

Overview of IRS Notice 2021-31

For more information on the ARP COBRA subsidy, visit our ARP COBRA Subsidy Information for Partners page here: <https://probenefits.com/arp-act-cobra-subsidy-information-for-employers/> The full text of IRS Notice 2021-31 can be viewed here: <https://www.irs.gov/pub/irs-drop/n-21-31.pdf>

Eligibility for COBRA Premium Assistance (Q&As 1-20)

Reminders Regarding Assistance Eligible Individuals (“AEIs”): The Q&As in this category confirm that the subsidy is available to AEIs. An AEI is a qualified beneficiary, who:

1. Loses plan coverage as a result of the covered employee’s reduction in hours or involuntary termination of employment (other than a termination due to gross misconduct);
2. Is eligible for COBRA continuation coverage during any portion of the period of April 1 through September 30, 2021 (the “Subsidy Period”); and
3. Elects COBRA.

Reminders Regarding Scope of COBRA Eligibility: These Q&As also confirm that an individual satisfies #2 above, if such individual:

- Is enrolled in COBRA as of April 1, 2021;
- Experiences a qualifying event during the Subsidy Period; or
- Has an additional election opportunity under the ARP’s Extended Election Period (described below).

Clarifications Regarding Qualified Beneficiaries: The Q&As in this category also clarify the following with respect to qualified beneficiaries:

- A child born to, adopted by or placed for adoption with a covered employee during the COBRA period of coverage may become an AEI.
- Individuals who are not qualified beneficiaries, such as a spouse or dependent child not covered under the plan on the day before the reduction of hours or involuntary termination of employment, are not AEIs and do not qualify for the COBRA premium assistance. This includes individuals who are not qualified beneficiaries, but are added to COBRA coverage at open enrollment.
- An individual may become an AEI more than once and receive a COBRA subsidy notice from more than one employer.
Example: An employee is involuntarily terminated during the Subsidy Period, becomes an AEI by electing COBRA, loses AEI status by becoming eligible for other group coverage sponsored by a spouse’s employer, loses such coverage when the spouse is involuntarily terminated during the Subsidy Period, and elects COBRA under the plan sponsored by the spouse’s employer.
- An AEI whose COBRA continuation period has been extended into the Subsidy Period (due to a disability, a second qualifying event, or an extension under state law) may receive premium assistance during such extension.



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Clarifications Regarding Disqualifying Coverage: The Q&As in this category also clarify the following with respect to disqualifying coverage:

- An AEI will be disqualified from receiving the subsidy assistance once the individual becomes eligible for other group coverage¹ or Medicare, regardless of enrollment in such coverage.
- An individual does not lose eligibility for premium assistance (for example, through an additional election opportunity) due to enrollment in other (interim) group coverage that ends prior to April 1, 2021, if the individual is no longer eligible for the interim coverage.
- If a potential AEI was eligible for other group coverage prior to April 1, 2021, but not permitted to enroll in such other coverage on or after April 1, 2021, the individual will not be disqualified from receiving the subsidy.
- If a waiting period applies to the other group plan coverage for which an AEI becomes eligible, the AEI will not be disqualified from receiving the subsidy until such date as the AEI would be permitted to enroll in (*i.e.*, covered under) the other group plan.

Clarifications Regarding Attestation and Substantiation Requirements: The Q&As in this category also clarify the following with respect to attestation and substantiation requirements:

- An employer may require individuals to complete an attestation (whereby they self-certify their eligibility for the subsidy, and their eligibility status with respect to disqualifying coverage under another group health plan or Medicare).
- An employer claiming the premium assistance credit must substantiate its entitlement to the credit, and must retain either the attestation received from the individual (if any) or such other documentation showing the individual's eligibility (such as records relating to the employee's reduction in hours or involuntary termination of employment).
- An employer may rely on an individual's attestation in substantiating its eligibility for the premium assistance credit, unless the employer has actual knowledge that the attestation is incorrect (such as when the employer knows that an individual has reached age 65 and is eligible for Medicare).

Reduction in Hours (Q&As 21-23)

Reminders Regarding Impact of Reduced Hours of Service: The Q&As in this category confirm that:

- A reduction in hours that triggers a loss of plan coverage (and potential AEI status) may be voluntary (e.g., initiated by an employee) or involuntary;
- A furlough would be treated as a reduction in hours (and may qualify as a qualifying event); and

¹ Eligibility for other group coverage does not include other COBRA coverage, but does include eligibility for HRA coverage, unless the HRA qualifies as a health FSA. (See Q&A-38)

- A reduction in hours includes a work stoppage that results from a lawful strike or a lockout.

Involuntary Termination of Employment (Q&As 24-34)

Clarifications Regarding Terminations That Qualify as Involuntary: The Q&As in this category closely track the guidance issued by the IRS in 2009 under ARRA, and provide that the determination of whether an employment termination is involuntary is based on all the facts and circumstances. The new guidance provides that an involuntary termination of employment includes:

- A termination “for cause” (other than a termination for gross misconduct);
- A resignation due to a material change in the geographic location of employment;
- Participation in a window program under which employees with impending terminations are offered a severance package; and
- An employee-initiated termination in response to an involuntary material reduction in hours.

An involuntary termination of employment may also include:

- The failure to renew an employment agreement or similar contract if the employee is otherwise willing and able to continue employment;
- Ending employment while an individual is absent due to illness or disability when there was a reasonable expectation the employee would return to work after the illness or disability subsided;
- An employee-initiated termination for good cause (due to employer action that results in a material negative change in the employment relationship); and
- A “retirement” when the employee is willing and able to continue employment but knows of the impending termination absent retirement.

Coverage Eligible for COBRA Premium Assistance (Q&As 35-42)

Reminders Regarding the Types of Coverage to Which Premium Assistance Applies: The Q&As in this category confirm that the premium assistance applies to the following:

- Vision-only and dental-only plans (regardless of whether the employer pays for any portion of the premium);
- Other group health plan coverage, except for health FSA coverage;
- HRA coverage (even though an HRA may qualify as a health FSA); and
- ICHRAs that are integrated with individual health insurance coverage (but not ICHRAs that are integrated with Medicare).

Reminders Regarding the Types of Coverage Excluded from Premium Assistance: The Q&As in this category also confirm that the premium assistance does not apply to:

- Non-health benefits (such as disability plans and group term life insurance); or
- QSEHRAs (which are not group health plans to which COBRA applies).

New Interpretation Regarding Offers of Retiree Coverage: In Q&A-36 (and Q&A-18), we learn for the first time that retiree health coverage may be treated as COBRA continuation coverage for which premium assistance under the ARP is available. For subsidy purposes:

- In order for retiree health coverage to be treated as COBRA coverage, it must be offered under the same group health plan as the coverage provided to similarly situated active employees.
- Although the amount charged for retiree coverage may be higher than the amount charged to active employees, it may not exceed the maximum amount permitted under Federal COBRA laws (102% of the applicable premium).

Clarifications Regarding Offering and Electing a Different Coverage Option: The Q&As in this category also clarify the following with respect to AEIs who enroll in coverage that is different from the coverage in place at the time of the qualifying event:

- Unless otherwise permitted under COBRA or other laws, if an AEI changes plan coverage and the premium owed for the new coverage is higher than the premium for coverage in place at the time of the qualifying event, the AEI will not be eligible for premium assistance.
- Exception: If the employer no longer offers the coverage that the AEI had in place at the time of the qualifying event, the AEI must be offered the coverage option currently provided to similarly situated active employees that is most similar to the AEI's prior coverage. In this case, premium assistance would be available, even if the premium for coverage is higher under the new plan.

Beginning of COBRA Premium Assistance Period (Q&As 43-46)

Clarifications Regarding Periods of Coverage: The Q&As in this category provide the following clarifications with respect to a particular AEI's first applicable period of coverage:

- A period of coverage is the monthly period (or shorter period) for which premiums are normally charged.
- For an AEI, the start date of the of the COBRA premium assistance (i.e., the first period of coverage beginning on or after April 1, 2021), depends on the period for which premiums would have been charged if the AEI were required to pay the premiums.

Example: Qualified beneficiaries under Plan X are typically required to pay COBRA premiums on a biweekly basis for a corresponding two-week period of coverage. For March 2021, the last two-week period of coverage is from March 28 through April 10, 2021, followed by a period of coverage from April 11 through April 24, 2021. Premium assistance may apply with respect to the premium for the period of coverage beginning April 11, 2021.

- AEIs with an additional election opportunity under the ARP's Extended Election Period (described below) are not required to begin COBRA continuation coverage with premium assistance as of the first period of coverage beginning on or after April 1, 2021. An AEI may waive COBRA (including for any retroactive period of coverage prior to April 1, 2021, otherwise available under the Outbreak Period relief)

and premium assistance for any period prior to electing to receive premium assistance.

- The employer's obligation to provide an additional election opportunity under the ARP's Extended Election Period is based on the qualified beneficiary's eligibility at the time of the qualifying event, even if the employer is no longer subject to Federal COBRA (*i.e.*, due to a reduction in the number of employees).
- Subsidy assistance may be available even if an AEI elects COBRA after September 30, 2021, as long as the AEI makes the election within the applicable 60-day election period.

End of COBRA Premium Assistance Period (Q&As 47-50)

Reminders Regarding Early Termination of Premium Assistance: The Q&As in this category confirm that:

- An AEI's premium assistance may end prior to September 30, 2021, if the AEI sooner:
 - Becomes eligible for other group health coverage or Medicare ("disqualifying coverage"); or
 - Ceases to be eligible for COBRA (*i.e.*, the maximum COBRA period expires).
- An AEI who fails to notify the employer, plan or carrier of his/her eligibility for other group health coverage or Medicare may be subject to a tax penalty of \$250 for each failure; and if the failure is fraudulent, a penalty of the greater of \$250 or 110% of the premium assistance wrongly received.

Clarifications Regarding Periods of Coverage: The Q&As in this category provide the following clarifications with respect to a particular AEI's last period of coverage:

- For an AEI, the end date of the COBRA premium assistance (*i.e.*, the end of the last period of coverage beginning on or before September 30, 2021), depends on the period for which premiums would have been charged if the AEI were required to pay the premiums.

Example: Qualified beneficiaries under Plan Y are typically required to pay COBRA premiums on a biweekly basis for a corresponding two-week period of coverage. For September 2021, the last two-week period of coverage is from September 19 through October 2, 2021. Premium assistance may apply with respect to the entire period of coverage beginning September 19, even though the period of coverage includes coverage for October 1 and October 2, 2021.

- If an AEI remains eligible for COBRA after the premium subsidy ends, COBRA will automatically continue, and payment for the first period of coverage after September 30, 2021, will be timely if it is paid according to the terms of the plan, subject to the COBRA requirements under the Outbreak Period relief.

Note: Since COBRA automatically continues if an AEI remains COBRA-eligible beyond the Subsidy Period, employers with multiple AEIs should be aware that coverage will continue through the 30-day payment grace period, and that there may be a subsequent failure by numerous qualified beneficiaries to pay premiums post-subsidy.

- Death of the employee who experienced a reduction in hours or an involuntary termination of employment does not end the availability of premium assistance with respect to other qualified beneficiaries (*i.e.*, the spouse and dependent children).

Extended Election Period (Q&As 51-55)

Reminders Regarding Application of the Extended Election Period: The Q&As in this category confirm that:

- The additional election opportunity only applies to federal COBRA and not state continuation (unless the state continuation law specifically provides for an additional election opportunity).
- Where an employee experienced a reduction of hours or an involuntary termination of employment and elected employee-only coverage at the time of the original qualifying event, a spouse or dependent child covered prior to the qualifying event who did not elect COBRA at the time of the qualifying event may elect COBRA during the Extended Election Period (*i.e.*, the 60-day period following receipt of the ARP Extended Election Period notice).
- AEIs who elected COBRA for some health coverages and declined COBRA for other health coverages available to them at the time of the qualifying event (*e.g.*, elected COBRA for medical, but not for dental and vision coverage), have an additional opportunity during the Extended Election Period to elect COBRA for any other health coverages they were enrolled in prior to the qualifying event for which they do not have a COBRA election in effect on April 1, 2021 (*e.g.*, dental and vision coverage).

Clarifications Regarding HRA Coverage and the Extended Election Period: The Q&As in this category provide clarification with respect to HRA coverage elected during the Extended Election Period:

- Where an AEI elects COBRA for an HRA after receiving notice of the additional election opportunity and does not elect retroactive coverage otherwise available under the Outbreak Period relief:
 - The HRA may not reimburse expenses incurred after the qualifying event and before the first day of the first period of coverage available as a result of the additional election opportunity (generally April 1, 2021); and
 - The AEI will have access to the same level of HRA reimbursements during COBRA coverage that was available immediately prior to the qualifying event, reduced by any reimbursements made after the qualifying event for expenses incurred prior to the qualifying event.

Extension under the Emergency Relief Notices (Q&As 56-59)

Reminder Regarding Application of the Outbreak Period Extensions: The Q&As in this category confirm that the Outbreak Period relief extending certain COBRA deadlines does not apply to the employer's deadline to provide the ARP notices to individuals.

Clarifications Regarding the Extended Election Period: The Q&As in this category provide the following clarifications with respect to the COBRA subsidy Extended Election Period:

- An AEI must elect COBRA with premium assistance for periods of coverage beginning on/after April 1, 2021, within 60 days of receiving the ARP Extended Election Period notice.
- The extension of the election deadlines provided under the Outbreak Period relief do not apply to the ARP Extended Election Period.
- If an AEI elects retroactive COBRA coverage, the AEI may be required to pay COBRA premiums for periods of coverage beginning before April 1, 2021.
 - The payment deadline extensions under the Outbreak Period relief will apply to the retroactive payments due on/after March 1, 2020.
 - However, an individual's failure to pay COBRA premiums for retroactive coverage does not impact his/her eligibility for COBRA premium assistance beginning April 1, 2021. If, by the applicable payment deadline, the individual only pays a portion of the total premiums due for retroactive COBRA coverage, the plan may credit those premiums to the earliest months of retroactive COBRA coverage and resume providing COBRA as of April 1, 2021 (which could result in gaps of coverage).

Example: Individual experiences an involuntary termination of employment on November 1, 2020 and receives a COBRA election notice. On April 30, 2021, the individual receives the ARP Extended Election Period notice and elects, on May 31, 2021, both retroactive COBRA coverage beginning November 1, 2020, and the COBRA subsidy beginning April 1, 2021. The individual makes 3 months of COBRA premium payments within the applicable deadlines and makes no further payments for the retroactive COBRA coverage. The plan may treat the individual as having retroactive COBRA coverage for November 2020, December 2020, and January 2021, and no coverage for February and March 2021. The individual has COBRA with premium assistance beginning April 1, 2021 through September 30, 2021 (assuming the individual remains subsidy eligible).

Payments to Insurers Under Federal COBRA (Q&A 60)

Clarification Regarding Fully Insured Plans Where the Insurer Collects Premiums: This Q&A confirms that where an insurance carrier for a fully-insured plan has agreed to collect COBRA premiums from qualified beneficiaries, the insurer must treat the AEI as having paid the full COBRA premium during the Subsidy Period, and if the insurance carrier fails to do so, it may be liable for the \$100 per day excise tax under the Code for COBRA violations. Notwithstanding the agreement between the employer and the insurance carrier, the employer is required to pay the COBRA premium to the insurance carrier for the months of COBRA premium assistance.

Comparable State Continuation Coverage (Q&As 61-62)

Reminder Regarding State Continuation Coverage and the Subsidy: The Q&As in this category confirm that, for an insured plan subject solely to continuation coverage under

State law (and not subject to federal COBRA), the insurance carrier is the entity responsible for premium payment (the premium payee) and entitled to the related tax credit. The employer is not eligible to take the premium assistance tax credit in this situation. As mentioned above, the IRS confirms in Q&A 52 that the additional election opportunity only applies to federal COBRA and not state continuation (unless the state continuation law specifically provides for an additional election opportunity).

Calculation of COBRA Premium Assistance Credit (Q&As 63-70)

Reminder Regarding the Calculation of the COBRA Premium Assistance Credit: The Q&As in this category confirm that the tax credit for a particular calendar quarter is equal to the amount of premiums not paid by AEIs for the quarter. The amount of premium not paid by an AEI is the COBRA premium, which includes the 2% administrative fee.

Clarifications Regarding the Calculation of the Premium Assistance Credit: The Q&As in this category provide the following clarifications with respect to calculation of the premium assistance credit:

- Only AEIs are eligible for COBRA premium assistance. Therefore, if non-AEIs are covered by COBRA and increase the premium cost, not all of the premium cost is eligible for premium assistance and the tax credit.

Example: An employee and one dependent child are AEIs, but there is another dependent of the employee with COBRA coverage who is not an AEI. The total COBRA premium for family coverage (absent the COBRA premium assistance) is \$1,000 per month, and the COBRA premium is \$800 per month for self-plus-one-dependent coverage (absent the COBRA premium assistance). The portion of the premium attributable to the coverage for the two AEIs is \$800 per month. The incremental amount the employee pays for COBRA continuation coverage for the non-AEI dependent is \$200 per month. Only \$800 would be eligible for premium assistance and the related tax credit, and the employee would be required to pay the \$200 difference in COBRA premiums.

- An employer may not claim the ARP premium assistance tax credit with respect to amounts that are taken into account as qualified wages pursuant to the CARES Act or as qualified health plan expenses under the FFCRA (no double credits).

Clarifications Regarding the Credit Where There is a Severance or Other Employer

Subsidy: The Q&As in this category provide the following clarifications with respect to calculation of the premium assistance credit where an employer provides a severance or other employer subsidy (outside of the ARP COBRA subsidy):

- Where an employer subsidizes COBRA premium costs, the credit is the amount that would have been paid by the AEI in the absence of the ARP COBRA premium assistance.
 - The tax credit does not include any amount of the COBRA premium the employer would have otherwise provided.
 - There is no tax credit for any month in which the employer subsidizes (as part of a severance agreement or other agreement) 100% of the COBRA

premiums. The Q&As provide additional severance examples that employers may find helpful.

Example: If 102% of the applicable COBRA premium is \$1,000 per month and the employer subsidizes \$500 of the COBRA premium pursuant to a severance agreement and requires the individual to pay the remaining \$500 of COBRA premium, the ARP COBRA subsidy tax credit is \$500 per month.

- The Q&As address when and how a plan can increase the COBRA premium amount (if it previously charged less than the maximum premium allowable) and receive the premium assistance tax credit. Additionally, a plan can provide a taxable severance payment to AEIs and the payment will not reduce the premium tax credit.

Note: Employer severance agreements are complex and typically address issues other than payment of benefit premiums. Employers should consult with legal counsel prior to altering existing severance agreement provisions related to payment of COBRA premiums or modifying severance agreements not yet finalized.

Claiming the COBRA Premium Assistance Credit (Q&As 71-86)

Reminders Regarding Claiming the Tax Credit: The Q&As in this category confirm that:

- The “premium payee” is entitled to claim the tax credit for COBRA premium assistance payments made pursuant to the ARP.
 - The premium payee is the employer in the case of a plan subject to federal COBRA (fully insured or self-funded), and the insurance carrier for a plan not subject to federal COBRA.
 - A governmental entity (State government, political subdivision thereof, etc.) can be a premium payee and entitled to the tax credit.
- If an AEI fails to provide notice of his/her eligibility for disqualifying coverage, the premium payee is still entitled to the tax credit, unless the premium payee knew of the individual’s eligibility for disqualifying coverage (such as when the employer knows that an individual has reached age 65 and is eligible for Medicare).
- An employer claims the tax credit by reporting the credit and the number of individuals receiving COBRA premium assistance on Form 941.
 - In anticipation of receiving the credit, an employer may (1) reduce the deposits of federal employment taxes up to the amount of the anticipated credit, and (2) request an advance of the amount of anticipated credit that exceeds the federal employment tax deposits available for reduction by filing Form 7200.
 - If the premium payee does not have any employment tax liability, the credit should still be claimed on Form 941. The premium payee entitled to the credit should also report any advance credits received on Form 941.
- An employer becomes entitled to the premium assistance credit as of the date the AEI’s COBRA election is received for any periods of coverage beginning prior to such date, and for subsequent periods of coverage, as of the beginning of each period of coverage without regard to when the premium payee could have required the payment of any premium.

- If an AEI erroneously pays the premium during the COBRA subsidy period, the premium payee is entitled to the tax credit on the date the AEI is reimbursed for the premium amounts for which they should have received the subsidy.
- The premium assistance tax credit is included in the gross income of the entity claiming the tax credit.

Clarifications Regarding the Tax Credit and Use of Third-Party Payers: The Q&As in this category provide the following clarifications with respect to the tax credit where an employer uses the services of a third-party payer:

- An employer that uses a third-party payer (e.g., payroll service provider or professional employer organization/PEO) to report and pay employment taxes to the IRS can receive the tax credit.
- The third-party payer is not entitled to the tax credit unless it is treated as the premium payee (see Q/A 82 for circumstances when a third-party payer would be considered a premium payee).