

compliance ALERT

IRS Issues Guidance on COBRA Subsidies under ARPA

May 20, 2021

Action Required:

- [Review the new guidance.](#)
- [Consult relevant administrators.](#)
- [Make any necessary changes as soon as possible.](#)

On May 18, 2021, the IRS issued [guidance](#) clarifying the rules pertaining to COBRA subsidies and relevant tax credits available under the American Rescue Plan Act of 2021 (“ARPA”). The guidance addresses frequently asked questions about the new ARPA subsidies.

Specifically, the guidance:

- Defines “involuntary termination of employment”
 - Clarifies application of “facts and circumstances test” to this definition
 - Provides examples of involuntary termination, including circumstances applicable to contract workers and constructive discharge
- Explains employer assistance eligible individual (AEI) substantiation and documentation requirements
- Explains how eligibility for/enrollment in other coverage affects subsidy eligibility
- Clarifies that subsidy is available for vision-only or dental-only coverage and HRAs
- Explains overlap between ARPA and DOL/IRS “Outbreak Period” rules
- Explains how AEIs can add spouses or dependents under the ARPA extended election period
- Explains when and how “premium payees” claim the ARPA premium tax credit

Employers and plan sponsors should discuss the new guidance with their COBRA administrators, third party administrators (if applicable) and other plan vendors handling COBRA and health plan administration.

To the extent that any changes need to be made to the way that COBRA is currently being administered, including the COBRA subsidy process under ARPA, those changes should be made as soon as possible. ■

↓ **Full Explanation Follows** ↓

IRS Issues Guidance on COBRA Subsidies under ARPA

On May 18, 2021, the IRS issued [guidance](#) (the “Guidance”) clarifying the rules pertaining to COBRA subsidies and relevant tax credits available under the American Rescue Plan Act of 2021 (“ARPA”). The Guidance addresses frequently asked questions about the new ARPA subsidies.

How does the new Guidance change the law?

While the new Guidance doesn’t change the law, it answers questions that remained unresolved after the last round of ARPA guidance was issued on April 7, 2021 (see our eAlert on that development [here](#)). Below is a discussion of several key clarifications addressed in the new Guidance:

Involuntary Termination and Reduction in Hours

The definition of “involuntary termination of employment,” qualifying an individual for the COBRA subsidy, is defined as “a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee’s implicit or explicit request, where the employee was willing and able to continue performing services.”¹

When determining if an involuntary termination has occurred, the IRS will apply a “facts and circumstances” test looking at all of the relevant information surrounding the termination (Q&A #24). Examples of involuntary termination of employment include:

- Resignation as a result of a material change in the employment relationship analogous to a constructive discharge, including a material change in the geographic location of employment or a material reduction in hours that did not result in a loss of coverage (Q&As #24, #28 and #32).
- If a termination was designated as voluntary quit or a resignation, but the facts and circumstances indicate that the employee was willing and able to continue performing services, so that, absent the voluntary termination, the employer would have terminated the employee’s services, and the employee had knowledge that they would be terminated (Q&A #24).
- Employer action to end an individual’s employment while the individual is absent from work due to illness or disability, if before the action there is a reasonable expectation that the employee will return to work after the illness or disability has subsided (Q&A #25).
- Involuntary termination for cause, other than gross misconduct (Q&A #27).

- An employer’s decision not to renew an employee’s contract, if the employee was otherwise willing and able to continue the employment relationship and was willing either to execute a contract with terms similar to those of the expiring contract or to continue employment without a contract. By contrast, the expiration of a contract that was for a set term, and where the parties to the contract understood that it was not to be renewed, would not qualify (Q&A #34).
- An employee’s participation in a “window program,” defined as a program under which employees with impending terminations of employment are offered a severance arrangement to terminate employment within a specified period (or window) of time (Q&A #29).
- Additionally, retirement would not ordinarily constitute involuntary termination of employment, but it could do so where the employee was willing and able to continue employment and had knowledge that they would be terminated absent the retirement (Q&A #26).

The COBRA subsidy is available to individuals whose reduction in hours of service was voluntary or involuntary, including due to a furlough, with “furlough” defined as a “temporary loss of employment or complete reduction in hours with a reasonable expectation of return to employment or resumption of hours ... such that the employer and employee intend to maintain the employment relationship.” A furlough will constitute a reduction in hours regardless of whether the employer initiated the furlough, or the individual participated in a furlough process analogous to a window program (Q&As #21, #22 and #29).

The Guidance also clarifies that it is possible to become an assistance eligible individual (AEI) more than once, for instance due to an employee’s own involuntary termination, followed by coverage under his/her spouse’s employer’s plan, followed by the spouse’s involuntary termination of employment, triggering COBRA continuation coverage with premium assistance (Q&A #3).

Substantiation of Premium Assistance Eligibility

Employers who claim the tax credit must retain documentation to substantiate that the individual was eligible for the COBRA premium assistance. Substantiation may include collecting employees’ self-certifications or attestations, or retaining employment records, that document that such employees experienced an involuntary termination or reduction in hours, and that they are not eligible for other group health plan coverage or Medicare. Employer reliance on such attestations or

¹This is the same definition that was used in a prior COBRA subsidy law—the American Recovery and Reinvestment Act of 2009.

self-certifications is permitted so long as the employer does not have actual knowledge that the information provided is incorrect (Q&As #4 -7).

Clarification of Other Subsidy Eligibility Issues

The Guidance further clarifies that an individual's ability to enroll under a spouse's group health plan under a loss of coverage special enrollment period extended by the IRS/DOL "Outbreak Period" rules (discussed in our prior eAlerts [here](#) and [here](#)) will disqualify that individual from receiving the COBRA subsidy (Q&A #9, Example 3). Also, individuals are eligible for the COBRA subsidy during eligibility waiting periods for other coverage that overlap with the ARPA subsidy period, and while they are outside of open enrollment periods on a spouse's employer's plan (Q&A #9).

Additionally, the new Guidance clarifies that so long as the original qualifying event was a reduction in hours or involuntary termination of employment, the COBRA subsidy is available during extensions of COBRA coverage due to a second qualifying event, disability determination, or under State mini-COBRA laws (Q&A #17).

Coverage Eligible for Subsidy

COBRA premium assistance is available for vision-only or dental-only coverage, for retiree health coverage offered under the same group health plan as the coverage made available to similarly situated active employees, and for health reimbursement arrangements, but not for health flexible spending accounts (Q&As #35 - 37).

If an AEI elects COBRA continuation coverage during the extended election period, but the employer no longer offers the health plan that they were enrolled in at the time of their qualifying event, then the employer must place them in an option that is most similar to the discontinued plan, even if the premium is higher. The subsidy will still apply in such instances (Q&A #42).

Extended Election Period

An employee who had an involuntary termination of employment or reduction in hours before April 1, 2021, but who would have been an AEI if the election were in effect, and who elected self-only COBRA coverage which later lapsed, can add a spouse or dependent under the extended election period, and receive the subsidy for their coverage, if the spouse or dependent were beneficiaries under the group health plan on the day before the qualifying event (Q&A #51).

Claiming the Tax Credit

The entity that is entitled to take the ARPA's refundable tax credit for providing the COBRA premium subsidy is referred to as

the "premium payee." The premium payees (employers, in the case of sponsors of fully-insured or self-insured group health plans, other than multiemployer plans) become entitled to the premium assistance credit as follows:

- As of the date on which the premium payee receives an AEI's election of COBRA continuation coverage, it is entitled to a credit for premiums not paid by an AEI (plus the administrative charge) for any period of coverage that began before that date. For example, for an AEI who on June 17, 2021, retroactively elects COBRA as of April 1, 2021, the payee is entitled to credit as of June 17, 2021 for premiums not paid by the AEI for coverage for April through June, 2021 (Q&A #74).
- As of the first day of each subsequent period of coverage (e.g., calendar month), the premium payee is entitled to a credit for premiums not paid by an AEI for that coverage period. So, for example, the premium payee is entitled to a credit on August 1, 2021, for premiums the AEI will not pay for the month of August (Q&A #74).

A payee claims the credit by reporting the credit (both nonrefundable and refundable portions), and the number of individuals receiving COBRA premium assistance, on Form 941, Employer's Quarterly Federal Tax Return, and in anticipation of receiving the credit may reduce deposits of federal employment taxes, including withheld taxes, up to the amount of the anticipated credit. It may also request an advance of the amount of the anticipated credit that exceeds the federal employment tax deposits available for reduction by filing Form 7200, Advance Payment of Employer Credits Due to COVID-19 (Q&A #75).

Thus, in the prior example involving a retroactive election on June 17, 2021, the employer would report the credit for April through June 2021 on the Form 941 for the second quarter of 2021. If instead the AEI had elected on July 17, 2021 to start COBRA as of June 1, 2021, the payee would be entitled to a credit as of July 17, 2021 for premiums payable for June and July 2021, and would report the total credit on Form 941 for the third quarter of 2021, including the credit for the periods of coverage from June 1, 2021 through June 30, 2021 (Q&A #75).

It is not permissible to reduce deposits, or request an advance for a credit, for a period of coverage that has not begun (Q&A #76).

When an AEI fails to report loss of eligibility for the COBRA subsidy (for example, due to eligibility for coverage under another group health plan) the premium payee is still entitled to the credit for the period of ineligibility (and is not required to refund it to the IRS), unless the payee knows of the individual's eligibility for such other coverage (Q&A #78).

Premium payees that use a third-party payer, such as a payroll service provider or PEO, to report and pay employment taxes may still be entitled to the credit, but different rules apply depending on the type of third-party payer arrangement (Q&As #81 – 82). Generally, the third-party payer will be treated as a premium payee for purposes of claiming the premium assistance credit only if the third-party payer:

- maintains the group health plan;
- is considered the sponsor of the group health plan and is subject to the applicable DOL COBRA guidance, including providing the COBRA election notices to qualified beneficiaries, and
- would have received the COBRA premium payments directly from the AEIs were it not for the ARPA COBRA premium assistance.

When Does the new Guidance go into effect?

The Guidance is effective immediately and applies to the ARPA COBRA subsidy rules currently in effect.

What Should Employers and Plan Sponsors Do Next?

Employers and plan sponsors should discuss the new Guidance with their COBRA administrators, third party administrators (if applicable) and other plan vendors handling COBRA and health plan administration. To the extent that any changes need to be made to the way that COBRA is currently being administered, including the COBRA subsidy process under ARPA, those changes should be made as soon as possible.

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