

# COBRA Premium Subsidy Under the American Rescue Plan Act of 2021

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The recently enacted American Rescue Plan Act of 2021 (ARP), signed into law on March 11, 2021, includes a 100% COBRA subsidy for certain individuals for up to a six-month period from April 1, 2021 through September 30, 2021. On April 7, 2021, the U.S. Department of Labor (DOL) issued [guidance in the form of Frequently Asked Questions \(FAQs\)](#) regarding the ARP COBRA subsidy. This bulletin contains a brief recap of the ARP COBRA subsidy, pertinent portions of the FAQs, and considerations for employers and plan sponsors. Your Vedder Price attorney can assist with navigating what can easily become complex issues in administering these ARP provisions.

## Summary of the ARP COBRA Subsidy

The ARP includes a 100% COBRA subsidy for “Assistance Eligible Individuals” for up to six months from April 1, 2021 through September 30, 2021. In other words, no COBRA premiums may be collected from Assistance Eligible Individuals during this time (or any premiums that were collected will need to be refunded or credited against future payments) and such Assistance Eligible Individuals must be treated as having paid COBRA premiums during this time. The employer/plan sponsor is responsible for paying the COBRA premiums for the Assistance Eligible Individuals and such premiums will be recoverable by the employer/plan sponsor through payroll tax credits when filing quarterly FICA tax returns.

An “Assistance Eligible Individual” is an individual who meets the following requirements:

- is eligible for COBRA continuation coverage due to an involuntary termination of employment (other than for gross misconduct) or a reduction of hours; and
- elects COBRA continuation coverage.

It is important to note that an Assistance Eligible Individual includes not only individuals who become eligible for COBRA as described above between April 1, 2021 and September 30, 2021, but also the following individuals:

- Individuals who lost coverage for the above reasons prior to April 1, 2021 who are on COBRA as of April 1, 2021; and
- Individuals who lost coverage for the above reasons prior to April 1, 2021, and who either did not elect COBRA or whose COBRA lapsed for failure to pay premiums prior to April 1, 2021.

An Assistance Eligible Individual will cease being eligible for the COBRA subsidy for months of coverage beginning on or after the *earlier* of:

- The first date on which such individual is *eligible* for (i) coverage under any other group health plan, such as through a new employer’s or a spouse’s plan, other than coverage consisting of only excepted benefits (generally defined as dental and vision benefits), coverage under a health flexible spending arrangement, coverage under a qualified small employer health reimbursement arrangement, or (ii) Medicare; or
- The earlier of: (a) the maximum COBRA continuation period applicable to such individual; or (b) the maximum COBRA continuation period that would have been applicable to such individual had COBRA been previously elected by or had not been discontinued for such individual.

If permitted by the employer/plan sponsor, the ARP also permits an Assistance Eligible Individual to elect a different level of COBRA coverage than the one in which they are currently enrolled, subject to certain rules (e.g., the premiums for the new

coverage cannot be more than the current premiums paid by the individual). The enrollment must take place within 90 days of the date the new COBRA notice is sent to the individuals. (Additional information about the new COBRA notice can be found below.)

A terminated individual who initially did not elect COBRA, but is eligible for the subsidy, may elect COBRA effective April 1, 2021 (assuming they would otherwise be entitled to elect COBRA). Enrollment must take place within 60 days of receiving the new COBRA notice.

The ARP provides that the COBRA notice provided to an individual who becomes an Assistance Eligible Individual during the period from April 1, 2021, through September 30, 2021, must include a statement regarding the availability of the COBRA subsidy and the option, if applicable, to enroll in different COBRA. An Assistance Eligible Individual who first became COBRA eligible prior to April 1, 2021 must be provided with a supplemental COBRA notice containing the same information. [The Department of Labor has provided model notices](#) that can be used to fulfill the notice requirements.

## Department of Labor FAQs

The FAQs are generally tailored to individuals but they are instructive for employers/plan sponsors. Of particular interest to employers/plan sponsors, the FAQs provide:

- As noted above, an Assistance Eligible Individual will cease being eligible for the COBRA subsidy if such individual becomes *eligible* for “other group health coverage, such as through a new employer’s plan or a spouse’s plan” or *eligible* for Medicare. Note, this is a different standard than applies for a COBRA participant losing COBRA coverage, which requires actual coverage (that is, enrollment and not merely eligibility to enroll). The FAQs put the onus on the individual to notify the employer/plan sponsor if such individual becomes eligible for coverage under another group health plan and thereby ceases to be eligible for the subsidy. The FAQs state that “[f]ailure to do so can result in a tax penalty” to the individual.
- An individual whose COBRA qualifying event took place prior to April 1, 2021, and who declined to enroll in COBRA at that time or who elected COBRA continuation coverage but is no longer enrolled (because, for example, the individual stopped paying the monthly COBRA premium) may elect to enroll in COBRA continuation coverage as long as the original maximum COBRA continuation period has not expired. Such coverage can be elected prospectively or may be made retroactive to April 1, 2021.
- The required COBRA notice previously mentioned must be provided within 60 days of the individual becoming eligible for the COBRA subsidy under the ARP. Accordingly, any individual who was eligible for such assistance as of April 1, 2021 must receive the notice by May 31, 2021.
- The election period for an Assistance Eligible Individual is 60 days after receiving the applicable COBRA notice.
- Note, both of these deadlines are independent of the deadline extensions provided under EBSA Disaster Relief Notice 2021-01.

## Practical Considerations for Employers/Plan Sponsors

Employers/plan sponsors will need to, either alone or in consultation with the respective COBRA administrators, identify all terminated individuals who must be provided the new or alternative COBRA notice and provide such notice within the applicable time frame. Failing to do so can result in substantial excise taxes to the employer of up to \$100 per qualified beneficiary (up to \$200 per family) for each day that the COBRA rules are violated.

Employers/plan sponsors will need to be aware of individuals who cease to be Assistance Eligible Individuals. However, as noted above, the individual is responsible for notifying the employer/plan sponsor if they cease to be an Assistance Eligible Individual because they have become eligible under another group plan or under Medicare.

Employers should also consider how COBRA premium assistance will impact severance plans, policies or agreements. For example, in many instances, an employer will offer as part of a severance package employer-subsidized COBRA coverage for a certain period of time following the individual’s termination of employment. Any such plans, policies or agreements should be reviewed to determine whether any temporary modifications or supplements are required or desired to reflect the ARP’s COBRA subsidy.

If you have any questions regarding the topic discussed in this article, please contact **Christopher T. Collins** at (312) 609-7706, **Thomas G. Hancuch** at (312) 609-7824, **Philip L. Mowery** at (312) 609-7642, **Jason P. Faust** at (312) 609-7727 or any Vedder Price attorney with whom you have worked.