



Compliance Services Alert

April 12, 2021

APPENDIX

Background on the ARPA COBRA subsidies

The amount and duration of the ARPA COBRA subsidies

ARPA authorizes 100% COBRA subsidies for up to six months, for monthly COBRA coverage periods beginning on or after April 1 through "the period ... ending on Sept. 30, 2021" (we'll refer to this period as the "COBRA subsidy window"). Subsidy-eligible individuals have their COBRA premium forgiven outright, for months for which they are eligible for the subsidies. They cannot be charged an administrative fee or any portion of their otherwise applicable COBRA premium.

Eligibility for the subsidies

The COBRA subsidies are available to individuals who lost group health insurance coverage – including coverage under dental and vision plans, but not health flexible spending accounts – due to a voluntary or involuntary reduction in hours or an involuntary termination of employment. In addition to having suffered one of these COBRA qualifying events (we'll refer to them as "requisite qualifying events"), subsidy-eligible individuals (we'll refer to them as "assistance eligible individuals," or "AEIs") must also meet additional requirements:

- If their qualifying event was an involuntary termination, it cannot have been due to gross misconduct (although care needs to be exercised here as gross misconduct is much narrower than one might think, and will typically require egregious, intentional misbehavior).
- They cannot be eligible for Medicare, a qualified small employer health reimbursement arrangement (QSEHRA), or other group coverage, but coverage under a typical dental plan, vision plan or health FSA is not disqualifying.
- Their maximum COBRA coverage period, measured from their qualifying event date, extends at least through April 2021 (or would have extended that far, had the individual elected and maintained COBRA coverage). They remain AEIs only until the earlier of the end of their maximum COBRA coverage period, their eligibility for other coverage, and the end of the COBRA subsidy window.

Lockton comment: It's possible for a plan to charge for COBRA on less than a monthly basis, but that is rare, so our illustrations assume a monthly period of COBRA coverage. Note also that the termination of employment or reduction of hours need not be dependent on any COVID-related reason or rationale. Any such employment change that results in a loss of coverage will make the person an AEI. In addition, AEIs are not limited to the employees or former employees who lost coverage but can include the employee's spouse and other dependents if they lose coverage due to the same qualifying event.

Fronting the subsidies

The AEI would normally pay COBRA premiums to the employer/plan sponsor (or the sponsor's COBRA administrator). Where the healthcare plan is subject to federal COBRA rules and is not a multiemployer plan (i.e., a union plan), the employer/plan sponsor waives the COBRA premium. The employer/plan sponsor then claims the amount of the forgone premium as a credit against the Medicare hospitalization portion of the plan sponsor's federal payroll tax liability. For insured plans maintained by employers too small to be subject to federal COBRA, the insurance company forgives the COBRA premium and claims the tax credit. For multiemployer plans, the plan forgives the subsidy and claims the reimbursement.

Calculating an AEI's maximum COBRA coverage period and why it matters

An AEI's eligibility for the subsidy ends on the earlier of (i) the end of the individual's maximum COBRA coverage period (measured from their qualifying event, as though they had elected COBRA when first offered it), (ii) the end of the six-month COBRA subsidy window, and (iii) when the individual becomes eligible for Medicare, a QSEHRA, or other group healthcare coverage (other than a dental plan, vision plan or health FSA).

Lockton comment: Because an AEI's maximum COBRA coverage period – and therefore their subsidy eligibility – can end before Sept. 30, 2021 (the end of the COBRA subsidy window), the calculation of that period is important. When calculating a COBRA beneficiary's maximum COBRA coverage period, most plans – at least administratively – treat the first day after the loss of coverage due to the qualifying event as the qualifying event date, even though the actual qualifying event (the reduction in hours or termination of employment) occurred earlier.

For example, assume an employee terminated employment on Nov. 12, 2020 and the plan terminated coverage at the end of the month. The plan will typically treat Dec. 1, 2020, as the qualifying event date and treat the 18-month COBRA coverage period as beginning then, even though the employment termination occurred earlier, because many plans find it easier to administer COBRA on a calendar month-by-calendar month basis.

Individuals who could have elected COBRA months ago but did not, or did but then dropped COBRA, may be entitled to a second COBRA election opportunity

The most administratively challenging aspect of the ARPA COBRA subsidies is that they are available not just to individuals buying COBRA on April 1, 2021, due to a requisite qualifying event, or to individuals who experience such a qualifying event during the six-month COBRA subsidy window. They are also available to individuals who could have elected COBRA (or who elected it and dropped it) due to such a qualifying event if their maximum COBRA coverage period would have extended through at least April 2021.

These individuals must receive a second 60-day opportunity to elect COBRA, and gain access to the subsidies.

Lockton comment: Note that this 60-day election window operates differently than typical 60-day election windows, which are currently suspended under the federal authorities' "outbreak period" guidance. See the discussion of that guidance [here](#). The 60-day subsidy election window is not suspended. But electing the COBRA subsidy doesn't mean the individual cannot then later, within the time allowed by the outbreak period guidance, go back and elect COBRA coverage retroactive to the qualifying event date.

Identifying individuals entitled to a second COBRA election opportunity can be challenging

To offer a second bite at the COBRA apple to the individuals described above, plans must identify those who experienced a requisite qualifying event as far back as Oct. 2019 (and maybe even earlier), even if they declined COBRA back then (or elected and dropped it).

Why Oct. 2019? If the individual's active coverage ended at the end of that month, the 18-month maximum COBRA coverage period for a qualifying event occurring in Oct. 2019 would begin Nov. 1, 2019, and extend through April 2021, the first month of the six-month ARPA COBRA subsidy window. The COBRA subsidies are payable for monthly periods of COBRA coverage that begin on or after April 1, 2021, through "the period ... ending on Sept. 30, 2021."

Lockton comment: The maximum COBRA coverage period is calculated under federal COBRA (typically, 18 months for the requisite qualifying events) or under applicable state COBRA-like laws, an important point because some state coverage continuation laws provide for a 36-month maximum coverage period for losses of coverage due to reduction in hours or termination of employment.

The new FAQs state that the subsidies are "also available for group health insurance required under state mini-COBRA laws." While not entirely clear – hopefully, future guidance will settle the matter – that language appears to mean that if an applicable state coverage continuation law provides for more than an 18-month maximum coverage period due to a reduction on hours or termination of employment, the employer will need to look back even farther, as far back as April 2018 for state COBRA laws providing for 36 months of continuation coverage.

A slew of new notices

To apprise AEs of their rights to the subsidy – particularly those whose qualifying events were many months ago and who didn't elect COBRA – ARPA and the new FAQs require plans to issue a variety of notices. Precisely who is entitled to what notice, and when the notice is due, depends on the individual's situation. ARPA required federal regulators to provide model notices by April 10, 2021 (which they did, for better or worse). The plan's notice obligations apply to AEs in different ways depending on their status relative to COBRA:

1. Individuals whose COBRA qualifying event occurred or occurs on or after April 1, 2021, but not later than Sept. 30, 2021, are due a standard COBRA election notice substantially modified to reflect information about the subsidies (for qualifying events occurring on or after Oct. 1, federal authorities apparently expect the plan to return to its usual COBRA election form). These modified election notices are apparently due at the standard time, within 44 days after the qualifying event. The individuals then have 60 days to elect COBRA and, if eligible for them, claim the COBRA subsidies.
2. Individuals who are already on COBRA coverage on April 1, 2021, due to a requisite COBRA qualifying event are due a notice describing their right to stop paying COBRA premiums for at least a portion of the COBRA subsidy window. That notice is due by May 31, 2021, and the individual has 60 days after the plan sends the notice to elect the subsidies, although the plan should also be working to identify these individuals and unilaterally waive their COBRA premium (otherwise, the plan or insurer, as the case may be, must return the payments that are made for months with respect to which no premiums were actually due).
3. Individuals who are due a second bite at the COBRA election apple are due a notice describing that opportunity. That notice is due by May 31, 2021, and the individual has 60 days after the plan sends the notice to elect COBRA and gain access to the subsidies.

There is a second notice obligation as well. ARPA requires that if an individual receiving subsidies is about to lose those subsidies, either because the COBRA subsidy window is about to close or because the individual's maximum COBRA coverage period is about to end during the COBRA subsidy window, the plan must send the individual a notice about the impending termination of subsidies. That notice is due no more than 45 days, and no less than 15 days, before the subsidies are due to terminate. This notice is in addition to the standard COBRA termination notices if they are also implicated.

Lockton Compliance Services

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