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ARP COBRA Subsidy

American Rescue Plan Act COBRA Subsidy

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Overview

To help clients better navigate the complexities of the recently announced COBRA subsidy under the American Rescue Plan Act (ARP), Benefit Comply has put together the following Guide. We hope this document provides assistance with the basics of the requirements and some meaningful direction while we await further guidance from the agencies.

Congress passed the \$1.9 trillion COVID relief bill on March 11, 2021. The bill includes a federal subsidy that will cover 100% of the cost of COBRA continuation coverage for up to 6 months for individuals who have had an involuntary termination of employment or reduction in hours who have federal or state continuation of coverage rights. The assistance eligible individuals (AEIs) will pay nothing for COBRA coverage. The employer or carrier will pay the full premium or cover qualified beneficiaries at no cost on a self-insured plan, then recover the premiums through a payroll tax credit. There are also significant new notice requirements.

Note: As of the publication date of this guide, the regulatory agencies have released very little guidance. It is expected that guidance will still be issues to address outstanding questions. The guide references this situation in several areas.

Assistance Eligible Individuals

“Assistance Eligible Individuals” or AEIs must be given the opportunity to participate in COBRA continuation coverage at no cost from April 1, 2021 – September 30, 2021, so long as they are not eligible for other group health plan coverage or Medicare. The following are examples of AEIs:

- Individuals who are offered federal COBRA or state continuation due to an involuntary termination of employment or reduction in hours that occurs April – September 2021;
- Individuals who were offered federal COBRA or state continuation due to an involuntary termination of employment or reduction in hours and who are currently COBRA participants (elected continuation coverage and are making monthly premium payments); and
- Individuals who were offered federal COBRA or state continuation due to an involuntary termination of employment or reduction in hours, chose not to elect COBRA, or elected and then dropped COBRA Coverage, but are still within their maximum COBRA coverage period during the subsidy period.

Employees/ former employees, spouses, and dependents can all be AEIs. Only those who were covered by the employer’s plan the day before their COBRA qualifying event can be AEIs. In other words, the subsidy does not give an opportunity to enroll new dependents who were not enrolled in the employer’s group health plan before the involuntary termination or reduction of hours.

There is no requirement that the involuntary termination of employment or reduction of hours be related to COVID-19 in order for an individual to qualify for the subsidy. Further, while termination of employment must be involuntary in order to make a qualified beneficiary an AEI, the same does not apply to a reduction in hours. In other words, a voluntary reduction of hours as a COBRA qualifying event, would make an individual an AEI.

The subsidy is not available to qualified beneficiaries whose loss of coverage was due to voluntary termination of employment, divorce, death, or loss of dependent status. In other words, if an individual's original COBRA qualifying event (i.e., the reason they lost eligibility for active coverage) is anything other than the employee's involuntary termination of employment or reduction of hours, they are not eligible for the subsidy.

Involuntary Termination

The language of the ARP statute did not contain a definition of involuntary termination. Further, the executive agencies have yet to release guidance specific to the ARP COBRA subsidy that provides a definition. However, the text of the ARP statute reads similarly to the COBRA subsidy that was in place in 2009 under the American Recovery and Reinvestment Act (ARRA). Therefore, we will discuss the guidance that was in place in 2009 in this guide as it’s possible that the agencies will adopt similar guidance for the ARP COBRA subsidy.

Under the 2009 guidance, an involuntary termination meant “a severance from employment 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.” Involuntary termination was interpreted broadly under this guidance. The following are all examples of involuntary terminations according to the 2009 guidance:

- Layoffs and reductions in force;
- Failure to renew a contract;
- Termination for cause;
- Employer’s action to end an employment when the employee cannot work due to illness or disability; and
- Employee resignation as the result of employer-initiated change in work location

Gross Misconduct

If the involuntary termination of employment was for gross misconduct, the individual is not a COBRA qualified beneficiary. In other words, termination of employment due to gross misconduct is not a COBRA qualifying event. Therefore, an employee terminated due to gross misconduct would not be eligible for COBRA or the COBRA subsidy.

There have been many court cases involving COBRA and gross misconduct, but courts have not agreed on a common standard to apply in gross misconduct cases. Certain federal courts have looked to the unemployment insurance laws of the state in which the court sits because these laws often deny unemployment benefits to employees terminated for "gross misconduct," "misconduct" or "willful misconduct." This approach, however, has not led to a uniform definition of gross misconduct because state unemployment law concepts vary according to the state in which the federal court deciding a COBRA case sits.

Plans should seek legal advice before they deny COBRA coverage due to employee gross misconduct. If a Court decides that the employer should have offered COBRA, this can lead not only to an award of retroactive COBRA coverage but also to imposition of penalties of up to \$110 per day. To clarify, while there is an exception to offering COBRA in general due to gross misconduct, there is no exception for the subsidy specifically. Based on the 2009 guidance, termination for cause is considered an involuntary termination which would make an individual eligible for the subsidy.

Subsidy Timing

Individuals who are still within their maximum COBRA coverage period during the subsidy timeframe (April 1, 2021 – September 30, 2021) can be AEIs. That means that any individual who experienced an involuntary termination or reduction of hours and who is still within their maximum coverage period during the subsidy period could be an AEI (if they timely elect coverage), whether their COBRA qualifying event occurred before or during the subsidy timeframe. This means that there are three instances where an individual would lose eligibility for the subsidy and would no longer be considered an AEI:

1. The individual reaches the end of their maximum COBRA coverage period;
2. The individual becomes eligible for an employer-sponsored group medical plan or Medicare; and
3. The individual reaches the end of the subsidy timeframe (September 30, 2021), assuming Congress does not extend the subsidy timeframe.

Disqualifying Coverage

If a qualified beneficiary is eligible for Medicare or an employer-sponsored group medical plan, they are not eligible for the COBRA subsidy. Enrollment in Medicare or an employer-sponsored group medical plan is not required; eligibility alone is enough for loss of AEI status. A qualified beneficiary may become eligible for an employer-sponsored group medical plan through a new employer, resulting in loss of subsidy eligibility. Alternatively, eligibility for employer-sponsored group medical plans offered through a spouse's or parent's employer would also result in loss of subsidy eligibility, as would an employer-sponsored retirement plan.

Significantly, an offer of employment on its own is not enough to result in loss of subsidy eligibility. For example, if an employer involuntarily terminates an employee and then later offers the former employee a benefit eligible position, the employee will only lose subsidy eligibility if they accept the employment offer and become eligible for the employer's group medical plan. In this example, if the former employee does not accept the employment offer, they will not lose subsidy eligibility due to the employment offer alone.

Eligibility for an employer-sponsored medical plan that provides only excepted benefits, a Qualified Small Employer Health Reimbursement Arrangement (QSEHRA), or a Health FSA on its own does not result in loss of subsidy eligibility. In addition, a qualified beneficiary can be eligible for Medicaid and the COBRA subsidy at the same time.

Finally, if an individual is eligible for or enrolled in an individual plan (whether purchased through a state or federal exchange or not) they can still be eligible for the COBRA subsidy. In fact, qualified beneficiaries may decide it is more cost effective to drop their individual coverage in order to enroll in COBRA to take advantage of the subsidy.

Qualified beneficiaries are required to alert the employer or carrier through which they are receiving the COBRA subsidy if they lose eligibility for the subsidy due to becoming eligible for an employer-sponsored medical plan or Medicare. If a qualified beneficiary fails to notify the plan, they will be subject to a fine of \$250. In addition, the fine can be increased to include repayment of the premium if the failure to notify was intentional. The penalty may be forgiven entirely if the employee's notice failure was due to reasonable cause.

Offering the Subsidy

Plans Subject to the Subsidy

All plans subject to COBRA are subject to the requirement to offer the COBRA subsidy, other than health FSAs. Therefore, medical, dental, vision, HRA, EAP (employee assistance plans), and onsite clinics are all examples of plans that could be subject to the COBRA subsidy. Employers should be aware that some state continuation regulations apply only to certain benefits. If a plan is only subject to state continuation, the plan is only required to offer the subsidy for the benefits that are subject to state continuation.

Employers are only required to offer the COBRA subsidy for coverage that was in place when the reduction in hours or involuntary termination of employment occurred. However, union employees covered by a multiemployer plan will be notified and provided coverage by the union plan. In other words, the employer is not responsible for providing the subsidy or notifying AEIs of its availability in the case of union employees covered by a multiemployer plan.

Enrollment in Alternative Coverage

Employers can choose to permit AEIs to enroll in coverage that is different from the coverage they had at the time of their COBRA qualifying event, and still claim the employer tax credit for providing the subsidy. Plans are not required to offer AEIs the option to enroll in alternative coverage.

In order to claim the tax credit for providing the subsidy for alternative coverage, the following must be true:

- The premium for the alternative coverage cannot be more expensive than the coverage the AEI was enrolled in the day before their qualifying event;
- The alternative coverage is also offered to similarly situated active participants;
- The alternative coverage is not an excepted benefit, QSEHRA, or health FSA; and
- The election is made within 90 days of being notified of the option

The model notices released by the Department of Labor (discussed below) include information regarding the option to offer alternative coverage. If a plan chooses not to permit enrollment in alternative coverage, the model notices should be updated to remove this language as it could be confusing to AEIs.

Covered Qualified Beneficiaries

Individuals who are already enrolled in COBRA and who are still within their maximum coverage period during the subsidy period will not be required to pay the monthly premium if they meet the eligibility requirements. In other words, if a COBRA qualified beneficiary's qualifying event was involuntary termination or reduction of hours, and they are not eligible for an employer-sponsored group medical plan or Medicare, they will not be required to actively elect the subsidy if they have already elected COBRA. In fact, the statute makes clear that if such an individual submits payment for a month during the subsidy period, the plan is required to return the amount to the AEI.

Second Chance to Enroll

Individuals who did not elect COBRA, or who elected and subsequently dropped, must be given a second chance to enroll and take advantage of the subsidy as long as they are still within their maximum coverage period (measured from the original qualifying event date). In order for an individual to take advantage of their second chance at enrollment, coverage must be elected within 60 days of being notified of the COBRA subsidy. Coverage under the second chance to enroll is not retroactive to the original qualifying event date, instead it begins as of April 1, 2021. Therefore, AEIs may have a gap in coverage under the plan.

Individuals who were involuntarily terminated or experienced a reduction of hours and who would still be within their maximum coverage period if they had elected COBRA, would be eligible for a second chance at enrollment. Therefore, group health plans subject to federal COBRA, will generally have to look back 18 months (i.e., to qualifying events that triggered a loss of coverage in October 2019 or later) because an employee's reduction in hours or involuntary termination of coverage will typically trigger an 18-month maximum coverage period for employees and their family members who were enrolled when the qualifying event occurred. However, it's possible that federal COBRA extensions may need to be taken into account. For example, spouses and dependents who have a 2nd qualifying event after electing COBRA can extend their maximum coverage period to 36 months. In addition, a disability determination can extend the maximum coverage period to 29 months.

For group health plans subject to state continuation, the maximum coverage period varies greatly from state to state. In some cases, the maximum coverage period lasts only a couple months, and in other cases (e.g., CA, NY), the maximum coverage period is 36 months. Finally, under one interpretation of the statute, group health plans subject to state continuation requirements, but not to federal COBRA, are not required to offer a second chance to enroll. Some carriers have adopted this interpretation. This is a topic about which additional guidance from either the DOL or IRS would be welcome.

Interaction with the Outbreak Period

After a National Emergency was declared as of March 1, 2020, regulatory agencies jointly issued a final rule in April of 2020 extending several specific notice and disclosure deadlines applicable under HIPAA, COBRA, and ERISA. The rule effectively extended the time participants were given for things like COBRA elections, COBRA payments, HIPAA special enrollments, and ERISA claims filing and appeals.

For the period of time beginning March 1, 2020, until 60 days after the National Emergency is over, all group health plans, disability plans, other employee welfare benefit plans, and employee pension plans must disregard this time period (the "Outbreak Period") when administering plans with respect to notices, disclosures and other deadlines covered by the rule. As of publication of this guide, the National Emergency is still in effect.

Therefore, it may be possible for an individual to be an AEI and to take advantage of the ability to retroactively enroll in COBRA to their qualifying event date due to the outbreak period. If an individual decides to retroactively enroll in COBRA due to the Outbreak Period, monthly premiums must be paid back to when the individual first triggered the qualifying event and corresponding loss of coverage. However, it is not clear whether a COBRA qualified beneficiary with a qualifying event that occurs during the subsidy period will be able to take advantage of the subsidy if they do not elect within 60-days from receiving the election notice.

The Notices

ARP requires employers to update existing COBRA election notices with new language describing the subsidy. There is also a new special notice that employers must send to any individuals who experienced a COBRA event due to an involuntary termination or reduction in hours and who are still within their maximum coverage period. This notice informs these individuals of their right for a second chance at electing COBRA coverage. The special notice must be sent to AEIs no later than May 31, 2021. Finally, a notice must be sent to anyone receiving the premium assistance informing them when the subsidy is about to end. This notice must be sent between 15 – 45 days prior to the expiration of the subsidy.

Although not entirely clear, it appears that for plans not subject to federal COBRA but subject to state continuation, it will be the carrier's responsibility to comply with the updated notice requirements. This is another topic about which additional guidance from either the DOL or IRS would be welcome.

DOL Model Notices and Website

The Department of Labor (DOL) has released model notices and a COBRA subsidy information website. The model notices can be found at the website. The website will also be a central location that the DOL uses to inform individuals of their potential right to take advantage of the subsidy, and to assist employers with fulfilling their compliance obligations.

<https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy>

Model Notices

The DOL makes it clear that employers are not required to use these exact notices, but it is expected that most employers' administrators will use language from the model notices, or a version of the model notices, as they attempt to communicate COBRA subsidy election opportunities and requirements to AEIs.

Model Election Notice with Updated Subsidy Language:

- *Model Notice in Connection with Extended Election Period*
- *Model Alternative Notice (appears to be for use by the insurance carrier when a plan is not subject to federal COBRA)*
- *Summary of COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021 (includes AEI certification of eligibility forms)*
- *Notice of Expiration of Premium Assistance*

Summary of COBRA Premium Assistance Provisions

The ARP statute did not require attestation by qualified beneficiaries in order to affirm AEI status (for example that they are not eligible for Medicare or an employer-sponsored group medical plan). However, the notice instructions state that the employer should include the "Summary of COBRA Premium Assistance Provisions" with the election notices. This document includes an attestation form that AEIs should use to request enrollment. Inclusion of this document does not appear to be required, but rather strongly recommended to confirm status as an AEI, ensure carrier coverage, and provide proof of eligibility for the payroll tax credit. The attestation portion can be found on pages 2-4 of the document.

Notice Recipients

There are 3 different groups of individuals who may require a notice:

1. New Qualified Beneficiaries (now – September 2021): The normal COBRA election notice should be replaced with the “Model General Notice and COBRA Continuation Coverage Election Notice” along with the “Summary of COBRA Premium Assistance Provisions.”
2. Existing Qualified Beneficiaries (triggered a continuation right prior to April 2021): The “Model Notice in Connection with Extended Election Period” along with the “Summary of COBRA Premium Assistance Provisions” should be sent no later than May 31, 2021.
3. AEs who elect the COBRA subsidy: The “Model Notice of Expiration of Premium Assistance” must be sent 15-45 days prior to the subsidy ending due to the end of the maximum coverage period or reaching September 30, 2021.

Notice Requirements

In the event that the employer decides not to utilize the model notices, the statute specifies what should be contained in the new notices. The requirements are quite extensive and specific, and therefore most employers will likely decide to simply utilize the model notices.

Required Content for the Amended COBRA Election Notice

- Forms necessary for electing COBRA and the premium assistance;
- Name, address, and telephone number necessary to contact the plan administrator and any other person maintaining relevant information in connection with such premium assistance;
- Description of the extended election period for those who experienced an involuntary termination of employment or reduction in hours prior to Apr. 1, 2021 and are still in their maximum coverage period;
- Description of the obligation of the QB to notify the plan of eligibility for group health plan coverage or Medicare and the penalty for failure to notify;
- 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
- Description of the option of the qualified beneficiary to enroll in different coverage if the employer permits it

Required Content for Subsidy Ending Notice

- the premium assistance for such individual will expire soon and the prominent identification of the date of such expiration; and
- such individual may be eligible for coverage without any premium assistance through COBRA continuation coverage or coverage under a group health plan

Distribution

The same distribution rules apply to the updated notice requirements as to COBRA notices in general. In other words, the employer is permitted to use hand delivery, mail, or electronic delivery (if the DOL safe harbor for electronic distribution is met). However, mail is recommended to ensure receipt by covered spouses.

Notice Failures

Failure to comply with the new notice requirements is treated the same as other COBRA notice failures. When notices are not provided in accordance with COBRA continuation requirements, there is a potential penalty risk of up to \$110 per day per affected individual, as well as risk of claims of a breach of fiduciary duty in regard to COBRA administration. This could be discovered as the result of a complaint by the qualified beneficiary, or during an audit.

Beyond penalties, the more serious and immediate risk is that if coverage is reinstated retroactively, the carrier (or stop-loss carrier) might refuse to cover claims because they're not required to do so. This potentially leaves the employer on the hook for medical claims incurred for those who should have been offered COBRA (along with accompanying legal expenses if legal action is taken).

Payroll Tax Credit

The employer, or in some circumstances the carrier, is required to provide continuation coverage at no cost to AEIs and will recover the lost premiums through a tax credit. Significantly, the term “premium” includes, with respect to COBRA continuation coverage, any administrative fee. Therefore, the administrative fee can be included in the tax credit claimed. It should also be noted that self-insured employers are not permitted to recover claims incurred as a result of providing the subsidy. Instead, self-insured employers are limited to claiming the COBRA premium as a tax credit.

Recovering Lost Premiums

For group health plans subject to federal COBRA, the employer is responsible for notifying AEIs, providing the coverage at no cost, and requesting a refund for the COBRA premiums not paid against the employer’s Medicare portion of the payroll taxes. For group health plans not subject to federal COBRA, but subject to state continuation, the carrier should take responsibility for providing the coverage and requesting a payroll tax credit.

The IRS has not issued any guidance to-date regarding how the process will work. However, it is likely that the process will work similarly to the 2009 ARRA COBRA subsidy. Therefore, we will discuss the 2009 process in this guide. This process is subject to change if the IRS releases new and differing guidance.

Under the process in place in 2009, employers take a credit against the Medicare portion of their payroll taxes. A credit equal to missed COBRA payments are taken for each deposit, then the total credits are reported on the employer’s quarterly (941) or annual (943 or 944) payroll tax report. Government entities are also eligible for the payroll tax credit. The IRS will release the process to be used when the Medicare payroll tax liability is less than missed COBRA premiums, in which case the employer will be able to apply for a refundable tax credit.

Documentation

Since the employer will be taking credits against taxes due, it will be necessary to maintain records of eligibility for the tax credits in case the plan is audited by the IRS. 2009 ARRA COBRA Subsidy IRS documentation requirements are as follows:

- For insured plans, a copy of invoice or other supporting statement from the insurance carrier and proof of timely payment of the full premium to the insurance carrier;
- For self-insured plans, proof of the premium amount and proof of the coverage provided to AEIs;
- Attestation of involuntary termination including the date of the involuntary termination;
- Proof of each AEI’s election of COBRA coverage;
- A record of the Social Security numbers (SSNs) of all covered employees, the amount of the subsidy reimbursed with respect to each covered employee, and whether the subsidy was for one individual or two or more individuals;
- Other documents necessary to verify the correct amount of reimbursement

To comply with documentation requirements, and to prove that the individuals who received the subsidy were eligible, the employer should provide the “Summary of COBRA Premium Assistance Provisions,” and either the “Model General Notice and COBRA Continuation Coverage Election Notice” or the “Model Notice in Connection with Extended Election Period” (see above for additional details).

Coordination with COBRA Administrator

It is possible the COBRA administrator will assist with much of what is required from an administrative perspective. However, the degree to which the COBRA administrator will be involved can vary. Therefore, the employer should communicate with the COBRA administrator to determine whether any administrative gaps exist. For that reason, the employer should determine the answer to each of the following questions:

- Will the administrator make sure an updated election notice is distributed to those individuals who trigger a continuation right following an involuntary termination of employment or reduction in hours April 1 - September 30, 2021?
- Does the administrator have accurate records to determine which individuals experienced an involuntary termination of employment or reduction in hours and are still in their maximum coverage period and are therefore eligible for the subsidy?
- Will the administrator prepare and distribute the required notice to such individuals letting them know about the subsidy option?
- Will the administrator help prepare and distribute notices within 15-45 days prior to the subsidized coverage terminating for those who elect it?