

March 23, 2021

American Rescue Plan Act of 2021: COBRA Subsidies & Dependent Care Assistance Program Increase



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American Rescue Plan Act of 2021



March 11, 2021

President Biden signs the America
Rescue Plan Act of 2021 (ARPA) into law.

Our topics for today:

1. COBRA Premium assistance
2. COBRA election rights and timeframe
3. Dependent Care Assistance Program (DCAP)
increase to annual maximum

COBRA Premium Assistance

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COBRA Premium Assistance

- Provides for COBRA premium assistance of 100% of the premium (including the 2% COBRA administration fee) for continuation coverage in effect **beginning April 1, 2021** and ending on or before the earliest of:
 - The date a premium-assistance eligible individual becomes *eligible* for other group health plan coverage or Medicare (as opposed to standard COBRA continuation rules, under which a qualified beneficiary loses COBRA when they become covered by another group health plan or Medicare);
 - When the qualified beneficiary *exhausts* his or her COBRA coverage period; or
 - **September 30, 2021.**

Assistance Eligible Individual

Who is eligible for premium assistance?

- Any individual that is a qualified beneficiary who:
 - Is eligible for COBRA continuation coverage by reason of a specified qualifying event; and
 - Elects such coverage.
- Applies to affected spouse and dependents.
- Does not include an individual that *voluntarily* terminated employment.
- COBRA need not be offered to employees terminated for gross misconduct.



Specified COBRA Qualifying Events:

- Involuntary termination of employment
- Reduction in hours

Assistance Eligible Individual

Assistance eligibility includes:

- AEI experiencing a qualifying event after April 1, 2021 and before September 30, 2021.
- AEI whose previous COBRA coverage was discontinued.
- AEI still within their election periods (which have been extended due to the “tolling” of election timelines) who have not elected COBRA continuation coverage.
- AEI currently in a COBRA coverage period.



Special Election Period

Special election period beginning on April 1, 2021 and ending “60 days after the date on which notification...is *provided* to such individual.”

- If elected, COBRA coverage begins as of the first coverage period beginning on or after April 1, 2021.
- Will “not extend beyond the period of COBRA continuation coverage that would have been required under the applicable COBRA continuation coverage provision if the coverage had been elected as required under such provision or had not been discontinued.”

Notification

For AEIs that become entitled to elect COBRA continuation coverage after April 1st, the election notice must include:

1. Availability of premium assistance with respect to such coverage under this subsection; and
2. The option to enroll in different coverage if the employer permits assistance eligible individuals to elect enrollment in different coverage (see later slide).
 - The requirement of the additional notification, for qualified AEIs to whom an election notice has not yet been provided, may be met by amendment of existing notice forms or by inclusion of a separate document with the notice otherwise required.

Notification

Notification must include:

1. the forms necessary for establishing eligibility for premium assistance under this subsection;
2. the name, address, and telephone number necessary to contact the plan administrator and any other person maintaining relevant information in connection with such premium assistance;
3. a description of the extended election period;
4. a description of the obligation of the qualified beneficiary to notify the plan administrator of eligibility for other group health plan coverage or Medicare and the penalty for not providing this required notification;
5. a description, displayed in a prominent manner, of the qualified beneficiary's right to a subsidized premium and any conditions on entitlement to the subsidized premium; and
6. a description of the option of the qualified beneficiary to enroll in different coverage if permitted by the employer.

Notification

The plan administrator (or other entity) must provide this notice for individuals who became entitled to elect COBRA continuation coverage:

- Before the first day of the first month beginning after the date of the enactment of this Act (April 1, 2021).
- Notice must be provided within 60-days of April 1, 2021 (May 31, 2021).

Failure to provide such notice shall be treated as a failure to meet the notice requirements under the applicable COBRA continuation provision.

Notification

Notice of expiration of premium assistance

- The plan administrator must notify the AEI in writing:
 - that the premium assistance for such individual will expire soon and the prominent identification of the date of such expiration; and
 - that such individual may be eligible for coverage without any premium assistance through COBRA continuation coverage, or coverage under a group health plan.

This notice must be provided during the period of 45 days before the date of such expiration and ending on the day that is 15 days before the date of such expiration.

- Notice is not required if coverage ends due to exhaustion of COBRA or eligibility for other coverage before assistance period ends.

Notification

Model Notices

- DOL, in consultation with Treasury and HHS, shall prescribe a model election notice not later than 30 days after the date of enactment of the Act (April 10, 2021).
- DOL in consultation with Treasury and HHS, shall prescribe a model notice of expiration of premium assistance not later than 45 days after the date of enactment of the Act (April 25, 2021).



AEI Requirements

The AEI must notify the group health plan of eligibility for other group coverage or Medicare.

- DOL penalty for failure to notify, as required by the DOL.
 - For intentional failure (fraudulent) the penalty is ‘the greater of —
 - \$250, or
 - 110% of the premium assistance provided after termination of eligibility for assistance.
 - Reasonable cause exception:
 - No penalty shall be imposed under this section with respect to any failure if it is shown that such failure is due to reasonable cause and not to willful neglect.

Alternative Coverage

Employers *may* permit AEs to elect alternative coverage offered to similarly-situated active employees.

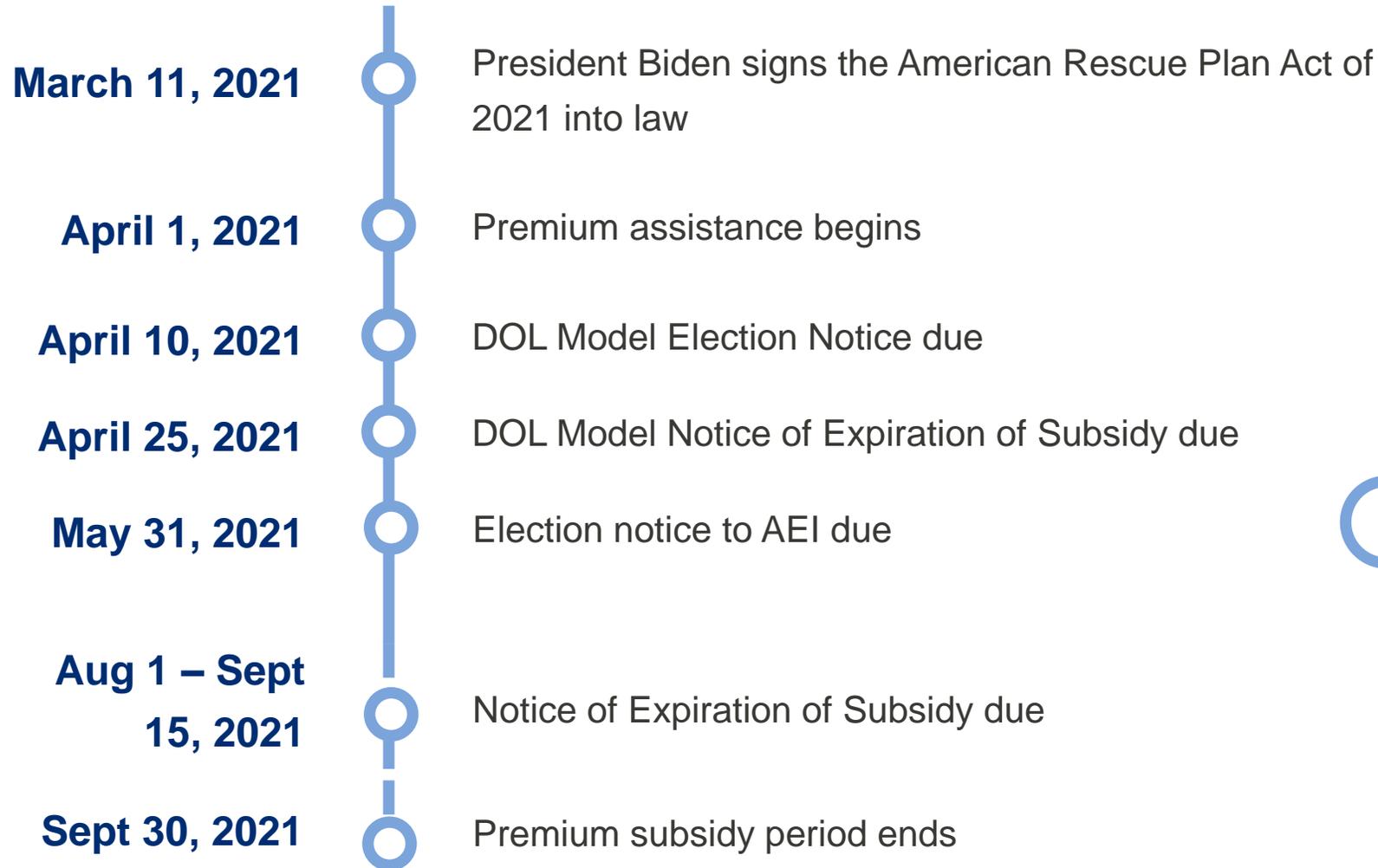
- The premium for alternative coverage may not be greater than the premium for the coverage the individual had prior to the qualifying event.
- Such other coverage may not be a Health Flexible Spending Arrangement (FSA) or Qualified Small Employer Health Reimbursement Arrangement (QSEHRA) or constitute only excepted benefits (for instance, stand-alone dental and vision plans).
- AEs enrolled in a group health plan offered by a plan sponsor will have up to 90 days after the date of notice of this plan enrollment option to elect alternative coverage.

Tax Credit for Premium Assistance

Medicare payroll tax credit is available for “person to whom premiums are payable.”

- The employer-plan sponsor for self-insured and fully-insured plans subject to COBRA as contained in the PHSA, ERISA or the Internal Revenue Code.
- The “plan” in the case of multiemployer plans.
- The insurer for insured plans not included above.

Premium Assistance Timeline



Premium Subsidy for Assistance Eligible Individuals

DCAP Increase

The ARPA 2021 provides a temporary increase in Dependent Care Assistance Plan (DCAP) annual tax exclusion limits for 2021.

- \$10,500 of dependent care expenses (\$5,250 for a married couple filing separate tax returns) reimbursed under a DCAP may be excluded from the individual's income.
- Note the Act's increased DCAP exclusion limit does not require plan sponsors to increase participants' annual election or reimbursement caps under their dependent care flexible spending arrangement (DCAP).
- Employers who choose to allow this increase may retroactively adopt this amendment no later than the end of the plan year.

Questions & Discussion

Q Are the COBRA subsidies only for those whose jobs were impacted by the pandemic?

A No. The subsidy applies if the individual was *involuntarily* terminated for any reason, including cause, or for a reduction in hours that causes a loss of coverage. But see next question.

Q Is the COBRA premium subsidy available to employees terminated for gross misconduct?

A If the employer has determined that the employee was terminated for gross misconduct, an offer of COBRA is not required so no subsidy would be available.

Q Does the rule regarding eligibility for other coverage apply to someone who can enroll in a spouse's coverage via HIPAA special enrollment? Does it apply to someone could have enrolled in another group health plan previously (e.g., when hired by another employer) but can no longer do so?

A It appears someone with a current HIPAA special enrollment right (including one based on the extend HIPAA special enrollment deadline) would not be eligible for the subsidy. It is not clear whether someone who was previously eligible for other coverage but is not currently able to enroll in that coverage is disqualified.

Q How does the recent EBSA guidance for COBRA notice and election extended deadlines interact with this new legislation?

A EBSA Notice 2021-1 provided the extensions expire:

- a) 1 year from the date they were first eligible for relief, or
 - b) 60 days after the announced end of the National Emergency (the end of the Outbreak Period).
- On the applicable date, the timeframes for individuals and plans with periods that were previously disregarded under the Notices will resume. In no case will a disregarded period exceed 1 year.

The ARPA of 2021 provides a premium subsidy for COBRA periods beginning April through September 30, 2021, for AEs that will include individuals eligible for relief under EBSA Notice 2021-1.

Q Is the premium reduction “automatic,” or is the qualified beneficiary required to elect COBRA continuation if they are not currently on COBRA?

A An AEI currently not covered will need to elect COBRA. However an AEI currently on COBRA should receive the premium assistance automatically but this means the employer must inform the COBRA administrator that the individual is eligible for premium assistance.

Q Is a premium-assistance eligible individual who is not currently enrolled in COBRA required to sign up retroactively and make up the missed premium for coverage prior to the start of the subsidy?

A AEs not currently covered under COBRA will have the right to elect coverage effective April 1, 2021 and will not be required to pay retroactive premiums back to the original qualifying event date or loss of coverage date.

Q Are temporary employees whose contracts with the employer expire eligible for premium assistance?

A This is likely a facts and circumstances situation. For example, IRS Notice 2009-27 (in response to the ARRA COBRA subsidy available in 2009) states:

An involuntary termination may include the employer's failure to renew a contract at the time the contract expires, if the employee was willing and able to execute a new contract providing terms and conditions similar to those in the expiring contract and to continue providing the services.

Q Is the continuation participant eligible for the premium subsidy after COBRA expires?

A In general, the subsidy ends when COBRA is exhausted. However, the legislation defines COBRA continuation coverage to include continuation coverage provided “under a State program that provides comparable continuation coverage.” If State law extends continuation coverage beyond COBRA, the subsidy might be available during the extended coverage.

Q Would an employee on ADA leave who was moved to COBRA qualify for the subsidy?

A If this is a reduction in hours resulting in a loss of coverage, the individual would be an AEI, if this occurs within the timeframe under the legislation and prior guidance.

Q If an employer is a small employer (not subject to the ACA employer shared responsibility requirement), is the employer still required to provide the subsidy?

A Yes, as long as the employer is subject to COBRA or comparable state continuation.

Q Does the tax credit available to employers cover the 2% COBRA administrative charge that may be included in COBRA premiums?

A Yes, an employer may take into account the 2% administration fee allowed under COBRA.

(J) PREMIUM — The term “premium” includes, with respect to COBRA continuation coverage, any administrative fee.

Q How does an employer get the credit for the COBRA subsidy if they're a non-profit/ESOP and don't pay federal taxes?

A The credit is on the Medicare tax paid by the employer.

“(A) CREDIT IS REFUNDABLE — If the amount of the credit under subsection (a) exceeds the limitation of paragraph (1) for any calendar quarter, such excess shall be treated as an overpayment that shall be refunded under sections 6402(a) and 6413(b).”

“(B) CREDIT MAY BE ADVANCED — In anticipation of the credit, including the refundable portion under subparagraph (A), the credit may be advanced, according to forms and instructions provided by the Secretary, up to an amount calculated under subsection (a) through the end of the most recent payroll period in the quarter.”



Q Does the increase in the DCAP tax exclusion apply only to plans that adopt the carryover or extended claims period?

A No, a plan is not required to adopt the carryover or extended grace period in order to increase the DCAP maximum to the new limit.

Allowing increased contributions raised election change issues and nondiscrimination issues.

Q How does the increase in the DCAP tax exclusion impact non-calendar year plans?

A The limit applies to an individual's tax year (typically the calendar year):

(D) SPECIAL RULE FOR 2021 — In the case of any taxable year beginning after December 31, 2020, and before January 1, 2022, subparagraph (A) shall be applied by substituting '\$10,500 (half such dollar amount' for '\$5,000 (\$2,500'.

Employers with non-calendar year DCAP plans adopting this change should make employees aware of the this limitation.



March 23, 2021

Thank you!



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