The American Rescue Plan Act of 2021

New Stimulus Law Includes COBRA Subsidies and Other Relief

President Biden signed the American Rescue Plan Act of 2021 (the "ARPA") into law on March 11, 2021. The ARPA is a $1.9 trillion omnibus federal spending package intended to provide economic and other relief related to the COVID-19 pandemic as well as spending for other programs.

This Alert focuses on the following relief under ARPA:

We collectively refer to the U.S. Departments of Labor (DOL), Treasury, and Health and Human Services (HHS) as the "Agencies" in this Alert.

COBRA Subsidies

The ARPA creates a temporary COBRA subsidy with enhanced election opportunities for eligible individuals.[1] The COBRA subsidy itself is not voluntary, although one of its election opportunities is. Plans will need to identify subsidy-eligible individuals and provide notices relatively quickly as described below.

[1] The subsidy also applies to comparable state continuation coverage. See *Covered Group Health Plans*.

COBRA Subsidy Period

The COBRA subsidy period runs from **April 1, 2021 – September 30, 2021**, and it applies to an eligible individual's (defined below) continuation coverage that overlaps with this period.

The subsidy <u>does not</u> extend an eligible individual's maximum period of continuation coverage.

Subsidy Amount

The subsidy is equal to 100% of the applicable COBRA premium for a covered group health plan during the subsidy period.[2] COBRA participants who are eligible individuals do not pay COBRA premiums during this subsidy period. The subsidy is not taxable income to the affected COBRA participants.

COBRA subsidies are reimbursable to the plan sponsors/employers for self-insured group health plans and the insurance carriers for fully insured plans (see *Subsidy Recovery*).

> **Partial Months?** It is unclear how the subsidy affects a COBRA coverage month that only partially overlaps the subsidy period. For example, assume a plan administers COBRA qualifying events as of the date of the event and not the end of that month. If a particular COBRA coverage month ends on April 6, 2021, does the plan need to pro-rate the COBRA premium for that month to account for the six days in April? We believe so and think the Agencies will address this in later guidance.

Covered Group Health Plans

The subsidy applies to group health plans subject to federal COBRA and comparable state continuation coverage. For the purposes of the COBRA subsidy (and this Alert), "COBRA" generally includes comparable state continuation coverage.[3] As drafted, this broadly includes medical, dental, and vision coverage as well as other benefits such as health reimbursement arrangements. The ARPA expressly *excludes* health flexible spending accounts.

It is not clear if Congress really meant to include non-medical plans, or if the Agencies will attempt to exclude them in later guidance.

Eligible Individuals

An individual is subsidy-eligible only if s/he *involuntarily* lost coverage due to a termination of employment or reduction in hours, and any portion of the individual's corresponding continuation coverage period overlaps with the subsidy period.[4] This means:

1. Individuals whose COBRA qualifying events occur from April 1, 2021 – September 30, 2021;
2. Existing COBRA participants whose COBRA qualifying events occurred before April 1, 2021; and
3. Individuals whose COBRA qualifying events occurred before April 1, 2021, and the individuals either did not elect COBRA or elected COBRA and dropped it before April 1, 2021 (see *COBRA Subsidy Extended Election* below).

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[2] This includes the full premium for fully insured coverage (employee plus employer's contribution).
[3] By contrast, the "Outbreak Period" relief mentioned in this Alert does not apply to state continuation coverage.
[4] This limitation also applies to comparable state continuation coverage. A plan can deny COBRA to an individual terminated due to gross misconduct, but this is a very high standard.

Eligible individuals also include any affected covered spouse and/or covered dependent children.[5] An individual who voluntarily loses coverage due to changing jobs or retirement or who loses coverage due to any other COBRA qualifying event or other reason is not eligible for the subsidy.

Certain enhanced election opportunities may apply:

- COBRA Subsidy Extended Election – Covered group health plans must offer this election opportunity Individuals who did not elect COBRA or who elected COBRA and later dropped it before April 1, 2021 are also eligible for the COBRA subsidy if any portion of their COBRA continuation coverage would have overlapped the subsidy period. An affected individual may elect COBRA prospectively as of April 1, 2021 for the remainder of the original COBRA continuation coverage period. The individual does not have to elect COBRA retroactive to the original COBRA qualifying event date. The affected individual has 60 days from the date s/he receives a COBRA subsidy extended election notice to make the election (see *Communications and Model Notices*).
- Drop-Down Election (our term) – This election opportunity is optional and generally limited to major medical coverage. An employer may offer an opportunity for eligible individuals to enroll in or change their existing COBRA elections to different major medical coverage than the medical coverage in effect immediately prior to their COBRA qualifying event date. The new medical coverage cannot be more expensive than the existing 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. An affected individual has 90 days from the date s/he receives notice of the availability of this election to make the drop-down election (see *Communications and Model Notices*).

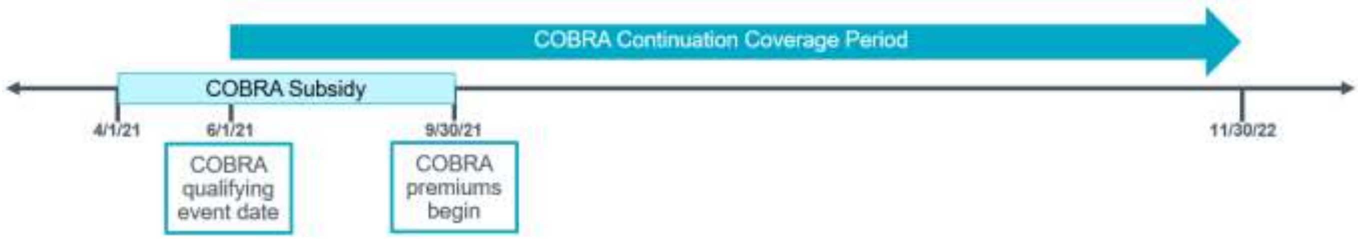
  The drop-down election creates an interesting timing issue. Outbreak Period relief aside, an individual normally has 60 days to elect COBRA. Can an individual elect COBRA and still take another 30 days to make a drop-down election?

  Note: Given that COBRA coverage is free during the subsidy period, a drop-down election only makes sense for an employee if s/he intends to keep COBRA coverage after the subsidy ends.

[5] This should also include domestic partners. Domestic partners are not federal COBRA qualifying beneficiaries by themselves and cannot independently elect COBRA. However, COBRA permits the former employee to continue coverage for covered dependents under the group health plan, which includes a covered domestic partner (and his/her covered children). If the employee makes a COBRA election that includes his/her domestic partner, the subsidy should apply.

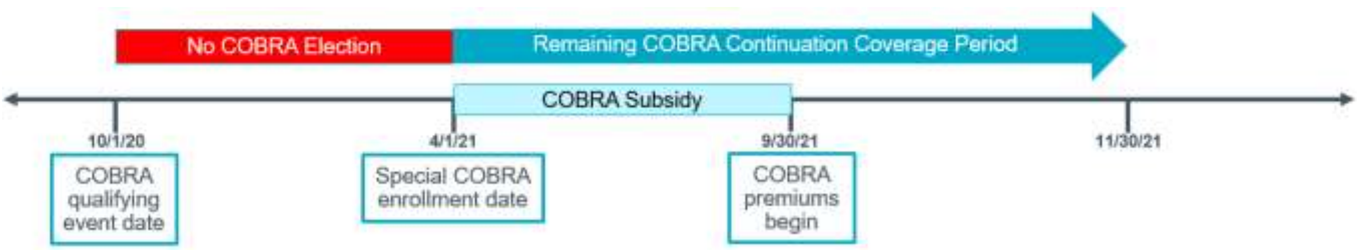
Example 1

Chris's employer lays him off on May 15, 2021. Chris's eligibility for group health coverage terminates at the end of the month, and his COBRA qualifying event date is June 1, 2021. Chris may elect COBRA continuation coverage for up to 18 months with an end date of November 30, 2022. Chris is eligible for the COBRA subsidy and will pay no premiums for the period from June 1, 2021 – September 30, 2021.



Example 2

Brigid's employer laid her off on September 14, 2020. Brigid's eligibility for group health coverage terminated at the end of the month, and her COBRA qualifying event date was October 1, 2020. Brigid did not elect COBRA continuation coverage prior to April 1, 2021. Under the COBRA subsidy extended election, Brigid can elect coverage as of April 1, 2021 through November 30, 2021 (the remainder of her original COBRA continuation coverage period). Brigid is eligible for the COBRA subsidy and will pay no premiums for the period from April 1, 2021 – September 30, 2021.



Marketplace Special Enrollment Right? In 2020, both the DOL and HHS released informal guidance indicating the loss of an employer-provided COBRA subsidy triggers a public health insurance marketplace special enrollment right.[6] We assume the DOL and HHS will treat the loss of this particular COBRA subsidy as a marketplace special enrollment right and may clarify this in later guidance.

An individual cannot claim the health care tax credit (HCTC) while receiving this COBRA subsidy. The HCTC is available to certain workers who lose employment due to foreign trade and pension plan participants of plans taken over by the Pension Benefit Guaranty Corporation.

[6] Interestingly, this informal guidance technically conflicts with the applicable regulations.

Loss of Subsidy Eligibility

An individual loses subsidy eligibility on the earliest to occur of the following:

1. The individual gains *eligibility* for other group health coverage (excluding coverage consisting only of excepted benefits) or Medicare;

2. The individual exhausts their COBRA continuation coverage period; or

3. September 30, 2021 (the end of the COBRA subsidy period).

Individuals must notify the plan administrator when they gain eligibility for other group health coverage and/or Medicare and are subject to potential penalties of the greater of $250 or 110% of the ineligible subsidy amount for failing to do so. The Agencies will address this in more detail in later guidance.

Subsidy Recovery

COBRA subsidies are reimbursable to the plan sponsors/employers for self-insured group health plans and the insurance carriers for fully insured plans in the form of Medicare tax credits. Employers will claim the credits on their quarterly payroll tax filings and may request advance payments. The credit is refundable, and an employer will still benefit if the credit exceeds the actual Medicare tax owed.

The IRS will address this process in later guidance, but it should be very similar to the process for claiming reimbursement for providing emergency paid sick leave and emergency family and medical leave. We expect employers will use IRS Form 7200 for advance payments requests.

No Double Dipping: Employers 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.

Communications and Model Notices

The COBRA subsidy obviously creates new notice obligations. Plan administrators – or COBRA administrators acting on their behalf – and/or insurers must provide eligible individuals with the information described below. The Agencies will provide model notice material for this content in April.

COBRA Subsidy Extended Election Rights Notice

The plan administrator must notify individuals who are eligible for the COBRA Subsidy Extended Election of their rights by **May 31, 2021**. This notification must include:

- The availability of the COBRA subsidy;

- The name and contact information for the plan administrator and/or other parties involved in applying and qualifying for the subsidy;

- A description of the COBRA Subsidy Extended Election and how to apply, if eligible;

- A description of the Drop-Down Election, if offered, and how to apply;

- Any additional forms or applications necessary to qualify for the subsidy and how to obtain them (if not included); and

- The obligation of an individual receiving a subsidy to notify the plan administrator when the individual gains eligibility for other group health coverage or Medicare.

Plan administrators may provide this information in a revised COBRA election notice or as a separate addendum to it. Since the subsidy is temporary, plan administrators may prefer using an addendum. We suspect this will depend on the model notice material.

Note: Remember that an individual who did not elect COBRA or elected it and dropped it is eligible if *any* portion of his or her original COBRA continuation coverage period overlaps with the subsidy period beginning on April 1, 2021. This may include individuals who involuntarily lost coverage due to a termination or reduction in hours as far back as October 2019 depending upon their COBRA qualifying event date.

General Subsidy Availability Notice

This applies to eligible individuals who are already COBRA participants when the subsidy period begins and eligible individuals whose COBRA qualifying events occur during the subsidy period. The content requirements are the same as the COBRA Subsidy Extended Election Notice. Plan administrators may provide this information in a revised COBRA election notice or as a separate addendum to it. Since the subsidy is temporary, plan administrators may prefer using an addendum. We suspect this will depend on the model notice material.

End of Subsidy Notice

Plan administrators must provide a notice to COBRA participants receiving subsidies including the following information:

- The individual's subsidy expiration date;

- The right to continue COBRA without a subsidy if the maximum COBRA continuation coverage period has not been exhausted; and

- Other coverage options that may be available.

It appears this is a separate notice requirement that cannot be met through the election notices. The notice requirement does not apply when the loss of subsidy is due to the individual gaining eligibility for other group health coverage or Medicare.

This notice has a delivery window beginning 45 days before the subsidy expires and ending 15 days before the subsidy expires. In other words, since the subsidy expires on September 30, 2021, the plan administrator must provide this notice sometime during **August 16, 2021 – September 15, 2021**.

State Continuation Coverage: Since the subsidy also applies to comparable state continuation coverage, the notice requirements apply to state continuation coverage. The Agencies' model notices will be written specifically for COBRA, but we assume insurers and/or COBRA administrators will adapt them for state continuation coverage purposes as needed.

COBRA Subsidy versus COVID-19 Outbreak Period Relief

There was no COBRA subsidy when the DOL and Treasury issued their revised Outbreak Period relief guidance affecting both COBRA election and payment (please see our previous Alert), and Congress did not account for the revised Outbreak Period relief with the COBRA subsidy.

This raises some interesting questions the Agencies need to address in guidance.

1. Retroactive subsidies – Based on the revised Outbreak Period relief and the potential duration of the Outbreak Period, it may be possible for eligible individuals to elect COBRA retroactively long after the subsidy period is over. Will these individuals still qualify for the subsidy for their period of retroactive COBRA coverage from April 1, 2021 – September 30, 2021?

2. Retroactive extended elections – Assuming the answer to #1 is yes and the affected individual's COBRA qualifying event date was before April 1, 2021, can the individual take advantage of the extended election right and elect COBRA beginning April 1, 2021 instead of retroactive to the original COBRA qualifying event date?

3. Electronic disclosures – Does the Outbreak Period relief permitting the broad use of electronic disclosures without prior consent apply to the COBRA notice obligations under the COBRA subsidy? What about the relaxation of delivery deadlines for good faith efforts by plan administrators?

The Outbreak Period relief does not apply to state continuation coverage, so these questions are limited to federal COBRA.

Smaller Pool: Remember that the Outbreak Period relief applies to all COBRA qualifying beneficiaries. By contrast, the COBRA subsidy is limited to COBRA qualifying beneficiaries who lose eligibility due to an involuntary termination of employment or reduction in hours.

Temporary Increase to Dependent Care Flexible Spending Account Limit

The ARPA temporarily increases the tax-free dependent care flexible spending account (DCFSA) reimbursable limit to $10,500 ($5,250 for married couples filing separate tax returns) [7] for, "any taxable year beginning after December 31, 2020, and before January 1, 2022."

This relief is optional, and DCFSAs do not have to adopt it.

Taxable Year versus DCFSA Plan Year

The effective year is a little deceptive. The term "taxable year" means the participant's tax reporting year and <u>not</u> the DCFSA's plan year. An individual's tax reporting year is the calendar year, so the increased DCFSA reimbursement limit applies only to the 2021 calendar year.

This is problematic for a non-calendar year DCFSA, because the reimbursement limit resets to $5,000 for the 2022 calendar year. A non-calendar year DCFSA needs to ensure participants do not exceed the 2022 reimbursement limit (but see *A Workaround for Non-Calendar Year DCFSAs* below).

Unlimited Carryovers and Extended Grace Periods

The increased contributions allowed for 2021 under this relief are subject to the unlimited carryover and extended grace period relief permitted under the Consolidated Appropriations Act, 2021 and IRS Notice 2021-15.

A Workaround for Some Non-Calendar Year DCFSAs

An employer with a non-calendar DCFSA plan year ending mid-to-late 2021 should be able to amend that plan year to allow for the increased limit and restrict reimbursements in excess of $5,000 to expenses incurred during the 2021 portion of the plan year.[8] The DCFSA could also implement an unlimited carryover or extended grace period for unused funds at the end of the 2020-2021 plan year. Since funds available during the 2021-2022 plan year due to an unlimited carryover or extended grace period do not count against the 2022 limit, this workaround should avoid potential reimbursement limit issues for both the 2020 and 2022 calendar years.

A workaround is trickier for non-calendar year DCFSAs with plan years beginning in early 2021. These DCFSAs will need to administer pro-rated reimbursement limits for expenses incurred during the 2022 portion of the 2021-2022 plan year.

Qualifying Life Event and Special Enrollment

Adopting the increased limit mid-year should trigger a qualifying life event for both existing DCFSA participants to increase elections as well as eligible employees who previously waived DCFSA coverage.

Amendment Timing

An employer must amend the DCFSA by the end of the plan year implementing the increase and must administer the plan consistently from the intended effective date through the amendment adoption date.

[7] The $10,500 (or $5,250) reimbursement limit can come from any combination of employee pre-tax contributions and employer tax-free contributions/direct reimbursements.

[8] Unlike health care flexible spending accounts, DCFSAs are not subject to the uniform coverage rule.

Nondiscrimination Issues: In our experience, most DCFSAs annually fail their Internal Revenue Code nondiscrimination requirements. This may be more likely for 2021, since the ARPA also improves the competing dependent care tax credit. Adopting the increased DCFSA limit for 2021 will probably result in larger corrections for highly compensated DCFSA participants by many employers. Employers may wish to consider restricting the increased limit to rank-and-file employees.

Voluntary Extension to Paid Sick and Family Leave

Employers have the option to extend either emergency paid sick leave (EPSL), emergency family and medical leave (EFML), or both from April 1, 2021 through September 30, 2021. This is not required. The rules that were in effect during the April 1, 2020 – December 31, 2020 EPSL/EFMLEA mandate period substantially remain in effect during this extension except where noted below. An employer may claim tax credits for paid leave taken by eligible employees during the extension.

If an employer adopts extended EPSL, EFMLEA, or both, it may be prudent to continue offering and administering the extended leave(s) on the same general terms as during the April 1, 2020 – December 31, 2020 period to avoid potential discrimination claims and/or employee relations issues.

An employer may take advantage of this extension even if it did not take advantage of the extension from January 1, 2021 – March 31, 2021.

EPSL Changes

The available EPSL leave for employees resets to 10 days (80 hours) as of April 1, 2021.

EFML Changes

The maximum total benefit increases from $10,000 to $12,000 as of April 1, 2021, but the available EFML does not reset. This effectively adds 10 more days to the maximum available EFML, so an employee who earlier exhausted their EFML would still be eligible for up to 10 more days of paid leave.

Revised Qualifying Purposes for EPSL and EFML

As of April 1, 2021, there are revisions to the qualifying purposes (see below), and employees may take EFML for <u>any</u> qualifying purpose from April 1, 2021 – September 30, 2021.

Qualifying Purposes for EPSL and EFML for April 1, 2021 – September 30, 2021
1. The employee is subject to a federal, state, or local government or agency quarantine or isolation order
2. A health care provider has specifically advised the employee to self-quarantine
3. **(Revised)** The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis, awaiting the results of a COVID-19 test after being exposed to COVID-19 or at the employer's request, or is getting vaccinated and/or recovering from health effects related to vaccination
4. The employee is caring for an immediate family member, a person who regularly resides in the employee's home, or a roommate who is subject to (1) or (2)

5.	The employee is caring for a son or daughter under age 18 (or a disabled adult child) due to a school or day care provider closure or the unavailability of a child care provider
6.	The employee is experiencing any other substantially similar condition specified in regulations issued by HHS (there is no guidance addressing this)

Non-Federal Governmental Employers

For the April 1, 2021 – September 30, 2021 extension period, state and local governmental employers may claim reimbursement for EPSL and EFML leave. The ARPA removes the previous restriction preventing this. This does not apply to EPSL and/or EFML taken before April 1, 2021.

Federal employers that are Internal Revenue Code §501(c)(1) organizations may also claim reimbursement.

A Word about Increased Marketplace Subsidies

The ARPA enhances public health insurance marketplace subsidies for 2021 and 2022, and one of the enhancements is worth a brief mention to employers. Normally, an individual with a household income equal to or greater than 400% of the federal poverty limit is not eligible for marketplace subsidies. This means these employees cannot trigger employer shared responsibility penalties against their employers under the Affordable Care Act. For 2021, 400% of the federal poverty limit for a single individual is $51,520 and $106,000 for a family of four.

The ARPA expands subsidy eligibility by removing the 400% limitation for 2021 and 2022. Employers pursuing strategies based on higher paid employees being ineligible for subsidies may wish to review them. Practically speaking, this is unlikely to have any effect before April or May of 2021.

About the Author

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