



# IRS Guidance Regarding COBRA Premium Assistance

## Introduction

The following general summary is intended to educate employers and plan sponsors on the potential effects of recent government guidance on employee benefit plans. This summary is not and should not be construed as legal or tax advice. The government's guidance is complex and very fact specific. As always, we strongly encourage employers and plan sponsors to consult their own legal or benefits counsel for advice on how this guidance applies to their specific circumstances.

On May 18, 2021, the Internal Revenue Service released guidance in the form of 86 questions-and-answers concerning the COBRA changes introduced by the American Rescue Plan Act of 2021 (ARPA). IRS Notice 2021-31\* covers a range of topics related to the COBRA premium assistance provisions of ARPA and additional COBRA enrollment opportunities afforded to certain Assistance Eligible Individuals (AEIs) during the ARPA subsidy period beginning April 1, 2021 through September 30, 2021. The IRS Q&As coordinate with previous FAQ guidance released by the Department of Labor† (DOL) regarding the ARPA subsidy, as well as model notices that the DOL provided that can be used when administering ARPA's continuation coverage subsidy requirements.

Below we have summarized the Q&As that are most relevant to most of our customers. The following overview of the information contained in Notice 2021-31 is not exhaustive. We encourage you to read the full notice to ensure that you have a complete understanding of the information included in Notice 2021-31.

For a refresher of the definitions and rules regarding the COBRA premium assistance and special election period available under ARPA, please review our previous compliance alert on the topic.‡

The following are some of the highlights of Notice 2021-31:

## Eligibility for COBRA Premium Assistance

Individuals can be an AEI more than once (Q&A-3). For example, an individual may lose coverage by virtue of her own involuntary termination and elect COBRA, then become eligible for and enrolled in her spouse's plan, causing her to lose AEI status. That individual then may lose coverage under the spouse's plan due to the spouse's involuntary termination of employment. In that case, the individual could regain AEI status.

Employers may rely on personnel records documenting a reduction in hours or an involuntary termination for purposes of substantiating an individual's eligibility to receive the ARPA premium subsidy (Q&A-4).

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\* <https://www.irs.gov/pub/irs-drop/n-21-31.pdf>

† <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy>

‡ [HealthEquity Compliance Alert ARPA COBRA Subsidy \(3-12-2021\)](#)

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Employers may instead obtain employee attestations of self-certification concerning individuals' status as an AEI (i.e., regarding whether an individual's qualifying event was a reduction of hours or an involuntary termination of employment and/or with respect to their eligibility for other group health plan coverage or Medicare) (Q&As-4 & 5). To the extent an employer relies on an individual's self-certification to substantiate eligibility for the ARPA premium subsidy, that employer must retain a record of it. Employers may rely on these attestations unless they have actual knowledge to the contrary (Q&A-6).

Notice 2021-31 also specifies that an individual is eligible to receive the ARPA premium subsidy until (s)he is eligible for other group health plan coverage (not including excepted benefits, a Health Flexible Spending Account (Health FSA), or a Qualified Small Employer Health Reimbursement Arrangement (QSEHRA)). If a plan imposes a waiting period, the individual is not considered eligible until the waiting periods ends (Q&A-11). In addition, if an individual is eligible to enroll in other group health plan coverage prior to the beginning of the ARPA subsidy period (that is, April 1, 2021) but as of April 1, 2021 is no longer able to enroll in that other group health plan coverage (for example, because she must wait until Annual Enrollment), that AEI will be eligible to receive the COBRA premium subsidy until (s)he is able to enroll in another group health plan. An individual is similarly ineligible to receive the ARPA premium subsidy once eligible for Medicare (Q&A-11). Note that ineligibility for the ARPA subsidy is based on eligibility for other group health plan or Medicare coverage, not enrollment.

An individual who is originally on continuation coverage by virtue of an earlier qualifying event – for example – a divorce, will not become eligible to receive the ARPA premium subsidy if the employee subsequently experiences an involuntary termination or reduction of hours (Q&A-14). This is because the reduction of hours or involuntary termination did not cause the loss of coverage – the divorce did. However, if an individual is originally on continuation coverage by virtue of an involuntary termination of employment or reduction of hours and has subsequently remained on continuation coverage due to a second qualifying event, such as a divorce, a Social Security 11-month disability determination, or an extension under applicable state continuation laws, the subsidy will be available for those coverage periods falling during the ARPA subsidy period (Q&A-17).

Only AEIs covered by a group health plan that is subject to COBRA or comparable state continuation coverage are eligible to receive ARPA premium assistance (Q&A-15). Plans ineligible for the premium assistance include self-funded small employer plans (generally those with less than 20 employees) and self-funded church plans.

Coverage under a retiree health plan would not cause an AEI to be ineligible for the subsidy if retiree coverage is offered under the same group health plan as active coverage (Q&A-18). However, if retiree coverage is offered under a separate group health plan, the AEI would not be eligible for the subsidy due to eligibility for another group health plan.

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The ARPA premium subsidy is not available to those continuants who are not qualified beneficiaries<sup>§</sup> (and therefore, are not AEIs) (Q&A-19). This would include domestic partners\*\* or spouses and/or dependent children added to continuation coverage during a plan's open enrollment period.

## Reductions in Hours

Notice 2021-31 reiterates that an individual's reduction of hours may be either voluntary (i.e., initiated by the employee) or involuntary (i.e., initiated by the employer) (Q&A-21). Furloughs are considered to be reductions of hours, provided there is a reasonable expectation of a return to work or a willingness to maintain the employment relationship (Q&A-22). Furthermore, a work stoppage as a result of a legal strike or lockout is also considered a reduction of hours, again as long as there is an intent to continue the employment relationship (Q&A-23).

## Involuntary Terminations of Employment

Notice 2021-31 provided some welcome clarification as to what constitutes an "involuntary termination" for purposes of ARPA. As previously reported, the IRS published 59 questions and answers<sup>††</sup> to help clarify the finer points of the American Recovery and Reinvestment Act of 2009, which included its own federal subsidy provisions for qualified beneficiaries receiving COBRA coverage due to an "involuntary termination of employment." Notice 2021-31 guidance is largely similar to Notice 2009-27 with respect to involuntary terminations.

Notice 2021-31 states that an involuntary termination of employment is 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 (Q&A-24). Furthermore, an employee-initiated termination from employment constitutes an involuntary termination for purposes of the premium subsidy if the termination is for good reason due to employer action that causes a material negative change in the employment relationship for the employee.

Notice 2021-31 also addresses prevailing ambiguities concerning the impact of the COVID-19 pandemic with respect to an individual's termination of employment. To this extent, employee-initiated terminations of employment due to general concerns about workplace safety (unless the employee can demonstrate an employer's actions or failure to act resulted in a material negative change), or due to the employee's personal circumstances (e.g., the health of a family member, a school or daycare closure) will not constitute an involuntary termination of employment (Q&As-30 & 31). A loss of coverage due to the employee's death is also not an involuntary termination of employment giving rise to eligibility to receive the ARPA premium subsidy (Q&A-33).

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<sup>§</sup> A qualified beneficiary is any of the following who is covered under the group health plan the day before the qualifying event: (1) the employee (including a retired employee), (2) the employee's spouse (including the spouse of a retired employee), and/or (3) a dependent child (as defined by the terms of the group health plan) (including the dependent child of a retired employee). Also, a child who is born to, adopted by, or placed for adoption with a covered employee during a COBRA coverage period is considered a qualified beneficiary if enrolled in accordance with the terms of the group health plan.

\*\* A domestic partner's child, however, may be an AEI.

†† <https://www.irs.gov/pub/irs-drop/n-09-27.pdf>



## Coverage Eligible for COBRA Premium Assistance

Notice 2021-31 confirms that the ARPA premium subsidy applies to all group health plans (except for Health FSAs provided through a Code § 125 cafeteria plan). This includes limited-scope vision and dental plans, Health Reimbursement Arrangements (HRAs) (regardless of whether they qualify as Health FSAs under Code § 106(c)(2)<sup>‡‡</sup> and Individual Coverage HRAs (ICHRAs) (but **not** QSEHRAs; QSEHRAs are not group health plans eligible for COBRA continuation coverage), and retiree coverage (if such coverage is provided under the same group health plan that covers active employees) (Q&As-35-40).

Notice 2021-31 also affirms – in instances in which an employer no longer offers the group health plan under which a potential AEI was covered – the employer must offer that individual the opportunity to elect continuation coverage under a group health plan that the employer makes available to a similarly situated active employee that is most similar to the previous plan that originally covered the potential AEI (even if the cost of this plan is greater than that of the previous plan) (Q&A-42). In this instance, if the individual is an AEI and elects continuation coverage under this new plan, that individual will be eligible to receive the 100 percent subsidy of that new plan (regardless of whether it costs more than the original coverage).

## Extended Election Period

As AEIs are qualified beneficiaries, both former employees/employees and spouses and dependent children who do not have a COBRA election in effect as of April 1, 2021 (but would otherwise satisfy the criteria of being an AEI if COBRA were in effect) may elect COBRA continuation coverage under the ARPA special extended election period (Q&A-51).

Notice 2021-31 reiterates that the extended election period under ARPA is required only for federal COBRA coverage; comparable state continuation programs may act independently to provide similar rights (Q&A-52).

## Extensions Under the Emergency Relief Notices

Notice 2021-31 confirms information provided in the DOL's FAQs concerning the interaction of ARPA and the ongoing Outbreak Period extension relief. The Outbreak Period relief does not apply to employers' obligations to notify potential AEIs who had a qualifying event prior to April 1, 2021 of the COBRA premium subsidy by May 31, 2021 or notify potential AEIs who have a qualifying event on or after April 1, 2021 of the COBRA premium subsidy within 44 days<sup>§§</sup> of the qualifying event (Q&A-57). Furthermore, the 60-day deadline for which AEIs have to elect subsidized COBRA continuation coverage by virtue of ARPA is also not extended (Q&A-57).

However, Notice 2021-31 also provides that the extended period still would apply to an election for retroactive unsubsidized COBRA coverage, but if the AEI opts to elect COBRA coverage retroactive to the coverage loss, the employer may require the qualified beneficiary to pay COBRA premiums for that retroactive period prior to April 1, 2021, consistent with the Outbreak Period extensions (Q&A-58). If the AEI declines retroactive COBRA coverage at the time they elect

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<sup>‡‡</sup> Eligibility under an HRA that does not qualify as a Health FSA under § 106(c)(2) will end the period of ARPA premium subsidy in the same way as eligibility for coverage under any other group health plan. (Q&A-38)

<sup>§§</sup> [29 CFR § 2590.606-4\(b\)\(2\)](#)



COBRA with the premium subsidy, Notice 2021-31 provides that the AEI loses the right to later elect coverage for the retroactive period (Q&A-59).

## Payments to Insurers Under Federal COBRA

Notice 2021-31 provides that – in the case of a fully-insured group health plan subject to federal COBRA requirements – an insurer is required to treat an AEI as having paid the full premium if the employer and insurer have agreed that the insurer will collect COBRA premiums directly from qualified beneficiaries. Notwithstanding the agreement between the employer and the insurer, the employer is required to pay the premium to the insurer for the months of COBRA premium assistance with respect to the individual. (Q&A-60).

## Comparable State Continuation Coverage

As with guidance provided in 2009's Notice 2009-27, the IRS confirms that it will only permit the insurer – not the employer – to claim the payroll tax credit for fully-insured group health plans subject only to state law (e.g., self-insured small employer plans not subject to federal COBRA) (Q&A-62). Note that for most ERISA plans (other than multiemployer plans), the employer generally is the party that is permitted to claim the credit.

## Calculation of COBRA Premium Assistance Credit

The premium tax credit is refundable and may be made against the entity's share of Medicare taxes assessed on a quarterly basis. Notice 2021-31 specifies that the amount of the credit is equal to the full amount of premiums not paid by the AEI (including the 2-percent COBRA administrative fee) (Q&A-63).

As some employers have expressed concern with respect to how the ARPA premium subsidy will interact with employer-provided subsidies (e.g., as part of a severance arrangement), Notice 2021-31 clarifies that an employer providing a subsidy for coverage during the ARPA subsidy period may not claim payroll tax credits for those employer-subsidized amounts (Q&A-64). Only the amount that the AEI would be required to pay for the premium (that is, the amount remaining after the application of the employer subsidy) may be claimed as a tax credit. However, an employer could increase the premium charged to the AEI, and the premium subsidy would apply to this increased amount (subject to certain restrictions and otherwise applicable COBRA limits on premiums) (Q&A-65).

## Claiming the COBRA Premium Assistance Credit

Notice 2021-31 provides that an employer who sponsors either fully-insured or (either completely or partially) self-insured group health plans subject to federal COBRA requirements is the entity permitted to claim the payroll tax credit (Q&A-71).

Eligible entities are instructed to claim the credit by reporting both the non-refundable and refundable portions and the number of individuals receiving ARPA premium subsidy on the appropriate lines of its federal employment tax return (which is generally Form 941) (Q&A-75). The premium payee may reduce its deposits of federal employment taxes up to the amount of the credit and request an advance of the amount of the anticipated credit that exceeds the federal tax deposits available in anticipation of receiving the tax credit to which it is entitled (via Form 7200) (Q&A-76).

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If there is no employment tax liability (for example, a multiemployer plan with no employees), the credit should still be claimed on the Form 941 for the quarter when the entity becomes entitled to the tax credit (Q&A-77).

Of course, employers and others claiming the premium tax credit must maintain records to substantiate their eligibility for the tax credit (Q&A-84). The employer does not have to submit these records when applying for the tax credit.

## Closing Comments

Obviously, receiving the IRS guidance after the start date of the subsidy and so close to the due date of required notices (May 31, 2021) presents a number of challenges!

We have been reaching out to employers to alert them of these new rules and to help facilitate notices to potential AEIs. We also have been working with employers to help them identify and document their list of potential AEIs (i.e., qualified beneficiaries due to a reduction of hours or involuntary termination). As discussed above, employers generally may: (1) determine who is a potential AEI and automatically consider them to be subsidy-eligible, subject to the AEI notifying the employer of ineligibility due to eligibility for other group health plan or Medicare coverage (opt-out approach); or (2) require potential AEIs to affirmatively opt in or attest that they should be treated as an AEI (which the employer may rely on unless it has actual knowledge otherwise) (opt-in approach).

The IRS guidance states that both approaches are permissible. The Q&As are clear that an employer generally may rely on an attestation, but following such an opt-in approach is not required. Furthermore, while an employer may generally rely on that attestation, it may not do so if it has actual knowledge that the attestation is incorrect. Therefore, if an employer relies on the attestation method, it will also likely need to look to its employment records to ensure the requesting individuals' records do not contain contrary information (Q&As 6 & 7).

If there is a reason to believe an individual is an AEI, the employer could face an excise tax under Code § 4980B if it does not provide the subsidy. The IRS has not provided further detail about what specific documentation an employer must rely upon when making AEI determinations and providing substantiation to the IRS (Q&A 84). Informally, the IRS has commented that whatever method is used, the employer should make sure its records are reasonably reliable. In addition, IRS representatives informally stressed that the intent of the Q&As in Notice 2021-31 was to provide flexibility to employers to either obtain attestation or to review their records and to clarify that either approach (relying on attestation or employer records) is permissible. The IRS noted that if an employer is relying on its own records that it reasonably believes are accurate, the employer does not also need to obtain an attestation from individuals.

With this short window, HealthEquity's ARPA administrative solution allows employers to make determinations of employees' reductions in hours or involuntary terminations of employment based on the applicable employment records and documentation. The model DOL "opt in" form generally would not be required since the HealthEquity approach is based on the employer making the initial identification of AEIs, streamlining the process for eligible individuals.

HealthEquity will rely on the codes provided by the employer to show which qualified beneficiaries were terminated involuntarily or had a reduction in hours. Employers can verify or correct their



qualifying event reporting codes at the time of data transmission, or they can update these codes in a supplemental file if needed.

HealthEquity's approach which achieves early identification of the AEI population (thereby reducing the risk that an excise tax will be imposed for failure to offer the subsidy to an AEI) does track the DOL model notices, which include a form for individuals who have been identified as AEIs to provide notice of ineligibility due to other coverage, as well as a form to allow an individual to opt in to the subsidy. While the DOL provided that use of the model forms is not required, HealthEquity's standard form does utilize the DOL's model notice of premium assistance ineligibility form and provides a mechanism for individuals to alert their employer of their AEI status if they have not been identified already.

Qualified beneficiaries with any qualifying event occurring on or after April 1, 2021 (including termination, reduction of hours, death of the covered employee, loss of dependent status, or divorce) will receive an amended election notice, including an ARPA-specific insert document based on the model notice's "Summary of the COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021" explaining the recipients' potential rights and responsibilities and that individuals with qualifying event reason codes of involuntarily termination or reduction in hours will be flagged to receive the ARPA subsidy automatically. In addition, the qualified beneficiaries will receive a Premium Assistance Ineligibility Form, which expressly asks individuals who have been identified as AEIs to indicate their ineligibility for the subsidy if either (1) their qualifying event that is listed as a termination was not involuntary; or (2) they are eligible for Medicare or other group health plan coverage. The form provides notice that the IRS may impose a penalty on the individual if the individual receiving the subsidy, is eligible for other disqualifying coverage, and does not provide notification of their ineligibility to receive the subsidy unless the failure to notify the plan is due to reasonable cause and not due to willful neglect. If these individuals indicate they are not eligible for the subsidy, they will still be able to enroll in COBRA coverage, but the subsidy will be removed based on this certification. Furthermore, qualified beneficiaries whose qualifying event type is reported as something other than an involuntary termination or a reduction of hours will be able to complete and return a "Request for Treatment as an Assistance Eligible Individual" form if they believe they are in fact an AEI (these will be collected and transmitted to the employer for its review and determination).

For qualified beneficiaries whose qualifying events were prior to April 1, 2021 and who (1) have not already elected COBRA; (2) who had previously elected and have since lost COBRA coverage; or (3) who are currently on COBRA, the employer will (again, relying on its own existing personnel records concerning the facts and circumstances of the employees' qualifying events) review WageWorks/HealthEquity records and affirm which qualified beneficiaries previously reported as terminations were involuntarily terminated and flagged to receive the ARPA subsidy automatically upon election of COBRA (pending the qualified beneficiary's certification of eligibility for Medicare or other group health plan coverage, in which case the subsidy will be removed based on this certification). Alternatively, an employer may provide written certification that any qualifying events previously reported are correct and indicate that any involuntary terminations, reductions of hours, and layoffs with qualifying events occurring prior to April 1, 2021 (and whose maximum COBRA eligibility period falls on or after April 1, 2021) should be treated as AEIs. This population, once confirmed, will receive a COBRA Continuation Coverage Notice in Connection with Extended Election Periods (and "Summary of the COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021") along with a "Premium Assistance Ineligibility

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Notice” to allow the qualified beneficiary an opportunity to provide notification of her/his eligibility for other group health plan coverage or Medicare.

In addition, WageWorks/HealthEquity will provide a subsidy statement to contracted clients' current premium statement recipient on or around the 20th of each month. This statement will be sent via e-mail and will also be available on the administrative website. The subsidy statement reflects the participants that have either a subsidy or severance adjustment applied for the current coverage month. Employers may use this subsidy statement as a tool to perform an audit of their records alongside their applicable personnel records when completing the IRS Form 941 (or Form 7200) for payroll tax filings.