

DOL Takes First Bite At COBRA Subsidy Guidance

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On April 7, 2021, the Department of Labor (“DOL”) released initial guidance regarding the 100% COBRA premium subsidies under the American Rescue Plan Act of 2021 (“ARP”), and also issued model notices that can be used in connection with administering the subsidized coverage. *See our previous [alert](#)* for a more detailed description of the ARP subsidy provisions, which will run for coverage periods between April 1, 2021 and September 30, 2021.

The DOL’s newly issued guidance includes the following items:

- [FAQs about the subsidies;](#)
- [A summary of subsidies;](#)
- [A model general notice and election notice;](#)
- [A model notice in connection with the extended election period;](#)
- [A model alternative notice; and](#)
- [A model notice of expiration of subsidies.](#)

While the guidance and model notices answer some questions, there are still many outstanding questions that we expect either the DOL or Internal Revenue Service (“IRS”) will address in follow-up guidance.

Most notably, the FAQs provided or confirmed the following:

- The guidance is clear that administrators must send COBRA subsidy notices for individuals with qualifying events that occurred before April 1, 2021, giving them a second chance to elect COBRA, by May 31, 2021. The guidance does not specifically address the deadline to send updated COBRA election notices describing the subsidies for individuals with qualifying events on or after April 1, 2021 except to state that the existing requirements for the timing of COBRA notices continue to apply. Thus, it appears that regular 44-day (when the employer is the administrator) COBRA election notice deadline applies

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and that COBRA notices will need to be updated by this date. It would be helpful, however, if DOL would also provide that an administrator is not required to send any COBRA election notice describing the subsidies until at least May 31, 2021 because, as a practical matter, administrators may need until May 31, 2021 to get the new notices out. Also, the likelihood of adverse consequences for taking a maximum of two additional weeks to send notices seems quite low, particularly because the qualified beneficiary would still have 60 days after the date of the notice to make his/her election.

- The extended COBRA deadlines under the [Joint Relief and EBSA Disaster Relief Notice 2021-1](#) do not apply to either the 60-day special election period for subsidized COBRA coverage or the deadline for the plan to provide the required ARP notices related to COBRA premium assistance.
- The election of subsidized COBRA coverage does not cut off an individual's pre-existing COBRA election right if it was extended under the Joint Relief and EBSA Disaster Relief Notice 2021-1. The ARP guidance treats the subsidy separately from the earlier extension guidance.
- The subsidy is available for all group health plans, including excepted benefits, such as dental and vision coverage. (The guidance does not specifically address the exclusion for health FSAs, but they are clearly excluded under the statutory language of ARP.)
- The guidance does not further define "involuntary" but does allow an individual to "request" treatment as an assistance eligible individual if he/she has not received a notice from his/her employer relating to the subsidies. A model form for requesting such treatment is included in the guidance, and in the form the individual would certify that he/she experienced an involuntary termination or a reduction in hours and is not eligible for other coverage. If the IRS issues guidance similar to its 2009 ARRA guidance, the employer would not be able to rely on this attestation and would instead be required to independently make this determination itself. However, many groups requested that the IRS adopt this "employee attestation" position, so it is possible the IRS could come out differently than it did in 2009. The guidance also clarifies that the subsidy applies to any reduction of hours that causes a loss of coverage (not just an involuntary reduction of hours).
- The special prospective *election* opportunity provided by ARP does not apply to state continuation coverage (although it appears states can take action to allow for special enrollment opportunities to allow individuals to access federal-subsidized state continuation coverage).
- The guidance states that individuals enrolled in individual market coverage, including through an ACA Marketplace, may drop individual market coverage to enroll in subsidized COBRA coverage, and such individuals "may" be eligible for a special enrollment period (SEP) to re-enroll into individual market coverage following the end of the COBRA subsidy period. Currently, there is a SEP for Marketplace coverage only if an individual exhausts COBRA. Our interpretation of this guidance is that by saying "may" be entitled to a SEP, the DOL is implying that the SEP rules could be expanded for this circumstance when the COBRA subsidy ends.

As new questions continue to arise under the ARP and its related guidance, please contact your Groom attorney, and we would be happy to discuss these issues with you further.

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