ALERTS

COBRA Subsidies Under the American Recovery Plan Act of 2021 — What Employers and Plan Sponsors Need to Know

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The American Recovery Plan Act of 2021 ("ARPA"), which President Biden signed into law on March 11, 2021, requires the federal government to fully subsidize the COBRA premiums for certain COBRA-eligible individuals for coverage periods between April 1, 2021 and Sept. 30, 2021. While the federal government will bear the ultimate financial burden of the subsidy, employers and plan sponsors will need to grapple with the logistics of administering the subsidy, including notifying eligible individuals and fronting the cost of the monthly premium. On April 7, 2021, the DOL released a series of FAQs to help guide employers and plan sponsors with implementation of the subsidy.

The COBRA subsidy, which is 100% of the monthly premium in addition to the 2% administration fee, applies to employer-sponsored group health plans, multiemployer plans, government plans and plans subject only to state "mini-COBRA" laws (i.e., based on their size). The subsidy does not apply to coverage under a health flexible spending arrangement ("FSA"), which means that participants can elect to continue contributions to their FSA but will be responsible for making such contributions.

The subsidy is available only to "Assistance Eligible Individuals," which ARPA defines as COBRA qualified beneficiaries who:

- Had a qualifying event that is a reduction in hours or an involuntary termination of employment;

- Elect COBRA coverage;
- Are not eligible for coverage under another group health plan (i.e., under a new employer's health plan or under a spouse's plan); and
- Are not eligible for Medicare.

As discussed below, former employees who have individual coverage, such as through a Health Insurance Marketplace (or "Exchange") may be eligible for the subsidy. Former employees who terminated their employment for any other reason (i.e., voluntary quit or termination for gross misconduct), are not eligible for the subsidy.

While the maximum subsidy period is six months, Assistance Eligible Individuals will lose the subsidy early if:

- They become eligible for another group health plan; or
- They reach the end of their maximum COBRA coverage period (generally 18 months for a reduction in hours or an involuntary termination of employment, without a subsequent qualifying event such as a disability). If an Assistance Eligible Individual's COBRA coverage period begins after April 1, 2021 or ends before Sept. 30, 2021, the subsidy will be shorter than six months.

Assistance Eligible Individuals are responsible for notifying their former employers if they become eligible for alternative group health plan coverage. Failure to do so could result in a tax penalty.

If an Assistance Eligible Individual receives the COBRA subsidy for the full six months but has not exhausted his or her maximum COBRA coverage period by Sept. 30, 2021, he or she can continue to receive COBRA coverage as long as he or she remits the appropriate COBRA premium (unless the Assistance Eligible Individual is not required to do so pursuant to an agreement with his or her former employer).

In addition to the COBRA subsidy, ARPA also provides an additional election period for COBRA qualified beneficiaries (including family members) who experienced an involuntary termination or reduction in hours prior to April 1, 2021 but either did not elect COBRA coverage at that time or did elect COBRA but are no longer enrolled (for reasons other than reaching the end of their maximum COBRA coverage period). However, this "second bite at the apple" does not extend the maximum

COBRA coverage period. For example, an Assistance Eligible Individual who, prior to April 1, 2021, had two months left before reaching the end of her maximum COBRA coverage period will be eligible for only two months of additional coverage and two months of the subsidy. Conversely, an Assistance Eligible Individual who, prior to April 1, 2021, had eight months left before reaching the end of her maximum COBRA coverage period will be eligible for the full eight months of additional coverage but only six months of subsidized coverage (assuming the coverage and subsidy do not end early).

ARPA does permit employers and plan sponsors discretion with respect to one matter — the ability to allow Assistance Eligible Individuals to change their coverage to another coverage option offered by the employer or plan sponsor. For example, if an employer offers three plans for employees to choose from — an HMO, an EPO and a PPO — and an Assistance Eligible Individual was covered under the HMO option at the time of his or her qualifying event, the employer could permit Assistance Eligible Individuals to change to the EPO or PPO option at the time of COBRA enrollment.

Specifically, in its FAQs, the DOL clarified that an individual will lose eligibility for the subsidy if:

- The COBRA premium charged for the different coverage option is the same or lower than the COBRA premium charged for the coverage that the Assistance Eligible Individual had at the time of his or her qualifying event;
- The different coverage option is offered to similarly situated active employees; and
- The different coverage is not limited to only excepted benefits, a qualified small employer health reimbursement arrangement or a health flexible spending account.

Assistance Eligible Individuals are not responsible for paying any COBRA premiums for coverage between April 1, 2021 and Sept. 30, 2021. Employers or plan sponsors pay the full premium directly and then will be reimbursed through quarterly payroll tax credits. If an Assistance Eligible Individual does pay a COBRA premium during the subsidy period, that person's former employer or plan sponsor must provide reimbursement for the amount paid (or a credit against any future payments after Sept. 30, 2021).

Importantly, because Assistance Eligible Individuals are now entitled under federal law to free COBRA coverage for six months, employers cannot offer COBRA coverage as consideration in a separation agreement for a release from an Assistance Eligible Individual during this time. Additionally, separation agreements cannot provide that Assistance Eligible Individuals will be required to pay for COBRA coverage after their last day of employment, or after the last day of the month in which their reduction in hours or involuntary termination of employment occurred, from now through Sept. 30, 2021. An employer may, however, elect to provide continuation of paid COBRA past the six month subsidy period to provide consideration for a release of claims.

Employers and plan sponsors must now inform Assistance Eligible Individuals of their expanded COBRA rights and eligible for the COBRA subsidy within certain timeframes. Specifically, employers and plan sponsors must provide:

- A general notice to all COBRA qualified beneficiaries who have a qualifying event that is a reduction in hours or an involuntary termination of employment between April 1, 2021 and Sept. 30, 2021, which notice may be provided on its own or with the COBRA election notice.
- A notice of the additional election period to Assistance Eligible Individuals who experienced a qualifying event that was a reduction in hours or an involuntary termination of employment prior to April 1, 2021 and who have not reached the end of their maximum COBRA coverage period. This notice must be provided by May 31, 2021, and individuals have 60 days after the notice is provided to elect COBRA coverage.
- A notice of the end of the subsidy, which notice must be provided between 15 and 45 days before the Assistance Eligible Individual's subsidy ends.

The notices must include:

- The forms necessary for establishing eligibility for the subsidy;
- Contact information for the plan administrator or other person responsible for the subsidy;

- A description of the right to receive the subsidy and the conditions for eligibility;
- A description of the extended election period, if applicable;
- A description of the option to enroll in a different coverage option available, if applicable; and
- A description of the requirement that the Assistance Eligible Individual notify the employer or plan sponsor when he or she becomes eligible for coverage under another group health plan or Medicare, as well as the penalty for failing to do so.

The DOL has issued model notices (available here) that contain sample language that employers and plan sponsors may tailor to their own needs.

Employers and plan sponsors that do not comply with COBRA coverage requirements, including ARPA's expanded coverage requirements, may be subject to an excise tax of $100 per qualified beneficiary (subject to a maximum of $200 per family).

Action Items

To comply with ARPA's expanded COBRA coverage requirements and avoid a potential excise tax, employers and plan sponsors must:

- Review their files to identify any former COBRA qualified beneficiaries who are eligible for ARPA's extended election period;
- Update and timely distribute the appropriate notice to Assistance Eligible Individuals (including qualifying former employees);
- Decide whether to allow Assistance Eligible Individuals to enroll in a coverage option that is different from the one they were enrolled in at the time of their qualifying event;
- Review any separation agreements in the pipeline to ensure that COBRA coverage is not being offered as consideration for a release from an Assistance Eligible Individual from now through Sept. 30, 2021;
- Update internal processes to reflect these changes (for example, to ensure that the nonpayment of premiums during the six month period does not terminate COBRA coverage for Assistance Eligible Individuals);

- Coordinate with payroll providers to claim the quarterly tax credit; and
- Prepare corresponding amendments to internal policies, health plans and summary plan descriptions.

Authored by Mark E. Brossman, Ronald E. Richman, Susan E. Bernstein and Melissa J. Sandak.

If you have any questions concerning this *Alert*, or wish to update your plan documents and participant communications to reflect these measures, please contact your attorney at Schulte Roth & Zabel LLP or one of the authors.

Related People

Mark Brossman

Partner

New York

Ronald Richman

Partner

New York

Susan Niver

Special Counsel

New York

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