

EBSA Guidance on COBRA Subsidy in the American Rescue Plan Act

The American Rescue Plan Act of 2021 (ARPA) provides a 100% federal subsidy of COBRA premiums from April 1, 2021, through September 30, 2021, for certain COBRA participants known as Assistance Eligible Individuals (AEIs). Our [previous client update](#) outlined the key ARPA provisions and flagged many open questions regarding how employers and plans should implement and ensure compliance with these new requirements. This week, the Employee Benefits Security Administration of the Department of Labor (EBSA) issued clarifying guidance about the subsidies, much of which is posted on a new dedicated webpage, COBRA Premium Subsidy | U.S. Department of Labor (dol.gov), as well as a companion notice to be published in the Federal Register linked [here](#) (collectively, EBSA ARPA Subsidy Guidance). As we highlight in today's update, the EBSA ARPA Subsidy Guidance helps to resolve some questions, but not all. However, we expect to see additional guidance to be issued soon from the Internal Revenue Service and the U.S. Department of the Treasury (IRS/Treasury).

Model Notices

As expected, the EBSA ARPA Subsidy Guidance included the following models, which employers and plans can use to satisfy their ARPA notice obligations:

- Model General Notice and COBRA Continuation Coverage Election Notice (for all COBRA qualified beneficiaries with qualifying events occurring from April 1, 2021, through September 30, 2021).
- Model Notice in Connection with Extended Election Period (to be provided by May 31, 2021, to all AEIs, including those who would be entitled to subsidies had they elected and/or maintained COBRA coverage).
- Model Alternative Notice (for insured coverage subject to state continuation requirements from April 1, 2021, through September 30, 2021).
- Model Notice of Expiration of Premium Assistance (for plans to alert AEIs 15–45 days before their subsidies are set to expire).
- Summary of COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021 (for enclosure with the General Notice, Notice in Connection with Extended Election Period, and Model Alternative Notice).

The model notice materials include a form called Request for Treatment as an Assistance Eligible Individual, which must be included in the plan's communications and which an employee could use to contact their current or former employer if they think they are an AEI who qualifies for subsidies. Receipt of the form by an employer is not a waiver of other notice obligations imposed under the ARPA specifically or COBRA generally.

Frequently Asked Questions

EBSA also published [FAQS ABOUT COBRA PREMIUM ASSISTANCE UNDER THE AMERICAN RESCUE PLAN ACT OF 2021](#) (EBSA FAQs). While the EBSA FAQs are directed at potential AEIs, they provide insight into certain open questions flagged in our previous update. We provide highlights below, and we also note areas where additional guidance may still be needed.

Identifying Assistance Eligible Individuals

In our [previous client update](#), we briefly described the employees (and their covered dependents) who qualify as AEIs—generally, those who were involuntarily terminated or who experienced a reduction in hours. The EBSA FAQs do not shed much light on the meaning of "involuntary," nor do these instruct on the process of identifying AEIs (including the extent to which employers or plans could rely on an individual's attestation of AEI status, given the Request for Treatment as an Assistance Eligible Individual). It is possible that the IRS/Treasury will issue clarifying guidance in this regard.

The EBSA FAQs confirm that a reduction in an individual's hours need not be "involuntary" in order for them to qualify as an AEI (provided they remain an employee at the time hours are reduced) and include the following examples:

- Change in a business's hours of operations.
- Change from full-time to part-time status.
- Taking of a temporary leave of absence.
- Participation in a lawful labor strike.

The EBSA FAQs also confirm that, consistent with federal COBRA provisions, an individual terminated for "gross misconduct" cannot qualify as an AEI. There is not a uniform definition of "gross misconduct" for federal COBRA purposes, and we would expect employers and plans to apply this concept consistent with past practices.

Special or Extended Election Opportunity for "Group (2) AEIs"

As described in our [previous update](#), plans must provide a special or extended election opportunity to "Group (2) AEIs"—generally, employees (and their covered dependents) who would have qualified as AEIs had they timely elected COBRA coverage and/or not discontinued it before April 1, 2021.

The EBSA FAQs confirm that a plan's obligation to provide this special election notice applies only to the Group (2) AEI population. Also, consistent with federal COBRA provisions, a dependent of a Group (2) AEI who was covered at the time of their involuntary termination or reduction in hours has an independent election right for the ARPA subsidies, even if they had failed to elect COBRA when it was first made available to them.

The EBSA FAQs also confirm that entitlement to a special or extended election opportunity under the ARPA does not serve to extend the AEI's COBRA maximum coverage period under the plan, which will continue to be based on their initial qualifying event.

Coordination of COBRA Subsidy and Outbreak Period Relief

In our [previous update](#), we noted the need for additional guidance on how the ARPA COBRA subsidies are to apply to individuals also entitled to "Outbreak Period" relief, as recently clarified in [EBSA Disaster Relief Notice 2021-01](#). The EBSA FAQs do not address all open questions but do confirm the following:

- The special or extended election period required to be offered to Group (2) AEIs, noted above, applies to the reinstatement of their COBRA coverage for purposes of receiving ARPA subsidies, and the ARPA subsidies do not apply to periods before April 1, 2021.
- The plan's offering of the special or extended election period and/or a Group (2) AEI's affirmative election of such does not cut off their preexisting right to elect COBRA coverage for periods prior to April 1, 2021, including per extended timeframes that are available under the Outbreak Period relief.

- However, the extended timeframes available under the Outbreak Period relief **do not** apply to notice and election deadlines imposed under the ARPA. Thus, a plan must issue the special or extended election notice by May 31, 2021, and each Group (2) AEI must make their election within 60 days if they wish to receive the subsidies. (It is not clear, but the EBSA FAQs seem to suggest that AEIs who become newly entitled to COBRA during the 6-month subsidy window similarly cannot rely on the Outbreak Period relief and would need to elect within 60 days if they, too, want these subsidies. We might see further clarifying guidance on this point.)

Claiming a Credit or Refund

The EBSA FAQs do not discuss the process by which employers or insurers would claim the refundable tax credit. We expect to see detailed guidance on this from the IRS/Treasury.

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