

Initial COBRA Subsidy Guidance Appears

Limited Guidance Addresses Some Issues and Includes Model COBRA Subsidy Notices

In March, we published an [Alert](#) providing a general overview of the COBRA subsidy created by the American Rescue Plan Act of 2021 (the “ARPA”). By itself, the ARPA is just an outline of the COBRA subsidy, and certain federal agencies need to provide the details to enable its actual administration. We expect this guidance will appear over time in the form of one or more technical notices and waves of frequently asked questions.

The U.S. Department of Labor (DOL) released its initial COBRA subsidy guidance as a set of frequently asked questions (the “FAQs”) and model notices on April 7, 2021. This Alert focuses on the issues addressed by the FAQs, remaining questions related to those issues, and the model notices. We will also summarize other remaining COBRA subsidy issues at the end.

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Not There Yet: There is enough information available for planning and preparatory work, but we still do not have enough information for plans to administer the COBRA subsidy.

Some Clarity on COBRA Subsidy Administration

The FAQs address several issues, but they leave certain critical questions unresolved and manage to raise some new questions. The FAQs generally rely on the literal language of the ARPA without broad interpretation or modification.

Covered Group Health Plans

The ARPA broadly includes all group health plans, but it expressly excludes health care flexible spending accounts (health FSAs).¹ We earlier wondered if Congress really meant to include non-medical plans such as dental and vision coverage, or if the DOL would attempt to exclude them in later guidance.

In its FAQs, the DOL confirms the subsidy will apply to all group health plans subject to federal COBRA and/or state continuation coverage, but it failed to mention the ARPA's exclusion for health FSAs. We assume this is an oversight and not an attempt to expand the subsidy to include them.

Subsidy Triggering Qualifying Events

It is natural and intuitive to assume that both a termination of employment and a reduction in hours must be *involuntary* for subsidy eligibility purposes, but the ARPA only directly attaches the involuntary condition to a termination of employment.²

In the FAQs, the DOL applied the ARPA language literally and confirmed that a loss of coverage due to a voluntary reduction in hours qualifies for the subsidy. For example, an employee who loses coverage by voluntarily switching from a full-time to a part-time schedule can qualify. Employees who lose eligibility while on approved leaves of absence may also qualify.³

Unfortunately, the FAQs do not provide a definition or examples for the term *involuntary*. This leaves us speculating in a number of situations and unable to conclude whether certain individuals are eligible for the subsidy.

Eligibility and State Continuation Coverage

The COBRA subsidy applies to both federal COBRA and *comparable* state continuation coverage. As written, however, the ARPA appears to limit the subsidy's extended election right to federal COBRA. The DOL again applied the ARPA language literally in its FAQs and confirmed that the ARPA did not create an extended election right for state continuation coverage.

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

² An employer does not have to offer COBRA to an employee terminated for gross misconduct. Gross misconduct is a high standard and requires more than just poor performance.

³ Eligibility must be lost during the leave of absence to qualify for the subsidy. Employees may choose to discontinue coverage while on FMLA leave, but they do not lose eligibility. Similarly, employees tend to remain eligible while on many forms of paid leave.

This means subsidy-eligible individuals are:

Under federal COBRA

1. Individuals whose triggering qualifying events occur from April 1, 2021 – September 30, 2021;
2. Existing COBRA participants whose triggering qualifying events occurred before April 1, 2021; and
3. Individuals whose triggering qualifying events occurred before April 1, 2021, and who either did not elect COBRA or elected COBRA and dropped it before April 1, 2021. The extended election right applies to this group.

Under state continuation coverage

1. Individuals whose triggering qualifying events occur from April 1, 2021 – September 30, 2021; and
2. Existing continuation coverage participants whose triggering qualifying events occurred before April 1, 2021.

Eligible individuals include the employee/former employee and family members who lost coverage due to the triggering qualifying event.

Note: However, the FAQs may have given states the wiggle room to implement their own extended election rights for the purposes of qualifying for the COBRA subsidy. The DOL needs to clarify this.

What is *Comparable State Continuation Coverage*?

There are generally two forms of state continuation coverage:

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

We believe the subsidy only applies to mini-COBRA. The FAQs support this conclusion by only referencing “mini-COBRA” in the two instances it discusses state continuation coverage, but a more definitive statement would be helpful. This feeds into a broader discussion of extensions of COBRA continuation coverage and subsidy eligibility.

Note: Most states limit state continuation coverage to fully insured medical plans, but this is not universally true. A survey of state continuation coverage is outside the scope of this Alert.

Eligibility and Extensions of Continuation Coverage

The subsidy applies to any portion of an eligible individual’s continuation coverage period that overlaps with the April 1, 2021 – September 30, 2021 subsidy period. This creates a subsidy “look-back period” for triggering qualifying events that occurred before April 1, 2021.

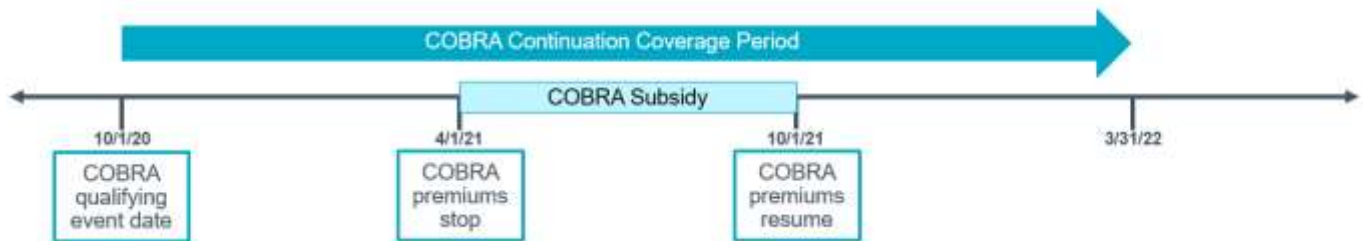
The ARPA does not address whether:

- The subsidy only applies if the original period of continuation coverage due to an involuntary termination of employment or a reduction in hours overlaps with the subsidy period; or
- Continuation coverage extensions also qualify so long as coverage was initially lost due to an involuntary termination of employment or a reduction in hours.

The answer has a profound effect on the subsidy look-back period. If extensions do not count, the subsidy look-back period begins in October or November of 2019 depending upon whether coverage was lost on the day of the triggering event or at the end of the month (but see [Treatment of Partial Subsidy Months](#)). If extensions do count, the subsidy look-back period can reach back as far as the middle of 2018.

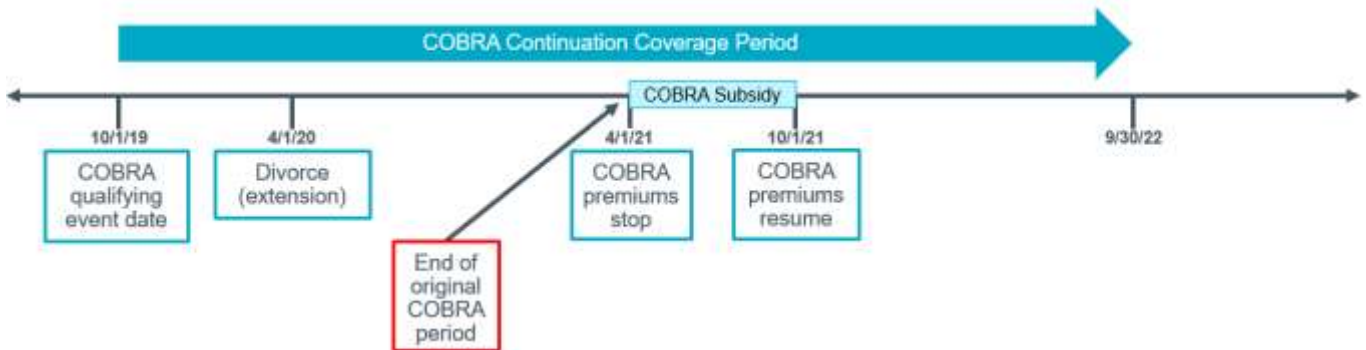
Example 1

Karen’s employer laid her off on September 14, 2020, and the COBRA qualifying event date for Karen and her spouse (Chris) was October 1, 2020. They both enroll in COBRA and are COBRA participants when the subsidy period begins.



Example 2 – If Extensions Count

Karen’s employer laid her off on September 14, 2019, and the COBRA qualifying event date for Karen and her spouse (Chris) was October 1, 2019. They both enrolled in COBRA. Chris and Karen divorce on April 1, 2020, giving Chris up to 36 months of COBRA continuation coverage measured from October 1, 2019. Chris’s original COBRA continuation coverage period ended March 31, 2021, but Chris is still a COBRA participant when the subsidy period begins because of the COBRA extension.



Note: If extensions count, they will have a similar effect on extended election rights.

We believe the subsidy will only apply to the original period of continuation coverage. Two statements in the FAQs support this conclusion, but both fall short of confirmation.

From FAQ #5

“However, this additional election period does not extend the period of COBRA continuation coverage beyond the original maximum period (generally 18 months from the employee's reduction in hours or involuntary termination).”

From FAQ #10

“This requirement does not include those individuals whose maximum COBRA continuation coverage period, if COBRA had been elected or not discontinued, would have ended before April 1, 2021 (generally, those with applicable qualifying events before October 1, 2019).”

We expect the DOL will clarify this in its next round of guidance.

Extended Elections and Delayed Enrollment

Under the ARPA, extended election enrollment is generally effective as of April 1, 2021.⁴ In one of its only departures from the ARPA, the FAQs allow individuals making extended elections to delay the effective date of COBRA coverage to their actual election date.

This may seem odd given that COBRA is free during the subsidy period, but it seems intended to help individuals receiving subsidized coverage in the public health insurance marketplace. If an individual's extended election is effective retroactive to April 1st, 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 to the date of the extended election can solve this if timed correctly.

Loss of Subsidy Eligibility

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

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).

Under the ARPA and FAQs, eligibility for other group health coverage or Medicare means mere eligibility and not enrollment or the current right to enroll. The FAQs are clear that coverage through a spouse's

⁴ The ARPA indicates coverage is effective as of the first period (month) of coverage beginning on or after April 1, 2021. If coverage is lost on the day of the triggering event instead of the end of the month, a period of continuation coverage can begin mid-month.

employer qualifies as other group health coverage. We believe an individual in a waiting period for other group health coverage to begin is ineligible for the subsidy, but clarity from the DOL would be helpful.

The FAQs suggest an individual must currently be eligible for other group health coverage when the subsidy period begins to be ineligible for the COBRA subsidy. We assume the FAQs will control, but further clarification would be welcome.

Less Scary than You Think: For most employers, the actual number of subsidy-eligible individuals will be significantly lower than the number of potentially eligible individuals who must receive subsidy rights notices.

Interaction with the Public Health Insurance Marketplace

Marketplace coverage is individual health insurance and does not affect subsidy eligibility. A subsidy-eligible individual can drop marketplace coverage and enroll in subsidized COBRA through the extended election right.

The FAQs confirm that the loss of the ARPA's COBRA subsidy "may" create a special enrollment opportunity to enroll in the marketplace. The DOL and U.S. Department of Health and Human Services (HHS) previously indicated that the loss of an *employer* subsidy toward COBRA triggers a marketplace special enrollment event.⁵ This actually contradicts applicable marketplace regulations, but it appears the federal agencies intend to disregard the regulations and treat the loss of an *employer* COBRA subsidy as a marketplace special enrollment event.

The FAQs suggest the loss of the ARPA's COBRA subsidy will receive the same treatment and qualify as a marketplace special enrollment event. This requires confirmation from HHS.

No Outbreak Period Relief for the Subsidy

The FAQs confirm that the Outbreak Period relief that otherwise applies to COBRA administration does not apply to the COBRA subsidy. An individual must elect COBRA within 60 days of receiving a subsidy election notice (see [The Model Notices](#)) or s/he will forfeit the subsidy. Similarly, an individual cannot use the Outbreak Period relief to take later advantage of the extended election right to elect COBRA coverage with an effective date of April 1, 2021 (or later).

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

⁵ Please see [COBRA Coverage and the Marketplace](#) on [Healthcare.gov](#) (from HHS) and Q5 in [COVID-19 FAQs for Participants and Beneficiaries](#) (from the DOL).

COBRA Premium Refunds to Participants

The ARPA requires plans to refund paid COBRA premiums that are eligible for the subsidy within 60 days of payment. The 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 60 days after the COBRA premium(s) were paid, we assume this means the federal agencies will not enforce the 60-day limit in these situations.

The Model Notices

The DOL released [model COBRA subsidy notices](#) in conjunction with the FAQs, and we will summarize these at a high level below. Each link below is to the Word version of the model notice.

- [General COBRA Election Notice](#) – This 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 is 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 who are not enrolled in COBRA and whose triggering qualifying events occurred before April 1, 2021. This notice contains the same general subsidy content described in the general COBRA election notice as well as information about extended election rights. Plans must begin distributing this notice by May 31, 2021.
- [Model Subsidy Application](#) – Despite a much longer (and misleading) title,⁶ this is really a model subsidy application and includes an attestation that the individual or individuals are not eligible for other group health coverage or Medicare. Plans are not required to use this notice or its contents,

⁶ The actual title is the, "Summary of the COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021."

but the attestations in it are useful. If a plan intends to use this application (or something like it), it should include it as an attachment to the general COBRA election or extended election notices.

- [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.

Note: A [separate model notice](#) exists to address state continuation coverage and subsidy rights.

Other Remaining Issues

There are several other remaining issues, including:

Subsidy Reimbursement

The IRS will release guidance addressing the subsidy reimbursement process, and we expect it will be very similar to the reimbursement process for emergency paid sick leave and emergency family and medical leave.

Domestic Partner Eligibility

The ARPA limits subsidy eligibility to federal COBRA qualifying beneficiaries, which does not include a domestic partner (or their children in most instances). The employee does have the right to continue coverage for enrolled plan dependents, including a domestic partner, by electing family coverage or another tier of coverage that includes them.

We wonder if the federal agencies will permit domestic partners to be subsidy-eligible in this situation for equity reasons or to ease administration. If domestic partners do not qualify at all, plans covering domestic partners will have to split COBRA premiums into subsidy-eligible and subsidy-ineligible parts.

Treatment of Partial Subsidy Months

The FAQs indicate the subsidy applies to the first period (month) of coverage beginning on or after April 1, 2021. This solves the partial month problem for months of continuation coverage that begin in March and end in April by excluding them from the subsidy.

The FAQs do not address what happens when a coverage month begins in September and ends in October. Does the plan have to pro-rate the COBRA premium for that month of coverage to exclude the portion that occurred in September?

Extended Elections and Drop-Down Election Rights

We expect the DOL to issue guidance addressing how to apply the extended election right when the plan option previously covering the eligible individual no longer exists. If the employer maintains a single plan option, that option is the obvious choice. We assume the DOL's guidance will address how to pick an appropriate plan option when an employer maintains two or more. This issue also affects the drop-down election rights (see our prior [Alert](#) for more information about drop-down elections).

About the Author



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