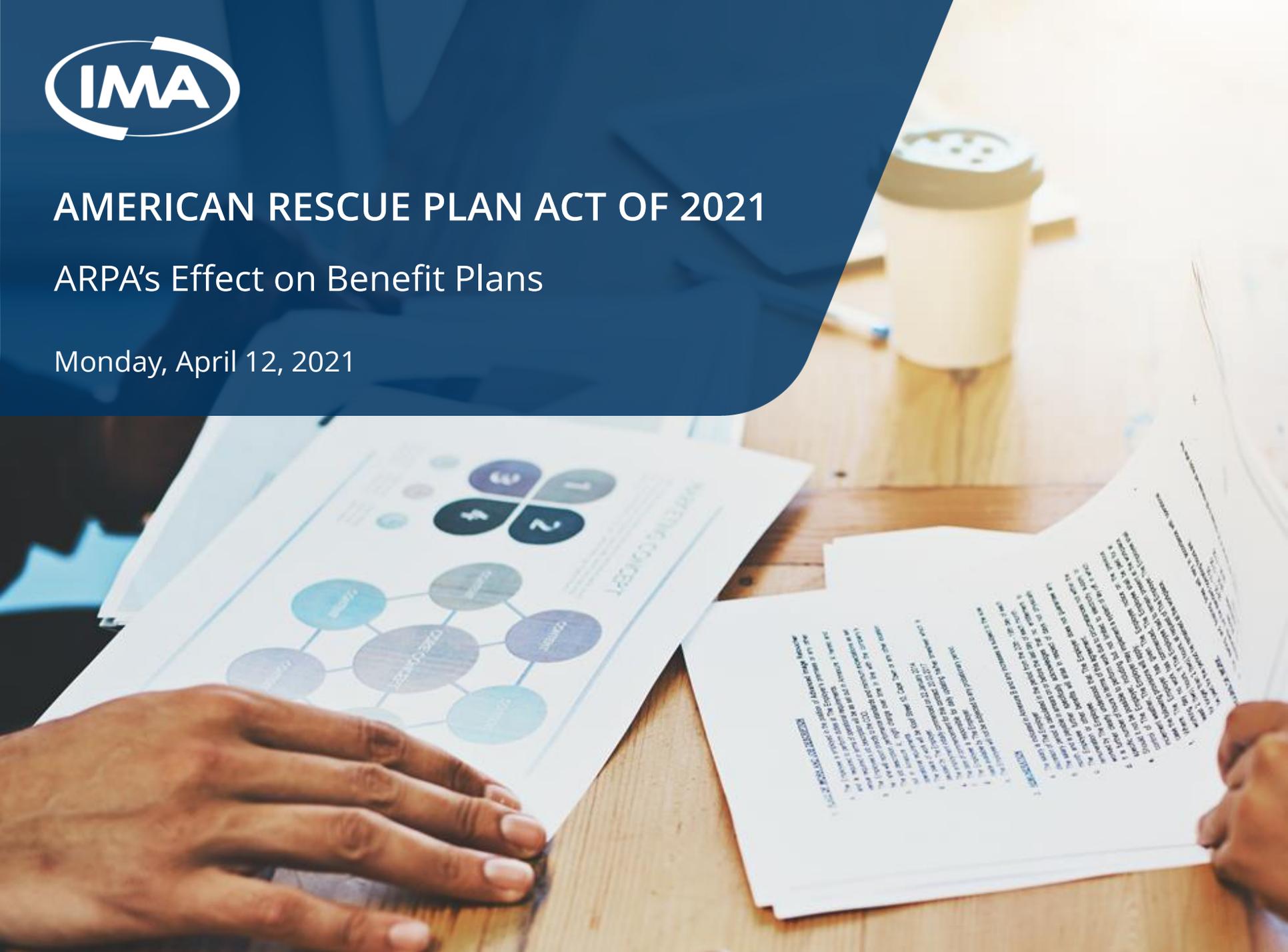




AMERICAN RESCUE PLAN ACT OF 2021

ARPA's Effect on Benefit Plans

Monday, April 12, 2021



Several pages of text are visible on the desk. The text is dense and appears to be a legal or financial document. Some words like "SECTION 401(a)", "SECTION 408(a)", and "SECTION 409(a)" are partially visible, suggesting the text relates to retirement or benefit plans. The text is oriented vertically on the page being held by the hand on the right.

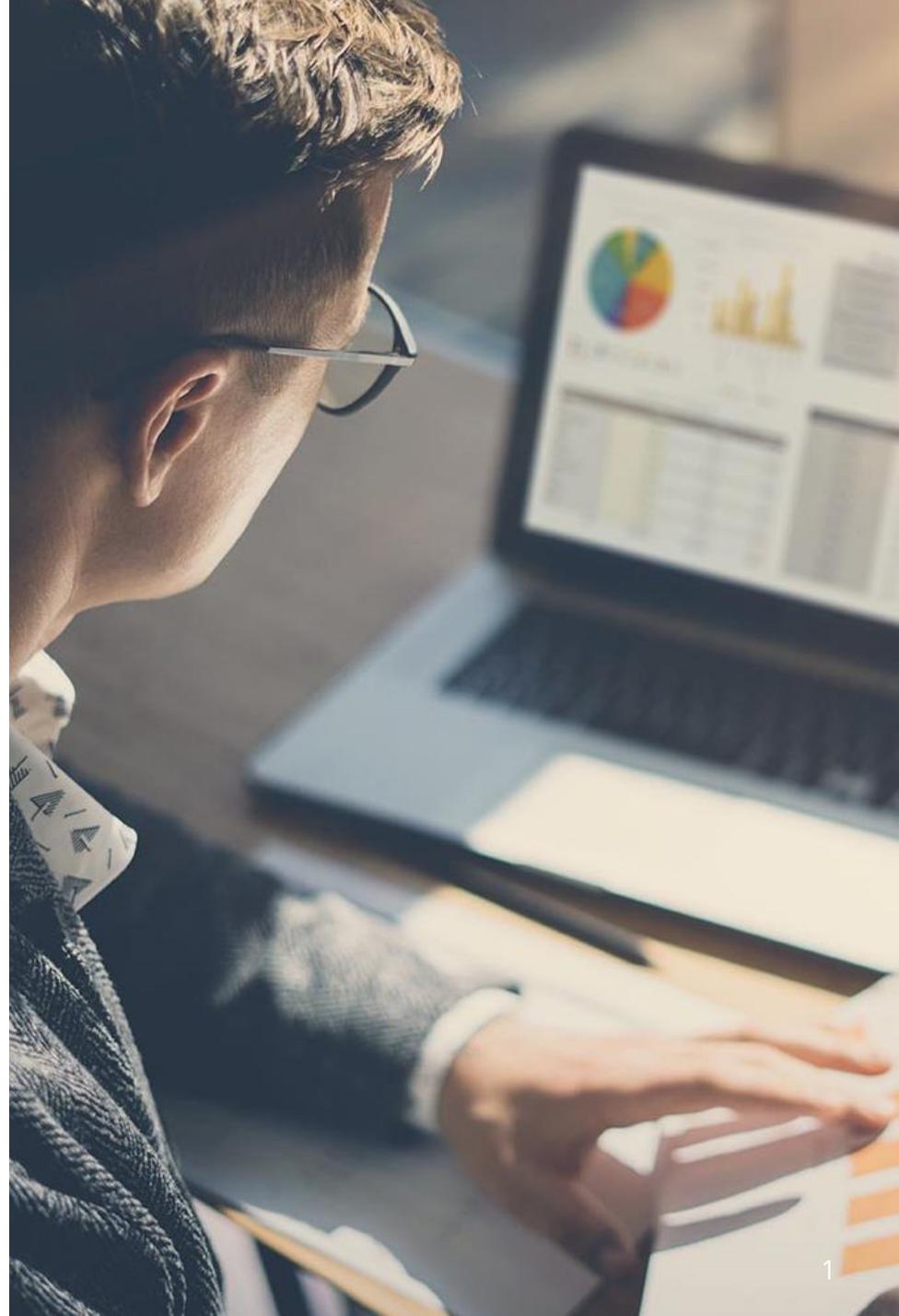
AGENDA

1 2021 DCAP Limit is \$10,500

2 Voluntary FFCRA Leaves

3 Employee Retention Credit

4 100% COBRA Subsidy for
April 1 through Sept 30



2021 DAYCARE FSA \$10,500

For calendar year 2021 only

(but we expect Congress to consider extending it and to possibly have the limit automatically index in future years)

❑ **Income Exclusion:**

- ✓ Typically employees can only be reimbursed up to \$5,000 tax-free each calendar year for expenses incurred that year, so any excess over \$5K is taxable income (*\$2,500 if married filing separately*)...employer-provided on-site childcare and direct employer payment without paycheck deductions also count toward the limit
- ✓ For calendar year 2021 only, ARPA allows large balances from 2020 available in 2021 to be non-taxable up to \$10,500 for expenses incurred and reimbursed in calendar year 2021 (*\$5,250 if married filing separately*)

❑ **Contributions:**

- ✓ We would recommend limiting new 2021 contributions to \$10,500 per person *less* any 2020 funds brought forward to avoid taxation issues for daycare expenses incurred and reimbursed in calendar year 2021
- ✓ Non-calendar year plans may not want to allow any contributions over the usual \$5K, especially if allowing 2020 funds to be brought forward to the plan year that begins in 2021 (*since the \$10,500 income exclusion is a calendar year limit*)
- ✓ Consolidated Appropriations Act already permits employer to allow daycare FSA election changes without a qualifying event this year, so that can be relied upon for making changes due to ARPA

The Child and Dependent Care Tax Credit was also adjusted for 2021, so employees might evaluate their daycare FSA election against claiming the [CDCTC](#)

- ❑ Was up to 35% credit, **non-refundable**, on \$3K (\$6K for 2+ children) phasing down for AGI >\$15K to land at a flat 20% for AGI >\$43K
 - ❑ *So a \$1,200 non-refundable credit for 2+ kids for AGI >\$43K*
- ❑ Now up to 50% credit, **refundable**, on \$8K (\$16K for 2+ children) phasing down for AGI >\$125K and phasing out for AGI >\$400K
 - ❑ *So \$8K refundable credit on 2+ kids to \$125K*

Watch your non-discrimination testing! And don't forget to make plan amendments as needed.

VOLUNTARY FFCRA LEAVES

- ❑ Consolidated Appropriations Act already extended 100% tax credits for employers that *voluntarily* honor FFCRA emergency leaves through March 31, 2021
 - ✓ Did **not** create a fresh 80 hours of EPSL or fresh 12 weeks of EFML
- ❑ ARPA extends the tax credits again to September 30, 2021, with major tweaks for employers willing to *voluntarily* honor EPSL/EFML
 1. ARPA recognizes April 1 is the one-year anniversary of when the original FFCRA emergency leave provisions took effect, so it grants a **fresh 80 hours of EPSL beginning April 1, 2021**
 - *It's less clear if there's a fresh 12 weeks of EFML, guidance should help clarify*
 2. ARPA adds to EPSL reason #3 (*symptomatic* employee seeking diagnosis)
 - Reason #3 will also include *exposure* to COVID-19, *employer-requested test*, and getting *vaccinated and recovering* from symptoms related to the vaccine
 3. EFML expanded to **pay first two weeks** and to cover **all EPSL reasons for leave at 2/3 pay** to \$200/day (*through March 31, 2021, EFML has not paid first two weeks and was only for reason #5, which is staying home to care for a child whose school or child care is unavailable due to COVID-19*)
 4. **Governmental employers can newly qualify for the tax credits starting April 1, 2021**
 5. Claimed against employer's share of Medicare taxes starting April 1, 2021
 - ✓ Historically claimed against employer's share of Social Security taxes through March 31, 2021

EMPLOYEE RETENTION CREDIT

This important credit for non-governmental employers had been extended to last through June 30, 2021, with some significant [enhancements](#) under the Consolidated Appropriations Act...it's extended again by ARPA for all 2021

- ❑ Still intended to help employers pay wages & benefits in a quarter with partial or full **government restriction on operations or significant decline in gross receipts** compared to a previous quarter
 - ✓ *Small employers with up to 500 employees can claim the 70% credit in 2021 on all wages & benefits that quarter up to \$10K per employee*
 - ✓ *Employers 500+ can claim the 70% credit in 2021 on paid leave wages & benefits that quarter up to \$10K per employee (or on all wages & benefits if severely financially distressed)*
 - ✓ *This could result in claiming up to **\$7K/qtr, or \$28K/yr, in credits per employee***
- ❑ Wages & benefits claimed under ERC cannot be claimed elsewhere (*no double dip on the tax savings, so they won't be claimable as ordinary business expenses and should not be claimed on wages & benefits paid under an FFCRA tax credit or forgiven PPP loan*)
- ❑ Claim ERC against employer's share of Social Security tax through June 30, 2021, then against employer's share of Medicare tax from July 1, 2021, through December 31, 2021
 - ❑ Employers may reduce payroll tax deposits by amounts to be credited
 - ❑ Small employers (with up to 500 employees in 2019) can claim additional amounts to be credited be paid to them in advance on Form 7200 (*large employers cannot do this in 2021*)
 - ❑ *Work with your tax advisor to ensure you follow all the [rules](#) here*

100% COBRA SUBSIDY APR-SEP 2021

- ❑ Hearken back to the American Recovery and Reinvestment Act of 2009 (ARRA) 15-month [65% ARRA COBRA subsidy](#), and you'll have a good idea what to expect with the 6-month 100% ARPA COBRA subsidy
 - ❑ [2009 Q&A #26](#) said church plans voluntarily offering COBRA were ineligible, and that's likely true again
- ❑ An assistance eligible individual (**AEI**) will be:
 - ❑ Each qualified beneficiary (*QB*) where the employee's **reduction in hours** or **involuntary termination** of employment caused a loss of eligibility for health coverage they were enrolled in, and
 - ❑ Some or all of their 18 months of COBRA is within April 1, 2021, and Sept 30, 2021
 - ✓ Voluntary termination, death, divorce, or child turning 26 are *not AEs*
 - ✓ Those not enrolled at the time of the event were not COBRA eligible then and are not AEs now
- ❑ Major medical is definitely included, dental & vision are likely included, health FSA is definitely not included
- ❑ Employer pays the full monthly COBRA premium elected, then is reimbursed via 100% tax credits
- ❑ Each QB can be an independent AEI if desired (*e.g., one family member becoming eligible for Medicare doesn't cause other QBs in the family to stop being AEs*)
- ❑ Insurers were responsible for ARRA state continuation subsidy tax credits, expecting same under this law

INVOLUNTARY TERMINATION

- ❑ Involuntary termination is typically employment action against an employee, and would often result in unemployment but doesn't have to
- ❑ Until we have more current guidance; [2009 ARRA guidance](#) gives us some history that involuntary termination included the following:
 - ✓ **General definition:** "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"
 - ✓ **Contract expiration:** "May include the employer's failure to renew a contract at the time the contract expires, if the employee was willing and able to execute a new contract providing terms and conditions similar to those in the expiring contract and to continue providing the services"
 - ✓ **Negative relationship/environment:** "An employee-initiated termination from employment ... if the termination from employment constitutes a termination for good reason due to employer action that causes a material negative change in the employment relationship for the employee" (*this likely includes unsafe working conditions during pandemic where employer isn't following CDC guidance or engaging in an interactive process with an employee*)
 - ✓ **Quitting when parties knew termination would happen:** "If a termination is designated as voluntary or as a resignation [or retirement], but the facts and circumstances indicate that, absent such voluntary termination, the employer would have terminated the employee's services, and that the employee had knowledge that the employee would be terminated"
 - ✓ **Layoff/furlough:** "Involuntary reduction to zero hours, such as a lay-off, furlough, or other suspension of employment, resulting in a loss of health coverage"
 - ✓ **Illness/disability:** "Involuntary termination includes an employer's action to end an individual's employment while the individual is absent from work due to illness or disability"
 - ✓ **Employment terminated for cause** (*gross misconduct that disqualifies someone for COBRA also disqualifies them from the subsidy, but this should be reserved for only the most serious breaches/crimes you would take the person to court over*)
 - *This does not address whether a written policy that a certain number of no-call/no-show absences will be a voluntary resignation...until we have more guidance, this might be involuntary termination for cause, even if you have their signature acknowledging the policy which treats this as a voluntary resignation*
 - ✓ **Geographic change:** "Material change in the geographic location of employment for the employee"
 - ✓ **Lockout** (*but not a strike*): Does not "include a work stoppage as the result of a strike initiated by employees or their representatives," but "a lockout initiated by the employer is an involuntary termination"
 - ✓ **Voluntary severance in lieu of layoffs:** "A termination elected by the employee in return for a severance package (a "buy-out") where the employer indicates that after the offer period for the severance package, a certain number of remaining employees in the employee's group will be terminated"

SECOND CHANCE ELECTION RIGHT

- ❑ “Second chance” election opportunity must be provided
 - ✓ AEs whose COBRA could begin prior to April 1, 2021, but are not currently enrolled in COBRA, get a new chance to enroll in **coverage they had back when they were enrolled**
 - ✓ AEI would have 60 days from the date of a new notice being provided to submit their election
 - *Department of Labor created a model notice for this, and it clarifies that the one-year Outbreak Period extensions do NOT apply to this 60-day deadline*
 - *If the employer wants to give them an option to also enroll in cheaper coverage if desired, then the AEI would have 90 days to submit their election*
 - ✓ The new coverage would begin April 1, 2021 (so **no retroactive coverage** and **no back premiums to make up**)
 - Note this does NOT take away anyone’s one-year Outbreak Period relief to still elect and pay for retroactive COBRA coverage if they want to
 - This new ARPA subsidy just ensures they don’t have to make up lapsed time/premiums if they don’t want to
 - ✓ Still limited to a total of 18 possible months, including any lapsed months
 - So employer needs to identify and mail notices to those with a reduction in hours or involuntary termination of employment as far back as October 2019, since their COBRA could have begun November 1, 2019, and their 18th month would be April 2021

WHEN COBRA SUBSIDY ENDS

The new COBRA subsidy ends the earliest of the following:

1. The AEI's 18th possible month of COBRA
2. September 30, 2021
3. The date the AEI is eligible to be enrolled in Medicare or in other group coverage (*such as through a new employer, spouse's employer, or parent's plan, after any waiting period*), noting each QB can be their own AEI and might remain eligible even when another family member loses eligibility as an AEI
 - Waiting on guidance to clarify this rule for those who were eligible to enroll in other group coverage back when their initial COBRA triggering event occurred, but that election window has since closed and they might be waiting for annual open enrollment
 - Keep in mind that one-year Outbreak Period relief has extended HIPAA special enrollment rights, so those who lost coverage with you due to reduction in hours or termination of employment should typically have up to a year after their original 30-day HIPAA special enrollment deadline to submit their election to the other group plan
 - Unless the other plan is a governmental plan not honoring such late requests since the relief was optional to them*
 - Church plans did have to honor the relief but only on their medical plans*

Note for reasons 1 and 2, the employer must send a second notice between 15 and 45 days in advance of the subsidy expiration date to give the AEI a heads-up that their subsidy is ending

- ✓ *The DOL has created a model notice for this*
- ✓ *It would appear sending this more than 45 days in advance of the subsidy expiration date will be non-compliant*

NEW MODEL NOTICES

The DOL has [structured](#) the up front notice in two parts, which must be **sent by May 31, 2021**:

1. A [cover letter](#) offering:
 - ❑ A summary page of the ARPA rules,
 - ❑ A rather confusing application to submit to the employer requesting treatment as an AEI (*which is not the COBRA election form that must also be turned in with this*), and
 - ❑ A form to submit when becoming eligible for Medicare or other group coverage later
2. That cover letter is to be coupled with either:
 - ❑ The model [general](#) COBRA notice as revised (*note it includes language most employers must strike out, such as Medicare being a COBRA event, as well as legal separation language if you only recognize divorce as a COBRA event*),
 - ❑ The new model [second chance](#) notice, or
 - ❑ The new alternative notice for [state continuation](#)
 - ✓ Current guidance is not clear on state continuation responsibilities, but 2009 ARRA guidance said “*the only person entitled to be reimbursed for the premium reduction through the payroll credit [was] the insurer*”
 - ✓ So we’re hopeful insurers will bear the responsibility for state continuation notices and just request details from employers about whether a termination of employment was voluntary or involuntary

The DOL has also provided the 15- to 45-day advance notice of [subsidy expiration](#)

HANDLING PREMIUMS & TAX CREDITS

Employer will be paying the full COBRA premium on behalf of all AEIs that elect COBRA, including the 2% administrative fee

- ✓ If self-funded, the employer will be paying the fixed costs on behalf of such AEIs, the 2% administrative fee if being charged that by a COBRA administrator, and the AEI's approved claims
- ✓ However, the self-funded employer will only be able to claim a tax credit for the COBRA rate with the 2% admin fee, and thus might not recoup what dollars the employer must pay out in claims for the AEI (*but should have the usual stop loss protection*)

Then the employer will claim the full COBRA rate with the 2% admin fee as a 100% tax credit ([*governmental plans also qualify*](#))...work with your tax professional on all this

- ✓ Employer can withhold that amount from the employer's share of Medicare payroll tax deposits during the quarter
- ✓ Credits may be advanced (*likely via Form 7200*), and we imagine employers will be able to submit this with each payroll tax deposit to ensure everyone's COBRA premiums are kept current
 - With the employer's share of Medicare only being 1.45%, we imagine you'll use Form 7200 pretty often (*as every \$100,000 in wages will only get you a \$1,450 credit, and that's not likely to keep up with the COBRA premiums of all AEIs electing coverage, let alone credits claimed for FFCRA leaves and ERC*)
- ✓ Credits are refundable once the quarterly 941 is calculated and reveals the employer is still owed more credits



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