Frequently Asked Questions: Benefits Compliance & the American Rescue Plan Act of 2021

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On March 11, 2021, President Biden signed the American Rescue Plan Act of 2021 (ARPA) into law, which includes important updates to certain benefits laws in response to the ongoing pandemic. The below questions and answers are intended to help clarify application of the ARPA and its impact on benefits administration with the guidance that is currently available.

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COBRA: Subsidies, New Election Period and Change Coverage to Other Plan Options

Q1: What COBRA subsidies are provided by the ARPA? ^

A1: The ARPA provides a premium subsidy for qualified beneficiaries (QBs) who elect continuation coverage through COBRA, including state continuation programs. This subsidy covers the entire cost of COBRA premiums and applies to COBRA premiums paid for coverage periods between April 1, 2021, and September 30, 2021 (or when the qualified beneficiary becomes eligible for other group medical or Medicare coverage, whichever comes first).

Q2: Which plans are subject to these rules? ^

A2: The ARPA applies to all group health plans, fully insured and self-insured, providing benefits that are subject to federal or state continuation coverage requirements. This includes major medical, dental and vision. Further, health reimbursement arrangements (HRAs) are subject to these provisions, as HRAs are group health plans. However, healthcare flexible spending arrangements (health FSAs) are not subject to these provisions.

Q3: Who is eligible for a COBRA subsidy? ^

A3: To be an assistance eligible individual (AEI), a QB must have experienced a reduction of hours or employer-initiated (i.e., involuntary) termination of their employment (other than by reason of such employee's gross misconduct) and must also not be eligible for other group health coverage or Medicare. Reduction of hours or termination does not have to be related to COVID-19 and may be voluntary or involuntary. Examples of a "reduction of hours" include any temporary leaves of absence, an individual's participation in a lawful labor strike, and medical leave (that does not result in thetermination of the individual's employment). Further, individuals who are eligible for COBRA due to voluntarily termination, or other qualifying events such as divorce, employee death, or losing dependent status, are not eligible for the COBRA subsidy.

This includes anyone who could still be in their COBRA maximum coverage period during the applicable timeframe (April 1, 2021, through September 30, 2021), even if the employer-initiated termination or reduction in hours occurred before April 1, 2021. Further, COBRA premium assistance is available to individuals who have elected and remained on continuation coverage due to disability, second qualifying event, or an extension under state continuation coverage, so long as the original qualifying event was a reduction in hours or an involuntary termination of employment and to the extent the extended period of coverage falls between April 1, 2021, and September 30, 2021.

As a reminder, dependents who are QBs will also have an independent election right to continue their COBRAif the employee was terminated or had their hours reduced. However, an individual is not eligible for premium assistance if they do not meet the definition of a QB under federal COBRA. For reference, "qualified beneficiary" is defined as an employee, spouse, or child who was a beneficiary under the plan on the day before the qualifying event. This appears to exclude domestic partners from premium assistance eligibility. That said, COBRA premium assistance does not apply to the portion of the premium related to continuation coverage for individuals who are not qualified beneficiaries. This means that premiums paid for a spouse or dependent who was not a beneficiary under the plan before the qualifying event are not eligible for premium assistance (since such spouse or dependent is not a qualified beneficiary). In other words, a spouse (or dependent) added to the plan at open enrollment by COBRA qualified beneficiary is not eligible for premium assistance. Note, however that a new child added during the continuation coverage period following birth or adoption is considered a QB and would be treated as an AEI.

Q4: Does retiree coverage impact eligibility for the COBRA subsidy? ^

A4: Whether retiree health coverage will impact eligibility for premium assistance depends on whether the retiree health coverage is offered under the same group health plan as COBRA continuation coverage or under a separate group health plan. An individual is **not** eligible for premium assistance if offered retiree health coverage that is not COBRA continuation coverage and is coverage under a separate group health plan than the plan under which the COBRA continuation coverage is offered. However, if the retiree health coverage is offered under the same group health plan, the offer of said coverage generally does not impact eligibility for premium assistance.

Additionally, IRS Notice 2021-31 clarifies that if the retiree health coverage is offered under the same group health plan as the coverage made available to similarly situated active employees, the retiree coverage may still be eligible for the COBRA premium assistance as long as the amount charged to a retiree does not exceed the maximum amount allowed under Federal COBRA.

Q5: Does former eligibility for other group health plan coverage impact eligibility for the COBRA subsidy? ^

A5: Eligibility for other group coverage impacts eligibility for the premium assistance only if the individual is actually permitted to enroll in that other coverage mid-year. If the individual is locked out of enrollment mid-year due to the lack of a qualifying event, the eligibility for the other coverage is disregarded and the individual is eligible for the premium assistance (assuming all other requirements are met).

It is important to note, however, that an individual who lost eligibility for an employer's plan within the last year due to termination of employment or reduction of hours may still have a HIPAA Special Enrollment Right (due to the extension of certain timeframes) to enroll in their own or a spouse's group health plan, and would therefore be ineligible for premium assistance.

Q6: If an AEI who initially elected COBRA continuation coverage with premium assistance for dental-only or vision-only coverage subsequently becomes eligible to enroll in other disqualifying group health plan coverage or Medicare that does not provide dental or vision benefits, does the individual cease to be eligible for COBRA premium assistance? ^

A6: Yes. IRS Notice 2021-46 clarifies that eligibility for COBRA premium assistance ends when the AEI becomes eligible for coverage under any other disqualifying group health plan or Medicare, even if the other coverage does not include all the benefits provided by the previously elected COBRA continuation coverage.

Q7: What circumstances are considered "involuntary termination" for purposes of eligibility for the COBRA subsidy? ^

A7: To determine whether termination is involuntary, a facts and circumstances test is used.

Generally, involuntary termination means termination due to the action (or inaction) of the employer where the employee was willing and able to continue performing services. IRS Notice 2021-31 provides an example that explains that termination is involuntary, even if it is designated as voluntary, when the facts and circumstances indicate that the individual was willing and able to continue working but for the voluntary termination, the employer would have terminated the individual (and the individual was aware that the employee would be terminated).

Further, guidance has clarified that:

- Absence from work due to disability or illness is not an involuntary termination unless the employer has taken action to terminate employment. (However, it could be a reduction in hours that will give rise to premium assistance if the person loses coverage as a result of the leave.)
- Involuntary termination includes when an individual voluntarily terminates employment due to being offered a severance agreement in light of an imminent termination.
- Generally, retirement is a voluntary termination except for when the facts and circumstances indicate that, absent retirement, the employer would have terminated the individual's employment and the individual was aware that they would be terminated and was willing and able to continue working.
- An individual who voluntarily terminates employment to care for a family member for reasons related to COVID-19 is not eligible.
- Voluntary termination due to general concerns about workplace safety, a health condition of the employee or a family member, or other similar issues, generally will not be involuntary termination. This is because the actual reason for the termination is unrelated to the action or inaction of the employer.
- Employees who voluntarily terminated employment because they do not have childcare would not be AEIs; but if they remain employed, take leave for that reason, and lose coverage this would be considered a reduction in hours that would make them an AEI.
- Involuntary termination includes a situation where an employee voluntarily terminates employment because of the employer's material change to the employment relationship such as a reduction in hours or change in geographic location of worksite.
- An employer's decision not to renew an employee's contract is an involuntary termination if the employee is willing and able to continue the employment relationship. However, if all parties always understood that the contract was for specified services over a set term and would not be extended, the completion of the contract without it being renewed is not an involuntary termination.

Q8: How do AEIs apply for the COBRA subsidy? ^

A8: AEIs should not be charged the full premium when enrolled in COBRA during the COBRA subsidy coverage period (April 1, 2021, through September 30, 2021). QBs should follow the process as outlined in the notices they receive. The Model Notices explain that the QBs must submit a "Request for Treatment as an Assistance Eligible Individual" along with their Election Form (or separately, if they are currently enrolled in COBRA coverage).

Then, the COBRA subsidy should be available to themautomatically (they should receive a notice stating such, as described further below). For reference, model notices are available here: https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy. (The "Request for Treatment as an Assistance Eligible Individual" form is included in the Summary of COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021 resource).

An employer may require individuals to provide certification or attestation of their eligibility before treating them as AEIs, but it is not required. However, in order to claim the payroll tax credit, the employer must retain such certification or attestation, or other documents that show the individual experienced a reduction of hours or were involuntarily terminated.

Practically speaking, COBRA administrators will not know whether reduction of hours or employer-initiated termination is the reason for COBRA eligibility. That said, employers should coordinate with their COBRA administrators to determine who is eligible for the ARPA COBRA subsidy. Employers may need to review COBRA triggering events back to October 2019 to determine ARPA COBRA subsidy eligible individuals.

Q9: What is the special COBRA election period? ^

A9: The ARPA provides an additional COBRA election period for certain qualified beneficiaries. This includes those individuals who would qualify for the premium assistance and are either (1) still within their 18-month coverage period but declined COBRA coverage, or (2) dropped COBRA coverage before the maximum coverage period expired. This special COBRA election period does not apply to QBs who are only eligible for state continuation.

Q10: How long is the special COBRA election period? ^

A10: This election period starts on the date the QB receives a new COBRA election notice and lasts for 60 days. However, if an election is made within the new 60-day election period, continuation coverage may be retroactive back to April 1, 2021, if elected by the individual.

Q11: Does the special COBRA election period extend the maximum COBRA coverage period? ^

A11: No. The new election period does not extend the maximum coverage period for any qualified beneficiary who elects COBRA coverage under these circumstances. For example, if an individual only had one month left in their coverage period as of April 1, 2021 – as calculated from the date of the loss of coverage and qualifying event, such as employment termination – then they would not gain additional months of coverage if they elected COBRA coverage during this new election period (and would only receive one month of the COBRA subsidy, if eligible).

Q12: If a qualified beneficiary elects COBRA during the special COBRA election period, is coverage retroactive back to initial eligibility (or the date COBRA coverage was dropped)? ^

A12: No. An election during the new election period is prospective in nature. This means that coverage is not retroactive back to initial eligibility (or date COBRA coverage was dropped), and the individual is only entitled to continuation coverage prospectively for the remainder of their COBRA maximum duration period. However, if an election is made within the special 60-day election period, continuation coverage may be retroactive back to April 1, 2021. If an AEI utilizes the special election period to re-enroll in COBRA coverage, it appears that they may be waiving their right to later enroll in retroactive coverage prior to April 1, 2021 under the COVID-19 related deadline suspension.

Q13: If a qualified beneficiary pays for COBRA in error during the period from April 1, 2021, through September 30, 2021, will they be reimbursed? ^

A13: Yes. Any eligible individual that is already on COBRA due to reduction of hours or involuntary termination will be due a refund if they accidentally pay for coverage in April – September. It is unclear who would refund the qualified beneficiary, but it is likely that the entity that obtains the tax credit for the subsidized payment will be responsible for the refund.

Q14: Does the ARPA allow AEIs to change coverage to another plan option? ^

A14: Yes. Employers have the option of allowing AEIs to change coverage to other plan options. Normally, QBs must be covered by the same plan that covered them on the day before the date of the qualifying event (although they can change coverage if an open enrollment period occurs during their period of COBRA coverage). The ARPA provides employers with the option to allow AEIs to choose coverage that costs the same or less than the coverage they already have. However, if the employer allows it, then it must provide AEIs with notice and give them 90 days from the date of the notice to make a change.

Q15: Is the expiration of the COBRA premium assistance a qualifying event to permit an individual to enroll in grouphealth plan coverage or an individual plan in the health insurance exchange? ^

A15: Without further guidance, the end of a COBRA subsidy is not an IRS-permitted qualifying event to enroll in group health plan coverage. However, it will qualify them for a Special Enrollment Period in the exchange.

Q16: How are the COBRA subsidy credits administered? ^

A16: The premium subsidy is paid through a refundable FICA tax credit to the employer, carrier or plan, as applicable (a "premium payee"). The credit is claimed by the employer for fully insured plans that are subject to federal COBRA and all self-insured plans; the carrier for fully insured plans that are not subject to federal COBRA (i.e., state continuation only); and the plan for a multiemployer plan.

IRS Notice 2021-46 clarifies that in the situation where state continuation and federal COBRA run concurrently and the state continuation program continues to run after the federal COBRA coverage period is exhausted, the entity that can claim the premium subsidy credit is the common law employer (even if the state-mandated continuation coverage would require the AEI to pay the premiums directly to the insurer after the period of federal COBRA ends).

In addition, IRS Notice 2021-46 explains that in the instance of a business reorganization (e.g., acquisition) where the seller remains obligated to make available COBRA continuation coverage to the individuals who became qualified beneficiaries because of the reorganization, the seller that maintains the group health plan is the entity entitled to claim the COBRA premium assistance credit – even if the buyer becomes the common law employer after the sale (if the buyer is not obligated to make available COBRA continuation coverage to AEIs).

Further, the process is similar to the FFCRA tax credit process — through the premium payee's quarterly tax return. A premium payee claims the credit by reporting the credit and the number of AEIs receiving the COBRA premium assistance on the designated lines of Form 941, Employer's Quarterly Federal Tax Return. In anticipation of the credit to which it is entitled, the premium payee may reduce the deposits of federal employment taxes (including withheld taxes) that it would otherwise deposit, up to the amount of the anticipated credit. Then, if the anticipated credit exceeds the federal employment tax deposit amount, the payee would request an advance of that amount by filing Form 7200, Advance Payment of Employer Credits Due to COVID-19. IRS Notice 2021-31 includes examples, including how to claim the premium assistance credit if the payee has no employment tax liability.

Q17: What is the amount that may be claimed as a payroll tax credit? ^

A17: The amount of the credit that may be claimed is equal to the premium that would have been charged to the AEI absent the premium assistance. Thus, administrative fees (up to the permissible 2% the cost of coverage) will be recoverable through tax credits.

If an employer agreed to fully subsidize a former employee's COBRA premiums as part of a severance agreement, the employer will likely not be able to claim that amount as a credit. This is because absent the ARPA premium assistance, the AEI still would have paid no premium. If the employer's subsidy is a partial payment of the premium, only the premium that would have been charged to the AEI may be claimed by the employer as a payroll tax credit.

Q18: Are employers required to obtain certification or attestation of individuals' eligibility before treating them as an AEI? ^

A18: No. An employer *may* require individuals to provide certification or attestation of their eligibility before treating them as an AEI, but it is not required. However, in order to claim the payroll tax credit, the employer must retain such certification or attestation, or other documentation that shows that the individual experiences a reduction in hours or was involuntarily terminated. It may also be helpful for the employer to retain employment records to supplement the attestation or certification.

Q19: Are there employer notice requirements associated with the COBRA subsidies, special election period and opportunity to change plan options? ^

A19: Yes. Employers must provide notice of the premium assistance and (if the employer chooses) the option to change coverage to those QBs who are potentially affected by these changes. QBs potentially affected by these changes are those who qualify for the premium assistance (even if they are already covered by COBRA) and those who qualify for the special election period, as described above. Practically speaking, COBRA administrators will not know whether reduction of hours or employer-initiated termination is the reason for COBRA eligibility. That said, employers should coordinate with their COBRA administrators to determine who is eligible for theARPA COBRA subsidy. Employers may need to review COBRA triggering events back to October 2019 to determineARPA COBRA subsidy eligible individuals.

Employers must provide this notice by May 31, 2021. (As a practical matter, May 31, 2021 is Memorial Day. As such, employers should plan to send the notice by May 28, 2021, the last business day prior to the deadline). Employers can either provide new notices or supplement current notices by including the new information in a separate document with the current notice. The DOL has provided model notices that include:

- The forms that are necessary for establishing eligibility for the premium assistance described above.
- The name, address and telephone number necessary to contact the plan administrator and any other individual maintaining relevant information in connection with such premium assistance.
- A description of the special election period described above.
- A description of the obligation of the QB to let the plan know when they have become eligible for coverage under another group medial plan or become eligible for Medicare benefits and thepenalty for failing to do so.
- A description, displayed in a prominent manner, of the QB's right to premium assistance and any conditions on entitlement to the assistance.
- A description of the option of the QB to enroll in different coverage (if the employer choosesthis option).

In addition, employers are required to provide notice of the expiration of the premium assistance to those AEIs who are benefiting from the ARPA COBRA subsidy. Employers must provide this notice between 15 and45 days before the date the assistance ends. The notice must also state that the qualified beneficiary will continue to becovered by C[illegible]r the remainder of the qualified beneficiary's coverage period (but without the subsidy) or by other group health plan coverage, if applicable.

Note that if the qualified beneficiary notified the plan that they had become eligible for another group medical plan or Medicare benefits, then the employer is not required to provide this notice. The DOL has produced a model notice for the expiration of the premium subsidy.

For reference, model notices are available here: https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy.

Q20: Who is required to provide the employer notices? ^

A20: The notices are an obligation of the plan administrator, which is typically the employer plan sponsor. The administrator should be identified in the plan's summary plan document (SPD). The employer may contract with another party, such as a COBRA vendor, to perform the duty on their behalf, but the employer is ultimately responsible for compliance. Employers who utilize a COBRA vendor should confirm if these COBRA notices will be sent by the COBRA vendor. Failure to comply with the notice requirement would be considered a COBRA failure subject to penalty.

Q21: Can the notices be distributed via email? ^

A21: Generally, no. The default is to send COBRA notices via first-class mail to the last known address of the qualified beneficiaries. Practically speaking, sending COBRA-related notices via email cannot be administered unless the former employee provided a personal email address (or the QB is still employed with a work email address but receiving COBRA due to a reduction of hours). In addition, since dependents will also need to receive these notices, sending notices to them via email may not be possible.

Q22: Do participants have any notice responsibility? ^

A22: Yes. If a participant becomes eligible for other group health plan coverage or Medicare, they are required to notify the plan accordingly. If such a participant fails to notify the plan, they could be subject to monetary penalties (however, no penalty will be assessed if the failure is due to reasonable cause and not willful neglect).

FFCRA: Emergency Paid Sick Leave and Expanded FMLA

Q23: Is the Emergency Paid Sick Leave and expanded FMLA provided initially by the FFCRA extended? ^

A23: Yes. Employers can opt to extend emergency paid sick leave (EPSL) or expanded FMLA to its employees through September 30, 2021, an extension of the March 31, 2021, deadline provided by the Consolidated Appropriations Act (CAA). If employers choose to do this, then they can receive payroll tax credits to offset the costs of providing that leave.

Q24: Does the ARPA expand eligibility for EPSL or expanded FMLA? ^

A24: Yes. As a reminder, FFCRA required employers to provide up to 80 hours of paid sick time to employees who are unable to work (including telework) due to one of the following reasons:

- Subject to a federal, state or local quarantine or isolation order related to COVID-19
- Advised by a healthcare provider to self-quarantine due to concerns related to COVID-19
- Experiencing symptoms of COVID-19 and seeking a medical diagnosis
- Providing care to an individual who is subject to a federal, state or local quarantine order related to COVID-19 or who has been advised by a healthcare provider to self-quarantine due to concerns related to COVID-19
- Caring for a child if the school or place of care of the child has been closed, or the childcare provider of such child is unavailable, due to COVID-19 precautions
- Experiencing any other substantially similar conditions specified by HHS (in consultation with the DOL and Treasury)

Per the ARPA, reasons for granting emergency paid sick leave now also include time taken when "the employee is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID-19 and such employee has been exposed to COVID-19 or the employee's employer has requested such test or diagnosis, or the employee is obtaining immunization related to COVID–19 or recovering from any injury, disability, illness, or condition related to such immunization." In addition, reasons for taking expanded FMLA now include *any* reason for leave allowed under EPSL, including the new reason.

Q25: Does the ARPA provide additional benefits under EPSL or expanded FMLA? ^

A25: Yes. The ARPA appears to grant an additional 80 hours of sick leave under EPSL effective after the first quarter of 2021. In addition, the first ten days of expanded FMLA appear to no longer be unpaid and the maximum leave provided under this provision is increased from $10,000 in the aggregate to $12,000. That said, if an employer opts to extend EPSL or expanded FMLA, then employees appear to be entitled to these additional benefits.

Dependent Care FSA (DCAP): Increased Exclusion

Q26: Does the ARPA increase a participant's DCAP reimbursement amount? ^

A26: Yes, but only for the calendar year 2021. A participant's DCAP reimbursement amount in a calendar year is generally limited to $5,000 if the employee is married and filing a joint return or if the employee is a single parent (or $2,500 if the employee is married filing separately). However, the ARPA provides a temporary increase for this exclusion to $10,500 (or $5,250 if the employee is married filing separately) for taxable years beginning after December 31, 2020, and before January 1, 2022. Accordingly, amounts over $5,000 that are reimbursed through a DCAP in the 2021 taxable year will not be treated as taxable income for participants.

Q27: Can participants contribute up to $10,500 to their DCAP due to the increase in DCAP exclusion? ^

A27: Yes. An employer can permit employees to increase their 2021 DCAP electionup to $10,500. Note that the plan must be amended to permit the increased contribution amount. The ARPA provides that retroactive plan amendments are allowed if the plan is amended no later than the last day of the plan year in which the amendment is effective and the plan is operated consistent with the terms of the amendment.

Q28: If an employer chooses to increase the DCAP contribution limit to $10,500 and also permits a carryover or grace period from the 2020 plan year, are amounts used over $10,500 in the 2021 calendar year subject to taxation? ^

A28: No. The ARPA temporarily increases the excludable amount for DCAPs to $10,500 (as described above) for calendar year 2021 only. However, amounts from a carryover or grace period from the 2020 plan year are disregarded for purposes of application to the limits for the 2021 taxable year.

IRS Notice 2021-26 clarifies that DCAP benefits that would have been excluded from income if used during the taxable year ending in 2020 (or 2021), remain eligible for exclusion from an individual's gross income and are disregarded for purposes of application of the limits for the subsequent taxable years of the individual when they are carried over from a plan year ending in 2020 (or 2021) or permitted to be used pursuant to an extended claims period.

For example, an employee has $1,000 in unused DCAP contributions for 2020. His employer chose to adopt a carryover feature for the DCAP permitting the total unused account balance to be carried over into the following plan year. His employer also chose to increase the DCAP contribution amount for 2021 to $10,500 (as described in Q22). For 2021, the employee elects $10,500 in DCAP salary reductions. During 2021, the employee incurs and is reimbursed for $11,500 in DCAP expenses. When the employee files his tax return, he is able to exclude from taxable income $11,500 in DCAP expenses. The $11,500 is excluded from the employee's gross income and wages because $10,500 is excluded as 2021 benefits and the remaining $1,000 is attributable to the 2020 carryover.