



## THE LONG-AWAITED COBRA PREMIUM SUBSIDY GUIDANCE HAS ARRIVED!

- IRS issued guidance on COBRA subsidy provisions
- Guidance arrives amid deadlines for COBRA administrators and Plan Sponsors to provide notices to AEIs
- This Briefing includes Q&As for several areas of the notice

On May 18, 2021, the IRS issued [Notice 2021-31](#), the highly anticipated offering of guidance to illuminate key aspects pertaining to the administration of the American Rescue Plan Act (ARPA) of 2021's COBRA subsidy provisions and rules surrounding the associated tax credits available for federal COBRA and similar state continuation programs applicable to smaller employers.

Reaching 41 pages in length and tackling 86 questions and answers, the much needed Notice is somewhat of a carryover from [April's ARPA FAQs](#) in parts but does provide some helpful additional information as well, while simultaneously muddying the waters in certain areas in which further interpretation is still desperately needed.

Under ARPA, COBRA administrators and Plan Sponsors are required to provide notices to Assistance Eligible Individuals (AEIs), so this fresh guidance arrives in the midst of those deadlines.

### The Notice is divided into the following subject areas:

- Eligibility for COBRA Premium Assistance (Q&A-1 through Q&A-20)
- Reduction in Hours (Q&A-14 through Q&A-23)
- Involuntary Termination of Employment (Q&A-24- Q&A-34)
- Coverage Eligible for COBRA Premium Assistance (Q&A-35 through Q&A-42)
- Beginning of COBRA Premium Assistance Period (Q&A-43 through Q&A-46)
- End of COBRA Premium Assistance Period (Q&A-47 through Q&A-50)
- Extended Election Period (Q&A-51 through Q&A-55)
- Extensions Under the Emergency Relief Notices (Q&A-56 through Q&A-59)
- Payments to Insurers Under Federal COBRA (Q&A-60)
- Comparable State Continuation Coverage (Q&A-61 and Q&A-62)
- Calculation of COBRA Premium Assistance Credit (Q&A-63 through Q&A-70)
- Claiming the COBRA Premium Assistance Credit (Q&A-71 through Q&A-86)

While this update will not detail all 41 pages of guidance, it will summarize the information that is new and that which is relevant to questions that have commonly been raised by employers since ARPA's initial introduction.



## ELIGIBILITY AS AN AEI

- By way of background, and as we discussed in our [April Briefing](#) summarizing the April FAQs and in our [March Briefing](#) providing an overview of the law, ARPA's provisions include a 100 percent subsidy for COBRA continuation coverage which began on April 1, 2021 and will continue through September 30, 2021 for AEIs.
- In order to be eligible for the subsidy, an individual must have experienced an involuntary termination (aside from a termination for gross misconduct) *or* must have undergone a reduction in hours (either voluntary or involuntary).
  - An individual must have been covered under the applicable group health plan on the day before the reduction in hours or involuntary termination occurred.
  - It should be noted that a determination of “gross misconduct” is best left to the employer and their Labor counsel to interpret in a given employment scenario.
  - An individual must also still have time remaining in their 18-month COBRA election window that overlaps with April 1 – September 30, 2021 in order to take advantage of the subsidy.
- An individual can indeed become an AEI more than once, as a COBRA qualified beneficiary could experience a reduction in hours or an involuntary termination of employment multiple times.
- Individuals must self-certify as an AEI and attest in writing that they are eligible for COBRA continuation coverage and that they are not eligible for coverage under another group health plan or Medicare.
  - Employers will need to keep a copy of either the self-certification or attestation on file if they intend to claim the tax credit.
  - Individuals who become eligible for coverage under another group health plan or Medicare while in their subsidy period will no longer be entitled to the COBRA subsidy.
- Qualifying events such as divorce or a covered dependent child ceasing to be a dependent child under the terms of the plan (such as aging out) *do not make an individual eligible for the COBRA subsidy.*
- Q-9 through Q-20 of the Notice delves further into various situations in which an AEI would be eligible for the subsidy.

## REDUCTIONS IN HOURS FURTHER DEFINED

- As noted above and in our past articles, a COBRA qualified beneficiary whose qualifying event is a *voluntary* reduction in hours is still potentially eligible for the subsidy.



- Likewise, furloughed employees and those who undergo a reduction in hours due to a work stoppage brought on by a lawful strike initiated by the employees or their representatives or a lockout initiated by the employer are also eligible for the subsidy.

## **INVOLUNTARY TERMINATION OF EMPLOYMENT FURTHER DEFINED**

- What constitutes an involuntary termination for the purposes of AEI classification?
  - Nuanced situations where it is unclear whether an employee’s termination was voluntary or involuntary should be further discussed with an employer’s Labor counsel. Making that call in a fact-dependent scenario will truly be at the discretion of the employer and their counsel, as employers encounter myriad situations in which the facts and circumstances surrounding a specific employee’s departure should be analyzed closely.
  - An employee’s willingness and ability to return to work is an important consideration.
  - Likewise, the employer should take into account the surrounding circumstances for an employee who resigns from their position.
- Does an involuntary termination of employment include retirement?
  - Not typically. Retirement would generally be perceived as a voluntary termination, but the employer should also look at the facts and circumstances here to determine the reasoning for the employee’s retirement.
- Q-28 through Q-34 of the Notice goes into additional detail about the various involuntary termination scenarios. Again, we recommend that employers discuss any of these “close call” situations in which an AEI status is being contemplated with their labor counsel.

## **ELIGIBILITY FOR AEIS**

- Is COBRA premium assistance available for COBRA continuation coverage under a vision-only or dental-only plan?
  - Yes, it is available under any group health plan (except for a health FSA offered under a Sec. 125 cafeteria plan).
- Is COBRA premium assistance available for non-group health plans as well?
  - No, the subsidy is not available for non-health benefits that are not subject to Federal COBRA continuation coverage requirements, i.e., group-term life insurance.



- Is retiree health coverage included as eligible for the subsidy?
  - Yes, the individual’s eligibility for the subsidy will not be affected as long as the retiree coverage is offered under the same group health plan as the coverage made available to similarly situated employees.
  - An individual will not be eligible for the subsidy if they are offered retiree health coverage under group health plan that is separate from the one in which the COBRA continuation coverage is offered.
- What about COBRA premium assistance for HRAs?
  - Yes, coverage under an HRA is eligible for the COBRA subsidy.
  - The rules as it pertains to an HRA with regards to when the free subsidy ends are the same as eligibility for coverage under other group health plans.
  - Individual Coverage HRAs (ICHRA) are also eligible.

#### **WHEN DOES THE ELECTION PERIOD BEGIN?**

- As remarked upon and well publicized, AEIs are entitled to receive COBRA premium assistance beginning on or after April 1, 2021 and group health plans must make it available on or after that date.
- What if the election for COBRA continuation coverage is made subsequent to September 30, 2021?
  - The potential AEI would need to make the election within their applicable 60-day election period following receipt of the ARPA general notice.
  - If the election is made after September 30, 2021 but within the 60-day period then the individual shall be entitled to the subsidy.

#### **WHEN DOES THE PREMIUM ASSISTANCE PERIOD END?**

- COBRA premium assistance will be available to AEIs until the earliest of:
  - (1) the first date an AEI becomes eligible for other group health plan coverage or Medicare, or
  - (2) the date the individual ceases to be eligible for COBRA continuation coverage due to their 18-month COBRA window expiring, or
  - (3) the end of the last period of coverage beginning on or before September 30, 2021.
- COBRA coverage will automatically continue on an unsubsidized basis after September 30, 2021.



- The death of an employee who experiences a reduction in hours or an involuntary termination of employment *does not* end the subsidy eligibility for any qualified beneficiary spouse and/or dependent children.

## NOTICE REQUIREMENTS FOR AEIS

- AEIs are responsible for providing notice that they are no longer eligible for COBRA premium assistance due to eligibility for other coverage under another group health plan or Medicare.
  - AEIs who fail to provide notice may be subject to a Federal tax penalty of \$250 for each failure to notify or, if the failure to provide notice is determined to be fraudulent, a penalty of the greater of \$250 or 110 percent of the cost of COBRA premium assistance that was improperly received.

## WHAT ABOUT THE EXTENDED ELECTION PERIOD?

- For employees who underwent a reduction in hours or an involuntary termination of employment prior to April 1, 2021 who elected self-only COBRA continuation coverage, spouses and dependent children who would have been an AEI if the election was in effect now have a second election opportunity *despite the employee's previous election of self-only COBRA continuation coverage*.
- Also, if COBRA continuation coverage was previously elected but then discontinued at some point before April 1, 2021, those individuals are now eligible for the subsidy.
- The extended election period continues for 60 days following the date an individual receives notice.
  - The individual must also elect or decline COBRA continuation coverage retroactive to the loss of coverage within that same 60-day period.
  - If the qualified beneficiary elects retroactive COBRA continuation coverage, they may be required by the employer to pay COBRA premiums for periods of coverage beginning before April 1, 2021.
- This portion of the Notice also reiterates that COBRA premium assistance is not applicable to periods of coverage prior to April 1, 2021.
- How does this apply to state continuation coverage programs?
  - The extended election period is not applicable to individuals covered under a comparable state continuation coverage program (unless the laws or regulations of that state indicate otherwise). Therefore, those individuals are not granted the ability to make a retroactive election.

## CLAIMING THE COBRA PREMIUM ASSISTANCE CREDIT

- According to the Notice, the “premium payee” for the COBRA continuation coverage is the entity that will be eligible for the tax credit.



- In this instance, the premium payee will be either the multiemployer plan, the plan sponsor of a group health plan subject to Federal COBRA that provides some portion of self-funded coverage, or an insurer providing coverage under a fully insured plan subject to state continuation coverage requirements.
- A premium payee may also include the government of any State or associated political subdivision, any Indian tribal government, or any agency or instrumentality of the U.S. Government.
- In certain circumstances, a third-party payer (such as a PEO) will be treated as a premium payee in situations in which the third-party payer performs services such as filing tax returns, paying employment taxes, etc.
- The premium payee claims the credit by reporting it (both the refundable and nonrefundable portions) on their federal employment tax returns along with the number of individuals receiving COBRA premium assistance.
  - Q-75 of the guidance gets into more of the particulars regarding this process, including specific examples of the forms that need to be filled out to claim the credit and the timing thereof.
  - Q-76 through Q-81 also outlines many of the nuances associated with this process as they apply to premium payees.

As mentioned, this follow up guidance was only recently released and is quite lengthy, so please continue to check back in with us for updates as we fully unpack everything. Furthermore, the Treasury Department and IRS are continuing to consider the matters discussed in this Notice and may decide to issue additional guidance at a later date. In the meantime, please do not hesitate to reach out to your Account Managers and Sales Executives for additional information.

Keenan & Associates is not a law firm, and no opinion, suggestion, or recommendation of the firm or its employees shall constitute legal advice. Clients are advised to consult with their own attorney for a determination of their legal rights, responsibilities, and liabilities, including the interpretation of any statute or regulation, or its application to the clients' business activities.