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## *COVID-19: COBRA Subsidy Under the American Rescue Plan Act of 2021— Important Deadlines Approaching*

May 12, 2021

On March 11, 2021, President Biden signed the American Rescue Plan Act of 2021 (ARPA), which subsidizes fully paid post-employment healthcare coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) for any “assistance eligible individual” for a six-month period from April 1, 2021, to September 30, 2021, using a 100 percent federal government subsidy for premiums paid. In addition to COBRA continuation coverage, the COBRA subsidy under ARPA applies to coverage under certain state law programs that provide comparable coverage to participants and beneficiaries, often referred to as “mini-COBRA.” The employer or plan to which COBRA premiums are payable is entitled to a tax credit for the amount of the premium assistance. As discussed in further detail below, this COBRA subsidy does not apply to any otherwise eligible employees (or other qualified beneficiaries) if the employee voluntarily terminates employment.

Employers and other plan sponsors will need to quickly prepare (or ensure that their plan administrator prepares) some of the COBRA notices referenced below since the deadline to distribute those notices to eligible employees, former employees and their qualified beneficiaries is fast approaching. The deadline for distributing regular COBRA election notices remains the same, but any extended election period notices must be provided to eligible employees, former employees and their qualified beneficiaries **by May 31, 2021**. Employers and other plan sponsors should note that the failure to comply with COBRA continuation coverage requirements can potentially lead to significant penalties.

Further guidance on the subsidy provisions was issued by the Department of Labor’s Employee Benefits Security Administration (EBSA) on April 7, 2021. In addition to certain COBRA model notices, EBSA issued a [Federal Register Notice](#) and a [10-page FAQ](#) about COBRA premium assistance under ARPA (FAQ).

There will likely be increased short-term costs arising from the subsidy provisions because employers will generally be required to pay the upfront costs of the COBRA subsidy before receiving a tax credit from the federal government.

## **COBRA Premium Subsidies Under the American Rescue Plan Act of 2021**

### *Eligibility and Duration*

To be an assistance eligible individual and receive the 100 percent COBRA subsidy, an individual is required to be an employee or other qualified beneficiary who (1) is eligible for COBRA continuation coverage by reason of a particular type of qualifying event (i.e., the reduction in hours or involuntary termination (other than by reason of such employee's gross misconduct) from employment of an employee who was provided coverage under a group health plan) and (2) elects COBRA continuation coverage under the normal election period rules or the extended election period rules added by ARPA (see Extended Election Period below). According to the FAQ, a reduction in hours includes "reduced hours due to a change in a business's hours of operations, a change from full-time to part-time status, taking a temporary leave of absence, or an individual's participation in a lawful labor strike, as long as the individual remains employed at the time hours are reduced."

To be eligible for the COBRA subsidy under ARPA, an individual's COBRA continuation period (generally 18 months) must not have expired by April 1, 2021. This means that, in the case of COBRA continuation periods related to termination of employment or reduction in hours, former participants who became eligible for COBRA on and after October 1, 2019, are potentially eligible for the COBRA subsidy and must receive notice of the subsidy provisions and opportunity to elect COBRA, as described below.

The COBRA subsidy under ARPA does not extend or shorten the period of COBRA continuation beyond the normal rules. The COBRA subsidy for assistance eligible individuals will end on the earliest of (1) September 30, 2021; (2) at the expiration of an assistance eligible individual's COBRA continuation period (which could be before September 30, 2021); or (3) on the first day the individual is Medicare eligible or *could* be covered by any other group health plan (excluding excepted benefits (such as dental- or vision-only coverage), a qualified small employer health reimbursement arrangement (QSEHRA), or a health flexible spending arrangement (FSA)). For example, a former employee would not be entitled to subsidized COBRA coverage if coverage under a spouse's plan were available. An employer is, however, required to offer COBRA coverage under usual COBRA coverage rules, even though the employee or former employee is ineligible for subsidized coverage. Individuals receiving the COBRA subsidy must notify their plans in writing once they are no longer assistance eligible individuals. Failure to do so in a timely manner may result in a penalty to the individual of at least \$250.

### *Extended Election Period*

Eligible individuals who either did not initially elect COBRA continuation coverage before April 1, 2021, or discontinued COBRA continuation coverage before April 1, 2021, are also entitled to the COBRA subsidy through the extended election period. Such individuals may elect COBRA continuation coverage under ARPA from April 1, 2021, to the date no later than 60 days after the notice of this extended election period is provided to such individuals (which notice must be provided no later than May 31, 2021). If an assistance eligible individual elects COBRA continuation coverage under this extended election period, that individual can choose to have coverage begin either on April 1, 2021, or, apparently, prospectively after the election is made.<sup>1</sup> This extended election period does not apply to individuals who received benefits under a state mini-COBRA program.

This extended election period does not extend the maximum period of COBRA coverage beyond the regular COBRA continuation period for applicable individuals. Therefore, if an individual was, for example, involuntarily terminated in November 2019 and did not elect COBRA continuation coverage until this extended election period, COBRA continuation coverage for such individual will *still* end at some point in May 2021.

Each COBRA-qualified beneficiary may independently elect COBRA continuation coverage. Therefore, even if an individual did not elect COBRA continuation coverage when another family member did, that individual will be provided with an opportunity to elect coverage under this extended election period.

### *COBRA Subsidy Refundable Tax Credit*

The “person to whom premiums are payable,” typically the employer, is responsible for paying 100 percent of the premium payments under ARPA and will receive a refundable tax credit.

The Internal Revenue Service (IRS) published [IRS Notice 2021-24](#), in which it explains how employers can apply for the COBRA subsidy tax credit, which is generally claimed against the employer’s share of the Medicare payroll tax. The employer may claim the refundable tax credit on Form 941, Employer’s Quarterly Federal Tax Return. Additionally, it appears that an employer may claim an advance payment of the refundable tax credit by using updated Form 7200. IRS Notice 2021-24 provides penalty relief for an employer that fails to timely deposit employment taxes related to the COBRA subsidy tax credit under certain conditions.

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<sup>1</sup> The individual may also have the ability to elect coverage retroactive to an earlier date under previous COVID-19-related guidance under the Joint Notice and EBSA Disaster Relief Notice 2021-01.

## New Notification Requirements for Employers and Group Health Plans

### *For Current Employees and Their Beneficiaries*

For individuals who experience a qualifying event from April 1, 2021, to September 30, 2021, plan administrators must include a written notification of the availability of the COBRA subsidy and the option to enroll in different coverage (if any) in a clear and understandable manner to that individual as part of his or her regular COBRA election notice. This may be accomplished by amending existing notice forms or by supplementing existing notice forms with a separate document. The deadline for furnishing the COBRA election notice (which varies depending on the process of the plan but is no more than 44 days following termination or reduction in hours) remains unchanged.

### *For Former Employees, Employees Who Experienced a Reduction in Hours and Their Beneficiaries*

A notice in connection with the extended election period must be provided **by May 31, 2021**, to those individuals who qualify to elect COBRA continuation under the extended election period. Assistance eligible individuals must elect COBRA coverage under the extended election period **no later than 60 days** after the extended election period notice is provided to them (which could be as late as July 30, 2021).

Each of the foregoing notices will need to include the following information:

- The forms necessary for establishing eligibility for premium assistance;
- The name, address and telephone number necessary to contact the plan administrator and any other person maintaining relevant information in connection with such premium assistance;
- A description of the extended election period;
- A description of the obligation of the qualified beneficiary to notify the plan that such individual is no longer eligible for the subsidy and information regarding the penalty for failure to carry out the obligation;
- A description displayed in a prominent manner, of the qualified beneficiary's right to a subsidy and any conditions on entitlement to the subsidy; and
- A description of the option of the qualified beneficiary to enroll in different coverage (when permitted by the employer).

The Department of Labor model general notice and the extended election period notice are available [here](#).

Furthermore, for plans that are not subject to COBRA but are subject to state mini-COBRA programs, there is a [model alternative notice](#) prepared by the Secretary of Labor, in consultation

with the Secretary of the Treasury and the Secretary of Health and Human Services, that plan administrators may use to provide notice to individuals covered under such plans.

Additionally, no more than 45 days, and no fewer than 15 days, prior to the expiration of the COBRA subsidy period under ARPA that applies to a particular person, plan administrators must provide assistance eligible individuals with a written notice of expiration of the period of premium assistance. This notice must (i) state that the COBRA subsidy for such individual will be expiring soon, (ii) prominently show the date of expiration and (iii) include language stating that the individual may be eligible for coverage without the subsidy through COBRA continuation coverage or coverage under a group health plan. Plan administrators do not have to provide this notice to an assistance eligible individual whose COBRA subsidy is expiring due to such individual's eligibility for another group health plan or Medicare. A model notification of subsidy expiration is provided [here](#).

### **Alternate Coverage Option**

Under ARPA, employers or plan sponsors are permitted to provide coverage that is different from the coverage under the health plan in which assistance eligible individuals were enrolled at the time of the qualifying event. If employers provide for an alternate coverage option, the premium payment for the alternate coverage must not exceed the premium at the time of the qualifying event, the alternate coverage must be offered to similarly situated active employees, and the alternate coverage must not be a QSEHRA, an FSA or coverage that only provides excepted benefits. Assistance eligible individuals must be given 90 days from the date the notice is provided to elect to change their coverage.

### **Potential Noncompliance Penalties**

Failure to satisfy the COBRA continuation coverage requirements, including the COBRA subsidy requirements under ARPA, may subject employers to an excise tax that could be as much as \$100 per qualified beneficiary (or up to \$200 per family) for each day that the employer is in violation of the COBRA rules. If the IRS conducts a COBRA compliance examination and finds violations of the COBRA continuation coverage requirements, more significant penalties may be imposed. In addition to the IRS taxes and penalties, employers that violate the COBRA notice requirements can face penalties of up to \$110 per day per person under the Employee Retirement Income Security Act of 1974 (ERISA).

### **Unanswered Questions**

As of the date of this alert, many questions remain regarding the implementation of the COBRA subsidy under ARPA.

For example, the term “involuntary termination from employment” is not defined in either ARPA or any guidance released by EBSA. A similar question arose after the enactment of a temporary COBRA subsidy in 2009, and the IRS answered it by defining the term “involuntary termination” under [IRS Notice 2009-27](#) (2009 Notice), which provided generally that a termination would be involuntary if it was “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.” The 2009 Notice emphasized that the determination was to be based on facts and circumstances and provided that under certain conditions, retirements and resignations could be involuntary.

Another common issue relates to the coordination of the COBRA subsidy under ARPA with employer-subsidized COBRA. Some employers offer employer-subsidized COBRA coverage for a limited duration following an involuntary termination of employment under an employment agreement, an individual severance agreement, or a severance policy or practice. ARPA and the FAQ are silent as to whether amounts paid under a severance agreement or plan during the six-month period beginning on April 1, 2021, and ending on September 30, 2021, would be eligible for reimbursement by the federal government through a refundable tax credit. Employers may want to consider the availability of the subsidy in structuring future severance arrangements.

While the 2009 COBRA subsidy under the American Recovery and Reinvestment Act is generally similar in approach to the 2021 COBRA subsidy, there are differences that may allow room for a range of reasonable interpretations of the statutory provisions, particularly in the absence of further guidance. Employers should be careful in their approach to implementing the provisions, treat all similarly situated employees alike and recognize that the guidance to date takes a typical pro-employee rights stance.

WilmerHale’s Executive Compensation and Employee Benefits Group and Labor and Employment Group are available to answer developing questions and help companies navigate their compliance obligations arising from ARPA.

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