

## Employee Benefits and Executive Compensation

# New ARPA COBRA Subsidy Guidance: IRS Issues Notice 2021-31



By: [Raymond D. Sinnappan](#) and [Maliha Ikram](#)

On May 18, 2021, the IRS published Notice 2021-31 (the Notice), providing long-awaited guidance on the temporary Consolidated Omnibus Budget Reconciliation Act (COBRA) premium assistance<sup>[1]</sup> (COBRA subsidy) established by the American Rescue Plan Act of 2021<sup>[2]</sup> (ARPA or the Act). While not exhaustive, the Notice covers a broad range of questions and answers that clarify the applicability of the Act's COBRA subsidy.<sup>[3]</sup> Much of the guidance is familiar, incorporating concepts from Notice 2009-27, which provided guidance on the American Recovery and Reinvestment Act of 2009<sup>[4]</sup> COBRA subsidy provisions. However, a good portion of the questions and answers contained in the Notice contemplate the ongoing COVID-19 pandemic's impact on different adverse employment outcomes.<sup>[5]</sup>

Employers will be keen to better understand the Act's new COBRA subsidy provisions, specifically, the meaning of "reduction in hours" of a covered employee's employment, or "involuntary termination" of employment for purposes of determining assistance eligible individuals.

This alert provides an overview of the reduction in hours and involuntary termination guidance contained in the Notice, breaking down the types of terminations or reductions in hours that would give rise to COBRA subsidy eligibility during the subsidy window. This alert also covers the interplay between the Act and the agencies' Employee Benefits Security Administration (EBSA) Disaster Relief Joint Notices. These aspects of the Notice encompass myriad human resource scenarios that employers encounter on a day-to-day basis. Please note that the IRS acknowledges that the Notice does not cover all elements of the Act's COBRA subsidy provisions. Accordingly, it is possible that government agencies may promulgate additional guidance in the future.

### **COBRA Subsidy: A Refresher**

#### *What is the COBRA Subsidy?*

"Assistance eligible individuals" (AEIs) (as defined below) and their beneficiaries may be eligible to receive the Act's temporary COBRA subsidy. The relevant window during which such individuals can receive the subsidy is April 1, 2021 through September 30, 2021.<sup>[6]</sup> During the subsidy window, an AEI is treated as though they paid the full amount of their COBRA premium for the specified coverage (*i.e.* 100%). The amount that the employer, insurer, or multiemployer plan pay in respect of this subsidy is refundable via a tax credit against its share of Medicare taxes under §6432 of the Code. The amount of the subsidy is not included in an AEI's gross income.

#### *Who are Assistance Eligible Individuals?*

The Act defines an Assistance Eligible Individual as an individual: (1) who is a qualified beneficiary with respect to a period of COBRA continuation coverage during the subsidy period (April 1, 2021 through September 30, 2021), (2) who is eligible for that COBRA continuation coverage by reason of a reduction of hours or involuntary termination (other than gross misconduct), and (3) who elects COBRA continuation coverage. A qualifying event other than a reduction in hours or an involuntary termination does not qualify someone for the COBRA subsidy.

### *How can a qualified beneficiary become an AEI?*

An individual must: (1) be covered under the employer's group health plan on the day before the reduction in hours or involuntary termination of employment, and (2) lose eligibility for the coverage due to the reduction in hours or involuntary termination of employment.

### *When is the COBRA subsidy not available to an AEI?*

If an individual is eligible for coverage under any other group health plan or Medicare, or if an individual becomes eligible for a group health plan or Medicare while receiving the subsidy, the assistance is unavailable or stops at that time. If an individual becomes eligible for other coverage while receiving the subsidy, the individual must notify the plan providing COBRA continuation coverage of their eligibility for other coverage, or otherwise be subject to a penalty of \$250 for each failure (the penalty can eventually equal the greater of \$250 or 110% of the subsidy improperly received after eligibility for it ended).

### *What about the extended election period?*

As provided in the Act, those individuals who did not have a COBRA continuation coverage election in effect on April 1, 2021 but would have been AEIs had they made an election, or those who previously elected COBRA continuation coverage and discontinued it before April 1, 2021, are eligible for the subsidy. This group of AEIs is offered an "extended election period." The extended election period continues for 60 days after the individuals receive notice of such election period. Notably, the subsidy period for these individuals will not continue past the maximum period of COBRA continuation coverage that would have been required had they elected COBRA continuation coverage initially upon the qualifying event or had not discontinued it.

## **Clarification on COBRA Subsidy Eligibility and Certification**

### *Can a person be an AEI more than once?*

Yes – someone who becomes a qualified beneficiary as the result of a reduction in hours or involuntary termination (and meets the other requirements for being an AEI) is an AEI regardless of whether they were treated as an AEI at an earlier date. This would typically happen within the subsidy period, for example:

A participant is involuntarily terminated on April 1, 2021. Then, the participant becomes eligible<sup>[7]</sup> for new coverage via their spouse's employer on July 1, 2021. Then, the participant experiences a loss of coverage due to their spouse's involuntary termination on August 1, 2021. The participant and spouse become qualified beneficiaries and are eligible for the COBRA subsidy under the spouse's employer. The participant was an AEI twice.

### *Effect of Prior Coverage*

- If a potential AEI does not elect COBRA continuation coverage upon a qualifying event and instead enrolls in other coverage, but ceases to be covered under that coverage as of April 1, 2021, then the subsidy is available to the individual if they elect COBRA under the extended election period. In other words, having earlier coverage that ends prior to April 1, 2021 does not disqualify the individual from the subsidy. However, if the other coverage lasted through April 1, 2021 or after, then that coverage *would* disqualify the individual from the subsidy. The same disqualification would occur if the individual became eligible for the other coverage after April 1, 2021 but did not enroll in it.
- An individual who is a qualified beneficiary as a result of a reduction in hours or involuntary termination but who is currently enrolled in individual health insurance coverage through a Health Insurance Exchange is eligible to elect COBRA continuation coverage during the extended election period and receive the subsidy.

## *Effect of Multiple Qualifying Events*

- Initial qualifying event followed by a subsequent qualifying event. If an individual first experienced a qualifying event other than a reduction in hours or involuntary termination of employment (e.g. divorce), and then subsequently experienced a reduction in hours or involuntary termination, the qualified beneficiary does not become a potential AEI. This is because the loss of coverage leading to COBRA continuation coverage eligibility is based on the first event (and not on the reduction in hours or involuntary termination).
- Period of COBRA coverage extends into a subsequent qualifying event. If an individual's first qualifying event was a reduction in hours or involuntary termination, and they elected and remained on COBRA for an extended period of time due to a disability determination, second qualifying event, or an extension under State mini-COBRA, then they are eligible for the COBRA subsidy, provided that the additional periods of coverage fall between April 1, 2021 and September 30, 2021. Notable here is that the guidance requires the individual to have remained on COBRA (which implies that this population does not need to be offered the extended election period).

*What is the effect of an offer of retiree health coverage on an AEI's eligibility for the subsidy?*

If the retiree coverage is offered under the same group health plan as the COBRA continuation coverage or under a separate group health plan, the retiree coverage has no effect on a potential AEI's eligibility for the subsidy. If the retiree coverage is not under the same group health plan, then a potential AEI is not eligible for the subsidy (*i.e.*, due to having an offer of other health plan coverage).

*Can an employer allow individuals to self-certify as to their eligibility or ineligibility?*

Yes. Employers should keep records of self-certification or attestation regarding the individual's eligibility status, or other documentation substantiating the same, in order to claim the credit. This certification can be used to substantiate an employer's entitlement to the credit.

An employer can also have individuals self-certify as to whether they are eligible for other disqualifying group health plan coverage or Medicare. Additionally, unless it has knowledge otherwise, an employer may rely on an individual's attestation or certification regarding a reduction in hours or involuntary termination to substantiate their eligibility for the credit.

## **Meaning of Reduction in Hours**

*Can a qualified beneficiary be a potential AEI if they experience a qualifying event that is a voluntary reduction in hours?*

Yes. A qualified beneficiary would be an AEI irrespective of whether the reduction in hours is voluntary or involuntary (although voluntary *terminations* do not result in eligibility).

*Is a qualified beneficiary an AEI if their qualifying event is a "furlough"?*

A "furlough" for purposes of the Act means a temporary loss of employment or complete reduction in hours with a reasonable expectation of return to employment or resumption of hours such that the employer and employee intend to maintain the employment relationship. A furlough can be a reduction in hours regardless of whether it was employer-initiated or the individual participated in a process like a window program.

*Does a reduction in hours include a work stoppage as the result of (1) a lawful strike initiated by employees or representatives or (2) a lockout initiated by the employer?*

Yes, but only if at the time the work stoppage or lawful strike begins, the employer and employee intend to maintain the employment relationship.

## **Meaning of Involuntary Termination of Employment**

*What constitutes an involuntary termination of employment for purposes of the definition of an AEI?*

Involuntary termination means a 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.

*When is an employee-initiated termination of employment considered an involuntary termination of employment for purposes of subsidy eligibility?*

If the employee-initiated termination constitutes a termination for good reason due to an employer's action that results in a material negative change in the employment relationship for the employee that is akin to a constructive discharge, it is considered an involuntary termination. Similarly, an employee's resignation as a result of a material change in the geographic location of their employment is an involuntary termination of employment.

*Determination of involuntariness is based on the facts and circumstances of the termination.*

In some cases, a termination may be designated as voluntary or as a resignation, but the facts and circumstances suggest that the employee was willing and able to continue performing services. Facts and circumstances may indicate that absent the voluntary termination, the employer would have terminated the employee's services anyway, or the employee had knowledge that they would be terminated. In such cases, the termination is deemed involuntary.

*Is an employer's action to terminate an individual's employment while the individual is absent from work due to illness or disability an involuntary termination?*

Yes, if there is a reasonable expectation that the employee will return to work after the illness or disability has subsided.

*Is an employee's absence from work due to illness or disability before the employer has terminated employment an involuntary termination?*

No. However, the absence from work could be a reduction in hours potentially resulting in COBRA continuation coverage if the absence from work results in a loss of coverage. Additionally, if such employee is subsequently terminated, that would be viewed as an involuntary termination.

*Does an involuntary termination include retirement?*

Generally, no. Retirement is typically a voluntary termination of employment. However, as indicated earlier, if facts and circumstances indicate that absent retirement, the employer would have terminated the employee's employment and the employee was willing and able to continue working and had knowledge that they would be terminated by the employer absent the retirement, the retirement is an involuntary termination of employment.

*Is a termination of employment for cause an involuntary termination?*

Yes, unless the termination for cause was due to gross misconduct. As a practical matter, many employers do not try to distinguish which terminations for cause are for gross misconduct, and consequently offer them COBRA coverage (and thus the ability to be a potential AEI).

*What is the effect of an employee's participation in a window program on determining whether an involuntary termination of employment has occurred?*

If an employee participated in a window program wherein an employee with an impending termination of employment was offered a severance arrangement to terminate employment, then an involuntary termination has occurred (provided that the window program meets the requirements of Treas. Reg. §

*Unique termination scenarios due to the COVID-19 pandemic.*

- Termination of employment by an employee because of concerns about workplace safety due to a health condition of the employee or their family member. Generally speaking, a voluntary termination of employment because of an employee's concern about workplace safety would not be considered an involuntary termination. This said, such a termination would be deemed involuntary if the employee can demonstrate that the employer's actions (or inactions) resulted in a material negative change in the employment relationship analogous to a constructive discharge/good reason termination. Importantly, if an employee's departure is due to their personal circumstances unrelated to an action or inaction of the employer (e.g. health conditions, inability to find daycare, etc.), the termination is unlikely to rise to the level of a constructive discharge.
- Employee-initiated termination of employment due to childcare concerns. If an employee terminates their employment because COVID-19 has led to the closure of their child's school or childcare facility, such termination is not a qualifying event that would make the employee a potential AEI. However, if the individual maintains the ability to return to work, and the facts and circumstances indicate that the qualifying event is a *temporary* leave of absence such that the employer and employee intend to maintain the employment relationship, the qualifying event is considered a voluntary reduction in hours and the individual would be a potential AEI.

*Is an employee-initiated termination in response to an involuntary material reduction in hours that did not result in a loss of coverage an involuntary termination?*

Yes. For COBRA subsidy eligibility, such an employee-initiated termination of employment is treated as a termination for good reason. Accordingly, an employee-initiated termination of employment due to an involuntary material reduction in hours would be an involuntary termination of employment.

*Is the death of an employee an involuntary termination of employment that makes the spouse and dependent children of the employee potential AEIs?*

No. Death is not a reduction in hours or involuntary termination.

*Is an employer's decision not to renew an employee's contract an involuntary termination of employment?*

Generally, yes – including employees who are employed by staffing agencies. If the employee whose contract was not renewed was otherwise willing and able to continue the employment relationship and was willing to either execute a new contract with terms similar to those of the expiring contract, or continue employment without a contract, the employer's decision not to renew is considered an involuntary termination of employment. Importantly, however, if the employer and employee understood at the time they entered into the expiring contract — and during the time when services were performed — that the contract would not be renewed and was for specific services over a set period of time, the nonrenewal of the contract upon its completion would not be an involuntary termination of employment.

### **Interaction with Emergency Relief Notices**

The Notice also clarifies that the DOL and Treasury's Joint Notice,<sup>[9]</sup> published May 4, 2020, and EBSA Disaster Relief Notice 2021-01, published February 26, 2021 (the Emergency Relief Notices), apply to the Act's COBRA subsidy.

*Application of Emergency Relief Notices to the Act's COBRA Subsidy.*

- If an individual elected retroactive COBRA continuation coverage under the Emergency Relief Notices, and did not pay or owe COBRA premium payments for the retroactive coverage for which payment deadlines were extended due the Emergency Relief Notices, the individual is still eligible

for the subsidy. Late or unpaid premiums for retroactive COBRA continuation coverage will not affect an individual's eligibility for the COBRA subsidy.

- If an AEI experienced a qualifying event before April 1, 2021 and still has an open COBRA continuation coverage election period independent of the Act (including an extended period for electing coverage under the Emergency Relief Notices), they can elect COBRA continuation coverage under the Act's extended election period and receive COBRA continuation coverage with the COBRA subsidy. This coverage period of coverage would begin on or after April 1, 2021. If the AEI elects retroactive COBRA continuation coverage under the original COBRA election period available prior to the Act's extended election period, COBRA continuation coverage is retroactive to that individual's loss of coverage. But, the subsidy does not apply to periods of coverage prior to the first period of coverage beginning on or after April 1, 2021.
- If a qualified beneficiary received a COBRA notice before April 1, 2021, and also receives the Act's extended election period notice, then, within 60 days of receiving the Act's extended election period notice, the individual may elect COBRA continuation coverage with the COBRA subsidy for periods of coverage beginning on or after April 1, 2021. Importantly, if an individual elects COBRA continuation coverage with the COBRA subsidy, the individual *must also elect or decline* COBRA continuation coverage retroactive to the loss of coverage, if eligible, within 60 days of receiving the Act's extended election period notice. The individual may be required to pay COBRA premiums for periods of coverage beginning before April 1, 2021 if they elect retroactive COBRA continuation coverage. ***If an AEI elects COBRA coverage with the subsidy during the extended election period but declines retroactive COBRA coverage, that individual is not allowed at a later time to elect retroactive COBRA coverage despite any otherwise applicable deadline relief.***

Please note that the Notice also discusses other salient components of the Act that are not the subject of this alert, including, among other items, how to claim the COBRA subsidy tax credit, calculation of the tax credit, payments to insurers, and state continuation coverage. If your company has questions about the employee benefits and executive compensation provisions of the Notice addressed herein, or any other questions about the Act or its related guidance, reach out to your Jenner & Block contact for assistance. The Employee Benefits and Executive Compensation Practice is continuing to monitor for and review the regulatory and legislative guidance as it is released.

---

*Conscious of the human, operational and financial strain that coronavirus is placing on businesses and organizations worldwide, Jenner & Block has assembled a multi-disciplinary Task Force to support clients as they navigate the legal and strategic challenges of the COVID-19 / Coronavirus situation.*

*For additional information and materials, please visit our COVID-19 / Coronavirus Resource Center.*

[Click here to visit our COVID-19 / Coronavirus Resource Center](#)



---

## Contact Us



**Raymond D. Sinnappan**

[rsinnappan@jenner.com](mailto:rsinnappan@jenner.com) | [Download V-Card](#)



**Maliha Ikram**

[mikram@jenner.com](mailto:mikram@jenner.com) | [Download V-Card](#)

Meet Our Team

---

## Practice Leaders

### Matthew J. Renaud

Chair

[mrenaud@jenner.com](mailto:mrenaud@jenner.com)

[Download V-Card](#)

---

[1] The term “COBRA premium assistance” is used in the Notice. For clarity, this alert refers to this as the COBRA subsidy.

[2] H.R.1319, Pub. Law 117-2

[3] Please note that the Department of Labor (DOL) published FAQs about the subsidy on April 7, 2021; however, the publication offered minimal substantive guidance to employers.

[4] H.R. 1, Pub. Law 111-5

[5] For more information on the legislation promulgated in response to the COVID-19 pandemic, please see <https://jenner.com/library/publications/20807> and the resources located at <https://jenner.com/practices/447/library>.

[6] The Notice clarifies that some employers may have periods of coverage that are shorter than one month (such as two weeks). As a result, coverage may begin after April 1, 2021 and end after September 30, 2021 depending on the period with respect to which premiums would have normally been charged by the plan. See Q&A #43.

[7] If a potential AEI was eligible for other coverage, but not eligible to enroll from April 1, 2021 through September 30, 2021, then they would be an AEI. Eligibility to enroll in other coverage means eligibility during the subsidy period, not generally.

[8] Treas. Reg. § 31.3121(v)(2)-1(b)(4)(v) addresses employer-provided benefits in connection with an employee’s impending termination. Subsection (B) covers “window benefits,” explaining that a window benefit is a retirement/early retirement-type subsidy or other benefit made available to an employee for a limited period of time (up to one year). This benefit is made available to employees who will terminate employment during that period of time. The rules of this Reg. cover more than just the duration of the window, and apply generally, not just in the context of the Act’s COBRA subsidy.

[9] 85 FR 26351