



# Compliance Services Alert

April 12, 2021

## More fizzle than sizzle: Feds issue first ARPA COBRA subsidy FAQs and model forms

### Executive summary

- Federal authorities have issued FAQs and several model forms to help plan sponsors implement their obligations under the American Rescue Plan Act's COBRA subsidy rules.
- The FAQs divide subsidy-eligible individuals into two categories: Those whose qualifying events occurred prior to April 1, 2021, and those whose qualifying events occur on or after that date but not later than Sept. 30, 2021 (we'll refer to this period as "the subsidy window"). The form and timing of the notices for each group are different.
- Regardless, all employer plans that have COBRA obligations must send all subsidy-eligible individuals one of the prescribed notices. For those with qualifying events before April 1, the notice deadline is May 31, 2021. For those whose qualifying events are later, the deadline depends on the date of the qualifying event.
- The subsidy-eligible individuals have 60 days after the notice is sent to elect COBRA and gain access to the subsidies.
- The subsidized COBRA coverage will potentially last from the first monthly period of COBRA coverage beginning on or after April 1 through the "period ... ending on Sept. 30, 2021." It will terminate sooner if the original COBRA period would have terminated sooner, or the individual becomes eligible for Medicare, a qualified small employer HRA, or other group coverage more substantial than coverage under a dental, vision or health flexible spending account plan.
- The FAQs leave many important questions unanswered, such as when a termination of employment is considered involuntary, but make clear that the suspension of the running of 60-day COBRA election periods, under federal authorities' "outbreak period" guidance, does not apply to 60-day COBRA subsidy election periods.

The U.S. Department of Labor (DOL) this week issued a slew of five model forms (individual links appear later in this document) and an initial set of [frequently asked questions](#) related to the new COBRA subsidies under the American Rescue Plan Act (ARP, or ARPA). Unfortunately, the FAQs fail to answer many key questions employers have, such as the precise scope of an *involuntary* termination of employment. The model forms, meanwhile, will likely prove more confusing than helpful to most employees, and the instructions for *when* to issue *which* forms will confound many employers and COBRA administrators.

**Lockton comment:** Additional guidance is forthcoming, and we hope it will provide answers to some of the more pressing unanswered questions. This week's guidance was issued by the DOL, which has jurisdiction over COBRA notice obligations, so its guidance was largely limited to that topic. The Treasury Department (IRS) has jurisdiction over the substantive aspects of COBRA, and we expect the next set of FAQs to be authored primarily by Treasury.

If you're already familiar with the ARPA/COBRA program, read on. If you would like a little more background on the program, before plunging into the recent FAQs and model notices, you may find the [appendix to this alert](#) helpful. There, we've compiled a discussion of the what, who, when and how of the COBRA subsidies.

## The new guidance and model forms: Clarifications

The new FAQs reiterate or clarify a handful of aspects of the ARPA subsidies but leave many other important questions for later. First, the clarifications. Brace yourself; some of these require extensive explanation:

- **Reductions in hours (whether or not the reduction is related to COVID)**

While this week's guidance shed *no* light on the scope of the term "involuntary termination of employment," it provided a bit of clarity on *reductions in hours* (which do not have to be involuntary) trigger a subsidy-eligible qualifying event.

Any reduction of hours that would cause an individual to lose eligibility for the employer plan qualifies. This includes a reduction in hours due to a cutback in business operations, a voluntary or involuntary switch from full-time to part-time employment, a voluntary or involuntary temporary leave of absence, even a lawful strike - but the employee must *remain* an employee of the employer.

**Lockton comment:** Furloughs have caused issues over the last year when it comes to various rules for plans. Many employers had to make accommodations for employees on furlough would have otherwise lost eligibility for the employer plans. If an employer has maintained that eligibility, COBRA would not be implicated of course. However, if the employees on furlough lose eligibility under the plan (or perhaps lose eligibility in the subsequent measurement period due to the ACA lookback measurement rules) the COBRA rules kick in and the subsidies would be available accordingly.

- **Termination of employment (whether or not the termination is related to COVID)**

If the employment relationship is terminated, the termination must be *involuntary*, and occur for reasons other than gross misconduct. (Care needs to be exercised here as gross misconduct is much narrower than one might think, and is rarely applicable to performance-related terminations but rather typically limited to extreme situations such as assault, felony theft, arson and other serious misconduct.)

**Lockton comment:** We will almost certainly obtain additional guidance soon on the issue of when an employment termination is involuntary, but until then we can make some assumptions based on guidance

issued in the wake of the American Recovery and Reinvestment Act of 2009's (ARRA) COBRA subsidies. The rules may change, but the old rules are the best we have currently. At that time, federal authorities treated the following as involuntary terminations (in addition to the standard, common-sense situations where the employee simply quits or fails to show up for work):

- An employee quitting after the employer tells the employee that layoffs are imminent
- The employer offering the employee the choice of layoff or reassignment to another location a significant distance away, and the employee declines the reassignment
- The employer's failure to renew a contract with the employee, where the contract has expired but the employee remains ready, willing and able to continue to work

Because the standard is "willing and able" to continue to work, terminations due to disability and death are likely not involuntary terminations, at least under the traditional understanding. That means that dependents of employees who lose their coverage due to disability or death of the employee may not be eligible for subsidies.

- **Refunds or credits for premium overpayments**

Where a subsidy-eligible individual (the ARPA statute refers to these individuals as "assistance eligible individuals," or "AEIs," and we will follow that nomenclature) has already paid or pays the COBRA premium for one or more months during the subsidy window, the ARPA statute imposes rather clear requirements that the plan (or insurer, for plans offered by employers too small to be subject to federal COBRA) promptly return those payments.

This week's guidance suggests that the plan might be permitted to simply apply the overpayment as a credit against future payments, but may be required to refund the overpayment "in certain circumstances." The guidance does not describe those circumstances. Presumably, a refund would be required where the AEI chooses not to apply the prior amount as a credit or does not choose to continue coverage after either the COBRA subsidy window closes or the individual's subsidy eligibility terminated during the subsidy window.

**Lockton comment:** A plan may charge for COBRA coverage on less than a monthly basis, but this is rare. For purposes of our discussion and illustrations, we assume a monthly period of COBRA coverage.

- **Changing COBRA coverage options**

The guidance includes a pair of FAQs about the *discretionary* right of a plan to allow AEIs to elect a COBRA coverage option other than the option they would normally have had to select, as long the alternate option is less expensive. We would expect few employers to willingly take on the administrative hassle of allowing such a change. Note that if the plan would permit active employees to change coverage tiers (as would be the case if there was an open enrollment for an off-calendar year plan in the middle of the subsidy window) the plan would be required to permit COBRA qualified beneficiaries, including, presumably the AEIs, to make changes at that time as well.

- **Identifying AEIs and which ARPA notices they require**

This new guidance draws a clear line between two categories of AEIs, for purposes of deciding which ARPA COBRA notices they must receive and when they must receive them.

**Lockton comment:** We have prepared a quick-glance grid showing, for the various classes of individuals due the special ARPA notices, the type of and timing for the notices due these various classes. [Click here for the grid.](#)

Also available from your Lockton account team is an Excel-based document on which an employer may calculate, with respect to any given individual, the specific due dates for the specific ARPA notices the plan must supply that individual.

The guidance drops into one bucket (Group 1) all AEs whose requisite qualifying events (reduction in hours or involuntary termination of employment) occurred prior to April 1, 2021, whether they are currently on COBRA or simply did not elect COBRA when it was offered (or elected it but dropped it) *but whose maximum COBRA coverage period would extend at least through April*. Then, the guidance drops into another bucket (Group 2) all those whose COBRA qualifying events, whatever they may be, occurred or occurs on or after April 1, 2021, but not later than Sept. 30, 2021.

*Group 1: Eligible qualifying events occurring prior to April 1, 2021*

The individuals in Group 1 are due a special, second COBRA election notice (federal authorities have issued a model notice called the [Model COBRA Continuation Coverage Notice in Connection with Extended Election Periods](#)) for the purpose of electing COBRA and using the subsidies. This notice should be accompanied by another model form called the [Summary of the COBRA Premium Assistance Provisions](#). These forms are due to these individuals by May 31.

With respect to those in Group 1 who are *currently on COBRA*, if the plan has not already identified them as AEs and implemented a premium waiver for them, those individuals can apply for such a waiver by completing the [Summary of COBRA Premium Assistance Provisions](#) form and returning it to the plan. They do not complete the actual second election form because they are already on COBRA.

**Lockton comment:** The new guidance suggests that if an AE is already on COBRA, the plan should figure that out and notify the individual that COBRA premiums are waived for April through, potentially, September. Thus, the guidance notes that if the individual believes they are subsidy-eligible but "have not received a notice from the employer, you may notify your employer of your request for treatment" as subsidy-eligible. That request would be on the *Summary* form.

Those in Group 1 who have *not* already elected COBRA (or they elected it but dropped it) may use the [Model COBRA Continuation Coverage Notice in Connection with Extended Election Periods](#) to elect or re-elect COBRA and gain access to the COBRA subsidies. Those individuals have 60 days to elect COBRA and obtain the subsidies after the plan sends that notice. They may start their subsidized COBRA coverage only prospectively or may make it retroactive to as early as April 1, 2021.

*Group 2: Eligible qualifying events occurring on or after April 1, 2021 but not later than Sept. 30, 2021*

Individuals in Group 2 – those whose qualifying events, whatever they may be, occurred or occur on or after April 1, 2021, but not later than Sept. 30, 2021 – are due a different notice, basically, a standard COBRA election notice heavily modified to describe aspects of the COBRA subsidies (federal authorities have issued a model notice called the [Model ARP General Notice and COBRA Continuation Coverage Election Notice](#)). That notice should also be accompanied by the same model [Summary of the COBRA Premium Assistance Provisions](#) provided to individuals in Group 1. It appears this notice should be supplied to those in Group 2 within the typical timeframe for supplying a COBRA election notice (i.e., within 44 days after the qualifying event), and the individual has 60 days after the plan sends the notice to make the election into COBRA and, if eligible for them, claim the subsidies.

- **Subsidy termination notice**

In addition to the notices described above regarding the availability of COBRA and the subsidy, ARPA requires a special subsidy termination notice in most cases. ARPA requires plans to notify individuals receiving COBRA subsidies when their subsidies are about to expire due to exhaustion of their maximum COBRA coverage period or due to the end of the subsidy window. The notice must be supplied no more than 45 days, and no less than 15 days, prior to the termination of the individual's COBRA subsidies. This week's guidance provides a model notice for this purpose, labeled the [Notice of Expiration of Period of Premium Assistance](#).

- **Continuing COBRA beyond the COBRA subsidy window**

If the AEI has a maximum COBRA coverage period, measured from the original qualifying event, extending past Sept. 30, 2021, the individual may continue COBRA beyond the end of the subsidy window provided the normal COBRA premium is paid. The individual may continue the COBRA coverage until the end of the maximum COBRA coverage period.

- **Outbreak period suspensions don't apply to subsidized COBRA elections**

The feds' diabolically complicated "outbreak period" guidance, under which (among other things) the typical 60-day COBRA election period clock is temporarily suspended for election periods in progress on, or arising on after, March 1, 2020, does not apply to the 60-day window to elect into the COBRA subsidies.

**Lockton comment:** This is a great result for plan sponsors but doesn't do much to diminish the complexity of how the outbreak period guidance is applied once the COBRA subsidy window is over. For more information on the outbreak period suspensions, see our most recent [alert](#) on that topic.

The upshot of the outbreak period guidance *not* applying to COBRA subsidy elections is best illustrated with an example. The example is based on our current understanding, without additional guidance about how this all plays out.

**Example:** Assume an employee terminated employment involuntarily, but not due to gross misconduct, on Nov. 12, 2020, and lost coverage at the end of the month. The plan issued a COBRA election notice on Dec. 5, 2020. Normally, the employee would have had 60 days, or until Feb. 2, 2021, to elect COBRA, but the outbreak period guidance suspended the running of the 60-day period, and that suspension will remain in effect until the earlier of Dec. 5, 2021, or 60 days after the president's rescission of the national health emergency related to COVID-19.

Because the individual is eligible for COBRA subsidies but has not yet elected COBRA, ARPA requires the plan to issue the individual, by May 31, 2021, the same notices issued to Group 1 (described above). The individual has 60 days after that notice is sent to elect COBRA, to take advantage of the subsidies. The individual elects into COBRA to claim the subsidies. The COBRA coverage is effective retroactively, but only to April 1 and no further. Of course, no premiums are due for the months of April through September. On Sept. 30, 2021, the subsidy window closes, and the individual declines (likely by just not paying any additional premium) to continue COBRA coverage on a self-pay basis.

On Oct. 1, 2021, the president rescinds the national health emergency related to COVID-19 and the individual's suspended COBRA election window (from the previous December) begins to run again 60 days later, on Nov. 29, 2021. The individual has another 60 days, until Jan. 27, 2022, to elect COBRA for the COBRA coverage period beginning Dec. 1, 2020.

If the individual makes that election, the individual must pay the back COBRA premium for the one or more consecutive months, beginning with Dec. 2020, for which the individual wants that retroactive COBRA coverage. Of course, the individual has already had *free* COBRA coverage for April through September 2021, so the individual is really deciding whether to elect COBRA and pay back premium for months beginning with Dec. 2020 through March 2021, and from October 2021 through the end of the 18-month COBRA coverage period, or through May 2022.

The individual is not required to elect that COBRA coverage, nor required – if COBRA is elected – to pay for all prior months, back to Dec. 2020. But if the individual elects COBRA, the months of COBRA coverage the individual *does* want must be consecutive, starting with Dec. 2020, and must be paid for, with the exception of the April 1 – Sept. 30, 2021, COBRA subsidy window. Of course, the individual could choose to continue their COBRA coverage on a self-pay basis after Sept. 30, 2021, based on their election into COBRA to gain the subsidies, until the end of the original maximum COBRA coverage period, but could also choose to let COBRA coverage lapse after the end of the subsidy window, and pick it up again later, pursuant to the outbreak period guidance, as described above.

- **Marketplace special enrollment period upon exhaustion of COBRA subsidies**

The guidance makes clear that an individual whose COBRA subsidies terminate – either due to reaching the end of the maximum COBRA coverage period or the end of the COBRA subsidy window – has a special enrollment opportunity to gain coverage in the individual health insurance market, either within or outside of an ACA marketplace.

Only attaining the end of the maximum COBRA coverage period, however, triggers a HIPAA special enrollment right to leap to other group coverage.

- **No formal appeals process**

Unlike the COBRA subsidies under the American Recovery and Reinvestment Act of 2009, there is no formal appeals process at the DOL through which individuals who believe themselves wrongly denied COBRA subsidies may challenge that denial. The DOL FAQs invite such an aggrieved individual to contact the Department's Employee Benefits Security Administration (EBSA). The DOL then implicitly encourages employers to be liberal in their granting of the subsidies, as it notes that employers and plans may be levied a penalty tax of \$100 per individual, per day (up to \$200 per family, per day) for each individual or family unit that is inappropriately denied the COBRA subsidies.

**Lockton comment:** Some employers have expressed concern about the IRS coming after them for claiming tax credits as reimbursement for providing subsidies to individuals who may not have been entitled to them. While that is possible, we think this risk is small. Public policy here, with respect to the ARPA subsidies, leans in favor of enrolling more people in healthcare coverage through September.

## The new guidance: Notable items left unaddressed

To the disappointment of plan sponsors and their brokers/consultants, this first tranche of guidance didn't answer a host of questions for which we're all eagerly awaiting, such as:

- What, precisely, is an *involuntary* termination of employment? One might assume we could use the rules developed several years ago for the American Recovery and Reinvestment Act of 2009 (ARRA) since it also contained COBRA subsidies. Perhaps that will be the case, but we have no guidance on that as of now.

- If subsidies are not available to employees terminated due to gross misconduct, when does mere misconduct give way to "gross misconduct"? The case law on this issue tends to excuse a lot of behavior that employers would deem to be gross misconduct. So, more guidance here would be helpful.
- If an otherwise subsidy-eligible individual can't get subsidies due to eligibility for other coverage, what does "eligibility" mean, and how is it applied?

**Lockton comment:** Is someone eligible for other coverage only if *enrolled* in other group coverage, or is mere eligibility (without actual coverage) enough? If mere eligibility is disqualifying for purposes of COBRA subsidies, when exactly is someone considered eligible? What if they're in an eligible class but in a waiting period? What if they're literally eligible for, say, a spouse's plan but were not enrolled during open enrollment and now, here in April 2021, cannot force their way onto the plan?

- The statute and the guidance seem clear that for plans offering COBRA on a non-calendar monthly basis, (e.g., the qualifying event occurs on the 15<sup>th</sup> of a month and the months of COBRA coverage start on the 16<sup>th</sup> and end on the 15<sup>th</sup> of the following month) the first month to which the subsidy applies is the monthly COBRA coverage period beginning after April. However, they are less than clear on whether the subsidized COBRA simply ends on Sept. 30 or continues to the end of the first monthly COBRA coverage period ending after Sept. 30.
- Do plan sponsors with insured plans subject to laws like Cal-COBRA *really* need to look back 36 months? What is the result of an 18-month federal COBRA coverage period that expired prior to April 1, 2021, but was extended due to disability or a second qualifying event, and the extension pushed the COBRA coverage period into the COBRA subsidy window?

Answers to these and other questions must await additional federal guidance. However, since the clock is running on the notice deadlines, employers may want to send notices to those AElS that they *know* are eligible, lightening the load later if it is determined that additional people fall into that category.

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