

# COVID Relief Webinar FAQs

## Understanding the Impact on Your Benefits Plans

March 22, 2021

The following is a Frequently Asked Questions (FAQs) to assist employers and plan sponsors with understanding the potential impacts of recent government actions on COBRA and Dependent Care Flexible Spending Arrangements (DCFSAs). This is not legal advice, and the relief actions are complex, making it likely that the Internal Revenue Service (IRS) will, at some point, issue interpretive guidance. We assume no liability whatsoever in connection with its use, nor are these comments directed to specific situations. As always, we strongly encourage employers and plan sponsors to consult their legal or benefits counsel for conclusive guidance on how the actions apply in their circumstances.

### Department of Labor (DOL) Extension: Employee Benefits Security Administration (EBSA) Notice 2021-01

<b>Q: What is the DOL extension timeframe?</b>	<b>A:</b> EBSA Notice 2021-01 affirms that the relief introduced in May 2020 continues for the duration of the COVID-19 Outbreak Period. Any period that is to be disregarded with respect to certain plan deadlines applying to a participant cannot extend beyond one year with respect to that participant's deadline period.  In other words, the Agencies have applied the one-year limitation to the date on which each impacted participant's deadline period would have commenced be applied on a person-by-person (and action-by-action) basis.
<b>Q: Is the DOL extension mandatory? How does the DOL extension impact a Health FSA plan?</b>	<b>A:</b> Yes. The extension is mandatory for all plans subject to ERISA. In addition, the Department of Health and Human Services (HHS) "concurs" with the relief and will adopt a non-enforcement policy to extend similar timeframes to non-federal governmental group health plans and health insurance issuers offering coverage in connection with a group health plan.  For example, a Health FSA run-out period for the 2019 plan year that would have otherwise ended March 31, 2020 will now have an extended time period to submit 2019 claims that is no later than March 31, 2021.
<b>Q: What does this mean for 2021 rollouts?</b>	<b>A:</b> The tolling period is to be applied on an individual basis based on the deadline that falls within the Outbreak Period. Therefore any 2020 or 2021 deadlines that fall within the tolling period are suspended until the earlier of one year from the original deadline date or 60 days after the end of the National Emergency Period.  The "tolling period" is basically the period in which the deadline dates are 'suspended' and, per the DOL guidance, is calculated on a person-by-person (and action-by-action) basis for up to one year.
<b>Q: Will there be notices available for the DOL extension?</b>	<b>A:</b> While the original Final Rule did not impose specific notice requirements, the DOL - in EBSA Notice 2021- 01 - directs the plan administrator or plan fiduciary to "consider affirmatively sending a notice regarding the end" of the one-year relief period (presumably to each member based on their own applicable tolling period expiration date). Furthermore, plans "may need" to reissue or amend plan disclosures issued prior to or during the COVID-19 pandemic if they

	<p>failed to accurately communicate these new extensions and the dates by which impacted participants and beneficiaries should take action (e.g., COBRA election notices). HealthEquity/WageWorks has – as a best practice – added notifications to relevant member communications advising of the provisions of the Agencies’ relief. The DOL also encourages plans to “consider” ways to ensure that those participants and beneficiaries who are losing coverage under their group health plans are advised of other coverage options that may be available to them (e.g., their respective states’ Health Insurance Marketplaces). HealthEquity/WageWorks is currently updating our relevant member notices commensurate to these extensions.</p>
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## American Recovery Plan Act (ARPA): COBRA subsidy and eligibility

<p><b>Q: What is the timeframe for the 100% subsidy?</b></p>	<p><b>A:</b> The 100% subsidy period begins April 1, 2021 and ends September 30, 2021 (the “Subsidy Period”).</p>
<p><b>Q: Who is eligible for the COBRA subsidy? Is it only for those that termed due to COVID or anyone that termed, even for cause?</b></p>	<p><b>A:</b> ARPA’s definition of an Assistance Eligible Individual (AEI), in part, is a qualified beneficiary who has experienced a termination of employment (except a voluntary termination of employment or a termination of employment due to gross misconduct) or a reduction of hours. Employers should begin to review their records to identify the facts and circumstances of those terminated employees in line with this distinction to help ensure commensurate application of subsidy eligibility. Although model notices will be forthcoming (as described below), it is important to identify these individuals as soon as possible so the necessary actions can be taken when ready.</p>
<p><b>Q: For the COBRA subsidy, who determines if the AEI is already qualified under another employer's group health plan or Medicare?</b></p>	<p><b>A:</b> The Subsidy Period begins April 1, 2021 and ends September 30, 2021. However, if an AEI becomes eligible for other group health coverage or Medicare or reaches the end of her/his maximum COBRA coverage period, her/his entitlement to the subsidy ends. Any AEI who becomes eligible for other group health coverage or Medicare must provide timely written notice that (s)he no longer qualifies for the subsidy. A subsidy recipient’s failure to provide timely notice to the plan of loss of eligibility for the subsidy is subject to a penalty of \$250 for each failure (though more if the failure to notify is deemed fraudulent, but penalties may be waived if the failure to comply is due to reasonable cause).</p>
<p><b>Q: Are the premiums due in full retroactively at the end of the tolling period, or will additional guidance be forthcoming?</b></p>	<p><b>A:</b> If an AEI already paid the applicable premium for any period to which the subsidy applies (e.g., they've already paid through April 30, 2021), the person to whom the premium is payable (e.g., the employer for a single-employer plan) is required to reimburse the individual for the amount previous paid. The entity providing the refund can apply for the payroll tax credit for those amounts.</p> <p>While the provisions of ARPA do not consider the currently tolled payment grace periods and election periods, it stands to reason that, for those qualified beneficiaries (QBs) who are still within their payment grace period or election period, they need to be given an opportunity to either elect and pay COBRA premiums retroactively <i>or</i> be provided an opportunity to elect through the second election period (causing their original record to cancel).</p> <p>Starting in mid-April, we will work with our employer clients to identify the individuals who are potentially eligible to retroactively receive the</p>

	<p>COBRA subsidy effective April 1, 2021. Also, we anticipate the DOL and/or the IRS will provide guidance to further clarify the COBRA subsidy provisions of ARPA. Any participant determined to be an assistance eligible individual who has paid the applicable premium for any period to which the subsidy applies, those amounts will be reimbursed as soon as practicable. We will continue to update our website with additional information regarding ARPA as it becomes available.</p>
<p><b>Q: Is there anything that mandates that state continuation is included in this or will this be a state-by-state decision?</b></p>	<p><b>A:</b> The subsidy provisions do apply for state continuation; however, the special second election period appears to include COBRA eligible plans only. We hope future guidance will provide clarification.</p>
<p><b>Q: Under ARPA, is a voluntary term that could have eventually resulted in an involuntary term be considered eligible for subsidy? If so, what would be examples and is guidance expected?</b></p>	<p><b>A:</b> The provisions of the Act contain a number of procedural similarities to the COBRA changes introduced by the American Recovery and Reinvestment Act of 2009 (“ARRA”), including ARRA’s provision of a federal subsidy for qualified beneficiaries receiving COBRA due to an “involuntary termination of employment.”</p> <p>IRS Notice 2009-27 states that an involuntary termination of employment “means 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.”</p> <p>The notice also specifies: [T]he determination of whether a termination is involuntary is based on all the facts and circumstances. For example, if a termination is designated as voluntary or as a resignation, but the facts and circumstances indicate that, absent such voluntary termination, the employer would have terminated the employee’s services, and that the employer had knowledge that the employee would be terminated, the termination is involuntary. Since ARPA does not define “involuntary termination”, further guidance would be welcome.</p>
<p><b>Q: If electing the subsidy, is there a back premium due for the months that coverage had not been elected?</b></p>	<p><b>A:</b> If an AEI already paid the applicable premium for any period to which the subsidy applies (e.g., they’ve already paid through April 30, 2021), the person to whom the premium is payable (e.g., the employer for a single employer plan) is required to reimburse the individual for the amount previously paid. The entity providing the refund can apply for the payroll tax credit for those amounts.</p> <p>While the provisions of ARPA do not consider the currently tolled payment grace periods and election periods, it stands to reason that, for those qualified beneficiaries (QBs) who are still within their payment grace period or election period, they need to be given an opportunity to either elect and pay COBRA premiums retroactively <i>or</i> be provided an opportunity to elect through the second election period (causing their original record to cancel).</p> <p>We anticipate the DOL and/or the IRS will provide guidance to further clarify the COBRA subsidy provisions of ARPA and its interaction with the deadline suspensions of EBSA 2021-01.</p>

<b>Q: If an AEI chooses to take the COBRA Subsidy, can they continue with the COBRA (out of pocket) past September 30, 2021 if their initial period has not expired?</b>	<b>A:</b> Yes. The AEI would be responsible for timely payment of COBRA to their original COBRA expiration date.
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## COBRA Notifications

<b>Q: As the third-party administrator (TPA), will HealthEquity/WageWorks be sending new notices or will that be owned by employers?</b>	<b>A:</b> There will be additional follow-up communication coming from HealthEquity about how to apply these changes. In the meantime, employers should begin to identify Assistance Eligible Individuals (AEI) as soon as possible so the necessary actions can be taken when ready.
<b>Q: When will the DOL provide new model notices for COBRA?</b>	<b>A:</b> ARPA model notices are due from the DOL on or around April 11, 2021.

## DCFSA Contribution Increase

<b>Q: Is the DCFSA contribution increase optional or mandatory?</b>	<p><b>A:</b> The DCFSA contribution increase is optional.</p> <p>If an employer wants to take advantage of the DCFSA contribution increase, a plan amendment will be required to make this change.</p> <p>HealthEquity/WageWorks will provide more details soon to assist you with requesting this change.</p>
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