

ALERT

Employee Benefits

HINKLE

LAW FIRM LLC

hinklaw.com 316.267.2000

APRIL 15, 2021

COBRA: NEW REQUIRED AND RECOMMENDED NOTICES

In our recent Alert on March 25, 2021 ([see here](#)), we briefly addressed some of the latest COBRA developments regarding (i) how to calculate COBRA deadlines now that the COVID-19-inspired suspension of the original deadlines has been lifted, and (ii) who may be entitled to subsidized COBRA coverage by virtue of the American Rescue Plan Act of 2021 (“ARPA”). We mentioned in the Alert that the ARPA *requires* multiple notices to be provided to certain COBRA qualified beneficiaries in connection with the Act’s COBRA subsidy provisions, and that the Department of Labor (“DOL”) has “recommended” (but not required) the distribution of additional notices in connection with the lifting of the suspension rules. The DOL, we also pointed out, would soon be issuing model notices related to subsidized COBRA. Well, that day has now arrived.

Rarely is anything simple with DOL guidance (or congressional legislation) and this case is no exception. The DOL issued four distinct model notices. It also provided a separate form designed to aid individuals in receiving their subsidy and having their subsidy end upon loss of eligibility. While the models are a good starting point, we are certain there are a lot of folks scratching their heads at the long list of models and wondering, “Which notice goes to whom and when? What has to be attached? Do these notices come with CliffsNotes (and perhaps a bottle of brandy)?” You are not alone in your confusion.

In this Alert, we have drafted a comprehensive list of questions for you to use in determining which notices must be provided to which employees. Our list covers both the *required* COBRA notices as well as the *recommended* notices regarding the end of suspended deadlines. Links to the DOL model notices are below. We have not attempted to revise them because there are too many individualized determinations that need to be made to make such an effort feasible. But as you read through the information below, you will see where you may want to make some changes as you customize the notices to your particular needs.

Wichita Office
1617 N. Waterfront Parkway
Suite 400
Wichita, KS 67206
316.267.2000

Kansas City Office
Lenexa City Center – Penn I
8711 Penrose Lane
Suite 400
Lenexa, KS 66219
913.345.9205

Topeka Office
800 SW Jackson
Suite 1520
Topeka, KS 66612
316.267.2000

I. - The "Extended Election Periods" Notice

The Extended Election Periods Notice must be sent to all "assistance eligible individuals" (i.e., individuals who (i) lost their eligibility for active coverage due to either a reduction in hours or an involuntary termination of employment, and (ii) are still in their 18-month COBRA window). The Notice must be sent **by May 31, 2021** to any assistance eligible individual who (i) is currently enrolled in COBRA, (ii) previously enrolled in COBRA but then dropped the coverage, or (iii) previously declined COBRA coverage.

Use the list of questions below to identify those individuals who need to receive the COBRA Extended Election Periods Notice that is required by ARPA:

- (1) **Qualifying Events.** Who at the company was either involuntarily terminated or had a reduction in hours (it doesn't matter if the reduction in hours was voluntary or involuntary)? Make a list of these employees.

Timeframe: Your list should date **back to October 1, 2019** if participants' active coverage goes through the end of the month following COBRA qualifying events (i.e., COBRA would have started November 1, 2019), **or back to November 1, 2019** if participants' active coverage ends on the date of the COBRA qualifying event. *Your list should not extend beyond March 31, 2021.*

- (2) **Covered Individuals.** Who on the list had coverage in one of your group health plans (other than a health FSA), e.g., medical coverage, dental coverage, vision coverage, etc.?

Remove the names of anyone who did not participate in one of your group health plans.

- (3) **Gross Misconduct Exception.** Was anyone on the list terminated for gross misconduct? If their conduct truly constitutes gross misconduct, they are not eligible for the subsidy and no notice is necessary, but we recommend caution before denying COBRA or the subsidy based on this determination. Seek the advice of counsel on this touchy issue.

Note: You may see individuals on your list who were offered COBRA and did not elect it, or who elected COBRA and then dropped it. This doesn't matter. Keep them on your list. They still need to get the Extended Election Periods Notice and have a new chance to elect COBRA coverage.

- (4) **Customize DOL Notice.** Customize this DOL model Notice found [here](#) for the above individuals.

If you need assistance in customizing the Notice, we can help. For example, if you do not allow a change in coverage options, it would be helpful to delete related language so as not to confuse the reader. And there is no place on the model Notice to indicate the effective date of coverage for those getting a second chance to elect COBRA.

- (5) **IMPORTANT DEADLINE:** This Notice needs to be sent **by May 31, 2021**. But the sooner, the better, because the qualified beneficiary has 60 days to elect coverage after the Notice is sent.
- (6) **COBRA Effective Date.** For those getting a “second-bite-of-the-apple,” COBRA, if elected, may be effective *retroactively* back to April 1, 2021, or *prospectively* from the date of their election.
- (7) **Attachments.**
 - (a) The above link includes an Election Form on page 6. This needs to be included.
 - (b) The above link also includes a Form for Switching COBRA Continuation Coverage Benefit Options. You should remove this unless you are allowing a coverage option change.
 - (c) Be sure to attach the DOL’s “Summary of the COBRA Premium Assistance Provisions,” which can be found [here](#).

Note that this Summary includes a Request Form that will need to be completed by qualified beneficiaries attesting to the fact that they are eligible for the subsidy, e.g., they are not eligible for Medicare or spousal coverage, etc.

- (8) **Mail.** We recommended sending the Notice and attachments via first class mail to the qualified beneficiaries.

II. - The “General Notice”

Next up on ARPA’s required COBRA notices is the General Notice. The General Notice must be issued to all qualified beneficiaries who lose coverage as a result of *any COBRA qualifying event* between April 1, 2021 and September 30, 2021. ([An alternative, very similar, notice](#) is to be used by “small,” insured plans subject to state (mini-COBRA) continuation coverage.) Use the list of questions below to identify individuals who need to receive the General Notice:

- (1) **COBRA Events Since April 1, 2021.** Who at the company has experienced *any* COBRA qualifying event since April 1, 2021? Make a list and continue to add to it until September 30, 2021.

- (2) **Customize DOL Notice.** Customize this DOL model Notice found [here](#).

If you need help in customizing the Notice, we can help. For example, if you do not allow a change in coverage options, it would be helpful to delete related language so as not to confuse the reader.

- (3) **DEADLINE:** You have 44 days from the date of the qualifying event to provide this General Notice. The sooner, the better.

- (4) **Attachments.**

(a) Attach the DOL's Summary of the COBRA Premium Assistance Provisions, which is found [here](#).

(b) The model General Notice includes an Election Form on page 9. This needs to be included.

(c) The model General Notice includes a Form for Switching COBRA Continuation Coverage Benefit Options on page 10. You should remove this form unless you are allowing a coverage option change.

(d) The model General Notice also includes "Important Information About Payment" on pages 11 and 12. Be sure to customize the bracketed language and include in the packet.

- (5) **Mail.** We recommend sending the Notice and attachments via first class mail to the qualified beneficiaries.

III. - Notice of Expiration of Period of Premium Assistance

The final notice required by ARPA is the Notice of Expiration of Period of Premium Assistance. It is intended to inform "assistance eligible individuals" who are receiving subsidized COBRA premiums that such subsidy will soon be expiring and that they may be eligible for Medicaid, coverage through the Marketplace, or unsubsidized COBRA continuation coverage.

To identify the individuals who need to receive this Notice, you will need to start with the same list of individuals you came up with earlier in connection with the Extended Election Periods Notice. All of those individuals who were either already on COBRA or who elect it as a result of you sending the Extended Election Periods Notice need to receive *one more notice* giving them a heads up of when their subsidy will end, as follows:

- (1) **Those Who Already Elected COBRA.** Who on your list already elected COBRA and are currently enrolled in COBRA? Calculate the 18-month period when their COBRA will end so that you can send these qualified beneficiaries the Notice of Expiration of Period of Premium Assistance. The DOL model Notice can be found [here](#).

Timeframe: The Notice of Expiration of Period of Premium Assistance should be distributed between 15 and 45 days prior to their premium assistance ending. Just because an individual's COBRA *subsidy* is ending does not mean that his/her COBRA *eligibility* will end. For other individuals, however, their maximum 18-months of COBRA might end before the ARPA's COBRA subsidy period ends on September 30, 2021.

- (2) **Those Getting a Second Chance.** Who, out of the individuals getting a second chance to elect COBRA, actually elects it a second time? Use their originally effective COBRA date to calculate their 18-month period of COBRA so that you can send them the Notice of Expiration of Period of Premium Assistance between 15 and 45 days prior to their date of COBRA exhaustion.

IV. - End of COBRA Suspended Deadline Notices

Having discussed all the required notices arising out of the ARPA's COBRA premium subsidies, we can at last turn to potential notices arising out of the end of the DOL's suspended deadlines for COBRA notices. As we noted earlier, these latter notices are *not* required by law. They are simply something we (and the DOL) *recommend*. The DOL, however, did not provide any model notices so if you need help in preparing these, please let us know.

Dating back to the start of last year, you may have individuals who fall outside the categories of involuntary termination of employment or reduction in hours - i.e., who experienced a different COBRA qualifying event (e.g., voluntary termination of employment, divorce, etc.). They are *not* eligible for any COBRA subsidies under ARPA, but they still have COBRA rights because of the prior suspension of certain COBRA deadlines. To the extent you previously provided them with COBRA paperwork, you either did not know the suspended deadline rules would come about, *or* you did not know how long those deadlines would be suspended.

For those individuals identified below, we recommend providing them with a notice describing their COBRA deadline:

- (1) **COBRA Events Other than Involuntary Termination or Reduction in Hours.** Who at the company had a COBRA qualifying event (other than an involuntary termination of employment or a reduction in hours - already addressed in Parts I through III) from **January 1, 2020 through February 28, 2021**? Make a list of these individuals. It might include divorcees or dependents who aged out.

Note: COBRA qualifying events, in this context, mean a loss of coverage due to divorce, a dependent aging out, the employee's death, or a *voluntary* termination of employment.

If the event is divorce or a child aging out, you may not be aware of the event and the individual may still have time to tell you about it due to the extension of deadlines ([see Alert here](#)). But for those individuals who lost group health plan coverage (other than a health FSA) and *did* inform you of their qualifying event, continue with this exercise. As additional notices from qualified beneficiaries of qualifying events trickle in over the next year, you will need to add those individuals to your list.

- (2) **Calculation of New Deadline.** For qualified beneficiaries with events from January 1, 2020 through February 28, 2021, calculate their extended deadline to elect or pay for COBRA (see "New DOL Guidance" heading in our Alert found [here](#)).
- (3) **New Notice Based on New Deadline.** As a qualified beneficiary's new deadline to elect COBRA and/or pay any COBRA premiums approaches, we encourage you to *re-send those individuals a copy of their original COBRA paperwork, along with an accompanying letter that references the "new" / revised deadline for electing COBRA or paying the COBRA premium (as applicable)*.
- (4) **Marketplace Notice.** For those individuals who elected COBRA and will soon be losing COBRA coverage, we (and the DOL) also recommend sending a notice informing them that coverage may be available on the Exchange.

We hope this Alert will help you to sort through the various categories of COBRA qualified beneficiaries and serve as a guide in customizing the DOL model notices in order to provide them to the right individuals at the right time. If you have a COBRA administrator, they should be able to help you with the required notices. If your plans are not subject to COBRA because you are a "small" employer, the DOL has provided a model notice for use by your insurance company.

Should you need any help in customizing the DOL model notices or providing the recommended suspension notices, or have any other COBRA questions, please do not hesitate to contact [Eric Namee](#), [Steven Smith](#), [Brad Schlozman](#), or [Ruhe Wadud](#).