



COBRA Subsidy 2021 UPDATE

This Compliance *FAQ* provides answers to some questions you may have about the new COVID COBRA subsidy rules and how they work.

This *FAQ* reflects HPI's current understanding of the new temporary COBRA subsidy rules and incorporates all guidance provided by the Department of Labor (DOL) to date.

HPI will continue to provide updates as any new guidance is issued.

Q 1. Which plans are eligible for the subsidy?

- A. All group health plans sponsored by an employer which are subject to the COBRA rules under the Employee Retirement Income Security Act of 1974 (ERISA), including medical, dental and vision coverage.

Q 2. Who is eligible for the subsidy?

- A. "Assistance Eligible Individuals (AEIs)" are entitled to the subsidy and are defined as employees and covered family members who lose health coverage due to the employee's:

- Reduction in hours,

or

- Involuntary termination of employment

and who fall into one of the three categories below:

- Are currently enrolled in COBRA, *or*
- Become eligible for COBRA on or after April 1, 2021 and before September 30, 2021, *or*
- Became eligible for COBRA before April 1, 2021 and are still within their maximum 18 month COBRA period even if they did not previously elect COBRA,

and

- Are **not** eligible for coverage under either another group health plan (such as a spouse's, parent's or new employer's plan) or Medicare

During its April 26, 2021 webinar, the DOL reiterated that a reduction in hours that qualifies an employee for the subsidy includes such voluntary actions as changing from full-time to part-time or taking an approved leave of absence, provided these actions result in a loss of coverage under the Plan.

¹ The subsidy applies to federally recognized dependents, i.e., spouses, children, step children. If other family members, such as domestic partners, are covered under the Plan, there may be some premium due. For example, if an employee covered only herself and her domestic partner, and the Plan's coverage levels were self-only and family, the subsidy would be the value of self-only coverage and the additional premium due would be the difference between self-only and family coverage. But, using the same coverage levels, if an employee had family coverage that included her children and domestic partner, the subsidy would cover 100% of the cost of the family premium since including the domestic partner does not affect the amount of the total family premium.

Q 3. What does “involuntary” mean in the context of the pandemic?

- A. Involuntary termination includes employment termination initiated by employer action, such as layoffs and firing (except firing for gross misconduct). However, during its April 26, 2021 webinar, the DOL indicated that both the IRS and the DOL may review whether the definition might be more expansive. HPI understands that the DOL and IRS have been receiving many questions about terminations initiated by employees who may have left work for COVID-specific reasons such as caring for a child whose day care or school closed, or being at high risk for contracting the virus. Again, HPI will provide updates if and when additional guidance is issued.

Q 4. How will eligibility for the subsidy be confirmed?

- A. Employers will identify AEIs as those employees whose hours were reduced or who were involuntarily terminated from employment and lost coverage under their plans as a result. HPI will work directly with our COBRA administration clients on this process and will provide lists of all COBRA-eligible individuals on which the clients can indicate which are AEIs.

Members who believe that they are eligible for the subsidy must apply using a form called *Request for Treatment as an Assistance Eligible Individual* which also requires that they attest that they and their covered dependents meet the eligibility criteria listed in Q 2 above.

Q 5. What if an employer incorrectly categorizes an employee’s status?

- A. There are potential tax consequences under the IRS rules, as well as potential liability under the COBRA regulations:
- If an employer incorrectly provides a subsidy and submits for a payroll tax credit (see Q 11) for a person determined by the IRS not to be eligible, the IRS may determine that the employer failed to pay required payroll taxes.
 - If an employer incorrectly denies a subsidy to an employee found by the DOL to have been eligible, the DOL may find that the employer violated the employee’s rights under COBRA.

Q 6. Are there penalties for individuals who fail to notify their Plan or COBRA Administrator about eligibility for other coverage?

- A. Yes. The penalty is \$250 or, if the failure to notify is intentional, 110% of the subsidy provided.

Q 7. What happens if an AEI loses eligibility due to becoming eligible for another group health plan or Medicare?

- A. The AEI must submit a *Participant Notification* form to let the Plan and COBRA Administrator know about their eligibility for other coverage. These forms are part of the notification packages that will be provided with the forms to apply for the subsidy.

Q 8. When does the subsidy begin?

A. On the *later* of:

- The first day of the AEI's COBRA coverage period, or
- April 1, 2021.

Q 9. When does the subsidy end?

A. On the *earlier* of:

- The last day of the AEI's COBRA coverage period, or
- September 30, 2021.

Q 10. What does the subsidy cover?

A. The subsidy covers 100% of the COBRA premium for each AEI.

Q 11. How long do AEIs have to apply for the subsidy using their *Request for Treatment as an Assistance Eligible Individual* form?

A. Applicants for the subsidy must submit their *Request for Treatment as an Assistance Eligible Individual* form to HPI no more than 60 days after the form is mailed to them.

Q 12. How is the subsidy funded?

A. The cost is fully funded by the federal government. Employers first absorb the cost of the subsidized COBRA premiums and then work with their tax advisors to recover the subsidy amounts from the IRS with filings against quarterly payroll taxes due for Medicare health Insurance.

Q 13. Will there be additional charges from HPI to issue the required notices and process applications related to the COBRA subsidy?

A. No. These services will be covered by HPI's current COBRA administration fees.

Q 14. May employers rely on an individual's attestation regarding reduction in hours, involuntary termination and eligibility?

A. Yes, an employer may rely on individual's attestation regarding reduction in hours, involuntary termination and eligibility for other GHP or Medicare unless employer has actual knowledge that the attestation is incorrect.

Q 15. Must employers keep records of individuals' attestations if the employer is relying on the attestation?

- A. Yes, employers must keep records of individuals' attestations if the employer is relying on the attestation, but employers may also rely on other evidence to substantiate eligibility, such as records regarding a reduction in hours or involuntary termination of employment.

Q 16. If an individual's employment was involuntarily terminated, and then became eligible for other GHP coverage before 4/1/21 but did not enroll, and is not permitted to enroll until the next OE period, is that individual eligible for the subsidy?

- A. Yes, but, if the individual is eligible to enroll in spouse's GHP coverage under the Emergency Relief Notice, then they would not be eligible for the subsidy from the former employer.

Q 17. Is an AEI whose COBRA coverage is extended by a second qualifying event eligible for the subsidy during the portions of the extension?

- A. An AEI whose COBRA coverage is extended by a second qualifying event is eligible for the subsidy during the portions of the extension that fall between 4/1/21 and 9/30/21 if the original qualifying event was a reduction in hours or involuntary termination of employment.

Q 18. Are early retirees who are offered retiree coverage under a plan separate from the active coverage eligible for the subsidy?

- A. No, early retirees who are offered retiree coverage under a plan separate from the active coverage are not eligible for the subsidy.

Q 19. Does a reduction in hours that results in loss of coverage cause a qualified beneficiary to be a potential AEI?

- A. Yes, a reduction in hours that results in loss of coverage would cause a qualified beneficiary to be a potential AEI regardless of whether reductions in hours is voluntary or involuntary.

Q 20. What is an involuntary termination?

- A constructive discharge - i.e., an action by the employer that results in a material negative change in the employment relationship, is an involuntary termination. (The IRS did not include examples, but this would likely include severe reductions in hours or pay, or schedule changes, or change in work location (Q 28) which then triggered an employee's resignation).
- Termination of employment initiated by the employee in response to involuntary material reduction in hours that did not result in loss of coverage is an involuntary termination of employment.
- Involuntary termination includes employer decision not to renew an employee's contract.

Q 21. Are incentives to leave employment an involuntary termination?

- A.** Yes, involuntary termination includes accepting termination incentive, such as an early retirement incentive, within a specified window.

Q 22. What would not be an involuntary termination?

- Involuntary termination does not include employee concerns about health or safety, such as concerns about the employee or a family member, or the inability to locate daycare*.
**If an individual initiates a termination of employment because of lack of child care or school closure, but the employee and employer intend to maintain the employment relationship (i.e., treat the absence like a leave of absence), then the qualifying event is a voluntary reduction in hours and the employee would be a potential AEI.*
- A death of employee is not involuntary termination of employment and covered dependents are not potential AEs.

Q 23. When would the subsidy begin if the period of coverage is not on a monthly basis?

- A.** If, for example, a period of coverage for which an individual is paying is a two-week period, with coverage running from March 27 through April 9, the subsidy would begin on April 10. Similarly, if a period of coverage begins in September 2021 and continues into October 2021, the subsidy would be payable for the entire period beginning in September 2021.

Q 24. Any impact to an employer falling below 20 EE threshold during pandemic?

- A. All the COVID-related provisions apply to employees whose qualifying events fell during the period when an employer was subject to the provisions of COBRA.

Example: Based on the number of employees from the preceding calendar year, an employer is not a small employer for the 2020 calendar year, but is a small employer for calendar year 2021. As a result, Federal COBRA requirements apply to the employer for calendar year 2020 but not calendar year 2021. An individual has a qualifying event that is an involuntary termination of employment in November of 2020. Because the qualified beneficiary's qualifying event occurred during the 2020 calendar year when the employer was not a small employer and the plan was subject to Federal COBRA requirements, the employer is required to provide the ARP extended election period and the qualified beneficiary is eligible to elect Federal COBRA continuation coverage with COBRA premium assistance.

Q 25. What is the HRA impact?

- A. Generally, qualified beneficiaries electing COBRA continuation coverage with respect to HRA coverage have access to the same level of reimbursements during COBRA continuation coverage as was available immediately before the qualifying event. Thus, a qualified beneficiary electing COBRA continuation coverage with respect to an HRA under the ARP extended election period will have access to the same level of reimbursements as the qualified beneficiary had immediately before the qualifying event based on the amount originally available for the HRA plan year and reimbursements for expenses incurred before the qualifying event, reduced by the amount of any reimbursements made after the qualifying event; for example, reimbursements for expenses incurred before the qualifying event that were submitted and reimbursed after the qualifying event.

Q 26. Electing COBRA retroactively?

- A. If a potential Assistance Eligible Individual elects COBRA continuation coverage with COBRA premium assistance but declines to elect COBRA continuation coverage that would begin at the time of a qualifying event that occurred before April 1, 2021, that individual may not, after the 60-day extended election period for electing COBRA continuation coverage under the ARP has ended, later elect COBRA continuation coverage that begins at the time of the qualifying event.

Q 27. Can an employer include the 2% administrative fee that it would have charged the QB as part of the credit?

- A. Yes.

Q 28. If a plan had previously charged less than 102% of the applicable premium for COBRA, may it raise the premium to 102% for all similarly situated QBs, and claim the entire 102% on the tax credit?

A. Yes, but the premium increase must apply to all QBs, not only to those whose QEs were reduction in hours or involuntary termination of employment, but the 102% tax credit would apply only to AEIs.

Q 29. Is there an impact on the subsidy for covering non-AEI dependents?

A. If the coverage of an individual who is not an AEI increases the total COBRA premium for all individuals, that additional cost is not eligible for the subsidy.

Examples:

An employee covers herself, two dependent children and her domestic partner on her family plan. The cost for employee + dependents is the same regardless of how many dependents are covered. The entire premium is eligible for the subsidy.

An employee covers herself and her domestic partner on her family plan. The cost for self-only coverage is \$600 per month, and the cost of family coverage is \$1000 per month. The amount eligible for the subsidy is \$600 per month.

Q 30. Is an HRA amount eligible for subsidy credit?

A. The subsidy credit available for an HRA is 102% of the amount actually reimbursed to the member during the subsidy period.

The information in this *FAQ* is intended to provide a summary of HPI's understanding of recent regulatory developments which may affect our clients' plans. It should not be construed as specific legal advice or legal opinion.