



# National Compliance Update

## USI EMPLOYEE BENEFITS

March 11, 2021

## Here Comes the COBRA Subsidy

President Biden signed the American Rescue Plan Act of 2021 (“the Act”) into law on March 11, 2021. The Act includes a 100% COBRA subsidy available to certain COBRA qualified beneficiaries who lose group health plan coverage as the result of an involuntary termination or reduction in hours. This is different from the original House legislation, which included an 85% subsidy (with the COBRA beneficiary responsible for 15% of the COBRA premiums).<sup>1</sup> Employers will be able to claim a credit against payroll taxes to reimburse the cost of the subsidy.

The COBRA subsidy begins April 1, 2021 (the first day of the month following enactment) and lasts through September 30, 2021.

While this subsidy provides welcome relief for many COBRA qualified beneficiaries, it will be administratively challenging for employers, especially given other relief afforded to COBRA elections and premiums payments under the Outbreak Period guidance.<sup>2</sup>

The following FAQs explain the Act’s COBRA subsidy in more detail.

### Who qualifies for a subsidy?

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An *assistance eligible individual* (“AEI”) qualifies for the subsidy.

An AEI is, for the period of April 1, 2021 – September 30, 2021, an individual who is eligible for COBRA due to an involuntary termination of employment or a reduction in hours and who elects COBRA continuation of coverage. Individuals who voluntarily terminate from employment are not AEIs.

AEIs include:

- **New COBRA qualified beneficiaries.** Individuals who become COBRA qualified beneficiaries due to involuntary termination of employment or reduction in hours on or after April 1, 2021 but before September 30, 2021.

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<sup>1</sup> See USI’s National Compliance Update, [“A COBRA Subsidy May Be on the Horizon”](#) (February 18, 2021).

<sup>2</sup> See USI’s National Compliance Update, [“Guidance Issued on Outbreak Period”](#) (February 26, 2021).

- **Existing COBRA qualified beneficiaries.** COBRA qualified beneficiaries due to an involuntary termination of employment or reduction in hours who currently have COBRA coverage and continue COBRA between April 1, 2021 – September 30, 2021.
- **Second chance COBRA qualified beneficiaries.** Individuals who were COBRA qualified beneficiaries due to an involuntary termination of employment or reduction in hours but, either (1) did not elect COBRA or (2) elected then dropped COBRA. Had they elected COBRA (or not dropped the coverage), they would have had COBRA coverage between April 1, 2021 – September 30, 2021.

#### **How much is the subsidy?**

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The COBRA subsidy is 100%. This means AEIs will not pay any portion of their COBRA premium during the subsidy period (April 1, 2021 – September 30, 2021) so long as they remain subsidy eligible.

Employers are allowed a credit against Medicare payroll taxes to be reimbursed for the subsidy.

#### **Is there a “second chance” to elect COBRA?**

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Yes. There is a second chance for an individual who otherwise would be an AEI except the individual:

- Does not have a COBRA election in effect on April 1, 2021; or
- Elected COBRA coverage and later dropped the coverage.

In this case, the AEI may elect COBRA coverage (and the subsidy) beginning April 1, 2021. The maximum COBRA coverage period will be measured from their original qualifying event date had they elected COBRA (or not dropped the coverage).

As described later, a special notice will need to be provided and, upon receipt, these “second chance” individuals will have 60 days to elect COBRA continuation of coverage (retroactive to April 1, 2021).

**USI Note.** This is likely to get very complicated with delayed election relief for the Outbreak Period which permits retroactive enrollment back to the original qualifying event date. Note, however, that subsidized premiums are only available beginning April 1, 2021. An individual who is eligible for both types of relief would be permitted to enroll in the subsidized coverage April 1, 2021 going forward. That said, more guidance on the interaction of the Outbreak period and COBRA subsidy would be helpful.

#### **When does the subsidy end?**

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The subsidy naturally expires September 30, 2021. After that date, the full COBRA premium will be owed to continue COBRA coverage or to elect new COBRA coverage. Employers must provide notice within a specific window prior to expiration of the subsidy.

Additionally, if an AEI becomes eligible for other group health plan coverage or Medicare, the subsidy is no longer available. Mere eligibility (versus enrollment) is all that is required.

An AEI must notify the group health plan when the AEI is no longer eligible for the subsidy due to other coverage. Regulations will provide guidance as to the time and manner of this notification. A

penalty of \$250 applies for failure to notify.<sup>3</sup> There is an exception when the failure is due to reasonable cause and not willful neglect.

**USI Note.** It is possible for Congress to extend the subsidy beyond September 30, 2021 through future legislation.

#### How far back will we have to look for AEs?

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COBRA coverage due to a termination of employment or reduction in hours runs 18 months. Thus, individuals who experienced an involuntary termination of employment or reduction in hours and were in their COBRA election window beginning in November 2019 (or later) may be eligible for the subsidy relief.

For example, Joe was involuntarily terminated October 15, 2019. His COBRA election window (and COBRA coverage) started November 1, 2019. Joe will be considered an AEI and eligible for one month of the COBRA subsidy when it begins April 1, 2021 (Joe's 18<sup>th</sup> month of COBRA coverage). Joe's maximum COBRA period ends after April 30, 2021.

#### What coverage does the COBRA subsidy apply to?

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The statute defines group health plan coverage broadly to include an employee welfare benefit plan providing medical care.<sup>4</sup> While further guidance is likely to clarify this, we expect a subsidy to be available with respect to the following coverage:

- Major medical
- Dental
- Vision

This includes fully insured and self-funded group health plans.

#### Can AEs change their COBRA coverage?

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An employer may, but is not required to, allow an AEI to enroll in a different, lower cost plan option than the coverage the individual was enrolled in at the time the qualifying event occurred. The different plan option must be offered to similarly situated active employees of the employer at the time the election to change the plan is made. The different plan option cannot be excepted benefits (e.g., dental coverage), a qualified small employer health reimbursement arrangement (QSEHRA) or a health flexible spending account (health FSA).

An AEI has 90 days after the date of notice of this plan enrollment option to elect to enroll in the different coverage option.

**USI Note.** Employers considering allowing enrollment in a lower cost plan option should obtain carrier (including stop loss carrier) approval. Not all carriers may allow for this flexibility.

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<sup>3</sup> If the failure is fraudulent, the penalty is the greater of \$250 or 110% of the non-subsidized COBRA premium.

<sup>4</sup> ERISA 607(1), "the term 'group health plan' means an employee welfare benefit plan providing medical care (as defined in section 213(d) of title 26) to participants or beneficiaries directly or through insurance, reimbursement, or otherwise."

## Are there notice requirements?

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There are multiple notice requirements associated with the subsidy.

### *Election Notice*

COBRA election notices for AEIs who become entitled to COBRA coverage between April 1, 2021 – September 30, 2021 must be updated to include information on the availability of premium assistance and, if applicable the ability to enroll in a lower cost plan option. Employers may use a separate document that includes the required information.

In addition, notice must be provided to AEIs who have a “second chance” to elect COBRA and obtain the subsidy. This notice must provide by May 31, 2021 (60 days from April 1, 2021 – first of the month following enactment). Failure to provide such notice will be treated as a failure to meet the notice requirements under COBRA.

Briefly, the notice must include:

- forms necessary to establish eligibility for the subsidy;
- contact information for the employer or other entity maintaining information in connection with the subsidy;
- a description of the:
  - extended election period;
  - obligation of qualified beneficiaries to notify the plan when no longer eligible for the subsidy and the penalty for failure to notify;
  - qualified beneficiaries’ right to a subsidized premium and any conditions on entitlement to the subsidy (displayed prominently); and
  - option (if available) for the qualified beneficiary to enroll in a different coverage option.

A model notice will be available by April 10, 2021 (30 days after the date of enactment). It is possible the Departments will require additional notifications as part of their guidance.

### *Notice of Option to Change COBRA Coverage*

If an employer allows AEIs to change to a different, lower cost plan option notice must be provided to inform the AEI of this option.

### *Notice of the Expiration Period for Premium Assistance*

A notice must be provided to an AEI about the upcoming expiration of the available subsidy except in cases where the subsidy is no longer available due to eligibility for other group health plan coverage or Medicare.

The notice must be provided beginning on the date that is 45 days before the subsidy ends and ending on a day that is 15 days before the expiration and must be written in clear and understandable language. It must be provided to the AEI and indicate that the AEI’s subsidy will expire soon and include the date of the expiration in a prominent manner.

A model notice will be available by April 25, 2021 (45 days after enactment).

## Who may claim the tax credit?

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The “person to whom premiums are payable” may claim the tax credit. In the case of a group health plan that is subject to COBRA,<sup>5</sup> this is the employer maintaining the plan.<sup>6</sup>

Employers may apply to credit against Medicare payroll taxes to reimburse the cost for the COBRA subsidy.

## What should employers do now?

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- Connect with your COBRA vendor to discuss administration for this new COBRA subsidy. This will include:
  - issuing notices to the “second chance” AEs by May 31, 2021;
  - updating election notices to reflect the subsidy for COBRA events between April 1, 2021 and September 20, 2021; and
  - issuing notice to AEs when their individual subsidy is set to expire in accordance with required timeframes.
- Identify all individuals who may qualify as AEs. This will include individuals who may not have elected COBRA (or dropped COBRA) but are still within the 18-month maximum COBRA period. Employers may need to look back to individuals who experienced an involuntary termination of employment or reduction and were otherwise eligible for COBRA beginning in November 2019.
- Discuss the COBRA subsidy with payroll departments and await further guidance for clarification on claiming the tax credit.
- Await further guidance and model notices. Hopefully, any guidance or notices will address the COBRA deadlines impacted by the Outbreak Period and how this intersects with the COBRA subsidy and applicable notices.

## RESOURCE

For a copy of the legislation as passed, visit <https://www.congress.gov/117/bills/hr1319/BILLS-117hr1319enr.pdf> (pages 124-135).

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<sup>5</sup> For this purpose, it includes COBRA provisions under the Internal Revenue Code, ERISA and the Public Health Service Act (“PHSA”). PHSA COBRA requirements apply to group health plans maintained by states or their political subdivisions, agencies or instrumentalities. The COBRA subsidy is not available to church plans.

<sup>6</sup> In the case of a multiemployer plan, the plan claims the tax credit. Generally, a multiemployer plan is one that is maintained pursuant to one or more collective bargaining agreements between one or more employee organizations and more than one employer to which more than one employer contributes.