



# IRS Q&As explain ARPA's COBRA premium subsidy program

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## Summary

[Notices 2021-31](#) and [2021-46](#) explain how employers should have administered the temporary COBRA subsidy created by the American Rescue Plan Act (ARPA) ([Pub. L. No. 117-2](#)). For assistance-eligible individuals (AEIs), ARPA provided 100% subsidies of COBRA premiums for coverage periods from April 1, 2021, through Sept. 30, 2021. Employers typically provided the COBRA premium assistance and sought reimbursement by claiming a tax credit on their quarterly employment taxes. For faster reimbursement, employers could reduce their employment tax deposits or request an advance of the credit. IRS Notice 2021-31 offers Q&A guidance and numerous examples to help employers work through complex issues related to the COBRA premium assistance and the tax credit. Topics covered include who was eligible for the COBRA subsidy, what coverage could be subsidized, how employers should have administered the second COBRA election opportunity required by ARPA, when the COBRA subsidy began and ended, how the deadline extensions under the “outbreak period” relief interact with the premium assistance, who could claim the credit and how, and what substantiation and recordkeeping were required. This article describes the guidance on those topics and more. *Updates to this article reflect guidance in IRS Notice 2021-46 and [Notice 2021-58](#). Unless otherwise noted, all references to Q&A numbers refer to IRS Notice 2021-31.*

## Who was eligible for the COBRA subsidy?

Premium assistance under ARPA was limited to COBRA premiums for AEIs. To qualify as an AEI, a person had to be a qualified beneficiary and meet all of the following requirements [Q&A 1]:

- Became eligible to elect COBRA coverage because of a reduction in hours or an involuntary employment termination (other than due to gross misconduct)
- Was eligible for COBRA coverage (or state continuation coverage) for some or all of the period from April 1 through Sept. 30, 2021
- Elected COBRA coverage

To receive the COBRA subsidy, the person also could not be eligible for other disqualifying group health plan coverage or Medicare.

## Who could be a qualified beneficiary?

COBRA qualified beneficiaries include employees, their spouses and dependent children who meet two conditions:

- Were covered by the group health plan on the day before the qualifying event triggering loss of coverage — in this case, the employee's reduction of hours or involuntary termination
- Lost eligibility for the coverage due to the reduction of hours or involuntary termination of employment

Children born to or adopted by employees on COBRA coverage are also treated as qualified beneficiaries.

No other individuals, such as domestic partners, are qualified beneficiaries — even if they are covered dependents under an employer-sponsored plan, and even if the employer offers continued coverage similar to COBRA (often referred to as “COBRA-like” coverage). The ARPA COBRA subsidy didn't apply to their coverage. Other qualified beneficiaries receiving COBRA coverage were not entitled to the subsidy because the original qualifying event did not involve a reduction of hours or involuntary termination of employment. [Q&As 1, 2 and 19]

The chart below lists who can be a COBRA qualified beneficiary.

Family member	Qualified beneficiary?	Comments
<b>Employee</b>	Yes	
<b>Spouse, married before qualifying event</b>	Yes	
<b>Domestic partner</b>	No	Not a COBRA qualified beneficiary, even if eligible to continue coverage under a plan's terms or a state law
<b>Employee's child</b>	Yes	If covered by the plan immediately before the qualifying event or born to or adopted by the employee while on COBRA coverage
<b>Domestic partner's child</b>	Maybe	If child is the employee's dependent child under plan terms
<b>Other family members (parents, grandchildren)</b>	No	Not a COBRA qualified beneficiary, even if eligible to continue coverage under a plan's terms
<b>Spouse, married after qualifying event</b>	No	Can be added to an employee's COBRA coverage, but not a qualified beneficiary
<b>Common-law spouse</b>	Yes	If established in a jurisdiction that recognizes common-law marriage before the qualifying event

## What is a reduction in hours or involuntary termination of employment?

For purposes of the COBRA subsidy, a reduction in hours included both involuntary and voluntary decreases in hours worked. [Q&A 21] In contrast, the COBRA subsidy was available only for "involuntary" terminations of employment. IRS defines involuntary termination as:

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. [Q&A 24]

The IRS underscores that whether a termination was involuntary depended on each situation's facts and circumstances. For example, an employer may have designated a termination as voluntary, but the termination would have been involuntary for COBRA subsidy purposes if facts and circumstances showed that the employee was willing and able to continue to work, but quit because the employee knew of the employer's intent to terminate. [Q&A 24]

The next chart lists events addressed in IRS Notice 2021-31 and indicates whether each event was a reduction in hours or an involuntary termination. Note that a reduction in hours or an involuntary termination must result in a loss of eligibility for health coverage to be a COBRA qualifying event.

<b>Examples in Q&amp;As</b>	<b>Reduction in hours or involuntary termination?</b>
<b>Termination for cause</b>	Yes, an involuntary termination [Q&A 27]
<b>Termination for gross misconduct</b>	No, not a COBRA qualifying event [Q&A 2]
<b>Reduction in hours initiated by the employee</b>	Yes, a reduction in hours [Q&A 21]
<b>Employee's death</b>	No, neither a reduction in hours nor an involuntary termination [Q&A 33]
<b>Retirement</b>	Generally no, but could be an involuntary termination if the employee expected to face termination absent the retirement and was willing and able to continue working [Q&A 26]
<b>Furlough</b>	Yes, a reduction in hours [Q&A 22]
<b>Employee quits in response to an involuntary material reduction in hours.</b>	Yes, an involuntary termination [Q&A 32]
<b>Strike initiated by employees (or their representatives) or a lockout initiated by the employer</b>	Yes, a reduction in hours as long as the employer and employee intend to maintain the employment relationship [Q&A 23]
<b>Employer terminates an employee absent from work due to illness or disability.</b>	Yes, an involuntary termination [Q&A 25]
<b>Employee absent from work due to illness or disability, but employer takes no action to terminate employee</b>	Yes, a reduction in hours [Q&A 25]
<b>Resignation because of material geographic change</b>	Yes, an involuntary termination [Q&A 28]
<b>Window program*</b>	Yes, an involuntary termination [Q&A 29]
<b>Employment contract not renewed</b>	Generally yes, unless the parties understood that the contract was for a set term and would not be renewed [Q&A 34]
<b>Employee's divorce</b>	No, neither a reduction in hours nor an involuntary termination [Q&A 8]
<b>Dependent aging out of eligibility</b>	No, neither a reduction in hours nor an involuntary termination [Q&A 8]
<b>Employee quits due to concerns about workplace safety.</b>	No, unless employee was "constructively discharged" because of employer's action/inaction resulting in a negative change [Q&A 30]

Examples in Q&As	Reduction in hours or involuntary termination?
<b>Employee quits because of loss of childcare or in-person school.</b>	No, neither a reduction in hours or involuntary termination, but could be a reduction in hours if the employee actually took temporary leave and both the employee and employer intended for the employee to return to work. [Q&A 31]
<b>Employee reduces hours (to zero or some other amount) because of loss of childcare or in-person school.</b>	Yes, a reduction in hours if employee took temporary leave and both the employee and employer intend for the employee to return to work [Q&A 31]

\* Notice 2021-31 refers to [Treas. Reg. Section 31.3121\(v\)\(2\)-1\(b\)\(4\)\(v\)](#) for window plan requirements.

**When was the subsidy available due to a furlough?** Many employers furloughed employees during the COVID-19 pandemic, so the IRS includes several helpful Q&As addressing whether furloughed employees were subsidy-eligible. The IRS uses “furlough” to mean a temporary loss of employment or a reduction in hours after which both the employer and employee expected that the employee would return to work. Even though furloughs are typically reductions in hours, whether the COBRA subsidy was available to a particular furloughed employee depended on the circumstances, as the following chart shows. [Q&As 22 and 32]

Impact of furlough on employees' group health plan coverage	Potentially subsidy-eligible?	Comments
<b>Group health plan coverage ends during furlough.</b>	Yes	Furloughed employees had a reduction in hours resulting in a loss of group health plan coverage.
<b>Employees remain eligible during furlough but are charged a higher amount than active employees.</b>	Yes	Furloughed employees had a reduction in hours resulting in loss of group health plan coverage.
<b>Employees remain eligible during furlough and are charged the same (or less than) active employees.</b>	No	No COBRA qualifying event occurred since furloughed employees did not lose coverage.
<b>Employees quit as a result of a furlough.</b>	Yes	Quitting in response to reduced hours is considered an involuntary termination, which results in loss of group health plan coverage.

The last row of the chart may surprise some employers that considered employees who quit because of a furlough to have terminated voluntarily. Such employers had to identify those employees and offer them (and their spouses and dependent children) subsidized COBRA coverage.

**Involuntary termination or reduction in hours had to be the first COBRA qualifying event.** Some qualified beneficiaries have multiple qualifying events. The IRS clarifies that the COBRA subsidy was only available to qualified beneficiaries for whom an involuntary termination or a reduction in hours was their first qualifying event. [Q&A 14] For example, if a spouse initially elected COBRA due to a divorce, the employee's later involuntary termination would not allow the spouse to get the COBRA subsidy.

**Multiple involuntary terminations/reduction in hours.** The same person could be an AEI more than once if the person lost coverage due to multiple involuntary terminations or reductions in hours. [Q&A 3]

*Example.* Mark was involuntarily terminated on March 31, 2021. He elected COBRA and became an AEI on April 1 (the date he lost coverage). On July 1, Mark's COBRA subsidy ended when he became eligible for disqualifying coverage (his spouse's group health plan, in which Mark enrolls). Mark's spouse was involuntarily terminated on July 31, and Mark became an AEI again. Mark was eligible for subsidized COBRA under his spouse's plan beginning Aug. 1.

**Subsidy available for certain extended coverage after an involuntary termination or a reduction in hours.** An individual who experienced a reduction in hours or an involuntary termination as a *first* COBRA qualifying event and elected COBRA may have been eligible for the ARPA subsidy during periods of extended coverage. Q&A 17 explains that those individuals may have been eligible for the COBRA subsidy for any period of extended COBRA coverage between April 1 and Sept. 30, 2021, due to any of the following:

- A disability
- A second qualifying event
- An extension under a state mini-COBRA law, such as California or New York's continuation coverage laws for insured plans

*Example.* Ann was involuntarily terminated on June 1, 2019. She elected self-only COBRA coverage in her employer's group health plan, which is an insured plan issued in California. Under California law, the insurer must offer 36 months of continued coverage, so Ann could continue her COBRA coverage until May 31, 2022. If Ann was otherwise subsidy-eligible, she should not have been charged premiums for coverage periods between April 1 and Sept. 30, 2021.

Notice 2021-46 [Q&A 1] clarifies that the subsidy may have been available even if the plan wasn't notified of the extension before April 1, 2021.

*Example.* After involuntary termination, Ted elected COBRA coverage effective Oct. 1, 2019. His 18 months of COBRA coverage expired March 31, 2021. The Social Security Administration issued a disability determination on March 1, 2020, finding Ted disabled as of Nov. 1, 2019. Although Ted didn't notify the plan about this determination until April 10, 2021, if he was otherwise subsidy-eligible, he could have elected subsidized COBRA coverage beginning April 1, 2021. The [outbreak period relief](#) extended the 60-day deadline to inform the plan about the disability determination to April 30, 2021.



IRS guidance does not address an individual who *waived* federal COBRA coverage after an involuntary termination or a reduction in hours or who elected federal COBRA coverage but dropped it prior to its expiration at some point before April 1, 2021. Would a second enrollment opportunity have been available to anyone who experienced a disability or a second COBRA qualifying event that would have extended COBRA coverage into the ARPA subsidy period? (This was not an issue for extensions under state mini-COBRA laws, which — at least so far — do not require a second enrollment opportunity.)

*Example.* Ellen was involuntarily terminated on May 1, 2018. Her spouse, Ann, was covered on Ellen's plan prior to the termination and waived COBRA coverage. Ellen and Ann divorced in May 2019. If Ann had elected COBRA coverage when first eligible, she could have continued it until May 1, 2021 — 36 months from Ellen's termination date — due to the divorce, a second qualifying event. The guidance does not address whether Ann had a second enrollment opportunity to enroll in subsidized coverage from April 1 through April 30, 2021.

Nor does the guidance tackle whether Q&A 17 expands employers' notice obligations. Whether employers had to notify *all* employees who *might* be eligible for extended federal COBRA coverage that overlaps with the COBRA subsidy period is unclear.

## How did other group health coverage affect subsidy eligibility?

COBRA coverage terminates when an individual actually becomes covered by other group health plan coverage or Medicare — mere eligibility for other group health plan coverage isn't enough. In contrast, the COBRA subsidy ended once an AEI became *eligible* for other disqualifying group health plan coverage or Medicare. Notice 2021-31 explains that eligibility for other group health plan coverage means an individual *could enroll* in health coverage through another group health plan (providing more than an excepted benefit) or Medicare. [Q&As 9–11] Thus, if an AEI could be covered under another group health plan that has a two-month waiting period, the COBRA subsidy would have ended after the waiting period for non-COBRA coverage closed, even if the individual didn't enroll.

The guidance clarifies that eligibility for other health coverage was not disqualifying unless the individual could enroll in the coverage after April 1, 2021. Health coverage with an enrollment window that closed before that date is not disqualifying. For example, an AEI was not disqualified by a spouse's group health plan if that plan's open enrollment window closed before April 1, 2021.

However, Notice 2021-31 illustrates that due to the outbreak period relief, the enrollment window remains open for one year in some circumstances, which may have disqualified many otherwise-eligible AEIs from the COBRA subsidy.

*Example.* Mary was involuntarily terminated and received a COBRA notice on Oct. 1, 2020. Under the Health Insurance Portability and Accountability Act's special enrollment rules, her spouse's medical plan must permit Mary to enroll within 30 days of a loss of coverage, which would ordinarily be Oct. 31, 2020. Under the outbreak period relief, the spouse's medical plan must disregard the outbreak period for up to one year (or 30 days after the outbreak period ends if that occurs first) in calculating the 30-day special enrollment window. Since the outbreak period is ongoing, Mary had until Oct. 31, 2021, to enroll in her spouse's plan. Because Mary was eligible to enroll in her spouse's

plan on April 1, 2021, she was not eligible for the COBRA subsidy to pay for her former employer's coverage.

It isn't clear how AEIs would have known about these rules when reporting disqualifying coverage to the plan. The model notices explained that waiting periods were not disqualifying, but did not instruct AEIs to investigate whether they could actually enroll in other coverage. Nor did the notices explain that the outbreak period relief may have extended certain enrollment time frames. Nonetheless, unless the employer *knew* that an AEI's attestation about disqualifying coverage was incorrect, employers could rely upon the AEI's self-certification.

### What coverage was disqualifying?

The chart below summarizes whether eligibility for coverage under various plans disqualified an AEI for the COBRA subsidy.

Type of plan	Ends subsidy eligibility?	Comments
<b>Major medical</b>	Yes	Includes a spouse's plan or the plan of a new employer
<b>Medicare</b>	Yes	[Q&A 12]
<b>Health flexible spending arrangement (FSA)</b>	No	Excepted benefit
<b>Health savings account (HSA)</b>	No	Not a group health plan
<b>Health reimbursement arrangement (HRA) integrated with a group health plan</b>	Yes	Unless HRA qualifies as an excepted-benefit health FSA [Q&A 38]
<b>Excepted benefits</b>	No	Excepted benefits include onsite clinics, as well as most dental, vision and employee assistance programs (EAPs).
<b>Excepted-benefit HRA</b>	No, but associated coverage may cut off the subsidy	Employer must offer traditional group health coverage to an employee offered an excepted-benefit HRA.
<b>Another group health plan's COBRA coverage</b>	No	[Q&A 11]
<b>Individual coverage on public exchange</b>	No	Individual won't be eligible for premium tax credit to help pay for public exchange coverage during any month that individual has COBRA coverage (whether subsidized or not). [Q&A 13]
<b>Retiree coverage</b>	Maybe	Only if offered under a different plan than active coverage [Q&A 18]



Under ARPA, eligibility for excepted benefits did not end the COBRA subsidy. The Q&As do not address what happened if an AEI receiving the COBRA subsidy for an excepted benefit like dental coverage became eligible for new dental coverage during the subsidy period. It appears that the COBRA subsidy could continue. The IRS has confirmed, however, that an AEI would lose the COBRA subsidy for dental or vision coverage on becoming eligible for disqualifying coverage like Medicare or a spouse's major medical coverage — even if the disqualifying coverage didn't cover dental or vision care. [Notice 2021-46, Q&A 2]

## What health coverage could be subsidized?

Under ARPA, the subsidy was available for any group health plan coverage continued under COBRA, except for health FSAs. The subsidy was not available for any other continued coverage not required by federal COBRA or a state mini-COBRA law that the employer voluntarily chooses to provide. [Q&A 15]

The following chart lists the different types of coverage addressed in IRS Notice 2021-31, and whether they qualified for ARPA's COBRA subsidy.

Type of plan	Subsidy eligible?	Comments
<b>Medical</b>	Yes	
<b>Dental</b>	Yes	[Q&A 35]
<b>Vision</b>	Yes	[Q&A 35]
<b>Health FSA</b>	No	[Q&A 35]
<b>HRA</b>	Yes	Could be subsidized even if HRA qualifies as a health FSA [Q&A 37]
<b>Individual-coverage HRA (ICHRA) integrated with individual health insurance</b>	Yes	Subsidy for the ICHRA only, not for the individual health insurance [Q&A 39]
<b>ICHRA integrated with Medicare</b>	No	Medicare enrollment ended the COBRA subsidy [Q&A 39]
<b>Qualified small-employer HRA (QSEHRA)</b>	No	Not a group health plan [Q&A 40]
<b>Group life insurance, disability insurance, etc.</b>	No	Not group health plans subject to COBRA [Q&A 35]
<b>Retiree health coverage</b>	Maybe	Yes, if the retiree health coverage was the same group health plan available to similarly situated active employees (even if the cost is higher) [Q&A 36]
<b>State or local government health plan</b>	Yes	[Q&A 73]

Type of plan	Subsidy eligible?	Comments
Self-insured church health plans	No	[Q&A 15]
Small employer health plans not subject to federal COBRA or state mini-COBRA	No	[Q&A 15]
Federal Employees Health Benefits Program	No	[Q&A 16]

Although not addressed in the Q&As, other group health plans sponsored by employers, such as EAPs, presumably were subsidy-eligible.

**Changing COBRA coverage.** The ARPA COBRA subsidy covered the cost of the benefit option in which the AEI was enrolled prior to the qualifying event. ARPA permitted — but did not require — an employer to let an AEI enroll in less expensive coverage instead. The premiums for the lower-cost coverage were subsidy-eligible.

However, if an employer allowed an AEI to elect a more expensive coverage option, *none* of the premium for the more expensive option was subsidy-eligible. [Q&A 41] IRS Notice 2021-31 outlines a few exceptions to this rule:

- If the employer no longer offered the health plan in which the AEI was enrolled prior to the involuntary termination or the reduction in hours, the AEI electing COBRA as part of a second enrollment opportunity should have been offered the option most similar to the prior plan, even if the premium was higher. The new coverage was subsidy-eligible. [Q&A 42].
- If an AEI elected different COBRA coverage during open enrollment, the premium subsidy would apply to the new coverage, even if the cost was higher. [Q&A 69]

## How should employers have administered the second COBRA election opportunity?

ARPA required a special 60-day COBRA election period for certain individuals who had a qualifying event before April 1, 2021. This second enrollment opportunity was available to individuals who were not enrolled in COBRA coverage as of April 1, 2021, but would have been AEIs had they elected and remained enrolled in COBRA. [Q&A 51]

**Second election opportunity extended to all potential AEIs not enrolled in COBRA on April 1, 2021.** If one member of a family had COBRA coverage as of April 1, 2021, the other family members who did not elect COBRA may have been entitled to a second election opportunity.

*Example.* Cindy, her husband Mark and their two children lost health coverage because of Cindy's involuntary termination on Jan. 15, 2021. Cindy elected self-only coverage for herself. Although Cindy was not entitled to a second election opportunity, Mark and their two children were. [Q&A 51]

An AEI's enrollment in COBRA coverage for one group health plan as of April 1, 2021, didn't preclude a second opportunity to enroll in another group health plan's COBRA coverage. For example, an AEI enrolled in COBRA dental coverage as of April 1, 2021, may still have had a second enrollment opportunity to elect COBRA for the medical plan. [Q&A 55]

**AEI could choose when COBRA coverage began.** An AEI who elected COBRA during a second enrollment opportunity did not need to have that coverage start with the first coverage period beginning on or after April 1, 2021. Although that start date was an option, the AEI may have been able to elect coverage retroactively or prospectively. [Q&As 44 and 53]

The IRS envisions prospective coverage as helpful to those who waived COBRA in favor of individual public exchange coverage, as the example below demonstrates.

*Example.* Maria was involuntarily terminated and lost health coverage on Oct. 1, 2020. She received her COBRA election notice the same day. Maria enrolled in public exchange coverage effective Nov. 1, 2020, some of which she paid for using premium tax credits. She received a notice of a second COBRA enrollment opportunity on May 1, 2021. Maria had several choices: (i) She could elect COBRA coverage retroactively to Oct. 1, 2020, because the disaster relief extends COBRA enrollment deadlines for up to one year. (ii) She could enroll in COBRA coverage retroactively to April 1, 2021. (iii) She could enroll in COBRA coverage prospectively. Maria used the third option to enroll in coverage prospectively beginning June 1, 2021. She contacted the public exchange to end her coverage as of May 31, 2021. Maria did not have any overlapping coverage that would require her to repay her premium tax credit on her 2021 tax return.

The Department of Labor (DOL)'s model COBRA continuation coverage notice in connection with extended election periods did not explain that the potential AEI has a choice of start dates, nor did the election form give AEIs a space in which to indicate their preferred start date. The form explained the impact of the COBRA subsidy on premium tax credits, so some AEIs might have requested a start date other than April 1, 2021. The employer (or the COBRA administrator) should have honored those requests to the extent required by the IRS guidance. Employers should have consulted with counsel about whether to go beyond the model notices and disclose the choice of enrollment dates to individuals with a second enrollment opportunity. Although the DOL considers using the model notices to be good-faith compliance with an employer's notice obligations, former plan participants and beneficiaries often challenge the adequacy of COBRA notices in court.

For further discussion of an individual's right to elect COBRA coverage prior to April 1, 2021, see [How does the outbreak period relief interact with the premium assistance?](#)

**How the second election opportunity worked for an HRA.** If an AEI took advantage of the second enrollment opportunity to elect subsidized HRA coverage effective the first coverage period beginning on or after April 1, 2021, the AEI had access to the same HRA funds available immediately before the AEI's

reduction in hours or involuntary termination. However, the HRA could only reimburse expenses incurred while the AEI was covered by the HRA. Accordingly, expenses incurred during the gap between the qualifying event and the first subsidized period of COBRA coverage were not reimbursable. [Q&A 54]

## When did the COBRA subsidy begin and end?

**When did the subsidy period begin?** The subsidy applied to the “first period of coverage” on or after April 1, 2021, when a COBRA qualified beneficiary had AEI status. A period of coverage could be a month or less and was determined by the plan’s normal due date for COBRA premiums. If qualified beneficiaries pay for coverage as of the first of each calendar month, then an AEI’s first period of coverage would have begun on April 1, 2021. But the start date would have differed for a plan with a different payment schedule. [Q&A 43]

*Example.* After involuntary termination on Jan. 15, 2021, Fred immediately elected COBRA coverage and had AEI status. Under his plan, premiums were due on a biweekly basis. A two-week coverage period ran from March 28 through April 10, and the next period ran from April 11 through April 24. Fred’s COBRA subsidy began with the premium due for the coverage period beginning April 11.

**When did the subsidy period end?** The subsidy ended on the earliest of these dates [Q&A 47]:

- The end of the last period of COBRA coverage beginning on or before Sept. 30, 2021
- The date when the AEI became eligible for other group health plan coverage or Medicare
- The date when COBRA coverage ended for any reason (such as end of the maximum COBRA period)

The death of an employee who experienced a reduction in hours or involuntary termination did not end the COBRA subsidy for the employee’s spouse or dependent children who were COBRA qualified beneficiaries. [Q&A 50]

## How did the outbreak period relief interact with the premium assistance?

To provide relief during the pandemic, the DOL and Treasury Department extended certain deadlines for up to one year during the “outbreak period.” The outbreak period began March 1, 2020, and will end 60 days after the announced end of the COVID-19 National Emergency. The outbreak period relief applies to the deadlines for plans to provide COBRA election notices and for qualified beneficiaries to elect COBRA. IRS Notice 2021-31 provides crucial information about how the outbreak period relief impacted ARPA’s COBRA subsidy. [Q&As 56–59] IRS Notice 2021-58 provides additional information, especially on how the outbreak period relief applies to COBRA premium payments due before and after the subsidy.

**Outbreak period relief did not apply to notice and election of second enrollment opportunity.** The IRS clarifies that the May 31, 2021, deadline to send the notice of a second enrollment opportunity was not extended by the outbreak period relief. Nor did the outbreak period relief extend the time that an individual had to elect COBRA coverage after receiving that notice. An individual had to elect COBRA coverage within 60 days of receiving the notice about a second enrollment opportunity.

**Electing the COBRA subsidy may have limited subsequent retroactive COBRA elections.** The outbreak period relief extends the time for a qualified beneficiary to retroactively elect COBRA coverage back to the date of the qualifying event (or loss of coverage, if later). An AEI had 60 days after receiving the notice to elect ARPA's COBRA subsidy. The Q&A 59 suggests and IRS Notice 2021-58 confirms that an AEI electing the COBRA subsidy also had to elect any retroactive COBRA coverage — that is, for periods before April 1, 2021 — within that same 60-day window.

*Example.* Ellen was involuntarily terminated on Jan. 1, 2021, and received a COBRA election notice that same day. She later received a notice about the ARPA extended election period on May 31 and elected subsidized COBRA coverage retroactive to April 1. Ellen had until July 30 (60 days after she received the ARPA notice) to elect coverage retroactive to Jan. 1. The outbreak period relief did not extend the July 30 election deadline. After July 30, Ellen could not elect COBRA coverage retroactive to Jan. 1, even though the outbreak period is ongoing.

This is welcome news for employers. The outbreak relief is difficult to administer with respect to COBRA, and the long extension to elect retroactive COBRA coverage increases the risk of adverse selection. However, the DOL model notices issued in March 2021 did not explain to participants that electing the ARPA COBRA subsidy ends some rights under the outbreak period relief. For example, page 3 of the [DOL model COBRA continuation coverage notice in connection with extended election periods](#) states:

The election period for COBRA continuation coverage with premium assistance does not cut off an individual's preexisting right to elect COBRA continuation coverage, including under the extended timeframes provided by the Joint Notice and EBSA Disaster Relief Notice 2021-01.

Employers therefore may have decided to let AEIs who elected the subsidy exercise their full COBRA election rights under the outbreak period relief to avoid any suggestion of misrepresentation. Employers taking this approach should have confirmed that their insurer or stop-loss carrier agreed and would cover any associated claims. Alternatively, employers that intended to close the window on retroactive COBRA coverage for those electing the COBRA subsidy needed to consider whether to communicate with impacted AEIs about this issue. However, if a potential AEI did not elect subsidized COBRA within the 60-day time frame, the individual may still have time under the outbreak period relief to elect unsubsidized COBRA coverage retroactive to the qualifying event.

**Outbreak period relief applies to premiums for coverage before and after the subsidy.** If a qualified beneficiary elects retroactive COBRA coverage, the plan may charge premiums for coverage periods beginning before April 1, 2021. The outbreak period relief applies to the payment deadlines for that coverage. [Q&A 58 and IRS Notice 2021-58]

The guidance explains what happens when an individual does not pay the COBRA premium by the applicable deadline:

- If no premiums are paid, the individual can be treated as covered beginning with the first coverage period starting on or after April 1, 2021.
- If the individual pays part of the premiums by the applicable deadline, the plan may credit those premiums to the earliest months of retroactive COBRA coverage and resume the COBRA coverage with the first coverage period starting on or after April 1, 2021.

IRS Notice 2021-58 provides a helpful example:

*Example.* Tania was involuntarily terminated and received a COBRA notice on Nov. 1, 2020. She received an ARPA notice on April 30, 2021, and on May 31, 2021, elected the ARPA COBRA subsidy, with retroactive COBRA coverage beginning Nov. 1, 2020. Tania's COBRA premiums are due as follows:

- For coverage from November 2020 through January 2021, the initial COBRA payment is due Feb. 14, 2022 (one year and 105 days after Nov. 1, 2020)
- For February 2021 coverage, the COBRA premium is due March 3, 2022 (one year and 30 days after Feb. 1, 2021)
- For March 2021 coverage, the COBRA premium is due March 31, 2022 (one year and 30 days after March 1, 2021)
- For coverage from April 1, 2021 through Sept. 30, 2021, no premiums are due because the ARPA subsidy applied
- For October 2021 coverage, the COBRA premium is due Oct. 31, 2022 (one year and 30 days after Oct. 1, 2021)

Tania pays the amount due on Feb. 14, 2022, but fails to pay the amounts due March 3, 2022, or March 31, 2022. She makes a payment on May 1, 2022. The IRS explains that the May 1, 2022, payment should be applied to Tania's October 2021 coverage. Tania was covered from November 2020 through January 2021, but not for February and March 2021 because she failed to make a timely payment for those months. Because Tania elected the ARPA subsidy, Tania was covered from April 1, 2021, through Sept. 30, 2021. She was covered for October 2021 because of her May 1, 2022, payment. Tania may continue to pay for COBRA premiums after October 2021 until she is no longer eligible for COBRA continuation coverage.

After the end of the last coverage period beginning on or before Sept. 30, 2021, the COBRA subsidy expired and unsubsidized COBRA coverage should automatically continue. The guidance clarifies that the outbreak period relief applies to payment deadlines for that unsubsidized coverage. [Q&A 48]



## How did the subsidy apply to state continuation coverage?

Employers that normally have fewer than 20 employees do not have to provide federal COBRA coverage. However, if such employers provide group health plan coverage through an insurance policy, state law may require continuation coverage when employment termination or a reduction in hours would otherwise cause loss of coverage. State-required continuation coverage that is similar to COBRA coverage qualified for the subsidy.

The state-required continuation coverage does not have to be identical to federal COBRA coverage. The IRS guidance clarifies that state-required continuation coverage could be subsidy-eligible even if the duration of coverage, the individuals eligible for coverage, the qualifying events and the amount charged for coverage differ from federal COBRA provisions. However, the subsidy was available only to individuals on state continuation coverage who would have been qualified beneficiaries if covered by federal COBRA. [Notice 2021-31, Q&A 61 and Notice 2021-46, Q&A 3]

Although the subsidy provisions applied to non-COBRA insured plans providing state-mandated continuation coverage, the employer could not take the employment tax credit for the premium subsidies. Only the insurer providing the coverage could claim the tax credit. [Q&A 62]

**Second election opportunity applied to federal COBRA only.** The second enrollment opportunity generally applied only for federal COBRA coverage. If a state law provides a similar second election opportunity, a COBRA subsidy may have been available to AEIs. [Q&A 52]

## How was the COBRA subsidy tax credit calculated?

COBRA qualified beneficiaries can be charged up to 102% of the applicable premium for continued coverage. If an employer charges all qualified beneficiaries the full amount for COBRA coverage, then the employer could claim a tax credit for the entire amount during the subsidy period.

Some employers, however, charge less than the full COBRA rate to some (or all) qualified beneficiaries and voluntarily pay some (or all) of the COBRA premium. The IRS Q&As limit the available tax credit to the amount that the employer would have charged a similarly situated qualified beneficiary who is ineligible for the ARPA COBRA subsidy. [Q&As 63 and 64] Employers that have voluntarily been paying part of the COBRA premium needed to calculate the portion eligible for the ARPA tax credit.

*Examples.* In the examples below, River Rock Co. offers a group health plan, and 102% of the applicable premium was \$1,000 per month in 2021.

*Example 1.* If River Rock charged \$500 per month for COBRA coverage absent any federal subsidy, its tax credit was \$500 per month for each AEI enrolled in COBRA coverage.

*Example 2.* For certain involuntarily terminated employees, River Rock charged \$200 per month for the first three months of coverage as part of its severance benefits, then \$1,000 per month for the remaining COBRA coverage period. A terminated AEI was offered severance on April 1 and elected COBRA as of that date.

If River Rock counted the first three months as part of COBRA coverage, it could claim a \$200 monthly tax credit for the AEI's COBRA coverage in April, May and June, then \$1,000 for July, August and September. If River Rock instead considered the first three months of coverage to be severance benefits, with COBRA coverage beginning when the severance period ended and coverage was lost, the company couldn't claim the tax credit for April, May and June. River Rock could claim a monthly \$1,000 tax credit for the AEI's COBRA coverage in July, August and September.

**Employer could increase amount qualified beneficiaries had to pay.** An employer that initially charged less than the full applicable COBRA premium could increase the amount charged and require qualified beneficiaries to pay up to the full applicable COBRA premium. The higher premium qualified for the COBRA subsidy. [Q&A 65]

*Example.* River Rock Co. offers a group health plan, and 102% of the applicable premium is \$1,000 per month. However, River Rock fully subsidized the premium for all qualified beneficiaries for coverage periods beginning before April 1, 2021. River Rock Co. ended the employer subsidy for all qualified beneficiaries effective April 2021 and charged \$1,000 per month for qualified beneficiaries' COBRA coverage going forward. River Rock could claim a \$1,000 monthly tax credit per AEI for coverage periods between April 1 and Sept. 30, 2021.

An employer could not increase premiums only for AEIs to take advantage of the ARPA tax credit. If an employer took that approach, the IRS would limit the tax credit to the premium charged to similarly situated, subsidy-ineligible COBRA qualified beneficiaries.

**Employer's taxable cash payment did not affect the COBRA subsidy.** Additional taxable cash paid to an AEI was not considered an employer premium payment and didn't reduce the COBRA subsidy. [Q&A 66]

*Example.* Peter was an AEI and received a taxable severance benefit that included \$600 per month. Peter could (but was not required to) use the cash benefit to help pay the plan's \$1,000 monthly COBRA premium. Peter remained entitled to the COBRA subsidy for the entire premium for the COBRA subsidy period, and his former employer could claim the tax credit for the entire amount.

**Redesigning severance programs.** The guidance validates the strategy of employers that reduced their own COBRA subsidies for all similarly situated COBRA qualified beneficiaries — perhaps providing taxable cash instead — to take advantage of the ARPA tax credit. Employers that did not quickly adjust their severance programs may have found it challenging to take advantage of this guidance. The IRS guidance does not permit employers to increase COBRA premiums retroactively. Employers also may be restricted from raising premiums by severance contracts or other contractual agreements.

**Premiums attributable to non-AEI coverage excluded.** The premium subsidy was not available for individuals with continued coverage who were not COBRA qualified beneficiaries. As noted earlier, certain individuals (such as domestic partners) are not qualified beneficiaries, although they may be covered as dependents of a COBRA qualified beneficiary or pursuant to state law. In this situation, the

IRS required employers to allocate the premium first to the cost of covering qualified beneficiaries and then to the cost of covering the nonqualified beneficiaries. [Q&As 67 and 68]

*Example.* Teresa was an AEI and elected COBRA for herself and her child on April 1, 2021. She married Sean on May 1 and added him to her coverage effective June 1. Sean was not a qualified beneficiary. The monthly COBRA premium was \$800 for employee-plus-one coverage and \$1,000 for employee-plus-family coverage. The premium subsidy applied only to \$800 of the total premium amount. Teresa had to pay \$200 for Sean's coverage.

*Example.* Same facts as above, except Teresa has two children and initially elected COBRA for herself and her two children, so she paid the employee-plus-family rate of \$1,000 per month. Adding Sean resulted in no extra premium cost, so the entire amount of Teresa's COBRA premium was subsidized by ARPA.

## Who claimed the tax credit and how?

During the COBRA subsidy period, AEIs should not have been charged premiums. The “premium payee” — usually, but not always, the employer — received reimbursement for the unpaid premiums by claiming a tax credit on quarterly employment taxes. The guidance also describes alternatives that may have provided faster reimbursement to the premium payee.

## Who was the premium payee?

**Employer usually was the premium payee.** The AEI's common-law employer (or former employer) was the premium payee for any fully or partly self-insured plan and for any fully insured plan that is subject to federal COBRA. [IRS Notice 2021-46, Q&A 4]

- **Insured plans subject to COBRA.** For an insured plan subject to federal COBRA, the employer was the premium payee — even for state-mandated coverage after federal COBRA coverage expires. [IRS Notice 2021-46, Q&A 5]
- **Plans with multiple participating employers (other than multiemployer plans).** The AEI's common-law (or former) employer was the premium payee, even if that employer participated in a health plan with other related or unrelated employers. [IRS Notice 2021-46, Q&As 6 and 7]
- **State or local governments.** The premium payee could be a state or local government. [Q&A 73] However, in limited instances, the state agency sponsoring a health plan subject to federal COBRA — rather than the AEI's common-law employer — was the premium payee. This exception applied when two conditions were met:
  - A state agency had to make COBRA available to employees of other state agencies and local governments within the state.
  - AEIs ordinarily had to submit COBRA premiums directly to the state agency maintaining the plan. [IRS Notice 2021-46, Q&A 10]

- **Business transactions.** Building on [existing regulations](#), the IRS states that when the selling group was responsible for offering COBRA coverage to M&A qualified beneficiaries after a business transaction, the entity within the selling group that maintained the group health plan — not the AEI's common-law employer — was the premium payee. [IRS Notice 2021-46, Q&A 9]
- **Third-party payers.** An employer that used a third-party payer (such as a professional employer organization or PEO) would generally be the premium payee. This rule applies even if the third-party payer was considered the employer for other purposes, although the IRS guidance provides a limited exception. [Notice 2021-31, Q&As 80–83 and Notice 2021-46, Q&A 8] An employer using a third-party payer should have consulted its tax advisor about how to claim the tax credit.

**Limited instances in which the plan or the insurer was the premium payee.** The premium payee differed for the following plans:

- A multiemployer plan, in which case the plan itself was the premium payee [Q&A 72]
- A plan that is neither self-insured nor subject to federal COBRA (such as [small insured plans subject to a state continuation law](#)), in which case the insurer was the premium payee
  - The premium payee may differ for certain Small Business Health Options Program (SHOP) plans. [Notice 2021-31, Q&A 72 and Notice 2021-46, Q&A 11]

**What if the insurer collected the premiums, but was not the premium payee?** The IRS guidance addresses how the COBRA subsidy worked when the insurer collected COBRA premiums directly from individuals covered under an insured plan (other than a multiemployer plan) subject to federal COBRA. The insurer had to treat AEIs as having paid the full COBRA premium during the subsidy period or face COBRA penalties. [Q&A 60] The employer had to pay the AEIs' premiums to the insurer during the COBRA subsidy period, regardless of the contractual arrangement between the employer and the insurer. The employer was the premium payee and could claim the tax credit.

## Important information about claiming the tax credit

**When was the premium payee entitled to the tax credit?** The premium payee was entitled to the credit on the first day of the coverage period for which an AEI did not pay premiums because of the COBRA subsidy. This may have differed from the date that the premium payee would ordinarily require payment. For prior coverage periods, the premium payee was entitled to the tax credit on receipt of the AEI's COBRA election notice.

*Example.* A premium payee — in this case, the employer — uses the calendar month as its COBRA coverage period. COBRA premiums are due on day 10 of each month. On June 17, 2021, the employer received a COBRA election notice from an AEI, electing COBRA effective April 1, 2021. The employer was entitled to the tax credit as of June 17 for the premiums not paid by the AEI for the April, May and June coverage periods. Assuming that the AEI remained eligible for the COBRA subsidy, the employer was entitled to the tax credit for the July, August and September coverage periods on July 1, Aug. 1 and Sept. 1, respectively.

If the AEI paid a premium that should have been subsidized, ARPA required the premium payee to reimburse the AEI within 60 days. The premium payee became entitled to the credit on the day of the reimbursement. [Q&As 74 and 85]

**How did the premium payee claim the tax credit?** Once entitled to the tax credit, the premium payee could claim the credit against its Medicare payroll taxes on the quarterly [IRS Form 941](#), *Employer's Quarterly Federal Tax Return*. If the credit exceeded the Medicare taxes owed for the quarter, the excess was refunded to the premium payee. The employer claiming the credit had to report the COBRA premium assistance provided and the number of individuals receiving COBRA subsidies. Even if a premium payee doesn't typically file a Form 941 (for example, a multiemployer plan with no employees), it had to do so to claim the credit. [Q&As 75 and 77]

A premium payee may have wanted to seek its credit before filing its quarterly Form 941, and the IRS guidance allowed for that. Once entitled to the credit, the premium payee could reduce its federal employment tax deposits by the amount of anticipated credits. A premium payee could also request an advance credit using [Form 7200](#), *Advance Payment of Employer Credits Due to COVID-10*. [Q&As 75 and 76] The IRS cautions that deposits could not be reduced, nor advances requested, for a coverage period that had not yet begun.

Given the complexities involved, premium payees should have worked with their tax advisors on claiming the tax credit.

**What if the AEI failed to provide notice of disqualifying coverage?** An AEI eligible for disqualifying coverage had to notify the plan or face penalties for failing to do so. If the AEI did not provide this notice to the plan, the employer was still entitled to the credit for the COBRA coverage period during which the AEI was subsidy-ineligible. However, once the premium payee *knew* that the AEI was eligible for disqualifying coverage, the premium payee was not entitled to the tax credit. [Q&A 78]

## What substantiation and recordkeeping were required?

To claim the tax credit for the COBRA subsidy, employers (or any other entity seeking the credit) had to keep records substantiating each individual's eligibility for the COBRA subsidy. [Q&As 4, 5 and 84] These records must be provided to the IRS on request. [Q&A 84]

**Employers could rely on self-certification.** Unless employers *knew* that the information supplied was incorrect, they could rely on an AEI's self-certification or attestation to substantiate that the individual had a reduction in hours or an involuntary termination and lacks disqualifying coverage. [Q&A 6] This is helpful, since employers generally did not know whether an individual was eligible for disqualifying coverage — with the possible exception of some individuals eligible for Medicare or a separate employer-sponsored retiree plan. Employers that did not keep records of whether terminations were involuntary or voluntary also appreciated this guidance.

**DOL model notices provided a self-certification form.** The DOL instructed employers using its model notices to enclose a [Summary of the COBRA Premium Assistance Provisions](#). The summary included a



two-page *Request for treatment as an assistance eligible individual* for qualified beneficiaries to attest that they were eligible for the subsidy. Although the IRS Q&As do not explicitly refer to the DOL's model notices, employers presumably could rely on a completed and executed request form to substantiate that a particular individual was an AEI.

**Should employers have required self-certification?** The IRS didn't mandate that employers obtain an AEI's self-certification. To claim the tax credit, an employer could use "other documentation" to substantiate that the individual was eligible for the COBRA subsidy. [Q&As 4 and 5] An employer may have employment records to demonstrate who lost health coverage from a reduction in hours or an involuntary termination. [Q&A 7] However, Notice 2021-31 doesn't give examples of what "other documentation" an employer could use to substantiate the absence of disqualifying coverage. Accordingly, requiring self-certification seemed to be the best course of action in most situations — at least for substantiating the absence of disqualifying coverage. The IRS allowed employers to condition the subsidy on an AEI's self-certification.

## Next steps for employers

Employers should review their administration of the COBRA subsidy and coordinate with vendors to ensure compliance with the IRS's guidance. Here are some steps for employers to take:

- **Confirm and document proper distribution of required notices.**
  - Confirm all individuals who lost coverage due to an involuntary termination or a reduction in hours were correctly identified and sent a notice. Some situations that may need to be revisited in light of the IRS Q&As include:
    - Did employees who quit as a result of a furlough receive a notice of the COBRA subsidy?
    - Were employees who quit due to loss of childcare (and their spouses and dependent children) treated as voluntary terminations when appropriate?
  - Consider whether any individuals who had an involuntary termination or a reduction in hours *before* Oct. 1, 2019, were subsidy-eligible (and should have received a notice) for any period of extended COBRA coverage due to a disability, a second qualifying event or a state law requirement.
- **Comply with the outbreak period relief.**
  - Consider whether to permit AEIs electing the COBRA subsidy within the 60-day election period to subsequently (after the 60-day time frame to elect the subsidy has expired) elect COBRA retroactively to a qualifying event (or loss of coverage) before April 1, 2021.
    - Review prior communications to determine whether additional communications are necessary.
    - If permitting such elections, confirm that the insurer or stop-loss carrier will cover claims.



- **Coordinate payment issues with insurer.**
  - If an employer-sponsored insured plan (other than a multiemployer plan) is subject to federal COBRA and the insurer typically collects premiums directly from COBRA enrollees, make arrangements to pay AEIs' COBRA premiums directly to the insurer.
  - Coordinate how to administer the subsidy for a COBRA-covered plan's state-law extensions of coverage (such as in New York or California), and which entity will claim the tax credit.
- **Review substantiation and recordkeeping strategy.**
  - Consider whether to require self-attestations to substantiate entitlement to the tax credit.
  - Review self-attestations for completion, and keep them available to produce at the IRS's request.
  - Track notices of disqualifying coverage, and make sure that any qualified beneficiary eligible for disqualifying coverage was charged for COBRA.
- **Work with tax advisors, and prepare to claim the tax credit.**
  - Line up assistance for completing and filing Form 941. Prepare to provide the number of individuals receiving the subsidy. Calculate the amount of the tax credit according to IRS guidance (for example, appropriately accounting for any employer COBRA subsidies and excluding the cost of COBRA coverage allocated to non-AEIs).
  - Consider reducing deposits or, if necessary, filing a Form 7200 for faster recovery of the COBRA subsidy.
  - Review recordkeeping strategy, and determine how long to maintain records substantiating the COBRA subsidy tax credit.
  - If using a third-party payer (such as a PEO), consult a tax advisor to determine how the COBRA subsidy and tax credit will work.

## Related resources

### Non-Mercer resources

- [Notice 2021-58](#) (IRS, Oct. 6, 2021)
- [Notice 2021-46](#) (IRS, July 26, 2021)
- [Form 941](#) (IRS, June 2021)
- [Instructions for Form 941](#) (IRS, June 2021)
- [Notice 2021-31](#) (IRS, May 18, 2021)

- [Form 7200](#) (IRS, April 2021)
- [Instructions for Form 7200](#) (IRS, April 2021)
- [COBRA premium subsidy](#) (DOL)
- [Pub. L. No. 117-2](#), the American Rescue Plan Act (Congress, March 11, 2021)

## **Mercer Law & Policy resources**

- [Deadline relief continues for health plans and participants](#) (Nov. 12, 2021)
- [DOL releases model COBRA subsidy notices and forms](#) (April 20, 2021)
- [Tracking federal COVID-19 laws affecting employee benefits, jobs](#) (March 30, 2021)
- [COBRA subsidies in COVID-19 rescue plan require employer action](#) (March 29, 2021)
- [Deadline relief continues for health plans and participants](#) (March 4, 2021)

## **Other Mercer resources**

- [Navigating coronavirus](#) (regularly updated)

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