

The American Rescue Plan Act of 2021 – COBRA Subsidy Guide

The American Rescue Plan Act of 2021 (the “ARPA”) became law on March 11, 2021. Among many other provisions, the ARPA creates a limited COBRA subsidy that is generally effective from April 1, 2021 – September 30, 2021. By itself, the ARPA merely outlines the COBRA subsidy and requires certain federal agencies to fill in the details to enable its actual administration. The federal agencies leading this effort are the U.S. Department of Labor (DOL) and the U.S. Department of the Treasury (IRS).

This COBRA Subsidy Guide (the “Guide”) reflects our understanding of the COBRA subsidy and its intended administration as of the publication date based upon the following:

- [The American Rescue Plan Act of 2021, Subtitle F, §9501](#);
- [FAQs About COBRA Premium Assistance Under the American Rescue Plan Act of 2021](#), released April 7, 2021 (the “DOL FAQs”);
- [IRS Notice 2021-31, Premium Assistance for COBRA Benefits \(Part 1\)](#), released May 18, 2021 (the “First IRS Notice”);
- [American Benefits Council, Benefits Briefing Webinar: COBRA Subsidy Implementation](#), May 27, 2021, with DOL and IRS officials participating (the “Subsidy Webinar”); and
- [IRS Notice 2021-46, Premium Assistance for COBRA Benefits \(Part 2\)](#), released July 26, 2021 (the “Second IRS Notice”);
- Our existing knowledge and understanding of federal COBRA and state continuation coverage.

We will refer to federal COBRA and comparable state continuation coverage collectively as “COBRA” in this Guide and separately when necessary.



Conflict: The DOL and IRS appear to be in conflict over certain items addressed in this Guide. We will use this exclamation point symbol to identify these. Although the agencies generally have equal authority over COBRA, the IRS controls the COBRA premium reimbursement credits.

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The Applicable COBRA Subsidy Period

The COBRA subsidy period is generally effective from **April 1, 2021 – September 30, 2021**, but it can run into October 2021 since it adjusts for periods of COBRA continuation coverage that are not whole calendar months by using:

- The first period of coverage beginning on or after April 1, 2021; and
- The last period of coverage beginning by or before September 30, 2021.

A “period of coverage” is a month or any shorter interval of COBRA continuation coverage generally requiring the payment of premiums. Many group health plans treat the loss of coverage as the last day of the month in which the COBRA qualifying event occurs and use whole calendar months for their COBRA periods of coverage.

If a plan treats the loss of coverage as occurring on the date of the COBRA qualifying event or uses a shorter interval than a full month for the period of coverage (e.g. biweekly), COBRA periods of coverage can begin and end in the middle of a calendar month.

Example

Sue terminated employment with ABC Company on March 10, 2021, and lost eligibility for coverage under the ABC Company medical plan on that date. Assuming the plan uses the equivalent of a month as its COBRA period of coverage and Sue is otherwise eligible for the COBRA subsidy:

- Sue’s first period of coverage beginning on or after April 1, 2021 is the period from April 11, 2021 – May 10, 2021; and
- Sue’s last period of coverage beginning by or before September 30, 2021 is the period from September 11, 2021 – October 10, 2021.

This means Sue’s applicable subsidy period will run from April 11, 2021 – October 10, 2021.

Plans Subject to the COBRA Subsidy

The ARPA broadly applies the COBRA subsidy to all employer-sponsored group health plans subject to federal COBRA and/or comparable state continuation coverage, but it expressly excludes health care flexible spending accounts (health FSAs). The DOL FAQs failed to mention the ARPA’s exclusion for health FSAs, but we assume this is an oversight and not an attempt to expand the subsidy to include them. The First IRS Notice confirms the subsidy does not apply to health FSAs.¹

¹ While many health reimbursement arrangements (HRAs) are also health FSAs under Internal Revenue Code §106, the ARPA’s exclusion does not apply to HRAs and they qualify for the subsidy. The exclusion is limited to health FSAs offered through an employer’s cafeteria plan, which will not include an HRA.

What is Comparable State Continuation Coverage?

1. State continuation coverage that applies to group health coverage when federal COBRA does not apply at all (generally referred to as “mini-COBRA”); and
2. An additional extension that applies to a fully insured group health plan subject to federal COBRA once COBRA is exhausted. Examples of states with these extensions include California, New York, and Texas.

State continuation coverage limited to certain types of group health coverage, to a maximum continuation coverage period that is different from federal COBRA, or that only applies to certain groups of state residents (e.g., state/local governmental employees) still qualifies as comparable state continuation coverage.

Example

Texas insurance law requires fully insured medical plans that are not subject to federal COBRA to provide up to 9 months of continuation coverage to individuals who lose coverage due to a loss of employment if enrolled throughout the 3-month period leading up to the termination. This qualifies as comparable state continuation coverage despite being limited to medical coverage and only 9 months of continuation coverage.

Other Group Health Plans that May Not be Subject to the COBRA Subsidy

Certain group health plans may not qualify for the COBRA subsidy based upon particular circumstances.

- Church plans – If an organization claims church plan status for a self-insured group health plan(s), the plan is not subject to federal COBRA. Similarly, state continuation coverage laws do not apply to self-insured church plans (Ohio is an exception to this). Many church organizations offer continuation coverage to participants on the same or similar terms as federal COBRA or state continuation coverage, but the COBRA subsidy does not apply if the plan is not actually subject to those laws. By contrast, the subsidy will apply to a fully insured church plan subject to state continuation coverage.
- Employer plans not subject to federal COBRA in certain states – Some states do not provide comparable continuation coverage for group health plans when federal COBRA does not apply. For example, several states do not maintain comparable continuation coverage laws for group health plans at all,² while others exclude self-insured group health coverage even when federal COBRA does not apply. The COBRA subsidy will not apply to small employer plans in these states.
- Indian tribal government plans – Indian tribal governmental plans are federal governmental plans and historically excluded from federal COBRA. These plans are often self-insured and outside the

² These are Alabama, Alaska, Idaho, Indiana, Michigan, and Washington.

scope of comparable state continuation coverage laws. The federal COBRA exclusion does not apply to the group health plans of commercial enterprises operating on Indian land (e.g. hospitality, retail, and other commercial businesses).

No COBRA Subsidy for Generosity: The COBRA subsidy only applies to continuation coverage required for group health plans under federal COBRA and/or comparable state continuation coverage. The COBRA subsidy does not apply to offers of continuation coverage that are not subject to those laws or to any terms of continuation coverage that are more generous than the laws require.

COBRA Subsidy Eligible Individuals

An individual is eligible for the COBRA subsidy only if:

1. S/he is a qualified beneficiary under federal COBRA;
2. Who lost or loses group health coverage due to an **involuntary termination of employment** or due to a **reduction in hours** (the subsidy “triggering events”); and
3. All or a portion of the individual’s corresponding continuation coverage period overlaps with the COBRA subsidy period (the “Overlap Rule”).

Qualified Beneficiaries under Federal COBRA

The following individuals are qualified beneficiaries under federal COBRA if enrolled in a group health plan on the day *before* the COBRA qualifying event:

- An employee;
- An employee’s legal spouse; or
- An employee’s dependent child(ren).

A qualified beneficiary also includes a child born to or adopted by an employee/former employee during COBRA continuation coverage.

Note: The guidance is clear that continuation coverage for domestic partners does not qualify for the COBRA subsidy even when comparable state continuation law mandates continuation coverage for them. Please see [Domestic Partners and Other Non-Qualified Beneficiaries](#) for additional information.

Subsidy Triggering Events

The loss of group health coverage must be due to an involuntary termination of employment or a reduction in hours. The loss of coverage due to a reduction in hours can be voluntary or involuntary. The subsidy

does not apply if coverage is lost for any other reason.³

The First IRS Notice defines an involuntary termination of employment, which can be broken down into three parts:

1. The employer independently and unilaterally exercises its authority to terminate employment when the employee was willing and able to continue performing services, and
2. The employee did not implicitly or explicitly request termination (i.e. resign), or
3. The employee initiates termination (i.e. quits) after the employer takes an action that results or will result in a materially negative change to the employment relationship.

The IRS provided the following rule of thumb during the Subsidy Webinar to help determine if a termination is involuntary or voluntary:

- Involuntary – A termination is generally involuntary if the employer made it harder or impossible for the employee to continue working.
- Voluntary – A termination is generally voluntary if it occurs solely because of the employee's personal choice or circumstances.

This section includes examples of commonly occurring events that we believe are or are not triggering events for COBRA subsidy purposes. When in doubt, we recommend employers speak with their legal advisor before denying a subsidy.

Job Abandonment

Example 1

Donna's regular work schedule is weekdays, from 8:30 a.m. – 5:00 p.m. Donna failed to report for scheduled work from February 1, 2021 – February 12, 2021, and she did not contact her employer (ABC Company) directly or indirectly through family or a co-worker. ABC Company terminated Donna on February 15, 2021. Assume Donna's absence does not qualify for job-protected leave and/or is not due to a medical reason preventing her from contacting her employer.

Answer: We believe this is a voluntary termination of employment and Donna does not qualify for the subsidy for two reasons: (1) Her actions indicate she was not willing to continue performing services for ABC Company when it terminated her; and (2) Her actions should qualify as an implicit resignation from employment. The First IRS Notice does not define or explain what qualifies as an employee's implicit request to terminate employment, but failing to show up for work for a prolonged period without contacting

³ The death of an employee is a COBRA qualifying event, but it is not an involuntary termination of employment or reduction in hours for the purposes of the COBRA subsidy.

the employer should qualify as an implicit request to terminate employment.

Example 2

The same facts as Example 1, except ABC Company terminates Donna on February 4, 2021, after she missed work for three consecutive days.

Answer. This is a tough call, but we would cautiously consider this an involuntary termination. Our concern is that it was too soon to conclude Donna was unwilling to continue performing services or had implicitly resigned. There is no guidance addressing this, but we would rely on the equivalent of at least a week's worth of unexplained absences (and preferably more) before classifying the termination as voluntary. Our answer does not change even if the employer has a written "no call, no show" policy indicating an employee is considered to have voluntarily resigned if the employee fails to show up for work without notifying their supervisor.



Conflict: We are aware that one or more DOL officials verbally commented that the DOL views terminations for job abandonment as involuntary. We asked the DOL for clarification during the Subsidy Webinar, but the DOL official declined to comment. For now, we believe employers may rely in good faith on the First IRS Notice and its rule of thumb from the Subsidy Webinar to classify job abandonments as voluntary terminations.

Leaves of Absence

For our purposes, a leave of absence (LOA) means the employee is on an approved absence from work while still employed. If an employee loses coverage because of the LOA, which includes the loss of employer contributions toward coverage while on the LOA, the loss of coverage is due to a reduction in hours for subsidy purposes. If an employee does not lose coverage because of the LOA but loses coverage due to a termination of employment during or after the LOA, the loss of coverage must be due to an involuntary termination to qualify for the subsidy.

The First IRS Notice has a special rule for involuntary terminations when the LOA is due to an employee's illness or disability. The termination is involuntary if there is a reasonable expectation the employee will return to work from the illness or disability. The termination is voluntary if there is no reasonable expectation the employee can return to work.

The special rule does not limit the reasonable expectation of a return to work to the date the LOA ends, and it is not clear if reasonableness allows for a time limit. We recommend performing the interactive analysis under the Americans with Disabilities Act to determine if the employee can return to work (with or without a reasonable accommodation). We also recommend treating a termination as involuntary if a health care provider's medical certification (including any follow-up) projects a return to work.

The special rule also does not indicate whose reasonable expectation controls, although we believe the IRS means the employer.

Example 1

Ruth contracted COVID-19, is on FMLA leave, and her available FMLA leave ends on June 24, 2021. Ruth's treating physician indicates she should be able to return to work by mid-July. ABC Company extends Ruth's approved LOA to July 16, 2021 as a reasonable accommodation, and it allows Ruth to maintain her health coverage at the active employee rate during the extension. Ruth is still unable to return on July 16, 2021, but her physician indicates he will clear her to return to work by August 2, 2021. ABC Company terminates Ruth on July 16, 2021.

Answer: Ruth's LOA did not cause a loss of coverage, since she remained eligible for coverage at the active rate (whether or not she elected to continue coverage during the LOA). We believe Ruth's termination on July 16, 2021 is an involuntary termination making her subsidy eligible, because there was a reasonable expectation she would return to work by August 2, 2021.

Note: In this example, it makes no difference if Ruth's FMLA leave is also concurrent with other leave such as paid disability or sick leave. Unless certain circumstances apply, terminating Ruth during the portion of her LOA covered by the FMLA would be an FMLA violation.

Example 2

Kevin was in a car accident in February 2021, was concurrently on FMLA and disability leave, and declared permanently disabled in late April. Kevin's FMLA and disability leave ended on May 17, 2021, and his employer terminated him the next day. Assume Kevin transitioned to long-term disability.

Answer: Kevin's LOA did not cause a loss of coverage, since he remained eligible for coverage at the active rate (whether or not he elected to continue coverage during the LOA). While this is a COBRA qualifying event due to the termination of employment, it is not an involuntary termination eligible for the COBRA subsidy. We realize this may seem counterintuitive since Kevin feels like someone who needs or deserves subsidized COBRA coverage, but Kevin is no longer able to perform services and there was no reasonable expectation on the date of termination that Kevin would ever be able to return to work.

Example 3

Courtney took FMLA leave to care for her son who had a serious illness. In November, her son's physician indicated he would recover sufficiently for Courtney to return to work by mid-December. Courtney's FMLA leave ended on November 30, 2020, but she did not return to work in order to continue caring for her son. The employer terminated Courtney as of December 1, 2020. Assume Courtney cannot work remotely.

Answer: Courtney's LOA did not cause a loss of coverage, since she remained eligible for coverage at the active rate (whether or not she elected to continue coverage during the LOA). We believe this was an involuntary termination for subsidy purposes. As written, the special rule for involuntary termination when there is a reasonable expectation of a return to work following an illness or disability does not appear to be limited to the employee's own illness or disability. On Courtney's termination date, there was a reasonable expectation that she could return to work in mid-December.

Note: If Courtney could work remotely, this would be an involuntary termination without regard to her son's recovery, because she was willing and able to continue performing services when her employer terminated her. We realize Courtney's termination seems to fit within the IRS's rule of thumb for voluntary termination as a personal choice, but we believe the written special rule in the First IRS Notice controls.

Layoffs and Furloughs

Example 1

Michael's employer laid him off on December 31, 2020, and he lost his group health coverage the same day.

Answer: This is obviously an involuntary termination of coverage for subsidy purposes. Assuming Michael is otherwise eligible and was not a COBRA participant as of April 1, 2021, he has an extended election right. If he is a COBRA participant as of April 1, 2021, he will not owe COBRA premiums for the remainder of the subsidy period.

Example 2

ABC Company furloughed a portion of its workforce on January 1, 2021, including Teagan. Furloughed employees remain eligible for group health coverage, but ABC Company does not contribute toward their cost of coverage, and Teagan must pay the entire premium. ABC Company recalled its furloughed employees on March 15, 2021, but Teagan did not respond. Teagan also failed to respond to additional recall notices on March 17th, 22nd, and 26th, and ABC Company terminated her employment on March 29, 2021.

Answer: This is a trick. While Teagan remained eligible for coverage during the furlough, the loss of ABC Company's contributions was a loss of coverage due to a reduction in hours qualifying her for the subsidy. Teagan's failure to respond to the recall and subsequent termination is irrelevant.

If ABC Company allowed furloughed employees to pay the active rate for coverage, Teagan's failure to respond to the recall and subsequent termination is relevant, because the termination caused her loss of coverage. We believe Teagan's failure to return to work qualifies as an involuntary termination eligible for the subsidy, because she "quit" following a material negative change to her employment (the furlough).

Other

Example 1 (voluntary reduction in hours)

On June 7, 2021, Cam voluntarily reduced his work schedule from full-time to part-time in order to spend more time fishing, playing golf, and traveling with his wife. Cam will lose eligibility for ABC Company's group health coverage as of June 30, 2021.

Answer: This is obviously a loss of coverage due to a reduction in hours for subsidy purposes. It makes no difference that Cam's loss of coverage is due to his voluntarily reducing his work schedule for personal leisure activities.

Example 2 (material negative change to employment)

XYZ, Inc. acquired ABC Company on March 1, 2021. Brianna was a regional leader for ABC Company, but was demoted and placed in a sales role in April as part of a consolidation and reorganization of the combined workforce following the acquisition. Brianna resigned on April 30, 2021 to pursue other opportunities.

Answer: We believe Brianna's demotion was a material negative change to her employment and her resignation qualifies as an involuntary termination for subsidy purposes. Other potential material negative changes to the terms of employment include requiring Brianna to relocate or take a pay cut.

Example 3 (failure to renew an employment contract)

Meegan worked as an officer for ABC Company under the terms of an employment contract. The contract automatically renewed for additional one-year periods at the end of the initial contract term unless either ABC Company or Meegan gave notice of an intent not to renew at least 90 days before the start of the next contract period. The initial contract term expired on June 30, 2019, and the contract automatically renewed for one-year periods ending June 30, 2020 and again to June 30, 2021. On April 1, 2021, ABC Company notified Meegan it would not renew her contract for another period despite her willingness to renegotiate. Meegan's employment will end on June 30, 2021, and she will lose her group health coverage on that date.

Answer: We believe this is an involuntary termination of employment for subsidy purposes. There is a special rule in the First IRS Notice that states:

1. A loss of employment due to an employer's decision not to renew an employment contract is an involuntary termination if the employee was willing and able to continue performing services under the same or similar terms (with or without a contract); unless
2. Both parties understood at all times during the current contract period that there was no intent to renew the contract.

The facts indicate Meegan had no knowledge that the contract would not be renewed prior to April 1, 2021 (with only ¼ of the current contract term left), and she was willing to renegotiate.

Note: The special rule for contract employees can also apply to union employees covered by a collective bargaining agreement and staffing agency employees.

The Overlap Rule

If a qualified beneficiary under federal COBRA lost or loses coverage due to a subsidy-triggering event, the individual is subsidy-eligible if any portion of the corresponding continuation coverage period overlaps with the subsidy period. This Overlap Rule applies even if the individual previously waived or dropped COBRA continuation coverage before the subsidy period began. This creates three distinct groups of eligible individuals during the subsidy period:

- Group 1 – Individuals whose triggering events occur during the subsidy period;
- Group 2 – Existing COBRA participants whose triggering events occurred before the subsidy period; and
- Group 3 – Individuals whose triggering events occurred before the subsidy period began, are not COBRA participants at the start of the subsidy period, and their original or extended (subject to certain conditions) period of continuation coverage would have overlapped the subsidy period. These individuals are eligible for a second-chance election opportunity known as the extended election right under certain circumstances, addressed below.

Note: The ARPA only added the extended election right to federal COBRA, but states may adopt it for their comparable state continuation coverage. If a state does not adopt the extended election right, Group 3 eligibility will not apply to its comparable state continuation coverage.

Groups 2 and 3 require the use of a sort of “look-back period” starting with the date of the qualifying event to determine if the corresponding continuation coverage period overlaps with the subsidy period.

- Groups 2 and 3 (Original Period of Continuation Coverage) – An individual is subsidy-eligible if the *original* period of continuation coverage caused by a triggering event overlaps with the subsidy period. Based on the COBRA subsidy period’s first period of coverage rule, this look-back period begins on November 1, 2019 for federal COBRA (comparable state continuation coverage may differ). Group 3 individuals can take advantage of the extended election right to enroll in COBRA for the remainder of their original COBRA period.
- Group 2 (Extended Period of Continuation Coverage) – The First IRS Notice indicates a Group 2 individual receiving *extended* continuation coverage is subsidy-eligible so long as coverage was initially lost due to a triggering event, the individual elected COBRA, and the individual was still a COBRA participant when the subsidy period began.

Extensions to continuation coverage include second COBRA qualifying events, disability extensions, and state continuation coverage extensions (e.g. the Cal-COBRA extension), which can extend continuation coverage for different lengths of time. The look-back period can begin as early as May 1, 2018, but it only applies to individuals who were still COBRA participants when the subsidy period began.

- Group 3 (Extended Period of Continuation Coverage) – The Second IRS Notice (Q/A #1) indicates a Group 3 individual is subsidy-eligible through *extended* continuation coverage so long as:
 - (1) Coverage was initially lost due to a triggering event;
 - (2) The individual elected COBRA;
 - (3) The original COBRA continuation coverage period expired before the subsidy period began; and
 - (4) The individual is still within the period to notify the plan of their extension right (which is subject to Outbreak Period relief extending the deadline to notify the plan).

Allowing for Outbreak Period relief, the realistic look-back window should not begin earlier than July 1, 2018.

Continuous Coverage Required or Extended Election Right Available? The Second IRS Notice does not address whether a Group 3 individual must resume COBRA from the date the original period of continuation coverage expired, or if the individual can exercise an extended election right to resume COBRA as of April 1, 2021 (or a later date within the subsidy period).

We believe it is the former for two reasons:

- (1) The Second IRS Notice does not mention extended election rights under this special rule or demonstrate the use of an extended election right in its example; and
- (2) The First IRS Notice indicates individuals are only eligible for subsidies through extended coverage if they remain COBRA participants when the subsidy period begins (Q/A #17). Requiring the Group 3 individual to resume COBRA from the date the original continuation coverage period expired is consistent with that guidance.

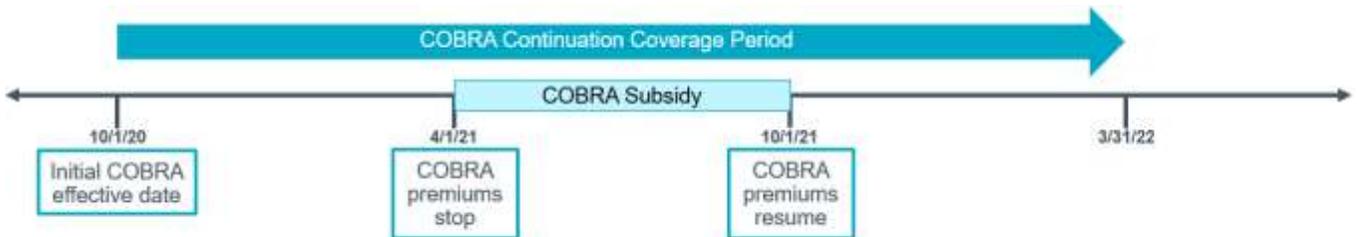
Example 1: The Overlap Rule for Group 1

Howard’s employer laid him off on May 15, 2021, and he lost his group health coverage at the end of the month. Howard elects COBRA as of June 1, 2021, and is eligible for the COBRA subsidy. Assuming Howard does not lose eligibility, he will not owe COBRA premiums from June 1, 2021 – September 30, 2021. His COBRA premiums will begin with the October 1, 2021 coverage period.



Example 2: The Overlap Rule for Group 2 (original period)

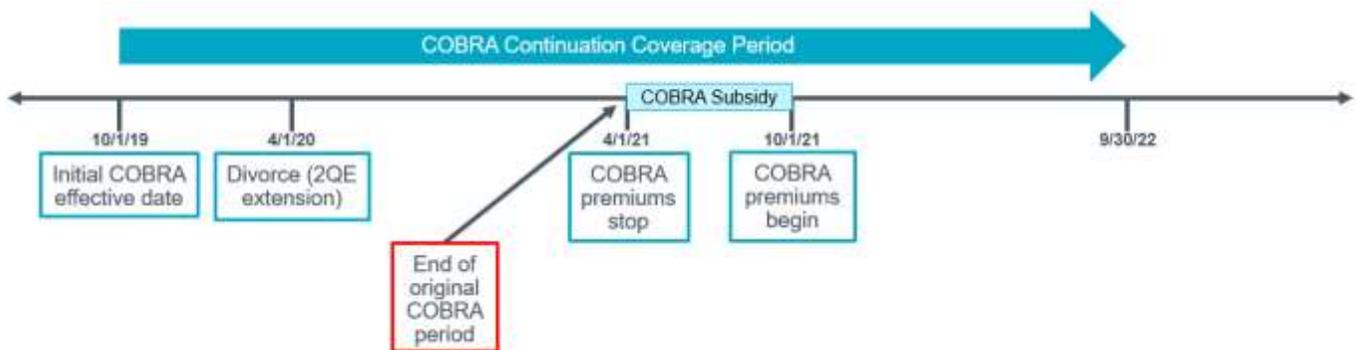
Brandie moved from a full-time to part-time position within ABC Company in September 2020 and lost her group health coverage at the end of the month. Brandie elected COBRA coverage for her family as of October 1, 2020, and they remain COBRA participants when the subsidy period begins. Assuming no loss of eligibility, Brandie does not owe COBRA premiums from April 1, 2021 – September 30, 2021, and her premiums will resume with the coverage period beginning on October 1, 2021.



Example 3: The Overlap Rule for Group 2 (applying extension)

Karen’s employer laid her off on September 14, 2019, and she and her spouse (Chris) lost coverage at the end of the month. They both enrolled in COBRA as of October 1, 2019. Karen and Chris divorced on April 1, 2020, giving Chris up to 36 months of COBRA coverage measured from October 1, 2019 (ending September 30, 2022). Chris notified the plan of the divorce in May 2020 and received the extension.

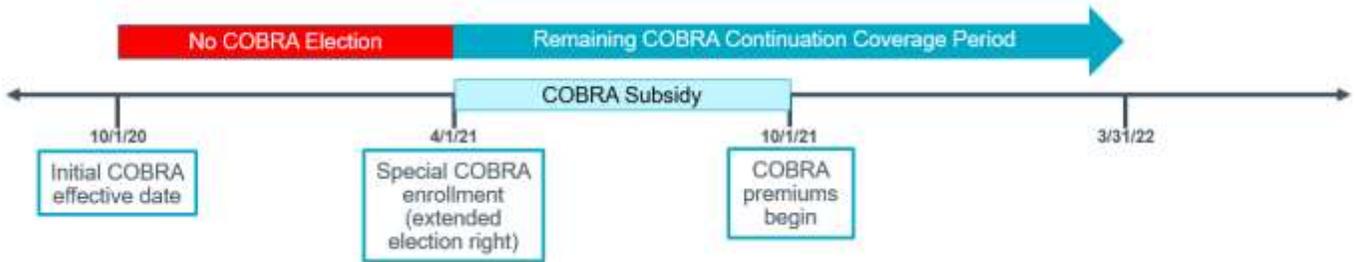
Karen’s COBRA coverage ends on March 31, 2021, before the subsidy period begins. Chris remains a COBRA participant when the subsidy period begins because of his COBRA extension and is eligible for the subsidy.



Example 4: The Overlap Rule for Group 3 (original period)

John’s employer laid him off on September 25, 2020, and he lost his group health coverage at the end of the month. The applicable COBRA continuation coverage period began October 1, 2020 and ends March 31, 2022. John did not initially elect COBRA as of October 1, 2020, but he is eligible for an extended election right because his original continuation coverage period overlaps with the subsidy period.

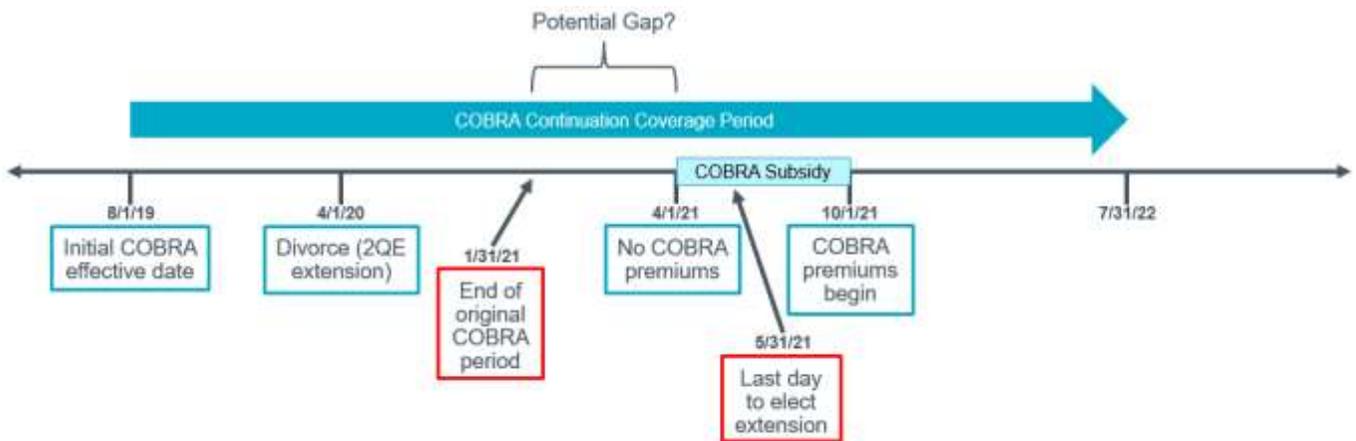
The existing Outbreak Period relief permits John to elect COBRA retroactive to October 1, 2020, but the COBRA subsidy's extended election right allows John to elect COBRA as of April 1, 2021 (or a later date within the subsidy period) for the remainder of his original COBRA continuation coverage period. John will owe COBRA premiums for any periods of coverage before or after the subsidy period, but he will not owe any COBRA premiums during the subsidy period.



Example 5: The Overlap Rule for Group 3 (applying extension)

Karen’s employer laid her off on July 14, 2019, and she and her spouse (Chris) lost coverage at the end of the month. They both enrolled in COBRA as of August 1, 2019. Karen and Chris divorced on April 1, 2020, giving Chris up to 36 months of COBRA coverage measured from August 1, 2019 (ending July 31, 2022). The plan requires notification within 60 days of the date of the divorce for the extension to apply. Neither Chris nor Karen notified the plan of the divorce by May 31, 2020.⁴

Karen and Chris’s COBRA coverage ends on January 31, 2021. Although Chris is not a COBRA participant on April 1, 2021, the existing Outbreak Period relief gave Chris until May 31, 2021 to request the divorce extension.⁵ Chris notified the plan of the divorce on May 5, 2021, resumed COBRA coverage retroactive to February 1, 2021, and is eligible for the subsidy beginning April 1, 2021.



⁴ Assume the plan met its COBRA rights notice obligation to the spouse.

⁵ This is one year from April 1, 2020 plus the 60 days to notify the plan of the divorce.

As discussed [earlier](#), we believe Chris must have continuous COBRA coverage to qualify for the subsidy through extended continuation coverage and cannot exercise an extended election right to elect COBRA as of April 1, 2021 (or a later date within the subsidy period).

A Surprise for Some Small Employers

If an individual's triggering event occurred during a year when an employer was subject to federal COBRA, the First IRS Notice indicates the employer must still offer an extended election right and administer the COBRA subsidy even if the employer's group health coverage qualifies for the small employer exception⁶ and is not subject to federal COBRA for 2021. As written, it appears the plan will be subject to federal COBRA for subsidy purposes even if state comparable continuation coverage otherwise applies to the plan for 2021.

This is a tricky proposition and may require manual intervention, because the plans will not be set up to administer federal COBRA for 2021.

For Cause versus Gross Misconduct

COBRA does not apply to an employee terminated for gross misconduct, so the COBRA subsidy does not apply either. Although "for cause" and "gross misconduct" frequently overlap, gross misconduct is a higher standard. All terminations for gross misconduct are also for cause, but not all for cause terminations equal gross misconduct, and the two terms are not interchangeable.

"For cause" generally means a termination for [ordinary] misconduct, including violations of company policy and significant or consistently poor performance. A "for cause" termination can allow an employer to avoid contractual obligations or an unemployment compensation claim, but an employee merely terminated for cause is still eligible for COBRA and the COBRA subsidy.

COBRA does not define "gross misconduct," but courts generally define it as outrageous and/or reckless behavior. Examples of gross misconduct include:

- The employee commits a felony against the company, an employee, or on company premises; and/or
- The employee commits an act that can significantly damage the employer's reputation.

We recommend employers speak with their legal advisor before asserting a termination is due to gross misconduct and denying COBRA or the COBRA subsidy. If an employer offers or already offered COBRA, it is too late to claim termination for gross misconduct.

⁶ This exception applies to employers averaging fewer than 20 employees on business days during the prior calendar year. Closely related employers count together for purposes of the 20-employee threshold.

Loss of Subsidy Eligibility

An individual loses subsidy eligibility as soon as any of these occur:

1. The individual is eligible for other group health coverage (excluding coverage consisting only of excepted benefits and health FSAs) or Medicare;
2. The individual exhausts their COBRA continuation coverage period; or
3. The end of the subsidy period.

This means individuals may be ineligible as of April 1, 2021 or later during the subsidy period.

The ability to enroll in other group health coverage through COBRA does not cause a loss of subsidy eligibility. This includes retiree coverage offered as extended coverage in the same group health plan for similarly situated active employees as an alternative to COBRA. This retiree coverage may also qualify for the COBRA subsidy as an involuntary termination if the retirement is coerced. If retiree coverage is not through the same group health plan covering similarly situated active employees, the retiree coverage will cause a loss of COBRA subsidy eligibility.

The subsidy application process requires individuals to attest that they are not eligible to enroll in disqualifying other coverage and that participants receiving subsidies must notify the plan when subsidy eligibility is lost. The penalty for failing to notify the plan when subsidy eligibility is lost is \$250 (or the greater of \$250 or 110% of the ineligible subsidy amount if the failure to notify the plan is fraudulent). An employer is entitled to rely on an attestation from an individual unless it has actual knowledge that the information provided is incorrect.

What it means to be “Eligible” for Other Group Health Coverage or Medicare

The First IRS Notice clarifies that eligibility means eligibility plus the current opportunity to enroll. If an individual enrolls or can enroll but is subject to a waiting period or other delay before coverage is effective, the individual is subsidy eligible until the coverage is or would be effective.

Example 1

ABC Company laid Michelle off on October 31, 2020, and she lost her ABC Company medical coverage the same day. Michelle started working for XYZ Inc. on January 11, 2021 in a benefits-eligible position, and she waived XYZ’s coverage during her new hire enrollment window. XYZ’s next open enrollment period occurs in December 2021 with coverage effective on January 1, 2022.

Michelle remains eligible for the COBRA subsidy under ABC Company’s medical plan due to her involuntary termination and can enroll using the extended election right. She will lose eligibility for the subsidy if she gains the right to enroll in XYZ’s coverage during the subsidy period due to a qualifying life event.

Example 2

ABC Company laid Tracy off on January 31, 2021, and she lost her ABC Company medical coverage the same day. Tracy started working for XYZ Inc. on March 11, 2021 in a benefits-eligible position and has thirty days to enroll in coverage as a new hire. XYZ's medical coverage is effective on the first of the month following sixty days from the date of hire.

Tracy was eligible to enroll in XYZ's medical coverage as of April 1, 2021, but her coverage could not be effective until June 1, 2021 because of the waiting period. Tracy remains eligible for the COBRA subsidy under ABC Company's medical plan due to her involuntary termination until June 1, 2021, and can enroll using the extended election right.

HIPAA Special Enrollment Rights and Outbreak Period Relief

The existing [Outbreak Period relief](#) for COVID-19 suspends the election deadlines for HIPAA special enrollments for up to one year from the date of the event while the relief remains in effect. This means certain individuals may remain eligible to elect group health coverage long after a plan's standard HIPAA special enrollment window expires.

HIPAA special enrollments for birth, adoption, or placement for adoption are effective retroactive to the date of the event. For the other HIPAA special enrollment rights (marriage, loss of other health coverage, and certain Medicaid/CHIP events), it is common for coverage to be effective on the first of the first month following the election, which is the latest HIPAA allows coverage to be effective. The First IRS Notice does not directly address this, but we believe this delayed effective date also affects eligibility for the COBRA subsidy similar to a waiting period.

Example

Monte lost coverage due to a layoff in September 2020, creating a HIPAA special enrollment right in his spouse's medical plan through her employer, XYZ Inc. XYZ's medical plan allows up to thirty-one days to request enrollment for this event and coverage is effective on the first of the month following the election. Assume Monte's spouse did not add Monte to her coverage during the standard special enrollment window or during open enrollment.

We believe Monte is eligible for the COBRA subsidy under the ABC Company medical plan through April 30, 2021. Monte was eligible to enroll in XYZ's medical plan as of April 1, 2021, but since coverage is not effective until the first of the following month after the election, Monte does not lose subsidy eligibility until May 1, 2021.

A Complete Loss of Subsidy Eligibility

As written, the ARPA and available guidance indicate that gaining eligibility for any other group health coverage (other than excepted benefits or a health FSA) or Medicare results in a loss of subsidy eligibility for all group health coverage. Medicare's dental and vision benefits are very limited, and it feels unfair that

gaining eligibility for Medicare could result in a loss of subsidies for dental and vision coverage. Unfortunately, the Second IRS Notice confirmed this is the correct outcome.

Subsidy Notices and Election Rights

The DOL released [model COBRA subsidy notices](#) in conjunction with the DOL FAQs, and we will summarize these at a high level below.

- [General COBRA Election Notice](#) – The ARPA does not require plans to notify ineligible individuals about the COBRA subsidy, but the DOL obviously expects and intends this notice to replace a plan's existing general COBRA election notice for all COBRA qualified beneficiaries who experience qualifying events during the April 1, 2021 – September 30, 2021 subsidy period.

This notice indicates certain COBRA qualifying beneficiaries may be eligible for the subsidy and under what circumstances, how to apply for it, and other subsidy rights and obligations. The DOL intends for plans to return to the standard general COBRA election notice once the subsidy period is over.

The ARPA and FAQs do not include a due date for plans to begin providing this model notice, which suggests the standard COBRA due date applies. If the employer/plan sponsor is also the plan administrator, this is 44 days after the later of the COBRA qualifying event date or the actual loss of coverage. This should mean the earliest due date was May 15, 2021.

Note: Plans could provide a separate general notice describing subsidy rights just for eligible individuals, but two sets of general notices may prove tricky to administer.

- [Extended Election Notice](#) – This notice applies to potential subsidy-eligible individuals already enrolled in COBRA when the subsidy period begins and those who waived or dropped COBRA before April 1, 2021 if any portion of their continuation coverage would have overlapped with the subsidy period. This notice contains the same general subsidy content described in the general COBRA election notice as well as information about extended election rights. Plans should have begun distributing this notice by May 31, 2021 (but see [Penalties and Enforcement](#)).
- [Model Subsidy Application](#) – Despite a much longer (and misleading) title,⁷ this is really a model subsidy application and includes an attestation that the individual or individuals applying for the subsidy are not eligible to enroll for other group health coverage or Medicare. Plans are not required to use this notice or its contents, but the attestations in it are useful and subsidy guidance requires entities claiming reimbursement credits to keep attestations for substantiation purposes. If a plan intends to use this application (or something like it), it should include the application with the attestation as an attachment to the general COBRA election and extended election notices.

⁷ The actual title is the, "Summary of the COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021."

- [Expiration of Premium Assistance Notice](#) – This applies to all participants receiving the subsidy. It notifies them of their subsidy expiration date and coverage options available to them once the subsidy ends. This notice does not apply when the loss of the subsidy is due to the individual gaining eligibility for other group health coverage or Medicare.

Plans must distribute this notice during a window that is 45 days to 15 days before the subsidy ends. If the subsidy will expire on September 30, 2021, this means the notice is due August 16, 2021 – September 15, 2021. The plan will need to calculate separate delivery windows for individuals who will exhaust their continuation coverage before September 30, 2021.

A [separate model notice](#) exists for insurance carriers to address state continuation coverage and subsidy rights for fully insured coverage that is not subject to federal COBRA but is subject to comparable state continuation coverage.

Extended Election Rights and Delayed Enrollment

Under the ARPA, extended election enrollment can be effective as of April 1, 2021,⁸ or a later date within the subsidy period. An individual must make an extended election within sixty days of receiving the extended election notice.

The available guidance allows individuals exercising extended election rights to delay the effective date of COBRA coverage to the date of the election or other later date during the subsidy period. This may seem odd given that COBRA is free during the subsidy period, but it benefits individuals receiving subsidized coverage in the public health insurance marketplace. If an individual's extended election is effective retroactively to April 1, 2021, the individual will also retroactively lose eligibility for their marketplace subsidy and have to pay it back. Allowing the individual to delay the effective date of the extended election can solve this if timed correctly.

Optional Enrollment Rule

This election opportunity is optional and generally limited to major medical coverage.⁹ An employer may allow eligible individuals to elect a different plan option from the coverage in effect immediately prior to their COBRA qualifying event date. The new coverage cannot be more expensive than the participant's prior coverage. The new coverage must also be available to similarly situated active employees, which is the employee group the COBRA participant would belong to if still employed (i.e., The coverage option cannot exist solely for COBRA participants or retirees).

If an employer permits this optional election, it will include this information in the general COBRA election and extended election notice(s). An individual has 90 days from the date s/he receives notice of the availability of this election to make the election.

⁸ If coverage is lost on the day of the triggering event instead of the end of the month, the individual's applicable subsidy period may begin after April 1, 2021.

⁹ The ARPA excludes excepted benefits from this election opportunity, which will prevent most non-medical coverage from qualifying.

Extended Election Rights and Mapping Plan Options

The delay between the triggering event and the availability of an extended election right means an employer may no longer offer the same group health coverage that covered an individual when their triggering event occurred. The First IRS Notice indicates the employer must map the extended election right to the most comparable plan option available to similarly situated active employees. The subsidy still applies even if the comparable plan option is more expensive than the individual's prior coverage.

The Subsidy and Open Enrollment

COBRA participants must receive the same open enrollment opportunities to elect and/or change coverage as similarly situated active employees. The subsidy still applies if an individual elects coverage that is more expensive during open enrollment. From a practical standpoint, this will only affect employers with plan years beginning from April through September.

Subsidy Amounts and COBRA Premiums

The subsidy is equal to the full COBRA premium for a covered group health plan for eligible individuals (and only eligible individuals; see below). The full COBRA premium means the total premium (or premium equivalent) plus the 2% administrative charge.¹⁰ The value of the subsidy is not taxable income to participants.

Waiving COBRA Premiums for Eligible Individuals

- Self-insured Coverage – The employer/plan sponsor will waive the COBRA premium.
- Fully Insured Coverage –
 - If subject to federal COBRA, the employer/plan sponsor will waive the COBRA premium for the subsidy-eligible participant and pay the full COBRA premium to the insurance carrier.
 - If not subject to federal COBRA, the insurance carrier will waive the COBRA premium.

Refunds of COBRA Premiums Eligible for the Subsidy

Participants receiving the subsidy do not owe COBRA premiums during the subsidy period. The ARPA requires plans to refund paid COBRA premiums that are eligible for the subsidy within sixty days of payment. The DOL FAQs indicate that plans and COBRA participants can agree to a refund in the form of an offset against future COBRA premiums once the individual's subsidy ends. Since an offset could easily be more than sixty days after the COBRA premium(s) were paid, we assume this means the federal agencies will not enforce the sixty-day limit in these situations.

¹⁰ In rare instances where a participant receives the subsidy during a COBRA disability extension, the subsidy still includes the total premium, up to 150%.

Domestic Partners and Other Non-Qualified Beneficiaries

The subsidy only applies to individuals who are qualified beneficiaries under federal COBRA. As a result:

- Domestic partners do not qualify even if they are federal tax dependents and/or state law requires domestic partners be offered coverage under a plan as if they were legal spouses.
- A domestic partner's child(ren) frequently will not qualify either, but please see the note below for an exception to this.
- Other non-qualified beneficiaries that will not qualify include a spouse or existing child added to coverage during open enrollment, the employee's parents, grandchildren, and other relatives.

Domestic Partner's Child(ren): If the employee and partner enter into a registered domestic partnership or civil union officially recognized under state law (usually by filing paperwork with the Secretary of State or a County Clerk of Courts office), the domestic partner's children are the employee's stepchildren under that state's law and can be qualified beneficiaries under federal COBRA. This means they will be eligible for the COBRA subsidy. Unlike marriage, this treatment only applies if the employee resides in that state or another state that also officially recognizes the domestic partnership or civil union.

If a COBRA election includes both subsidy-eligible and non-subsidy eligible individuals, the plan must split the premium into two parts for subsidy purposes:

1. The subsidy eligible amount waived during the subsidy period and eligible for reimbursement credits; and
2. The applicable non-subsidy eligible amount.

While an employer can waive the COBRA premium for any covered individuals, the employer or other entity claiming reimbursement credits may only claim reimbursement credits for the subsidy eligible amount(s).

The First IRS Notice allows plans to calculate the premium split by subtracting the tier of coverage that would apply if there were no non-qualified beneficiary from the tier of coverage including the non-qualified beneficiary(ies). If the non-qualified beneficiary(ies) do not affect the tier of coverage, the entire COBRA premium is eligible for the subsidy.¹¹

¹¹ We view this as an endorsement to use a similar approach when calculating the fair market value of coverage offered to non-tax dependents.

Example 1

Tier of Coverage	Monthly COBRA Premium
Employee Only	\$500
Employee + Spouse	\$800
Employee + Child(ren)	\$700
Family	\$1,200

Chris and Jennifer (Chris's domestic partner) lose coverage due to a triggering event and Chris's employer extends continuation coverage to domestic partners on the same terms as spouses. Chris elects Employee + Spouse COBRA continuation coverage.

Answer: The portion of the COBRA premium eligible for the subsidy is \$500/month. The ineligible amount is \$300/month, which is the difference between the cost of Employee + Spouse and Employee Only coverage ($\$800 - \$500 = \$300$).

Example 2

Tier of Coverage	Monthly COBRA Premium
Employee Only	\$500
Employee + Spouse	\$800
Family	\$1,200

Chris, his two children, and Jennifer (Chris's domestic partner) lose coverage due to a triggering event and Chris's employer extends continuation coverage to domestic partners on the same terms as spouses. Chris elects Family COBRA continuation coverage.

Answer: The portion of the COBRA premium eligible for the subsidy is \$1,200/month. Chris and his two children would be in the Family coverage tier with or without Jennifer. There is no need to split the premium in this example.

Example 3

Tier of Coverage	Monthly COBRA Premium
Employee Only	\$500
Employee + Spouse	\$800
Employee + Child(ren)	\$700
Family	\$1,200

Chris and his child lose coverage due to a triggering event. Chris elects Employee + Child(ren) COBRA continuation coverage. The plan’s open enrollment period occurs during June 2021, and Chris adds his spouse (Jennifer) to his coverage with an effective date of July 1, 2021.

Answer: The \$700 premium for Employee + Child(ren) coverage is eligible for the subsidy throughout the subsidy period. Jennifer is not a qualified beneficiary under federal COBRA, because she was not a participant on the date before coverage was lost. Beginning with the July 1, 2021 coverage period. The ineligible amount is \$500/month, which is the difference between the cost of Family and Employee + Child(ren) coverage ($\$1,200 - \$700 = \$500$).

Example 4

Tier of Coverage	Monthly COBRA Premium
Employee Only	\$500
Employee + Spouse	\$800
Family	\$1,200

Chris, Jennifer (Chris’s domestic partner), and Jennifer’s child lose coverage due to a triggering event and Chris’s employer extends continuation coverage to domestic partners and domestic partner children on the same terms as spouses. Chris elects Family COBRA continuation coverage. Assume Chris and Jennifer are in a registered domestic partnership and her child is his stepchild under state law.

Answer: The portion of the COBRA premium eligible for the subsidy is \$1,200/month. Chris and his stepchild (Jennifer’s child) would be in the Family coverage tier with or without Jennifer. There is no need to split the premium in this example.

Claiming Reimbursement Credits

Who Claims the Reimbursement?

1. Multiemployer plans – The plan’s board of trustees claims the reimbursement credits. A good example of a multiemployer plan is a plan offered by a union to its union membership employed at several different employers. Under the collective bargaining agreement, the employers pay the union an agreed-upon amount toward the cost of coverage.
2. Employers – Employers claim the reimbursement credits for:
 - a. Self-insured and fully insured plans subject to federal COBRA, and
 - b. Self-insured plans not subject to federal COBRA (if subject to state continuation coverage).
3. Insurance carriers – Insurance carriers claim the reimbursement credits for fully insured plans that are not subject to federal COBRA but are subject to state continuation coverage, such as a small employer plan or church plan.

MEWAs: If a multiple employer welfare arrangement (MEWA) does not qualify as a single employer plan for ERISA purposes (likely), each participating employer pays the COBRA premiums and claims the reimbursement credits for its own respective COBRA participants. If the MEWA qualifies as a single employer plan, the board of trustees waives the premiums and claims the credits.

How to Claim Reimbursements

The applicable entity claims the subsidies as fully refundable Medicare (or Railroad Retirement) payroll tax credits through:

- Reducing quarterly Medicare payroll tax deposits based on expected credits before filing the applicable [IRS Form 941](#) quarterly payroll tax return;
- Advance payments using [IRS Form 7200](#); and/or
- Claiming credit reimbursements through the applicable IRS Form 941 quarterly payroll tax return (the first quarterly claim date using IRS Form 941 is August 2, 2021).

While non-profit entities are not subject to federal income tax, they still pay federal Social Security and Medicare payroll taxes. We assume a number of employers will reduce quarterly Medicare payroll tax deposits or use IRS Form 7200 to claim advance payments for cash flow reasons. An employer will true-up both approaches on the next IRS Form 941 and potentially receive additional credits or need to pay additional taxes. Reimbursement credits are taxable income to the entities receiving them.

Reimbursements are only available for the applicable COBRA premium for subsidy eligible individuals during the subsidy period. Vendor fees for mailing and processing subsidy notices may be deductible as business expenses, but they are not eligible for credit reimbursement.

We recommend employers speak with their legal and/or tax advisors about which approach or approaches an employer should take and how to complete requests for reimbursement.

No Double Dipping: An employer cannot claim reimbursement for the same expense through this COBRA subsidy program and emergency paid sick leave/emergency family medical leave or the employee retention credit under the CARES Act.

Severance/Separation Agreements and Reimbursement Credits

An employer cannot claim reimbursement credits for continuation coverage amounts it already subsidizes or agrees to subsidize during the subsidy period. An employer can claim credits for amounts in excess of its own contractual subsidy obligations.

Example

ABC Company laid off a number of employees in January 2021 as part of a reduction in force. ABC Company agreed to subsidize 50% of the cost of COBRA premiums for up to six months of medical coverage for the affected employees a part of a severance package. ABC Company can only claim reimbursement credits for 50% of the applicable COBRA premiums for subsidy-eligible individuals from April through June 2021. It can claim 100% of the applicable COBRA premium for subsidy-eligible individuals for the remainder of the subsidy period beginning in July.

Potential Windfall: If an employer provides additional compensation to a former employee intended to assist with COBRA premiums instead of directly reducing the COBRA premium, the COBRA subsidy may result in a windfall to the employee. A subsidy-eligible individual will still not owe COBRA premiums during the subsidy period, and absent “claw back” language in the separation agreement, the former employee should be able to keep the additional compensation.

Interaction with the Public Health Insurance Marketplace

Marketplace coverage is individual health insurance and does not affect subsidy eligibility. The official guidance confirms a subsidy-eligible individual can drop marketplace coverage and enroll in subsidized COBRA through an extended election right. The DOL FAQs and later guidance from the U.S. Department of Health and Human Services confirm that the loss of the COBRA subsidy creates a special enrollment opportunity to enroll in the marketplace.

No Outbreak Period Relief for the Subsidy

The DOL FAQs and First IRS Notice confirm that the Outbreak Period relief that otherwise applies to COBRA administration does not apply to the COBRA subsidy election window. An individual must elect COBRA within 60 days of receiving a subsidy election notice (see [Subsidy Notices and Election Rights](#)) or s/he will forfeit the subsidy. This includes the extended election right. If an individual exercises an extended election right to elect COBRA coverage, the individual forfeits the Outbreak Period relief right to elect COBRA retroactive to the date of the original COBRA qualifying event.

The Outbreak Period relief also does not apply to the timing requirements for plans to provide the subsidy notices. Unfortunately, the Outbreak Period's relaxed electronic delivery rules do not apply either.

Penalties and Enforcement

The DOL and IRS confirmed the existing COBRA administration excise tax penalty applies to most COBRA subsidy compliance failures. This penalty is \$100/day per affected participant (capped at \$200/day per family) up to a maximum penalty of \$500,000, if due solely to neglect and not willful or intentional misconduct. The federal agencies usually agree to waive this penalty if corrected within thirty days of discovery or the date the error should reasonably have been discovered. Other penalties apply to reporting errors for IRS Forms 941 and 7200. Potential fiduciary violations may also apply.

Given the late and continually evolving guidance, we expect the federal agencies will waive penalties for good faith efforts to comply and correct errors.

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