

## DOL Issues Guidance on COBRA Subsidy Provision under the American Rescue Plan Act

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On April 7, 2021, the Department of Labor (the DOL) issued guidance (the [Guidance](#)) and model notices and forms for the COBRA subsidy provision of the American Rescue Plan Act (the Act). Although the Guidance, a series of frequently asked questions, is directed to COBRA qualified beneficiaries, it provides useful information to employers and service providers tasked with administering the COBRA subsidy. Nonetheless, several important questions remain unanswered including, most significantly, the logistics of claiming a refundable federal tax credit to offset employer-subsidized COBRA premium payments and the meaning of “involuntary termination” for purposes of triggering eligibility for the subsidies. We anticipate the Internal Revenue Service (IRS) will release implementing guidance on these issues shortly.

### Overview of COBRA Subsidy Provision under the Act

The Act’s COBRA subsidy provision provides for fully subsidized coverage for “Assistance Eligible Individuals” from April 1, 2021 through September 30, 2021 (the Subsidy Window). An Assistance Eligible Individual is an individual who lost group health coverage due to a reduction in working hours or involuntary termination of employment and who is entitled to continuation coverage during the Subsidy Window. (See our initial alert on the COBRA subsidy provision, [New Options for Affordable Health Coverage under the American Rescue Plan Act](#)) Under the Act, employers must provide no-cost COBRA coverage to qualifying Assistance Eligible Individuals who elect coverage during the Subsidy Window, but may subsequently recoup premium costs from the federal government via a refundable tax credit. The Act also extends the COBRA election period for eligible workers who (1) did not previously elect COBRA, or (2) elected COBRA but subsequently discontinued coverage. Under the Act, these individuals have a new opportunity to enroll beginning April 1, 2021, and extending 60 days following receipt of a new mandatory COBRA notice describing the subsidy. Note that the Act does not lengthen the maximum COBRA continuation coverage period for Assistance Eligible Employees (generally, 18 months from the date of the qualifying event).

### New Guidance on Several Key Issues

**Definition of Assistance Eligible Individuals:** The Guidance clarifies that a reduction in hours need not be involuntary and provides several examples, including a reduction due to a change in the business’s hours of

operation, a change from full-time to part-time status, taking of a temporary leave of absence, or an individual's participation in a lawful labor strike. The Guidance further clarifies that Assistance Eligible Individuals include both workers and their eligible qualified beneficiary family members. These individuals are independently eligible for the COBRA subsidy and can elect coverage regardless of their own past election or election of a family member (assuming eligibility criteria are satisfied). While the Guidance did not address the meaning of "involuntary termination" for purposes of the subsidy, we expect further guidance from the IRS on this issue. The Guidance does reiterate, however, that individuals who lost coverage due to termination of employment for gross misconduct are not Assistance Eligible Individuals, since they are not eligible for COBRA.

Because COBRA coverage due to employment termination or reduction in work hours can last up to 18 months, the Guidance notes that the subsidy could potentially apply to qualified beneficiaries with a qualifying event that occurs between October 1, 2019 and September 30, 2021.

**Winston Takeaway:** *Consistent with the Act's provisions, the Guidance defines an Assistance Eligible Individual as a person who is eligible for and elects COBRA coverage. Therefore, covered family members who do not have an independent right to elect COBRA coverage, such as domestic partners, are not eligible for the subsidy.*

**Impacted Plans:** The Guidance clarifies that the COBRA subsidy is available to all ERISA-covered group health plans, except health flexible spending accounts. The subsidy also applies to non-ERISA plans sponsored by state or local governments subject to continuation of coverage provisions under the Public Health Services Act, as well as to insured group health plans subject to state "mini-COBRA" laws. However, the Guidance makes clear that the Act does not change existing requirements under those state laws; therefore, it appears that a subsidy would only be provided for Assistance Eligible Individuals who timely elect state continuation coverage and have that coverage in effect during the Subsidy Window.

**Coordination with Deadlines under Outbreak Period Guidance:** In response to the COVID-19 pandemic, federal regulators suspended certain COBRA and ERISA deadlines during the "Outbreak Period," defined as the earlier of one year following the triggering event or 60 days following the end of the nationally declared public health emergency. The extended COBRA-election period must be calculated on an individual basis, complicating administration. (See our alert on the Outbreak Period guidance, [Tri-Agencies Clarify Outbreak Period Relief Due to COVID-19](#), for further information.) The DOL explains in the Guidance that the Outbreak Period relief neither extends nor alters election and notice deadlines set forth under the Act. In other words, while certain eligible individuals can still enroll in COBRA coverage under the extended enrollment deadline in the Outbreak Period guidance, they forfeit their right to fully subsidized COBRA coverage if they fail to make the election for subsidized coverage within 60 days of receipt of the new COBRA subsidy notice.

**Enrollment in Subsidized Continuation Coverage:** Assistance Eligible Individuals can elect subsidized coverage following a qualifying event occurring anytime within the Subsidy Window (e.g., a worker who was involuntarily terminated on June 5, 2021, can elect subsidized COBRA coverage beginning on such date through September 30, 2021 (or beyond, at the worker's own expense)). Individuals eligible for the COBRA subsidy due to a qualifying event on or before April 1, 2021, can elect subsidized coverage effective April 1, 2021, or on a prospective basis following the date of their COBRA election. In accordance with Outbreak Period guidance, these individuals may also choose to elect coverage retroactive to the date of the qualifying event, but such coverage is not subsidized prior to the Subsidy Window.

The Guidance and accompanying model notices clarify that an Assistance Eligible Individual must affirmatively request the subsidized coverage. Each person electing to receive a subsidy must individually attest that (1) the individual is electing COBRA coverage, (2) the individual is not eligible for other group health plan coverage or Medicare, and (3) the individual's qualifying event was involuntary termination or a reduction in work hours.

**Termination of COBRA Premium Assistance:** The Act provides that subsidized coverage ends prior to September 30, 2021, if an Assistance Eligible Individual becomes eligible for another group health plan or Medicare, regardless of whether the individual enrolls in that coverage. On this point, the Guidance clarifies that the Assistance Eligible Individual is responsible for notifying the plan that he or she is eligible for other coverage or potentially faces a penalty. Individuals eligible for coverage under Medicaid or the Health Insurance Marketplace remain eligible for the COBRA subsidy. However, if an Assistance Eligible Individual elects to enroll in COBRA continuation coverage with

premium assistance, the individual will no longer be eligible for a premium tax credit, advance payments of the premium tax credit, or the health insurance tax credit for health coverage during that period.

COBRA premium assistance also ends prior to September 30, 2021, if the Assistance Eligible Individual reaches the end of his or her maximum COBRA coverage period before that date. The DOL also clarified in the Guidance that when the subsidy period ends, the individual may be eligible for Medicaid or a special enrollment period through the Health Insurance Marketplace or individual market health insurance coverage outside the Marketplace.

**Winston Takeaway:** *Although not stated explicitly, the Guidance and model notices indicate that a qualified beneficiary can only be an Assistance Eligible Individual if the qualified beneficiary is within the initial 18 months of COBRA coverage. Therefore, if COBRA is extended beyond 18 months due to disability or a second qualifying event, only the portion of the initial 18-month COBRA period that falls within the Subsidy Window is eligible for premium assistance.*

**Employer Notice Requirements:** Finally, the Guidance clarifies employer notice obligations and references newly released model notices, including a general notice for all potential Assistance Eligible Individuals, a notice of the extended COBRA election period for certain qualifying individuals with a qualifying event prior to April 1, 2021, and a notice of expiration of premium assistance. Pursuant to the Act, plan sponsors are required to send COBRA subsidy notices to Assistance Eligible Individuals whose qualifying event occurred before the Subsidy Window no later than May 31, 2021, and individuals have 60 days after the notice is provided to elect COBRA. All notices must include the forms necessary for an individual to establish his or her eligibility for subsidized COBRA coverage, a description of the individual’s obligation to notify the plan if he or she becomes eligible for other coverage (and associated penalty), and a description of the individual’s right to receive the subsidy, among other things. Links to the applicable forms are in the below chart:

QUALIFIED INDIVIDUAL	APPLICABLE FORM
<p>For qualified beneficiaries with any qualifying event 4/1/2021 through 9/30/2021</p>	<p>Model General Notice and COBRA Continuation Coverage Election Notice, COBRA Continuation Coverage Election Form, and (Optional) Form for Switching COBRA Continuation Coverage Benefit Options</p> <p>Summary of COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021, Request for Treatment as an Assistance Eligible Individual, and Participant Notification of Ineligibility for Premium Assistance</p>
<p>For qualified beneficiaries who are Assistance Eligible Individuals due to an involuntary termination or reduction in hours qualifying event from 10/1/2019 through 3/31/2021</p>	<p>Model COBRA Continuation Coverage Notice in Connection with Extended Election Periods, COBRA Continuation Coverage Election Form, and (Optional) Form for Switching COBRA Continuation Coverage Benefit Options</p> <p>Summary of COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021, Request for Treatment as an Assistance Eligible Individual, and Participant Notification of Ineligibility for Premium Assistance</p>

## QUALIFIED INDIVIDUAL

## APPLICABLE FORM

For individuals covered under an insured plan not subject to federal COBRA who are eligible for continuation coverage at any time from 4/1/2021 through 9/30/2021 under a state mini-COBRA law due to involuntary termination or reduction in hours

Model Alternative Notice of ARP Continuation Coverage Election Notice, Continuation Coverage Election Form, and (Optional) Form for Switching Continuation Coverage Benefit Options

Summary of COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021, Request for Treatment as an Assistance Eligible Individual, and Participant Notification of Ineligibility for Premium Assistance

For Assistance Eligible Individuals receiving premium assistance, to be provided 15–45 days before the subsidy expires

Model Notice of Expiration of Period of Premium Assistance

**Winston Takeaway:** *While the Guidance provides much-needed information on administering the Act's COBRA subsidy provision, some significant employer questions remain unanswered. Most notably, employers are still without guidance on how to claim tax credits for COBRA premium payments made on behalf of Assistance Eligible Individuals. Many employers are also left with questions on how the Act's COBRA subsidy provision interacts with employer-subsidized coverage already promised pursuant to severance agreements and appropriate methods for retroactively determining whether workers terminated employment involuntarily. We hope that forthcoming guidance from the IRS will clear up these outstanding issues.*

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