

# compliance ALERT

## DOL Issues FAQs and Model Notices on the new ARPA COBRA Subsidies

April 8, 2021

### Action Required:

- Review the new [model notices and FAQs](#).
- Identify and properly notify assistance eligible individuals (AEIs), considering voluntary vs. involuntary terminations and any applicable state mini-COBRA laws.
- Record AEIs utilizing the ARPA for tax and COBRA subsidy refund purposes.

On April 7, 2021, the U.S. Department of Labor (DOL) issued [FAQs](#) and [model notices](#) for the new COBRA premium assistance provisions of the recently passed [American Rescue Plan Act](#) (ARPA). The ARPA provides a 100% premium subsidy that is available from April 1, 2021 through September 30, 2021, to assistance eligible individuals (AEIs) who are eligible for and elect COBRA coverage.

While the model notices provide templates to help employers satisfy the ARPA's new notice requirements, the new FAQs clarify how the ARPA COBRA premium subsidy relief will work, including:

- Application of "Outbreak Period" Rules
- Application of State Mini-COBRA Laws
- Eligibility Clarifications
- Eligible Plans
- Extended Election Period, and
- Administrative Fees.

The ARPA subsidy period has already begun and notice deadlines are fast approaching, so it's important that employers and plan sponsors work closely with their relevant administrators to determine AEIs.

More specifically, it's important to make sure that the AEI determination process is properly taking into account voluntary vs. involuntary terminations of employment, as well as whether any state mini-COBRA laws may apply to the group health plans which may have longer continuation coverage periods than federal COBRA.

Once these AEIs have been identified, ensure that they receive the appropriate model notice required under the ARPA. It's also important to keep an accurate record of which AEIs are electing and utilizing the ARPA in order to accurately complete the quarterly payroll tax filings to obtain the full IRS refund for the COBRA subsidies that your organization has paid. Many open questions remain, so watch for further guidance that may impact decisions going forward. ■

↓ Full Explanation Follows ↓

## DOL Issues FAQs and Model Notices on the new ARPA COBRA Subsidies

On April 7, 2021, the U.S. Department of Labor (DOL) issued [FAQs](#) and [model notices](#) for the new COBRA premium assistance provisions of the recently passed [American Rescue Plan Act](#) (ARPA).

The ARPA provides a 100% premium subsidy that is available from April 1, 2021 through September 30, 2021, to assistance eligible individuals (AEIs) who are eligible for and elect COBRA coverage—or comparable state continuation coverage—because of their own or a family member’s reduction of hours (involuntary or voluntary) or involuntary termination of employment. The FAQs provide general information and clarifications, while the model notices provide templates to help employers satisfy the ARPA’s new notice requirements. The new model notices and FAQ guidance appear on a new DOL [webpage](#) dedicated to the ARPA COBRA subsidy.

### How do the DOL’s new FAQs Change the Law? What are the Major Clarifications in the new FAQs?

The new FAQs do not change the law, but rather clarify how the ARPA rules on COBRA premium subsidy relief will work (for additional background, see our [eAlert](#)). Below is an overview of the major clarifications:

- **Application of “Outbreak Period” Rules.** Q&As #5, #10 and #13 clarify that the DOL and IRS guidance that extended certain deadlines, including COBRA deadlines, during the COVID-19 National Emergency, rules commonly referred to as the “Outbreak Period” rules (see our recent [eAlert](#)), do not apply to COBRA elections for the purpose of obtaining the ARPA COBRA premium subsidies.
- **Application of State Mini-COBRA Laws.** Q&As #1, #2 and #6 clarify that the time period for continued health coverage under applicable state “mini-COBRA” laws (*i.e.*, laws that provide comparable continuation coverage to federal COBRA) must be taken into consideration when determining whether AEIs are eligible for a premium subsidy under the ARPA. This is a significant clarification since state mini-COBRA laws can extend beyond COBRA’s normal 18-month period. As background, and as clarified in Q&A #3, to trigger eligibility for the subsidy, an AEI’s qualifying event must be (1) an involuntary termination of employment; or (2) a reduction of hours, whether involuntary or voluntary, that results (or that would have resulted) in that AEI’s period of continuation coverage extending into the ARPA subsidy period, that is, the period between April 1, 2021 and September 30, 2021.
- **Eligibility Clarifications.** Q&A #3 further clarifies that AEIs will not be eligible for an ARPA subsidy if they are also eligible for Medicare or other group health coverage

(excluding excepted benefits (e.g., limited-scope dental/vision), QSEHRAs, or health FSAs). Also, employees terminated for gross misconduct are ineligible for both COBRA and the ARPA COBRA subsidy. Additionally, it should be noted that eligibility for or enrollment in Medicaid or coverage under an Exchange does not disqualify an individual from ARPA subsidy eligibility (but the premium tax credit for Exchange coverage will no longer be available to those receiving the ARPA subsidy).

- **Eligible Plans.** Q&A #2 emphasizes that the ARPA subsidy provisions apply to all group health plans subject to the COBRA rules under ERISA or the PHSA, as well as group health insurance required under state mini-COBRA laws. Although not noted in the FAQ, health FSAs are specifically exempt.
- **Extended Election Period.** Q&A #5 explains that qualified beneficiaries who experienced a reduction of hours (involuntary or voluntary) or involuntary termination of employment prior to April 1, 2021, but either did not elect COBRA when it was first offered or elected COBRA but later dropped it, are eligible for an additional election period. Such individuals must be notified of this opportunity by May 31, 2021, and will have 60 days after the notice is provided to elect COBRA. Individuals can begin their coverage prospectively from the date of their election, or choose to start their coverage as of April 1, 2021, even if they receive notice and make their election at a later date.
- **Administrative Fees.** Q&A #9 confirms that AEIs will not need to pay any part of what would otherwise be paid for COBRA coverage, including administrative fees. In other words, this means that the ARPA subsidy will cover the 2% administrative fee that is typically included in the COBRA premium.

### What are the New Model Notices that are Required?

Q&As #10 and #11 describe the notices that plans must provide to AEIs and list information that must be included. Specifically, the model notices provided by the DOL include:

- 1) **Model General Notice and COBRA Continuation Coverage Election Notice:** a general notice about the subsidy including an election notice to be provided to qualified beneficiaries with qualifying events occurring from April 1, 2021, through September 30, 2021;
- 2) **Model Notice in Connection with Extended Election Period:** a notice about the extended election period to be provided to AEIs currently enrolled in COBRA and those who would be AEIs if they had elected or maintained COBRA;

- 3) **Model Alternative Notice:** an alternative notice to be provided by insured plans subject to state continuation requirements;
- 4) **Model Notice of Expiration of Premium Assistance:** a subsidy expiration notice to be provided 15–45 days before an AEI’s subsidy expires; and
- 5) **Summary of COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021:** a summary of the ARPA subsidy provisions, which is to be attached to the general notice and includes a form by which an individual may request to be treated as an AEI or give notice of eligibility for other coverage.

It should be noted that these model notices may still require some editing before distribution. For example, the general notice refers to an AEI’s ability to switch to another coverage option, which may be confusing to AEIs whose employers do not allow that option.

**What are the Penalties for Noncompliance with the New Notice Requirements under the ARPA? What Happens if an AEI Fails to Give us Notice that they are Eligible for Other Coverage?**

Q&A #10 provides that employers or multiemployer plans (union plans) may be subject to an excise tax for failing to comply with the new ARPA COBRA rules. This tax could be as much as \$100 per qualified beneficiary, but not more than \$200 per family for each day of noncompliance.

Additionally, a penalty applies against the former employee or other AEI that receives the ARPA subsidy but intentionally fails to provide notice to their employer that they are eligible for other health coverage. Specifically, the penalty for such intentional failures is the greater of \$250 or 110% of the ARPA COBRA premium assistance provided to that individual.

**What’s Not in the New FAQ Guidance?**

Unfortunately for employers and plan sponsors, there are many open questions that were not answered by the new FAQs. For example, the new FAQs never clarified what the definition of “involuntary” is under the ARPA statute for purposes of determining involuntary terminations of employment. While it’s likely (but not 100% certain) that the DOL may later issue additional guidance on this, until that time, employers should

make a good faith determination as to whether the termination is voluntary or not, and then document the reasons for that decision considering all of the facts and circumstances. Additionally, we generally recommend that employers and plan sponsors exercise caution before denying COBRA (or the ARPA subsidy) on the basis of a determination of “gross misconduct,” since that is a very difficult-to-obtain standard and has only been found to apply in egregious cases of workplace misconduct.

Additionally, the new FAQs failed to clarify how the ARPA rules apply to MEWAs and situations where employers may have already paid for COBRA subsidies in severance agreements.

**What Should Employers and Plan Sponsors Do Next?**

Given that the ARPA subsidy period has already begun, and notice deadlines are fast approaching, it’s important that employers and plan sponsors work closely with their COBRA administrators and/or other plan administrators providing COBRA services to determine which former and current employees are AEIs. More specifically, it’s important to make sure that the AEI determination process is properly taking into account voluntary vs. involuntary terminations of employment, as well as whether any applicable state mini-COBRA laws may apply to the group health plans which may have longer continuation coverage periods than federal COBRA (in which case, when making AEI determinations you may need to look back further than 18 months from April 1, 2021).

Then once these AEIs have been identified, ensure that they receive the appropriate model notice required under the ARPA. It’s also important to keep an accurate record of which AEIs are electing and utilizing the ARPA in order to accurately complete the quarterly payroll tax filings to obtain the full IRS refund for the COBRA subsidies that your organization has paid. Finally, while the FAQs provide needed clarification on certain issues, many open questions remain about these new subsidies, and so, it will be important to watch for further guidance, as it may impact decisions going forward, such as decisions regarding terminations of employment and severance pay.

**If you have any additional questions, please call your Corporate Synergies Account Manager or 866.CSG.1719.**



**Upcoming: April 14, 2021  
Benefits Compliance Briefing Call**