

NEWS ALERT

EMPLOYEE BENEFITS



DOL Issues Model Notices, FAQs and Other Guidance About the ARP COBRA Premium Subsidy

By Melanie N. Aska and Erek M. Sharp | April 13, 2021

On April 7, 2021, the U.S. Department of Labor (DOL) issued welcome guidance—including eagerly-anticipated model notices—to help employers and their COBRA administrators implement the temporary six-month (April 1 to September 30, 2021) COBRA premium subsidy provided under the American Rescue Plan Act of 2021 (“ARP”) with respect to certain individuals who have lost or who will lose employer-sponsored group health coverage due to a reduction in hours or involuntary termination of employment.

DOL Guidance Packet. The DOL’s guidance packet consists of the following items:

- A *News Release*, available at <https://www.dol.gov/newsroom/releases/ebsa/ebsa20210407>;
- A *COBRA Premium Subsidy dedicated web page*, available at <https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy>, providing not only guidance about the ARP COBRA premium subsidy, but also previously-issued COBRA guidance for individuals (including *General COBRA FAQs for Workers* and *An Employee’s Guide to Health Benefits Under COBRA*) and for employers and their advisers (including *General COBRA FAQs for Employers* and *An Employer’s Guide to Health Continuation Coverage Under COBRA*);
- A set of *FAQs About COBRA Premium Assistance Under the American Rescue Plan Act of 2021*, directed primarily to individuals, but also including some guidance for employers and plans, available at <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/cobra-premium-assistance-under-arp.pdf>; and
- Five *Model Notices* (available in both Word and PDF formats on the DOL’s dedicated web page):
 1. *Model ARP General Notice and COBRA Continuation Coverage Election Notice* (for use by group health plans for qualified beneficiaries who have qualifying events occurring from April 1, 2021 through September 30, 2021), available at <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/cobra/premium-subsidy/model-general-and-election-notice.pdf>;
 2. *Model COBRA Continuation Coverage Notice in Connection with Extended Election Periods* (for use by group health plans for qualified beneficiaries currently enrolled in COBRA continuation coverage, due to a reduction in hours or involuntary termination of employment (Assistance Eligible Individuals), as well as those who would currently be Assistance Eligible Individuals if they had elected

and/or maintained COBRA continuation coverage), available at <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/cobra/premium-subsidy/model-extended-election-periods-notice.pdf>;

3. *Model Alternative Notice of ARP Continuation Coverage Election Notice* (for use by insured coverage subject to state (“mini-COBRA”) continuation requirements between April 1, 2021 and September 30, 2021), available at <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/cobra/premium-subsidy/model-alternative-election-notice.pdf>;
4. *Notice of Expiration of Period of Premium Assistance* (for use by group health plans to Assistance Eligible Individuals 15 to 45 days before their premium assistance expires), available at <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/cobra/premium-subsidy/notice-of-premium-assistance-expiration-premium.pdf>; and finally
5. *Summary of the COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021*, available at <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/cobra/premium-subsidy/summary-of-provisions.pdf>, which must be distributed with each of the three Model Notices described in 1 through 3 above, and which includes two forms, a *Request for Treatment as an Assistance Eligible Individual* (which an individual uses to apply for ARP premium assistance), and a *Participant Notification* form (which an individual uses to notify the group health plan that he or she has become ineligible for ARP premium assistance because he or she has become eligible for other group health plan coverage or Medicare). The *Summary* clearly warns the recipient that if he or she fails to notify the plan that he or she has become ineligible for the ARP COBRA premium subsidy, he or she may be subject to a penalty of \$250 (or if the failure is fraudulent, the greater of \$250 or 110% of the premium subsidy he or she received after becoming ineligible).

- **Some Key Take Aways from the DOL Guidance.**

- *No Insights About Involuntary Terminations of Employment, But Some Examples of Reductions in Hours.* ARP’s premium subsidy is available to “assistance eligible individuals” (AEIs). An AEI is a COBRA qualified beneficiary (that is, an employee or former employee or his covered spouse or dependent children) who, during the period from April 1, 2021 to September 30, 2021:
 1. Is eligible for COBRA continuation coverage by reason of a qualifying event that is a reduction in hours or an involuntary termination of employment (other than for gross misconduct); and
 2. Elects COBRA continuation coverage.

Unfortunately, the DOL guidance does not tell us what an “involuntary termination of employment” is. But the guidance does say that a “reduction in hours” could include reduced hours due to a change in a business’s hours of operations, a change from full-time to part-time status, the taking of a temporary leave of absence, or participation in a lawful strike, as long as the individual remains an employee when his or her hours are reduced.

Eligibility for the ARP premium subsidy ends, however, if the individual becomes eligible for other group health coverage (such as through a new employer’s plan or a spouse’s plan) or Medicare.

- *DOL’s Earlier COVID-19-Related Deadline Relief Does Not Apply to the Notice and Election Deadlines Related to the ARP’s Premium Subsidy.* The DOL guidance makes it clear that an AEI’s right to elect COBRA continuation coverage is separate from his or her right to the ARP premium subsidy. The DOL guidance also makes it clear that its earlier guidance, providing relief from the 60-day deadline for plans to provide COBRA election notices and from the 60-day deadline for qualified beneficiaries to elect COBRA continuation coverage, does *not* provide any relief from the particular notice and election deadlines imposed upon plans and AEIs under ARP. Thus, for example, the *COBRA Continuation Coverage Notice in Connection with Extended Election Periods* (that is, the “second-chance” election notice) must be furnished by May 31, 2021, the *Notice of Expiration of*

Period of Premium Assistance must be furnished within 15 to 45 days before the premium subsidy expires, and AEs who wish to elect *subsidized* COBRA continuation coverage must do so within 60 days after they receive their applicable ARP election notice. The DOL guidance reminds us that employers who fail to satisfy COBRA notice requirements may be subject to an excise tax under the Internal Revenue Code for failure to provide any required COBRA notice, including the new notices required by ARP.

- **Who Gets What Notice?**

- *ARP General Notice and COBRA Continuation Coverage Election Notice.* This Notice must be provided to all COBRA qualified beneficiaries (not just to AEs) who experience any COBRA qualifying event (not just reduction in hours or involuntary termination of employment) from April 1, 2021 to September 30, 2021. Plans that choose to use the *Model ARP General Notice and COBRA Continuation Coverage Election Notice* must customize the Notice by filling in its blanks with the appropriate plan information, and must include with the Notice the above-described *Summary of COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021* (similarly customized). AEs receiving this election Notice who wish to have *subsidized* COBRA continuation coverage have 60 days after the Notice is provided to elect such coverage.
- *COBRA Continuation Coverage Notice in Connection with Extended Election Periods.* This “second-chance” election Notice must be provided by May 31, 2021 to all AEs who, as of April 1, 2021, were enrolled in COBRA continuation coverage due to the qualifying events of reduction in hours or involuntary termination of employment (other than for gross misconduct), as well as to those AEs who, as of April 1, 2021 could have been enrolled in COBRA continuation coverage but were not, either because they did not elect such coverage or did elect it but failed to maintain it (for example, because they stopped paying the required premiums). Plans that choose to use the *Model COBRA Continuation Notice in Connection with the Extended Election Periods* must first customize the Notice by filling in its blanks with the appropriate plan information, and must include with the Notice the above-described *Summary of COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021* (similarly customized). AEs receiving this “second-chance” election Notice who wish to have *subsidized* COBRA continuation coverage have 60 days after the Notice is provided to elect such coverage.
- *Alternative Notice of ARP Continuation Coverage Election Notice.* ARP does not change any requirements of State continuation coverage (“mini-COBRA”) programs. ARP simply allows AEs who elect continuation coverage under State insurance law to receive the ARP premium subsidy from April 1, 2021 through September 30, 2021. Insured plans that are subject to State mini-COBRA insurance law may use the DOL’s *Model Alternative Notice of ARP Continuation Coverage Election Notice* to elect ARP subsidized State mini-COBRA coverage. Insured plans that choose to use the DOL’s *Model Alternative Notice of ARP Continuation Coverage Election Notice* must first customize the Notice by filling in its blanks with the appropriate coverage information, and must include with the Notice the above-described *Summary of COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021* (similarly customized). AEs receiving this election Notice who wish to have *ARP-subsidized* State mini-COBRA continuation coverage have 60 days after the Notice is provided to elect such coverage.
- *Notice of Expiration of Premium Assistance.* Plans must notify AEs 15 to 45 days before their ARP premium subsidy will expire. Plans that choose to use the *Model Notice of Expiration of Period of Premium Assistance* must first customize the Notice by filling in its blanks with the appropriate plan information, including the exact date on which the premium subsidy will expire.
- *Summary of COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021.* Plans that choose to use any of the three above-described model election Notices must include this *Summary* with those Notices. The cover sheet of the *Summary* clearly states that, to be an AE eligible for the ARP premium subsidy, the individual:
 - Must have experienced a COBRA qualifying event that is a reduction in hours or an involuntary termination of a covered employee’s employment;

- Must elect COBRA continuation coverage;
- Must not be eligible for Medicare; and
- Must not be eligible for coverage under any other group health plan, such as a plan sponsored by a new employer or a spouse's employer.

The *Summary cover sheet* also clearly states that if the AEI fails to elect the ARP premium subsidy within 60 days of receiving the *Summary*, he or she may be ineligible to receive the subsidy. The *Summary's* cover sheet (and its *Participant Notification* form) also clearly warn the individual that if he or she elects subsidized COBRA continuation coverage and then becomes ineligible for the subsidy because he or she becomes eligible for other group health plan coverage or Medicare and fails to so notify the plan, he or she may be subject to the above-described monetary penalties.

As noted above, the *Summary* includes two forms. The first, the *Request for Treatment as an Assistance Eligible Individual*, is the form the individual completes to attest that he or she (and, if applicable, his or her spouse and/or dependent children) meet all of the listed requirements to be AEIs. An AEI who has not yet elected COBRA continuation coverage would submit his or her completed *Request for Treatment as an Assistance Eligible Individual*, along with his or her completed COBRA election form, to the plan within 60 days after receipt. AEIs who are already enrolled in COBRA would send in their completed *Request for Treatment as an Assistance Eligible Individual* form separately.

Next Steps and Hope for More Detailed Guidance for Employers. Now that the DOL has issued Model Notices, employers who choose to use them to meet their ARP-based notice requirements must promptly begin to work with their COBRA administrators to customize the notices and timely furnish them to AEIs. As noted above, the *FAQs* which the DOL issued on April 7, 2021 were directed primarily to workers and their families. We hope that the next wave of guidance about the ARP COBRA premium subsidy will address additional issues that are of particular concern to employers and COBRA administrators, including what constitutes an involuntary termination of employment, as well as the mechanics of the payroll tax credit through which employers, insurers and plans, as applicable, would recoup their outlays for AEIs' COBRA premium subsidies.

If you have any questions about the DOL's April 7, 2021 guidance on the ARP COBRA premium subsidy or how that guidance might affect your business, please contact Melanie N. Aska, Counsel, at 617-457-4131 or maska@murthalaw.com or Erek M. Sharp, Partner, at 203-772-7772 or esharp@murthalaw.com.