



Biden Signs Stimulus Bill with 100% COBRA Subsidy Through September

Keep laid-off employees informed of changing COBRA rules

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March 11, 2021

[This article was last updated on 3/17/21]

The federal government will pay 100 percent of COBRA insurance premiums for eligible employees who lost their jobs and for their covered relatives through September, allowing them to stay on their company-sponsored health plan, under the American Rescue Plan Act (<https://advocacy.shrm.org/wp-content/uploads/2021/03/American-Rescue-Plan-Act-FINAL-6.pdf>) (ARPA) that President Joe Biden signed into law on March 11.

When the Senate voted to pass the bill, it increased the government's subsidy to 100 percent of COBRA premiums for laid off workers and covered relatives from April 1 through Sept. 30, 2021, up from an 85 percent subsidy in the House bill.

Employers will obtain the subsidy through a payroll tax credit against employers' quarterly taxes, and will be responsible for paying health insurance carriers for the premiums, explained Kathryn Bakich, Washington, D.C.-based national health compliance practice leader at Segal, an HR and employee benefits consultancy.

Both fully insured and self-insured group health plans subject to federal COBRA are eligible for the credit against their Medicare FICA payroll taxes, and must provide the COBRA premium subsidy to assistance eligible individuals who have elected COBRA coverage, starting April 1.

"If the credit exceeds the amount of payroll taxes due, the credit would be refundable when employers submit Form 941," their quarterly tax return, Bakich said. The credit could also be advanced under rules that will be set by the Treasury Department.

Six-Month Subsidy

The federal government's subsidy for COBRA coverage premiums that assistance eligible employees would otherwise be required to pay will:

- **Begin on** April 1, 2021.
- **End on** Sept. 30, 2021.

Who Is Eligible?

Only assistance eligible individuals (AEIs) qualify for a subsidy, which excludes employees who voluntarily end employment.

"An AEI is someone who, in the time period between April 1 and Sept. 30, 2021, is eligible for COBRA coverage due to an involuntary termination (other than for gross misconduct) or a reduction in hours (<https://www.bakerlaw.com/alerts/faqs-american-rescue-plan-act-of-2021-cobra>) and elects such coverage," noted law firm BakerHostetler. "An AEI no longer is eligible for a subsidy upon the earliest of his or her becoming eligible for other group health plan coverage (that is not an excepted benefit) or Medicare or the expiration of his or her maximum COBRA period," the firm explained.

AEIs are required to notify their group health plan if they become eligible for other ACA-compliant coverage during the subsidy period, after which the subsidy would end (even if the COBRA beneficiary does not enroll in the alternative coverage to which they become eligible), and they would be subject to penalties if they fail to do so.

Reviewing the Basics: COBRA Coverage

Most private-sector employers must offer COBRA health care continuation coverage if they sponsor a group health plan and had at least 20 full- or part-time employees (<https://www.dol.gov/sites/dolgov/files/ebsa/about-ebsa/our-activities/resource-center/faqs/cobra-continuation-health-coverage-for-employers.pdf>) during the previous year.

Employers may require terminated workers who choose to keep their employer-sponsored health plan—generally for up to 18 months (www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/howlongdoescobralast.aspx)—to pay for COBRA coverage. COBRA can be extended to 29 months for people with disabilities, and up to 36 months if there is a second qualifying event during the initial continuation coverage period, such as the divorce or separation of the employee and spouse. Some states impose their own COBRA coverage requirements in certain circumstances.

Typically with COBRA, insurance premiums are limited to the full cost of the coverage plus a 2 percent administration charge. That cost, however, is not affordable for many newly unemployed workers.

During the pandemic, some employers chose to pay COBRA coverage (www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/canwepayforaformerorcurrentemployeeescobracoverage.aspx) for employees who were laid off or who lost group health plan coverage when they were furloughed or had their hours reduced.

Who Receives the Tax Credits?

Ashley Gillihan, a partner in the Atlanta office of law firm Alston, & Bird, said during an Employers Council on Flexible Compensation virtual conference that it appears tax credits will apply as follows:

- If a group health plan is subject to federal COBRA, then the employer receives the tax credits, whether it's fully insured

or self-insured, and pays the insurer or third party administrator (TPA) to subsidize coverage for AEIs that elect COBRA coverage through September 2021.

- If a self-funded plan is not subject to federal COBRA but the state requires continuation coverage, then the employer receives the tax credit and pays the insurer/TPA to subsidize coverage.
- If a fully insured plan is not subject to federal COBRA but the state requires continuation coverage, then the insurer receives the tax credits and is responsible for ensuring AEIs' continuation coverage at no cost.

Employer Concerns

In preparing for the new subsidy, "employers are ... remembering the painful and confusing premium assistance credit program created in 2009" under the American Recovery and Reinvestment Act (ARRA), said Danielle Capilla, director of compliance and employee benefits at Alera Group, an employee benefits and financial services firm. "The process for that subsidy was complex, and many employers made mistakes with financial repercussions, and there are fears that the 2021 COBRA subsidy rules and process will be similar."

She added that employers have expressed hope "that regulatory authorities provide clear and concise guidance on how to implement and handle COBRA subsidies and learn from the mistakes of the ARRA subsidy program."

Timothy S. Klimpl, an attorney in the Stamford, Conn., office of law firm Carmody, advised that "Employers looking to dust off their COBRA subsidy playbook from ARRA, the 2009 recovery act, will need to add a few plays." For instance, he noted, "aside from the differences in subsidy amounts, the new legislation seems to clearly provide eligibility to individuals who lose active coverage as a result of a reduction in hours, not only an involuntary termination of employment."

Together with the individualized one-year election and payment extensions (www.shrm.org/ResourcesAndTools/hr-topics/benefits/Pages/agencies-revise-and-complicate-cobra-deadline-extensions.aspx) announced in late February by the Department of Labor (DOL), "employers will be facing a tremendous administrative and compliance challenge implementing the COBRA subsidy" Klimpl said. "The only way to meet this challenge will be to get out in front of it and make a proactive plan for communicating with eligible individuals, making those communications, and keeping good records of them to demonstrate fiduciary compliance."

Options for Employees

Under the ARPA, employers could give laid-off employees up to 90 days (following COBRA-notice receipt) to elect to enroll in a different group health plan offered by their employer. The premium for the alternative coverage choice cannot be higher than the premium for the plan in which the employee had been enrolled, among other restrictions.

For affected employees or covered relatives, "this could be a huge relief, and not just financially," said Kim Buckey, vice president of client services at DirectPath, a benefits education, enrollment and health care transparency firm. "It means they won't have the burden of finding—and learning the ins and outs of—a new plan, potentially finding a new provider, or risk going

without coverage at all while they're trying to find new employment during the pandemic," she explained.

If the employer chooses to allow COBRA beneficiaries to change plan options when they elect COBRA coverage, "that could provide additional financial relief," Buckey said.

Special Enrollment Period

Under the ARPA, a terminated worker who is eligible for assistance and who hasn't elected COBRA coverage by April 1, or who elected COBRA coverage but then discontinued it, may elect COBRA coverage during a special enrollment period starting April 1 and ending 60 days after the date on which the COBRA notification was delivered.

These individuals "may receive the subsidy on a prospective basis (<https://www.mercer.com/our-thinking/law-and-policy-group/cobra-help-dependent-care-items-in-covid-19-bill-pass.html>), without having to elect and pay for COBRA retroactively for months prior to the subsidy becoming available," according to Geoff Manville and Dorian Z. Smith, partners at HR consultancy Mercer.

Notice Requirements

By May 30, "employers' COBRA notices will have to include information about the availability of the subsidy and the special 60-day enrollment period for qualified beneficiaries," Manville and Smith advised. "This information may be added to current COBRA notices or provided in a separate document," they noted.

COBRA notice forms, either as amended or as a separate document, must include:

- **The forms necessary for establishing eligibility** for COBRA premium assistance.
- **The name, address and telephone number necessary to contact the plan administrator** and any other person maintaining relevant information in connection with premium assistance.
- **A description of the extended election period** provided by the legislation.
- **A description of the option to enroll in different coverage**, if adopted by the employer.

The ARPA directs the DOL to publish model notices within 30 days of the bill's enactment.

"Employers need to prepare now to send out notices and inform individuals about the subsidy," Bakich said.

Plans must also:

- **Send a separate expiration notice** to eligible individuals when their periods of premium assistance are due to expire.
- **Notify individuals if their subsidy will end before Sept. 30, 2021**, although this notice will not be required if their subsidy is ending due to the individual's eligibility for other coverage.

In addition to providing the required notices, plan sponsors of group health plans should consider whether they will permit individuals to enroll in a different—but not more expensive—plan option than the one in which they were enrolled when coverage was lost, Bakich said. "Plan sponsors would have the option to permit this and would need to include the availability of that option in the notices they send out," she noted.

Klimpl expects "proof of these special notices to become low-hanging fruit for ERISA compliance investigations conducted by the DOL's Employee Benefits Security Administration over the next couple of years."

Effect of COBRA Pandemic-Relief Deadline Extension

While employers respond to legislative developments regarding COBRA, they should stay aware of new regulatory guidance affecting COBRA deadlines for plan administrators and terminated employees.

The extended deadline guidance from the Department of Labor (www.shrm.org/ResourcesAndTools/hr-topics/benefits/Pages/agencies-revise-and-complicate-cobra-deadline-extensions.aspx) in Disaster Relief Notice 2021-01, issued on Feb. 26, "complicates administration of the COBRA subsidy in that individuals are allowed an extension of time to elect COBRA," Bakich said. "Those individuals who are eligible for delays will also be covered by the COBRA subsidy" if they meet the eligibility requirements, she noted.

Noted Klimpl, "Hopefully, the DOL will be issuing clear guidance and compliance assistance to clarify the interplay between the new COBRA subsidy and the individualized one-year extensions announced last month."

Administrative Issues

"Employers should be aware of administrative issues related to notifying individuals that may have had a COBRA event [i.e., loss of employment] in the last year, and become aware of how to address situations where the employer may have subsidized a portion of the COBRA premium," Bakich said.

In anticipation of the measure's enactment and the subsidy's April 1 effective date, employers should start "working hard to gather the names of COBRA qualified beneficiaries who had a qualifying event in 2020 so they can make sure that anybody who is eligible for COBRA during the six-month subsidy period gets a notice and ability to elect COBRA," Bakich said. Generally, this will include "anyone who had—or could have had—COBRA as far back as November 2019, because their 18 months of coverage would extend through April 2021," she pointed out.

Next Steps

Employers are advised by HR advisory firm CBIZ [to take these actions \(https://www.cbiz.com/insights/articles/article-details/at-issue-american-rescue-plan-act?\)](https://www.cbiz.com/insights/articles/article-details/at-issue-american-rescue-plan-act?):

- Identify all assistance eligible individuals entitled to elect COBRA coverage due to involuntary terminations and reductions in hours.
- Include both those currently on COBRA and those who could be on COBRA through September 2021 but for the fact that COBRA was declined or dropped.
- Be prepared to send out explanatory notices.
- Get ready to track assistance eligible individuals who elect the COBRA subsidy.
- Work with payroll providers to claim the refundable tax credit.

Working with TPAs

Buckey noted that "most employers today outsource COBRA administration, so it would fall on the administrator to manage election changes, notice requirements and billing." The model COBRA notices expected shortly "should ease the burden of revising current notices," she said, and "since most plans are silent on election changes for COBRA, it's unlikely that any plan amendment would be required to adopt the plan option change provision."

She added, "It's worth noting that the penalty for COBRA beneficiaries who fail to notify the plan when they become eligible for other group coverage is \$250, and in the case of intentional failure to notify, the greater of \$250 or 110 percent of premium assistance provided after loss of eligibility"—a matter about which employers should inform COBRA enrollees.

While employers may be able to outsource administration of the subsidy to their COBRA third party administrators to some extent, Klimpl said, "employers ultimately remain responsible for compliance. TPAs will also depend on employers to report terminated employees and beneficiaries who may be newly eligible for the special election and subsidy, including in some cases several months after a separation from employment that occurred during the [COVID-19] outbreak period," he explained.

COBRA Coverage or Subsidized Marketplace Plans?

Through 2022, the ARPA expands access to federal subsidies for people who buy health insurance on the Affordable Care Act (ACA) marketplace, through Healthcare.gov (<http://www.healthcare.gov/>) or a state-run exchange, by eliminating the subsidy cutoff if a purchaser earns more than 400 percent of the federal poverty level, about \$51,520.

Instead, for those earning more than 400 percent of the poverty line, subsidies—technically, advanceable tax credits—will gradually decrease as income rises, limiting the cost of ACA plan premium contributions for silver (midlevel) health plans to no more than 8.5 percent of an individual or family's income.

Until it expires at the end of September, the 100 percent subsidy for COBRA premiums is likely to keep terminated employees enrolled in their employer-sponsored plan, benefit specialists said. Beginning in October, however, those who have not exhausted their 18 months of available COBRA coverage (or 29 months for people with disabilities) may want to compare the cost of maintaining health insurance under COBRA with the cost of purchasing an ACA marketplace plan, especially if they are now eligible for enhanced subsidies (<https://www.kff.org/interactive/subsidy-calculator/>).

A point to remember: Active employees who are offered insurance through work are not eligible for premium subsidies through the ACA marketplace if their employer-sponsored coverage is considered affordable (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/aca-coverage-terms.aspx) and meets the ACA's minimum-value (www.shrm.org/ResourcesAndTools/hr-topics/benefits/pages/aca-coverage-terms.aspx#minimum-value) requirement.

Related SHRM Resource:

Summary: American Rescue Plan Act (<https://advocacy.shrm.org/wp-content/uploads/2021/03/American-Rescue-Plan-Act-FINAL-6.pdf>), SHRM Government Affairs, March 2021

Related SHRM Articles:

New COBRA Subsidy Requires Quick Action by Plan Sponsors (www.shrm.org/ResourcesAndTools/hr-topics/benefits/Pages/new-COBRA-subsidy-requires-quick-action-by-plan-sponsors.aspx), *SHRM Online*, March 2021

Agencies Revise—and Complicate—COBRA Deadline Extensions (www.shrm.org/ResourcesAndTools/hr-topics/benefits/Pages/agencies-revise-and-complicate-cobra-deadline-extensions.aspx), *SHRM Online*, March 2021

Stimulus Bill Provides Extensive Pension Funding Relief (www.shrm.org/ResourcesAndTools/hr-topics/benefits/Pages/stimulus-legislation-provides-pension-funding-relief.aspx), *SHRM Online*, March 2021

Senate Passes \$1.9 Trillion COVID-19 Economic Relief Bill (www.shrm.org/ResourcesAndTools/legal-and-compliance/employment-law/Pages/Senate-Passes-COVID-19-Economic-Relief-Bill.aspx), *SHRM Online*, March 2021

Biden Proposes Temporary Subsidies for COBRA Coverage (www.shrm.org/ResourcesAndTools/hr-topics/benefits/Pages/Biden-to-seek-temporary-subsidies-for-COBRA-coverage.aspx), *SHRM Online*, January 2021

SHRM Members-Only Resources:

SHRM members-only express request: COBRA Premium Subsidy (www.shrm.org/ResourcesAndTools/tools-and-samples/exreq/Pages/Details.aspx?Erid=1676&_ga=2.181996519.1705326135.1613401299-410169545.1525450797)

SHRM members-only how-to guide: How to Administer COBRA (www.shrm.org/resourcesandtools/tools-and-samples/how-to-guides/pages/howtoadministercobra.aspx)

SHRM members-only HR Q&As: What are the qualifying events under COBRA? (www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/qualifyingeventsundercobra.aspx)

SHRM members-only HR Q&As: How long does COBRA continuation coverage last? (www.shrm.org/resourcesandtools/tools-and-samples/hr-qa/pages/howlongdoescobralast.aspx)

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