

# Free and Extended COBRA Coverage Under The American Rescue Plan Act of 2021 (US)

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Section 9501 of the American Rescue Plan Act of 2021 (the “ARPA”)<sup>[1]</sup> requires employers to extend offers of free COBRA coverage to certain individuals for the period from April 1, 2021 through September 30, 2021. The ARPA then provides tax credits as means of offsetting the costs of the free COBRA coverage. The law also requires employers to extend offers of COBRA coverage to other individuals whose right to COBRA coverage previously ended.

This blogpost reviews who is eligible for free coverage, how the tax credits work, eligibility for extended coverage, and some potential issues pertaining to insurance coverages.

## Background

The “COBRA Law”<sup>[2]</sup> is a federal law that generally obligates employers with group health plans to offer covered employees and covered dependents (“COBRA qualified beneficiaries”) the right to continue coverage under the group health plan in certain circumstances where the coverage otherwise would cease. For purposes of the COBRA Law, group health plans include medical, prescription drug, dental and vision plans.

Primarily relevant here, the COBRA Law requires an employer to offer continuation of coverage for 18 months when coverage is lost due to a covered employee’s reduction in work hours or termination of employment (other than on account of gross misconduct).

A qualified beneficiary’s right to COBRA coverage ceases if the individual becomes covered under another group health plan that does not contain an exclusion or limitation with respect to a preexisting condition. COBRA rights also cease if a qualified beneficiary becomes entitled to Medicare, after electing COBRA coverage.

Employers are permitted to charge qualified beneficiaries up to 102% of the group health plan’s costs of the coverage.

## Free COBRA Coverage

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Under Section 9501 of the ARPA, free COBRA coverage must be offered to COBRA qualified beneficiaries who are enrolled for COBRA coverage under a group health plan on April 1, 2021 and thereafter, if coverage under the plan is lost, or previously was lost, due to a covered employee's:

- reduction in work hours (e.g., layoff, furlough, etc.), or
- termination of employment (*other than a voluntary termination*).

The offer of free COBRA coverage will cease if an individual becomes eligible for other group health plan coverage or Medicare.

Thus, free COBRA coverage must be offered on a prospective basis for losses of coverage that occur from April 1, 2021 through September 30, 2021, on account of a covered employee's reduction in work hours or termination of employment (other than voluntary).

In addition, free COBRA coverage also must be offered to the following types of qualified beneficiaries and other individuals:

- Qualified beneficiaries who are enrolled for COBRA coverage as of April 1, 2021, on account of a covered employee's prior reduction in hours or termination of employment (other than voluntary) and prior election of COBRA coverage.
- In addition, it appears that free COBRA coverage must be offered to qualified beneficiaries who are in a regular COBRA coverage election period and can elect COBRA coverage with an effective date that is retroactive back to April 1, 2021 or before.

If any of the foregoing rules do apply, the offer of free COBRA coverage must be made effective as of April 1, 2021. However, free COBRA coverage does not have to be extended past the end of what would have been the normal expiration date for the underlying COBRA coverage period (e.g., 18 months from the date of a covered employee's termination of employment or reduction in work hours).

## **Extensions of COBRA Coverage**

The law provides special COBRA enrollment rights under a group health plan for the following individuals who are not enrolled for COBRA coverage as of April 1, 2021:

- An individual who previously had the right to elect COBRA coverage on account of a covered employee's prior reduction in work hours or termination of employment (other than voluntary).
- An individual who was previously covered under the group health plan via a valid COBRA election of coverage, but subsequently had that coverage discontinued before April 1, 2021.

*The law is unclear in these two situations whether an offer of free COBRA coverage must be made. We are hopeful that the DOL will issue guidance on this point.*

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Note that the latter rule seems to apply to anyone who was previously on COBRA, without regard to the type of COBRA “qualifying event”.

If any of the foregoing rules apply, the offer of extended COBRA coverage must be made effective as of April 1, 2021. However, COBRA coverage does not have to be extended past the end of what would have been the normal expiration date for the underlying COBRA coverage period (e.g., 18 months from the date of a covered employee’s termination of employment or reduction in work hours).

## **Termination of Employment Issues**

Section 9501 of the ARPA introduces a new concept to the COBRA law. Under Section 9501 of the ARPA, the offer of free COBRA coverage does not have to be made if the employee’s termination of employment was “voluntary”.

It is not clear whether a mutual termination of employment will or will not be considered “voluntary” under the law. Given that there are tax credits being provided to help offset the employer’s costs, and that an employer can be subject to liability for failure to offer free COBRA coverage, we believe it would be wise for employers to be cautious when determining that an offer of free COBRA coverage does not have to be made because an employee’s termination of employment was voluntary.

In addition, note that previously, COBRA coverage did not have to be offered if an employee’s termination of employment was on account of “gross misconduct”. That exception still applies. Thus, if a qualified beneficiary was not offered COBRA coverage previously because an employee’s termination on account of gross misconduct, free COBRA coverage does not now have to be offered to that person. Nor would free COBRA coverage have to be offered prospectively to an employee whose termination of employment is on account of gross misconduct.

## **Notice and Election Issues**

Fortunately, the law requires the Department of Labor to issue within 30 days, a model notice for employers to use to advise qualified beneficiaries of their rights under the law. Plan administrators are required to give notices to eligible qualified beneficiaries by not later than May 30, 2021.

Once an eligible qualified beneficiary receives a notice, the individual is entitled to a 60 day period to elect the COBRA coverage. Any coverage elections will be made retroactive back to April 1, 2021.

Plan Administrators should be gathering information now to get ready to send out the required notices. In general, COBRA notices can be sent by first class mail to the last known address of a qualified beneficiary. However, it might be advisable under these circumstances to send a letter that has a return receipt.

If there are missing qualified beneficiaries, it is advisable for an employer to at least take some common sense actions to locate them. For example, former co-workers may know the whereabouts of a missing qualified beneficiary. The employer also might have a telephone number or home E-Mail address that might be used to contact a missing qualified beneficiary.

On an ongoing basis, as employees have reductions in work hours and terminations of employment (other than voluntary), COBRA notices will also need to be revised or supplemented to advise qualified beneficiaries of their rights to free COBRA. Again, the DOL is supposed to be issuing a

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model notice.

Notices of free COBRA will also have to explain that an individual's right to free COBRA will cease if the individual is eligible for coverage under another group health plan. The law also provides a tax penalty if an individual fails to notify the group health plan that the individual is eligible for coverage under another group health plan. The tax penalty generally is \$250 (or a much higher amount if the failure is intentional). The notice to the individual will also have to explain the employee notice and potential penalties.

Finally, the law also imposes another notice obligation. If a qualified beneficiary does elect free COBRA coverage, the plan administrator is required to notify the individual 15 – 45 days before the free COBRA coverage will expire. Again, the DOL is supposed to provide a model notice.

## **Tax Credits and Insurance Company Issues**

In an effort to help offset the costs of providing free COBRA coverage, the law makes available tax credits that may be taken against employer Medicare taxes. The tax credits are based on the COBRA premiums that would have been payable by the qualified beneficiary for the relevant free COBRA coverage.

This portion of the law has an unusual twist. Except as may otherwise be provided by the Secretary of the Treasury, the tax credits are provided to the following persons:

- If the plan is a multiemployer plan, the multiemployer plan itself.
- If the plan is fully or partially self-insured, to the employer that sponsors the plan (including state and local governmental employers).
- If the plan is not described above, to the insurance company

If an employer has a fully insured plan, presumably the employer will have to continue to pay premiums to the insurer for the enrollment of any qualified beneficiaries. However, the law provides that the tax credit goes to the insurance company, and not to the employer.

Under this scenario, the law does not seem to obligate an insurer to give the employer any portion of the tax credits as an offset to employer premiums. Thus, apparently the employer will need to negotiate with the insurer to have the insurer's tax credits used as an offset the employer's premiums that are due under the plan for the qualified beneficiaries.

In the case of a self-insured plan, the employer will directly receive the tax credits. However, a secondary issue might be lurking in relation to the employer's coverage under a stop-loss insurance policy.

The law does not address stop-loss policy coverage. Thus, self-insured employers may want to promptly determine whether the plan's stop-loss coverage will apply to claims incurred by COBRA qualified beneficiaries who obtain free COBRA coverage or extended enrollment rights under the ARPA. If the stop-loss policy will not apply to claims from those qualified beneficiaries, the employer may want to try to negotiate with the stop-loss carrier for additional coverage.

[1] P.L. 117-2, effective March 11, 2021.

[2] For private sector employers, the “COBRA Law” is contained in Part 6 of Subtitle B of Title I of the Employee Retirement Income Security Act (ERISA) (29 U.S.C. §601 et. seq.). Tax law penalties for failure to comply are contained in Section 4980B of the Internal Revenue Code. State and local governmental employers are subject to certain provisions of the Public Health Service Act (42 U.S.C. §300bb-1 et. seq.).

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