990s.

10. **Small employers and mini-COBRA**

We are exploring with small carriers in Massachusetts and other states, so stay tuned. Based on scant guidance so far, AEIs of small employers subject to a state’s mini-COBRA law:

1. qualify for the ARP subsidy for the period from April 1, 2021 through September 30, 2021, as is the case with AEIs of COBRA employers.
2. if permitted by the issuer (or required by state law) may be allowed to switch to different coverage options, but only if the cost is same or less, as is the case with AEIs of COBRA employers.

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3. might not qualify for ARP subsidies if the mini-COBRA election period for a pre-April 1, 2021 AEI Event has expired. This is a major difference with ARP rules for COBRA participants. Qualifying this class will either require changes in state law or voluntary gestures from issuers.

As for distribution requirements, the DOL Guidance assumes that the issuer (an insurer or HMO) is responsible for notices, not the Plan Administrator. That may be the case in most states, like RI, where the insurer administers mini-COBRA and collects premiums directly. However, Massachusetts mini-COBRA foists notice, election processing, and premium collection on employers. We definitely need some guidance here.

11. Summary

Congress came up with an extraordinarily complicated solution for short term relief. It has shifted the burden to employers, many of them troubled or they would not have terminated employees or cut back schedules. Unfortunately, the ARP penalties are so significant for non-compliance that employers have no choice but to give this priority treatment.

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