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COVID-19 Resource Guide for Human Resources Professionals: 100% Federally Funded COBRA Is Almost Here — What You Need to Know

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Who Needs to Know

Employers

Why It Matters

The American Rescue Plan Act (ARPA), signed into law by President Biden on March 11, packs a powerful one-two punch for employers and employees alike who continue to be sucker punched by the effects of COVID-19. While attention and publicity have primarily focused on the $1,400 stimulus for individuals with specified income levels, ARPA also includes a less well-known six-month 100% COBRA subsidy for individuals who lose health coverage due to an involuntary termination of employment or reduction of hours, offset by a fully refundable and advanceable 100% credit against Medicare taxes. Additionally, under ARPA, the gross income exclusion limit for dependent care assistance benefits has increased to $10,500 for 2021. This increased limit will help employees avoid additional taxable income in 2021 if they use amounts remaining from their 2020 dependent care flexible spending account (DCFSA) to pay for eligible expenses incurred in 2021.

This third edition of our series — COVID-19 Resource Guide for Human Resources Professionals — answers your questions on the new COBRA subsidy and other provisions under the American Rescue Plan Act.

If you have any questions or require assistance, please contact any member of the Troutman Pepper Employee Benefits and Executive Compensation Practice Group or the COVID-19 Response Team. We are here to help you in any way that we can. This alert reflects guidance as of March 23, 2021.

COBRA Subsidy

ARPA's mandatory federally funded COBRA subsidy provision requires insurers and employers to provide "assistance eligible individuals" (AEI) with a 100% subsidy for premiums otherwise owed for COBRA coverage during the period from April 1, 2021 to September 30, 2021 (Subsidy Period).

Which Employers Need to Provide the Subsidy?

Employers subject to COBRA continuation requirements must provide the subsidy to assistance eligible individuals. The Department of Labor reminds employers that COBRA generally applies to all private sector group health plans maintained by employers with at least 20 employees on more than 50% of its typical business days in the previous calendar year. Employers must count both full- and part-time employees to determine whether its group health plans are subject to COBRA. In addition, several states have "mini-COBRA" laws that apply to employers that do not meet the 20-employee threshold. ARPA provides that the subsidy applies to "a State program that provides comparable continuation coverage." We hope to receive additional guidance to clarify how the credit applies to employers whose group health plans are subject to mini-COBRA laws.

What Plans are Subject to the Subsidy?

The COBRA subsidy applies to COBRA coverage under medical, dental, and vision plans, but not health flexible spending accounts. Further, the COBRA subsidy is applicable to both fully insured and self-insured plans.

Who are Assistance Eligible Individuals (AEI)?

An AEI is a qualified beneficiary (1) whose COBRA qualifying event is an involuntary termination of employment or reduction of hours, (2) who is not otherwise eligible for Medicare or other group health plan coverage, and (3) who actually elects COBRA coverage. There are several things to note for purposes of the definition of AEI, as outlined below.

- Someone who voluntarily terminates from employment is not required to receive the COBRA subsidy, and the federal tax credit will not be available for any COBRA subsidy the employer chooses to provide to such individual. We hope to receive additional guidance on what constitutes an involuntary termination of employment for these COBRA subsidies (*e.g.,* whether a termination for good reason is considered involuntary or not).

- An AEI includes both employees/former employees *and* their eligible dependents (*e.,* a covered spouse and/or dependent child(ren) who become qualified beneficiaries at the time of the COBRA qualifying event).

- Once the AEI's maximum COBRA coverage period ends, the COBRA subsidy also ends (*i.e.,* the new law does not extend an AEI's maximum COBRA coverage period).

- Individuals eligible for Medicare or other group health plan coverage are not eligible for the COBRA subsidy, and the employer can rely on an individual's self-certification. Individuals are responsible for notifying employers about a change in their eligibility for coverage and may be subject to a penalty for failure to do so.

- An AEI can be someone who first becomes eligible for COBRA coverage on or after April 1, 2021. However, it also includes someone who had a COBRA qualifying event before April 1, 2021, and whose maximum COBRA coverage period overlaps with the Subsidy Period, in which case administration becomes more difficult, as further outlined below. If an AEI is already enrolled in COBRA coverage, ARPA requires that the COBRA subsidy apply automatically beginning April 1, 2021, and if the AEI sends in COBRA premium payments for a month to which the subsidy would apply, the employer must refund the premium back to the individual within 60 days.

Are Employees Who Never Elected or Discontinued COBRA Coverage Eligible for the Subsidy?

If an AEI became entitled to COBRA coverage previously, but he/she never elected COBRA coverage or elected and discontinued COBRA coverage, then a new prospective election opportunity must be provided to such AEIs who have months remaining in their maximum COBRA coverage period that would have overlapped with the

Subsidy Period if they had elected or continued COBRA coverage when originally available.

- This special election opportunity begins on April 1, 2021 and ends 60 days after the newly required notice of extended election period is provided, as described below.

- If the individual newly elects COBRA coverage, the individual is entitled to the COBRA subsidy on a prospective basis beginning April 1, 2021, without having to elect and pay for COBRA coverage retroactively for any months prior to the Subsidy Period.

- This additional election opportunity is particularly burdensome from an administrative perspective because of the individualized extended deadlines available to elect and pay for COBRA coverage, which were recently clarified in Notice 2021-01 (*e.,* beginning on March 1, 2020, the deadline to elect and pay for COBRA coverage ends on the earlier of one year from the date the deadline would have begun running for the individual or 60 days from the end of the national emergency, which is ongoing). Putting all this together means that employees who have experienced an involuntary termination of employment or reduction of hours as far back as over a year ago may now elect fully subsidized COBRA coverage prospectively starting April 1, 2021 (and only for the Subsidy Period), without requiring payment of COBRA premiums retroactive back to the date of loss of coverage. We hope to see additional guidance regarding any interaction between Notice 2021-01 and ARPA.

Can an AEI Elect a Different Plan Option?

Note that, generally, an individual who becomes eligible for COBRA coverage can only elect the plan option that the individual was enrolled in when he/she experienced the COBRA qualifying event. Under ARPA, an employer may (but is not required to) allow qualified beneficiaries to make a limited change to the coverage they were enrolled in at the time of their qualifying event if the premium for the other coverage is the same price or cheaper than the coverage in effect at the time of the qualifying event. A qualified beneficiary must make the election to change the coverage within 90 days after the date of notice of the enrollment option.

What is the Impact of a Second Qualifying Event on the Subsidy?

This question is not currently addressed in the guidance. We hope that additional guidance will provide clarity.

Are Additional Notices Required?

ARPA's COBRA subsidy provisions require several participant notices.

- **Election Notice Supplement.** Group health plans must provide COBRA subsidy information to qualified beneficiaries who first become entitled to elect COBRA during the Subsidy Period. This notice obligation can be met by amending existing COBRA election notices or by providing the new required notice information in a separate document. The DOL will issue a new model notice within 30 days of ARPA's enactment, but the employer may need to work with its COBRA administrator to update election notices before the new model is issued to ensure regular notice deadlines are met.

- **Extended Election Period Notice.** AEIs who first became entitled to elect COBRA prior to the Subsidy Period and whose maximum COBRA coverage period overlaps with the Subsidy Period must receive a new notice about their extended election period rights (described above) by May 31, 2021. The DOL will issue a model notice within 30 days of ARPA's enactment.

- **Subsidy Expiration Notice.** Plans must notify AEIs of their COBRA subsidy's expiration between 45 and 15 days before the expiration date, unless the COBRA subsidy is ending because the AEI has become eligible for coverage under another group health plan or Medicare. The DOL will issue a model notice within 45 days of ARPA's enactment.

Each of these notices must include specific content requirements (*e.g.,* the forms necessary for establishing eligibility for the COBRA subsidy, description of the extended election period, etc.) and are treated for compliance purposes like any other COBRA notice, including the applicable per-day penalty for failing to provide compliant notices.

How is the COBRA Subsidy Funded?

The COBRA subsidy is being funded entirely by the federal government via fully advanceable and refundable Medicare tax credits. For group health plans subject to COBRA under the Internal Revenue Code, ERISA, or the Public Health Service Act, the employer plan sponsor is the entity that is entitled to the federal tax credit, regardless of whether the plan is self-insured or fully insured. The employer will recover the entire COBRA premium subsidy, including the 2% administrative fee, for each AEI by offsetting the employer's regular quarterly Medicare employment tax obligation. Any excess credits are fully advanceable and refundable. Due to coordination provisions under ARPA with respect to other tax credits, it likely makes sense for the employer to consult with its tax advisor and/or tax credits consultant to ensure it maximizes, but does not overstate, all available credits.

What Should Employers Do Now?

In order to comply with the COBRA subsidy under ARPA, we suggest that employers do the following:

- Identify individuals who are currently enrolled in COBRA continuation coverage as a result of an involuntary termination of employment or reduction in hours and whose coverage period overlaps some or all of the Subsidy Period, for purposes of providing the Election Notice Supplement.

- Identify individuals who declined or discontinued their COBRA continuation coverage following an involuntary termination of employment or reduction in hours and whose COBRA coverage period would have overlapped some or all of the Subsidy Period, for purposes of providing the Extended Election Period Notice.

- Draft the required notices or contact your third-party COBRA administrator to ensure compliance with requirements under ARPA.

- Confirm whether employer payroll or HRIS systems need to be modified to process the Medicare tax credit.

Increased Dependent Care Assistance Limit

The ARPA also increased the amount that employees can exclude from their 2021 gross taxable income for employer-provided dependent care assistance program (DCAP) benefits under Internal Revenue Code (Code) Section 129, which include employee pre-tax contributions to a dependent care flexible spending account (DCFSA) through the employer's Code Section 125 cafeteria plan. Ordinarily, this exclusion is limited to $5,000 (or $2,500 for married individuals who file federal income tax returns separately from their spouse), subject to certain earned income limitations. For 2021, ARPA has increased that limit to $10,500 (or $5,250 for married individuals filing separately).

Are Employers Required to Allow Employees to Increase Their DCFSA Contribution Election for 2021?

No, an employer may amend its cafeteria plan to permit employees to increase their 2021 DCFSA pre-tax contribution election up to the new $10,500 limit, but if an employee has unused DCFSA amounts from 2020 that the employee uses to pay for eligible expenses incurred in 2021, those amounts could end up being taxable to the employee in 2021 if the total expenses incurred in 2021 and reimbursed from the DCFSA exceed the new $10,500 limit for 2021.

See our client alert "Increased Limit for Dependent Care Assistance Programs: Traps for the Unwary" for additional information and considerations.

Other ARPA Benefits Provisions

ARPA also includes certain funding relief provisions for both multiemployer and single-employer defined benefit pension plans, as well as extensions of the Employee Retention Credit (ERC) and tax credits for certain paid leaves. Please contact us if you would like additional information about any of those provisions.

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