



## **EXPLANATION OF THE NEW COBRA PREMIUM ASSISTANCE FOR EMPLOYERS**

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The American Rescue Plan Act of 2021 (“Act”) signed by President Biden on March 11, 2021, provides new COBRA premium assistance provisions and special enrollment rights that will require employers to take action quickly.

### **What premium assistance is provided?**

Eligible individuals are entitled to a 100% premium assistance for the cost of COBRA coverage for up to six months (ending September 30, 2021) for individuals who qualify for COBRA coverage beginning on April 1, 2021. This includes the 2% administrative fee.

### **Who is considered eligible for this premium assistance?**

Any individual who is a COBRA qualified beneficiary who is eligible for COBRA due to a reduction in hours or an involuntary termination of employment and who elects COBRA coverage will be eligible for the premium assistance.

### **Would COBRA coverage for an employee’s spouse and/or other dependents be eligible for premium assistance?**

Yes. The premium assistance applies not only to the employee who lost coverage due to a reduction in hours or an involuntary termination (other than for gross misconduct), but also to any other qualified beneficiaries who were covered through the employee and lost coverage as a result of the employee’s reduction in hours or an involuntary termination of employment (e.g., spouse, children).

### **For what period does the premium assistance apply?**

It applies for COBRA coverage during the period from April 1, 2021 through September 30, 2021.

### **To what coverages does premium assistance apply?**

It applies to all group health plan coverage (e.g., medical, dental, vision, employee assistance program), except for health care flexible spending account coverage.

### **How will the employer be paid for providing the premium assistance?**

For employers who maintain group health plans, the premium assistance will be delivered through the employer paying COBRA premiums to the insurance carrier (or covering the cost of providing COBRA coverage under a self-insured plan) and then taking a payroll tax credit to recoup the cost of covering COBRA premiums or costs. Employers will treat the subsidy as a credit against the employer's share of Medicare tax under Internal Revenue Code Section 3111(b).

If the credit exceeds the taxes owed for a quarter, the excess will be refundable.

In any case where it is not the employer or a multiemployer plan, the insurer as the person to whom premiums are payable.

**Does the employer have to provide an additional election opportunity to those eligible individuals who either did not elect COBRA coverage or discontinued COBRA coverage?**

Yes. An additional COBRA election opportunity must be provided for any eligible individuals who either do not elect federal COBRA coverage, but would have been eligible for premium assistance, or who had elected federal COBRA coverage previously, but discontinued COBRA coverage before April 1, 2021. Employers are required to provide notices to these eligible individuals, as provided below.

This special enrollment right must only be offered to those who are eligible for COBRA due to a reduction in hours or an involuntary termination of employment

Please note that individuals who discontinued COBRA coverage do not have to be assistance eligible in order to take advantage of this extended election period.

Eligible individuals may elect COBRA coverage during the period beginning on April 1, 2021 and ending 60 days after the date on which they are provided notice by the employer/plan administrator as required. This elected COBRA coverage elected begins on or after April 1, 2021 and does not extend beyond the maximum period of COBRA coverage that would have been required if the individual had elected COBRA at the time of the original event (or had not discontinued coverage that was elected at that time).

**When can the premium assistance be terminated?**

An individual ceases to be an eligible for premium assistance for months of coverage that begin on or after the earlier of:

- The first date the individual is eligible for coverage under Medicare or any other group health plan (other than coverage that is only "excepted benefits," coverage under a health flexible spending account, or coverage under a qualified small employer health reimbursement arrangement), or
- The date following the expiration of the normal maximum COBRA period, which generally would be 18 months from the qualifying event.

For an individual who did not originally elect COBRA or who originally elected but then discontinued COBRA coverage, this period is measured from what would have been the beginning of the COBRA coverage period if the individual had elected when originally eligible or had not discontinued COBRA (in other words measured by reference to a reduction in hours or an involuntary termination of employment that caused the loss of coverage).

## **Can an employer give an eligible individual the option to change coverages?**

Yes. An employer can allow an assistance eligible individual who is enrolled in coverage under the employer plan to change to a different coverage option offered under the plan. The election to change coverage options must be made by the individual no later than 90 days after the date of notice of the right to change options is provided to the individual. The premium for the new coverage option must not exceed the premium for the coverage in which the individual was enrolled at the time of the reduction in hours or involuntary termination of employment, and the new coverage option must be coverage that is offered to similarly situated active employees at the time the election to change is made, and cannot be coverage that provides only “excepted benefits,” a flexible spending account, or a qualified small employer health reimbursement arrangement.

## **What are the new required notice requirements?**

The following new notice requirements are imposed on employers/plan administrators and on individuals:

Additional Required Information for COBRA Election Notices. COBRA election notices provided to individuals who become eligible to elect COBRA coverage during the period between April 1, 2021 and September 30, 2021 must include additional information regarding the premium assistance. This additional information can be incorporated into the normal election notice or can be provided by including a separate document with the normal election notice.

The notice must include all of the following additional information:

- The forms necessary for establishing 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;
- A description of the individual’s obligation to provide notice if the individual becomes eligible for other group health coverage or Medicare, and of the penalty for failure to provide such notice (see below);
- A description “displayed in a prominent manner” of the individual’s right to a subsidized premium and any conditions on entitlement to the subsidized premium; and
- If the employer has chosen to offer the optional plan coverage option change, a description of that option.

**Notice of Extended Election Period.** For individuals who became entitled to elect COBRA before April 1, 2021, the plan administrator must provide notice to the individual no later than May 31, 2021 (60 days after April 1, 2021). The notice must satisfy the requirements described above. This notice must be sent to individuals who are eligible for premium assistance, individuals who would be assistance eligible if they had a COBRA election in effect on April 1, 2021, and individuals who had elected COBRA previously but discontinued COBRA before April 1, 2021 (whether or not assistance eligible).

**Notice of Expiration of Premium Assistance.** Between 45 days and 15 days before the premium assistance period ends for an individual (not including premium assistance that ends

because the individual becomes eligible for other group health plan coverage or Medicare), the plan administrator must provide written notice to the individual in “clear and understandable” language that premium assistance for the individual will “expire soon” and include prominent identification of the date of such expiration and that the individual may be eligible for continued COBRA without premium assistance or coverage under a group health plan.

**Notice by Individual.** As noted above, an individual ceases to be eligible for premium assistance for months of COBRA coverage that begin on or after the date the person is eligible for Medicare or coverage under any other group health plan (other than coverage that is only “excepted benefits,” coverage under a health flexible spending account, or coverage under a qualified small employer health reimbursement arrangement). An assistance eligible individual must notify the group health plan of such eligibility “in such time and manner as may be specified by the Secretary of Labor.” A new provision has been added to the Internal Revenue Code to impose a \$250 penalty on an individual who fails to provide such notice, except where the failure was due to reasonable cause and not willful neglect. The penalty may be increased where the failure to provide notice was fraudulent. In that case, the penalty is the greater of \$250 or 110% of the premium assistance provided to the individual after the individual’s eligibility ended due to the other coverage.

## **DISCUSSION OF WHAT IS GROSS MISCONDUCT UNDER COBRA**

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There is one exception for extending COBRA coverage to former employees. That exception would be when the employee is terminated for gross misconduct. When that happens, the termination is not considered a COBRA-qualifying event and the employer does not have to offer COBRA continuation coverage to the ex-employee, or the ex-employee’s covered spouse or dependent child(ren).

The COBRA statute does not specifically define the term gross misconduct, so the courts have taken the lead on deciding whether to apply it on a case-by-case basis. That means it is up to employers to determine whether their gross misconduct definition meets the standards that were previously ruled on from past court cases as well as regulatory and legal developments.

Courts that have faced the gross misconduct case generally refer to the two questions below when deciding if the conduct is truly gross misconduct.

Was the conduct intentional, willful, deliberate, or reckless, and was that conduct performed with a conscious or reckless disregard of the consequences of one’s acts for the very purpose of causing harm or with knowledge that harm would result in the employer’s best interest?

Did the conduct have a connection or series of connections or physical presence linking the gross misconduct or performance directly to the employer, a co-worker or a current or former client or customer?

To minimize their risk, many employers have decided not to apply the gross misconduct exception at all, but, instead, to extend COBRA to all terminated employees regardless of the reason for the termination. Another way an employer can limit their risk is to clearly communicate to employees the type of behavior an employer considers to be gross misconduct. This can be done by adding this policy to its employee handbook or to an employee's contract of employment. When an employer identifies gross misconduct in advance, it must inform its employees what it considers to be significant, and this will assist the employer later should it find it has a claim for not providing COBRA to an employee who was terminated for this cause.

Here is a list of conduct that most employers would consider to be gross misconduct:

- Fighting, physical assault, abuse, or threatening behavior
- Blatant disregard for the safety of others or serious breaches of health and safety rules
- Deliberate acts of vandalism or sabotage
- Any attempts to financially defraud the company or theft
- Significant levels of insubordination
- Dishonesty, falsification of documents, or other forms of misrepresentation
- Offensive or unlawful behavior (such as discrimination, harassment, or bullying)
- Working under the influence of illegal drugs or alcohol

Should an employer decide to deny COBRA to an ex-employee on the basis of gross misconduct, be sure it keeps detailed records of the process used to determine the gross misconduct along with any notices or correspondence to the ex-employee.

Just remember, COBRA mistakes can be costly whether they were intentional or not. Employers may be liable for a penalty of up to \$110 per employee or family member for each day of noncompliance. The Employee Retirement Income Security Act (ERISA) provides for additional penalties and gives affected persons—as well as the Department of Labor—the right to file a lawsuit. Be sure that the employer is sending timely notifications to its plan administrator when a qualifying event occurs, including terminations or a reduction in hours, such as a leave of absence or a layoff.