



# IRS guidance on premium assistance for COBRA benefits (Notice 2021-31)

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## Introduction

The “American Rescue Plan Act of 2021” (Pub. L. No. 117-2, enacted March 11, 2021) provides a 100% reduction in premium that would otherwise be payable by individuals and their families who elect “Consolidated Omnibus Budget Reconciliation Act of 1985” (COBRA) continuation coverage from a loss of healthcare coverage due to a reduction in hours or an involuntary termination of employment.

**Notice 2021-31** [PDF 287 KB] (41 pages) provides guidance on the COBRA premium assistance in a series of 86 questions and answers, with clarifications on administering premium assistance subsidies and tax credits.

This report includes an overview of the information contained in the notice, including eligibility, the definition of involuntarily termination, and reduction in hours, as well as how to claim the credit.

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## Eligibility for COBRA premium assistance

Eligibility for the COBRA premium assistance is limited to an “Assistance Eligible Individual”—a term generally defined as a qualified beneficiary because an employee experienced a reduction in hours or an involuntary termination of employment. Involuntary termination for purposes of eligibility does not include termination for gross misconduct. A qualified beneficiary can include a spouse or dependent child. Premium assistance only applies to qualified beneficiaries.

An individual must be covered under the group health plan on the day before involuntary termination or the reduction in hours and must lose coverage in order to be a qualified beneficiary. If an individual loses coverage because of termination for gross misconduct, that person is not a qualified beneficiary and is not eligible for premium assistance.

Employers can require that individuals self-certify or attest for a variety of eligibility requirements, including:

- Status regarding reduction in hours or involuntary termination
- Status regarding other disqualifying group health plan coverage or Medicare

The employer can rely upon the certifications/attestations for purposes of taking the credit. Employers must retain this documentation as substantiation that the individual was eligible for premium assistance. However, an employer cannot rely on the attestation if there is actual knowledge the attestation is incorrect. An employer is not required to use an employee attestation and can instead rely upon other evidence such as records concerning a reduction in hours or involuntary termination of employment.

Other COBRA qualifying events—such as divorce or dependent child ceasing to be a dependent child under the plan—do not qualify an individual for premium assistance. If there is a reduction in hours or involuntary termination following another qualifying event (divorce), the qualified beneficiary of the first event does not become eligible for the premium assistance.

Enrollment in other group health plan coverage does not end the period of eligibility for COBRA continuation coverage. If group health plan coverage ends, an individual is not disqualified from COBRA premium assistance.

An individual who is a qualified beneficiary and is enrolled in Health Insurance Exchange may be eligible to elect COBRA continuation with premium assistance. However, the individual may be required to repay the advance payments of the premium tax credit (APTC) if there are overlapping months.

Insurance must be COBRA continuation coverage to qualify for the premium assistance. If an individual was terminated and loses health coverage that is not covered by COBRA, the voluntary coverage by the employer is not eligible for the premium assistance. Self-insured church plans and small employer plans may be not subject to COBRA. Temporary continuation coverage elected under Federal Employees Health Benefits (FEHB) is not available for premium assistance. However, premium assistance is available for an election to remain on COBRA continuation coverage for an extended period due to a disability determination, second qualifying event, or an extension under state mini-COBRA, provided that the additional period fall between April 1, 2021, and September 30, 2021, and the original qualifying event was a reduction in hours or involuntary termination.

If retiree health coverage is offered under the same group health plan as the COBRA continuation coverage, there is no change to eligibility requirements for premium assistance. However, a retiree is not

eligible if offered coverage that is not COBRA continuation and the coverage is under a separate group plan.

An individual who owes premium payments for retroactive COBRA continuation under the extended relief notices is still eligible for premium assistance. Owing COBRA premium payments does not change eligibility.

## Reduction in hours

Notice 2021-31 specifies that the guidance on reduction in hours is provided only for purposes of the assistance premium and not for any other purposes of the Internal Revenue Code or any other law.

A qualified beneficiary may be a potential Assistance Eligible Individual even if the qualifying event is a voluntary reduction in hours. The reduction in hours can be voluntary or involuntary for purposes of eligibility.

A “furlough” can be either a temporary loss of employment or complete reduction in hours, but with a reasonable expectation that the employee will return to work. Both the employer and the employee must intend to maintain the employment relationship. A furlough may be a reduction in hours regardless of whether the employer initiated the furlough or the individual participated in the decision, similar to a window program.

Also, a reduction in hours can include both a work stoppage through either a lawful strike or an employer lockout, so long as the employer and employee intend to maintain the employment relationship.

## Involuntary termination of employment

Notice 2021-31 provides that the guidance on involuntary termination applies solely for purposes of this ARPA determination and section 6432, but not for other purposes of the Code or other law.

An involuntary termination is “a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee’s implicit or explicit request, where the employee was willing and able to continue performing services.” An involuntary termination determination is based on facts and circumstance. Even if a termination were designated as voluntary, if the employee would have been terminated, but had been willing and able to continue to perform services, the termination is treated as involuntary.

The notice provides several events that may be considered involuntary terminations, including:

- Retirement, if the employee would have been terminated without the retirement, and the retiree had to be willing and able to continue employment and had knowledge that he or she would otherwise be terminated
- Termination for cause
- Termination while an employee is absent for work due to illness or disability if there were a reasonable expectation that the employee would return to work after illness or disability
- Resignation due to a material change in the geographic location of employment
- Participation in a window program with impending terminations

- Termination due to safety concerns if the employee can demonstrate the employer's actions resulted in a material negative change in the employment relationship
- Material reduction in hours
- Employer decision not to renew the employee's contract, including with a staffing agency

The notice provides that several events are not considered involuntary including:

- Termination for gross misconduct and the termination is not a qualifying event and the family members are not eligible for COBRA continuation coverage
- "Good reason" termination due to general safety concerns
- Employee initiated termination because a child cannot attend school or lack of childcare
- Death

## Coverage eligible for COBRA premium assistance

Premium assistance is available for group health plans, including vision-only and dental-only plans. The premium assistance is not available for non-health benefits. Retiree coverage treated as COBRA, which is offered under the same group health plan as available to active employees, may be eligible for premium assistance even if the retiree is charged more than an active employee. However, the amount charged to a retiree cannot exceed the maximum amount allowed under federal COBRA.

COBRA premium assistance is available for COBRA continuation coverage under a health reimbursement arrangement (HRA), but does not include a health flexible spending arrangement (FSA) under a section 125 cafeteria plan. Eligibility for coverage under an HRA ends eligibility for the premium assistance similar to eligibility for a group health plan. Premium assistance is available for an HRA integrated with individual health insurance, but the continuation covers only to the individual coverage HRA and not the health insurance coverage. The beneficiary must still incur and substantiate medical care expenses.

A qualified small employer HRA (QSEHRA) is not a group health plan eligible for COBRA continuation.

An individual is not eligible for premium assistance if that person elects coverage with a premium greater than for which the person was previously enrolled in at the time of the qualifying event, unless allowed under the COBRA regulations or other applicable law. However, this rule does not apply if the plan the individual was enrolled in previously is no longer available. If continuation coverage is elected, but the prior health plan is no longer available, the individual must be offered an opportunity to elect the plan that a similarly situated active employee would have been offered that is most similar to the previous plan even if the premium is greater than the prior plan.

## Beginning of COBRA premium assistance period

An eligible individual is entitled to premium assistance on the first applicable coverage period on or after April 1, 2021. A period of coverage is a period of a month or shorter in which premiums are normally charged by the plan or issuer. The start date is the date the individual would have normally been charged by the plan if that person had had to pay the premium.

An eligible individual may take premium assistance from the first period of coverage, but can choose to waive coverage for any period before electing to receive COBRA premium assistance.

A qualified beneficiary is eligible for federal COBRA coverage based on the time of the qualifying event and Assistance Eligible Individual rules. If an employer is no longer subject to federal COBRA due to a reduction in the number of employees, the extended election period and premium assistance continue to apply to individuals who had a qualifying event while the employer was still subject to COBRA.

If an eligible individual elects COBRA continuation coverage after September 30, 2021, but within the 60-day election period, the individual may still be eligible for premium assistance from April 1, 2021, through September 30, 2021.

## End of COBRA premium assistance period

COBRA premium assistance applies until the earlier of (1) the individual becomes eligible for other group health plan coverage or Medicare, (2) the date the individual ceases to be eligible for COBRA, or (3) the last period of coverage beginning on or before September 30, 2021.

COBRA continuation coverage automatically continues after September 30, 2021, and the payment is considered timely if paid according to the plan terms.

An individual may be subject to a \$250 federal tax penalty for failure to notify the employer, plan or issuer if the individual is no longer eligible for the premium assistance. The penalty will not apply if the failure was due to reasonable cause and not willful neglect. The employer, plan or issuer does not have a right to the penalty payment.

If an employee eligible for the premium assistance dies, the qualified beneficiaries are still eligible for COBRA continuation and the premium assistance.

## Extended election period

Notice 2021-31 provides that the guidance on extended election periods only applies for purposes of federal COBRA unless specifically indicated otherwise.

If an employee had a reduction in hours or involuntary termination before April 1, 2021, and elected self-only COBRA, the beneficiaries (spouse/dependents) may elect COBRA continuation coverage under the extended election period. The extended election period is not available for continuation coverage that is only provided under state law and not federal COBRA.

For an election of COBRA continuation for an HRA under the extended election period, the HRA may no longer reimburse expenses incurred after the qualifying event that led to the loss of coverage and before the first day of the first period of coverage beginning on or after April 1, 2021.

If a qualified beneficiary was previously offered continuation coverage for health, vision, and dental, but only chose vision and dental, the beneficiary may now choose to add health coverage under the extended election provisions.

## Extensions under the emergency relief notices

A qualified beneficiary that received a standard COBRA notice prior to April 1, 2021, and receives a subsequent notice of the extended election period has within 60 days of receiving the extended notice to elect COBRA continuation coverage with the premium assistance for period of coverage beginning on or after April 1, 2021. The beneficiary must elect or decline coverage retroactive to the loss of coverage within 60 days of the notice. The beneficiary may be required to pay COBRA premiums for period of coverage beginning before April 1, 2021, consistent with the timeframes as extended under the Emergency Relief Notices. If the individual fails to pay any amount for periods of retroactive coverage, the employer may treat the individual as having not elected COBRA coverage until the first period of coverage beginning on or after April 1, 2021.

If an individual elects coverage with COBRA premium assistance but declines to elect COBRA continuation coverage that would begin before April 1, 2021, the individual may not after the 60 day extended election period choose coverage that begins at the time of the qualifying event.

The notice of extended election must be furnished by May 31, 2021, and the individual must elect continuation coverage no later than 60 days after the notice. These provisions are not further extended.

## Payments to insurers under federal COBRA

If an insured plan is subject to federal COBRA and is not a multiemployer plan and the insurer and employer have agreed that the insurer collects premiums directly from qualified beneficiaries, the insurer is required to treat an Assistance Eligible Individual as having paid the full premium. If the insurer fails to treat the Assistance Eligible Individual as having paid the premium, the insurer may be liable for the excise tax under section 4980B(e)(1)(B). However, the employer is required to pay the premium to the insurer for the months of COBRA premium assistance for the individual.

## Comparable state continuation coverage

A state continuation coverage program does not fail to provide comparable coverage qualifying for COBRA premium assistance solely because the maximum period differs from the federal COBRA period. Different periods of coverage do not automatically exclude the state program. Also, a state program that provides for different qualifying events, beneficiaries, and maximum premiums do not fail to provide comparable coverage solely for those differences.

If a state plan is subject to state law requiring the insurer to provide continuation coverage, then the employer is not eligible to take the premium assistance even if the employer pays the full premium to the insurer. The insurer is the premium payee of the group health plan.

### KPMG observation

Notice 2021-31 provides that Treasury and the IRS are to continue to consider the issues with state insurance programs when the employer is required to pay full premium costs. It is possible that there could be additional guidance in the future.

## Calculation of COBRA premium assistance credit

The amount of the credit is the premium that would have been charged to the individual in the absence of any premium assistance. The credit does not include any subsidy the employer would have provided. The amount of the premium assistance credit for a quarter is the amount that would normally be paid by the individuals and that the employer does not subsidize but for the premium assistance. Therefore, if an employer subsidizes COBRA premium costs for employees and qualified beneficiaries who are not Assistance Eligible Individuals, this amount of subsidy is not eligible for the credit.

If an employer normally charged less than the maximum premium allowed under COBRA, but increases the amount of premium for covered employees and qualified beneficiaries pursuant to Reg. section 54.4980B-8, Q&A-2(B)(1) and satisfies applicable notice requirements, then the premium assistance can apply to the increased premium amount. So long as the employer properly increases the COBRA amount with notice, the employer can provide a separate taxable payment to the individual and be eligible for the premium assistance credit. Further, the premium assistance applies to the increased premium of a plan in compliance with the COBRA increase and notice provisions, even if the plan allows the individual to change coverage to a different benefit package with a higher applicable premium.

Premium assistance is not available if COBRA continuation coverage is provided under a state program and the individuals would not be qualified beneficiaries under federal COBRA.

The credit for an individual HRA is limited to 102% of the amount actually reimbursed.

## Claiming the COBRA premium assistance credit

A premium payee is eligible to claim the credit. The premium payee includes (1) the multiemployer plan, (2) the common law employer, or (3) the insurer providing the coverage not covered in (1) or (2). A premium payee can include the government of any state or political subdivision, agency or instrumentality described in section 501(c)(1) and exempt from tax under section 501(a).

The premium payee is entitled to credit for premiums not paid by an Assistance Eligible Individual by reason of a provision of the "American Rescue Plan Act of 2021" (ARPA section 9501). The payee is eligible for each subsequent coverage period the individual does not pay the premium by reason of ARPA section 9501 regardless of when the premium payee would have required payment.

The premium payee claims the credit on Form 941 by reporting the credit and the number of individuals receiving COBRA premium assistance. A premium payee may reduce the deposit of federal employment taxes, including withheld taxes up to the amount of anticipated credit, and request an advance on the amount anticipated that exceeds deposits by filing a Form 7200.

For a multiemployer plan with no employees, the credit is claimed on Form 941 by entering zero (\$0) on all non-applicable lines so that the overpayment amount is the amount of the credit reduced by any advance payment received.

If an Assistance Eligible Individual fails to provide notice to the employer that the individual is no longer eligible for the COBRA premium assistance, the premium payee is still entitled to the credit received for the period of ineligibility unless the payee know of the of the ineligibility.



The premium assistance credit is included in gross income of any premium payee allowed the credit. The amount of credit is included in income on the last day of any quarter that the credit was allowed.

The premium assistance credit cannot be taken as qualified wages for the Employee Retention Credit or as qualified health plan expenses under the paid sick leave and extended "Family and Medical Leave Act" (FMLA) of the "Families First Coronavirus Response Act" (FFCRA).

A premium payee that uses a third-party payer, such as a professional employment organization (PEO), is still entitled to the credit. However, in limited circumstances, a third-party payer can be considered the premium payee if the third party maintains the group health plan, is considered the sponsor of the plan, and would have received the COBRA premium payments directly from the individuals if not for the COBRA assistance. The third-party payer can take the credit on Form 941 and can reduce the deposits of employment taxes for their own employees. If the third-party payee is claiming the credit, it must obtain any information necessary to accurately claim the credit. Adequate records must be maintained to substantiate the eligibility for the credit.

If an Assistance Eligible Individual pays premiums, but receives a reimbursement of the amount, the premium payee is entitled to the credit on the date of the reimbursement.

If a charity paid premium charges for an Assistance Eligible Individual, the premium payee needs to reimburse the Assistance Eligible Individual unless it is aware that the individual has assigned the right to the premium payment.

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