

The American Rescue Plan Act of 2021

Highlights for Employers



On March 11, 2021, President Biden signed the most recent COVID-19 relief legislation, the American Rescue Plan Act (ARP) of 2021. The ARP contains a variety of provisions of interest to employers, including new economic relief and tax credit opportunities. Many of the provisions build on prior COVID-19 relief legislation, including the Families First Coronavirus Relief Act (FFCRA); the Coronavirus Aid, Relief and Economic Security (CARES) Act; and the Consolidated Appropriations Act (CAA) of 2021, which was enacted in December 2020.

For highlights about issues relevant for employers under the Consolidated Appropriations Act of 2021, enacted in December 2020, see [**Aflac's March 2021 Advisory**](#). For recent changes to the PPP loan program, see [**Aflac's April 2021 Advisory**](#).



100% COBRA premium subsidy

The ARP includes a subsidy that covers 100% of COBRA premiums for certain qualified beneficiaries who have coverage during the “subsidy period” of April 1, 2021, through Sept. 30, 2021. The structure of the credit is similar to the 85% COBRA subsidy that was provided during the Great Recession under the American Recovery and Reinvestment Act (ARRA) of 2009. Key differences include the amount of the subsidy and the individuals eligible for the subsidy.

Eligibility

Individuals who are eligible for the subsidy are called Assistance Eligible Individuals (AEIs). An Assistance Eligible Individual is a COBRA-qualified beneficiary who meets all the following requirements:

- Is eligible for COBRA during the subsidy period due to a qualifying event that is a reduction in hours or an involuntary termination of the covered employee’s employment.
 - The reduction in hours does not have to be involuntary and may include, for example, reduced hours due to changes in the employer’s operations, a change from full-time to part-time status or a temporary leave of absence.
 - All qualified beneficiaries, such as a covered spouse or dependents, who lose coverage because of the employee’s reduction in hours or involuntary termination qualify for the credit.

- Elects or has elected COBRA coverage.
 - Individuals who become eligible for COBRA during the subsidy period may qualify for the credit for the portion of time that their COBRA coverage period overlaps with the subsidy period.
 - Individuals who elected COBRA coverage before the subsidy period may qualify as long as their normal COBRA coverage period extends into the subsidy period.

Example: Alice became eligible for COBRA due to an involuntary termination of employment in 2020 and elected COBRA coverage starting June 1, 2020. Alice's 18-month COBRA period would normally end Nov. 30, 2021. Alice is eligible for the subsidy for coverage for April 1, 2021, through Sept. 30, 2021, assuming other requirements for the subsidy are met (e.g., she is not eligible for other group coverage or Medicare). Alice can continue COBRA coverage without the subsidy for October and November 2021. If Alice's normal COBRA period ended before the end of the subsidy period (e.g., June 30, 2021), then COBRA and the subsidy would end at that time. The subsidy does not extend the normal COBRA period.

- As discussed further below, some individuals must be given a new opportunity to elect COBRA coverage in order to take advantage of the subsidy.
- Is not eligible for Medicare or coverage under another group health plan (e.g., a plan of a spouse's employer).
 - This restriction does not apply if the other group coverage consists only of coverage for excepted benefits (e.g., dental or vision coverage, specified disease or health indemnity coverage), coverage under a health FSA or coverage under a Qualified Small Employer Health Reimbursement Arrangement (QSERA).
 - This restriction means that eligibility for the credit may end before the COBRA coverage period ends.
 - Individuals are required to notify the plan sponsor of eligibility for other coverage or face a penalty of \$250. Increased penalties apply if the failure to notify is fraudulent.

Covered plans: The COBRA premium assistance applies to:

- Group health plans subject to COBRA under federal law, including dental and vision plans. It does not apply to Health FSAs.
- State programs that provide comparable continuation coverage, such as state "mini-COBRA" laws that apply to small employers that are not subject to federal COBRA regulations.





Additional COBRA election period

Employers subject to federal COBRA rules must offer an additional opportunity for certain qualified beneficiaries to elect COBRA coverage. This additional election applies to a qualified beneficiary if:

- The qualifying event was a reduction in hours or an involuntary termination of employment before April 1, 2021;
- The regular COBRA coverage period would include any portion of the subsidy period; and
- The qualified beneficiary:
 - Did not elect COBRA continuation coverage when it was first offered prior to that date; or
 - Elected COBRA continuation coverage but is no longer enrolled (for example, an individual who dropped COBRA due to inability to pay the premiums).

The plan must notify these individuals of the extended COBRA election period by May 31, 2021. The extended deadline for providing certain notices under the Joint Notice previously issued by the Department of Labor and the IRS does not apply to the notice of the extended COBRA election period.

Eligible individuals have until 60 days after the notice is provided to make a new COBRA election. Individuals can begin their coverage prospectively from the date of their election. They can also choose to start their coverage April 1 if they have a qualifying event on or before April 1, even if they make their election at a later date. In either case, the special election period does not extend the normally applicable COBRA coverage period, and the subsidy is available only for periods of coverage from April 1, 2021, through Sept. 30, 2021.

This additional opportunity to elect COBRA coverage is not available to individuals continuing coverage under a state continuation coverage law. For state continuation coverage programs, timing of COBRA elections will be determined under state law. The ARP does not change any requirement of state continuation coverage programs but allows AElS who elect continuation coverage under state law to receive the COBRA subsidy.

Additional notice requirements

The ARP also requires plans to provide the following additional notices:

- A general notice to all qualified beneficiaries who have a qualifying event that is a reduction in hours or an involuntary termination of employment from April 1, 2021, through Sept. 30, 2021. This notice may be provided separately or with the COBRA election notice following a COBRA qualifying event.
- An expiration notice explaining that the COBRA subsidy for the individual will expire soon, the date of the expiration and that the individual may be eligible for coverage without any premium subsidy through COBRA continuation coverage or coverage under a group health plan. Coverage may also be available through Medicaid or the Health Insurance Marketplace®. This notice must be provided 15-45 days before the individual's COBRA subsidy expires. The extended deadline provided under the joint notice does not apply.

Payment of the subsidy to employers and plans. The subsidy is provided through a refundable tax credit against the employer's share of the Medicare Hospital Insurance payroll tax. If the credit is more than this payroll tax, the difference is paid by the federal government.

In most cases, the employer maintaining the plan will receive the tax credit. The employer receives the credit for plans covered by federal COBRA, whether fully insured or self-funded. The employer also receives the credit if any part of the coverage is not provided by insurance (i.e., is self-funded).

Insurers receive the tax credit only in very limited circumstances, such as a fully insured plan of a small employer that is exempt from federal COBRA requirements and covered by a state mini-COBRA law or fully-insured church plans subject to state COBRA requirements.

In the case of a multiemployer plan, established through the collective bargaining process, the credit is paid to the plan.





Where to find additional guidance

The [DOL COBRA premium subsidy website](#) contains guidance regarding the subsidy, including an FAQ that provides general information on eligibility rules for the COBRA subsidy, a summary of the subsidy provisions for participants and model notices. As of this writing, the IRS has not yet issued guidance on the details of the subsidy provision. When issued, that guidance is expected to contain more detail, including how to claim the subsidy and how the subsidy applies in particular situations.

Extension and modification of the Employee Retention Tax Credit (ERTC)

The ARP extends the ERTC from July 1, 2021, through Dec. 31, 2021, at the same credit amount that applies under the CAA for the period Jan. 1, 2021, through June 30, 2021. Thus, for each quarter in 2021, qualifying employers may claim a per-employee ERTC for 70% of qualified wages up to \$10,000, with a maximum per-employee ERTC for 2021 of \$28,000 of qualified wages, including qualified health care costs.

The ARP also makes a few modifications to the ERTC that apply to wages paid from July 1, 2021, through Dec. 31, 2021. Recovery startup businesses may claim an ERTC of \$50,000 per quarter, subject to the normal per-employee limit, even if the business does not otherwise meet the general eligibility requirements (i.e., even if the business has not had an interruption in operations due to a COVID-19-related government order or a substantial reduction in gross receipts). A recovery startup business is an employer that began operations after Feb. 15, 2020, and had average annual gross receipts of no more than \$1 million for the three-year period before the year for which the ERTC is determined.

In addition, a severely financially distressed employer can claim the ERTC for any employee, regardless of employer size. Under the general rules for the ERTC for quarters in 2021, an employer with more than 500 employees may claim the ERTC only for employees who are not performing services. A severely financially distressed employer is an employer whose gross receipts for the quarter are less than 10% of the gross receipts for the same quarter in 2019.

Extended and expanded paid leave credits

The ARP extends the tax credit for eligible employers, generally businesses with under 500 employees, that voluntarily provide leave that would have met the FFCRA requirements. The credit was previously set to expire March 31, 2021. ARP also makes some changes to the credit, which are highlighted below.

Changes relating to Emergency Paid Sick Leave (EPSL): The ARP makes a number of changes to EPSL, including the following:

- Resets EPSL balances so that two weeks of leave, equal to 80 hours for full-time employees; pro-rated for part-time employees, during the second and third quarters of 2021 qualify for the credit.
- Expands the lists of qualifying reasons to include:
 - The employee getting vaccinated for COVID-19;
 - The employee recovering from an injury, disability, illness or condition related to a COVID-19 vaccination; and
 - The employee seeking or awaiting results of a diagnostic test for or a medical diagnosis of COVID-19 and the employee has been exposed to COVID-19 or the employer has requested such a test or diagnosis.
- The new qualifying reasons are paid at the employee's regular rate of pay, subject to a per-day cap of \$511.

Changes relating to Emergency Family and Medical Leave (EFML): Changes made by the ARP include the following:

- Expands reasons that a covered employer may offer leave and qualify for the credit, to include all of the reasons that the EPSL can be used.
- Removes the requirement that the first two weeks of EFML be unpaid, so that employers may receive the tax credit for up to 12 weeks of paid EFML, which is paid at two-thirds the regular rate of pay, capped at \$200.
- Increases the per-employee cap on the aggregate paid leave from \$10,000 to \$12,000. Thus, employers can now take an additional \$2,000 per employee in credits for qualifying EFML.

Nondiscrimination rules: The tax credits for EPSL and EFML do not apply if the employer favors certain employees when determining eligibility for the leave. Employers may not discriminate in favor of:

- Highly compensated employees;
- Full-time employees; or
- Employees on the basis of employment tenure.





Restaurant Revitalization Fund

The ARP established the Restaurant Revitalization Fund to aid restaurants, bars and other similar places of business that serve food or drinks. The ARP allocated \$28.6 billion for the program to the Small Business Administration (SBA). The program will provide restaurants and other eligible businesses with funding equal to their pandemic-related revenue loss up to \$10 million per business and no more than \$5 million per physical location. For the first 21 days of the program, the SBA will only distribute funds for approved small-business applicants owned by women, veterans, or socially and economically disadvantaged individuals. Recipients are not required to repay the funding as long as funds are used for eligible purposes by March 11, 2023.

To provide aid for the smallest businesses in underserved communities, the SBA has set aside funds for certain applicants as follows:

- \$5 billion for businesses with no more than \$500,000 of gross receipts in 2019;
- An additional \$4 billion for businesses with 2019 gross receipts from \$500,001 to \$1,500,000; and
- An additional \$500 million for businesses with 2019 gross receipts of no more than \$50,000.

More information is available on the [SBA website](#).

COVID-19 emergency grants through the Economic Injury Disaster Loan (EIDL) Program

The ARP includes an additional \$15 billion in funding for the Targeted EIDL Advance Program. Of this amount, \$10 billion is to help those who applied for relief in 2020 but did not receive the full \$10,000 grant. The remaining \$5 billion is set aside for supplemental payments of \$5,000 to covered entities that suffered economic losses of more than 50% during the covered period and that have 10 or fewer employees. More information on the program may be found on the SBA website.

Temporary increase in Dependent Care Assistance Plan (DCAP) maximum benefit

For 2021, the ARP increases the maximum amount excludable from employees' incomes for DCAP benefits to \$10,500, up from \$5,000. For married taxpayers filing separately, the maximum excludable amount is increased to \$5,250, up from \$2,500, for 2021. A plan amendment may be required to take advantage of this increase. Plan amendments may be made retroactively if the amendment is adopted by the last day of the plan year in which the amendment is effective and the plan is operated in accordance with the amendment's terms beginning on its effective date. This increase is welcome news for many, although there are a number of compliance issues for employers to consider if they want to take advantage of this provision.



Conclusion

The ARP provides new opportunities and relief for businesses affected by COVID-19. The impact of these provisions will vary based on particular situations, so businesses should contact their own advisors to learn how the provisions apply in their circumstances. We anticipate further guidance from federal agencies, including the IRS, that will provide more information and clarity for certain provisions of the law.

The information herein is provided for general informational purposes and is not provided as tax, legal, or financial advice for any person or for any specific situation. Employers and employees and other individuals should consult their own tax or legal advisers about their situation. Aflac herein means Aflac and Aflac New York.

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