

## **The COBRA Premium Subsidy Law: Understanding Your Compliance Obligations**

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The American Rescue Plan Act of 2021 (“ARPA”), which was signed by President Biden on March 11, 2021, includes provisions that dramatically and immediately affect compliance with the continued group health plan coverage requirements of the Consolidated Omnibus Budget Reconciliation Act of 1985 (“COBRA”). In particular, ARPA includes a 100% COBRA premium subsidy for periods of coverage occurring between April 1 and September 30, 2021. The subsidy is available to qualified beneficiaries who are eligible for COBRA coverage due to a covered employee’s reduction in hours of employment or involuntary termination of employment. The subsidy applies not only to federal COBRA coverage, but also to state law programs that provide comparable continuation coverage. Therefore, it is important for all group health plan sponsors to learn these new rules and understand their obligations.

### **Basic Rules on the Premium Subsidy**

For a period of up to six months (from April through September 2021), an “assistance eligible individual” is treated as having paid their COBRA coverage in full if the individual timely elects COBRA coverage. One hundred percent of the premium is subsidized by the federal government via a tax credit mechanism, described more fully below. Assistance eligible individuals generally are those qualified beneficiaries who lose group health coverage as a result of an employee’s reduction in hours or involuntary termination of employment and are not eligible for other group health coverage or Medicare. Importantly, ARPA subsidies for COBRA coverage apply to affected individuals even if their reduction in hours or involuntary termination of employment occurred before the effective date of the new law.

The ARPA COBRA subsidy tax credit rules include the following:

- The “person to whom premiums are payable” (defined below) is allowed to claim a tax credit for the COBRA premium that was not paid by an assistance eligible individual for any period of COBRA coverage during the subsidy period of April through September 2021.
- This credit applies against that entity’s liability for the Medicare Hospital Insurance (“HI”) tax (*i.e.*, the 1.45% Medicare payroll tax and not the .9% additional Medicare tax withheld from employee wages in excess of \$200,000). It also applies as a credit against any applicable similar tax under the Railroad Retirement Tax Act (“RRTA”) imposed on compensation paid to railroad employees and representatives.
- The amount of the credit generally cannot exceed the HI tax (or RRTA tax), reduced by any credits otherwise allowed under the Coronavirus Aid, Relief, and Economic Security

(“CARES”) Act or the Families First Coronavirus Response Act (“FFCRA”). However, if it does exceed that amount for any quarter, it is treated as a tax overpayment and the person to whom premiums are payable would get a direct refund.

- ARPA includes a rule whereby the IRS could allow for the credit to be “advanced” in anticipation of it being claimed. This feature must await further guidance from the IRS.

The rules governing the timing of HI and RRTA tax deposits and when this credit can actually be taken without exposing the person to tax penalties are quite technical. Generally, though, the law clarifies that any overstatement of a credit is a payroll tax violation. Further guidance from the IRS is needed to explain how the HI and RRTA tax timing rules work in this context and how the credit is claimed (*e.g.*, through a Form 941). This is particularly important for entities claiming the ARPA credit who might not otherwise have payroll tax liabilities (such as some multiemployer plans).

### **Who Is the Person to Whom Premiums Are Payable?**

Only the person to whom the COBRA premiums are payable is entitled to the ARPA tax credit. The person to whom premiums are payable varies depending on the type of plan involved. Importantly, the ARPA tax credit is not always available to the employer of the affected employees.

#### *Multiemployer Plans*

If the group health plan involved is a multiemployer plan, the plan is the person to whom the premium is payable and is entitled to the credit.

#### *Plans Subject to Federal COBRA or Partially/Fully Self-Insured*

In the case of the following types of group health plans, the person to whom the premium is payable is the employer maintaining the plan:

- Non-multiemployer plans that are subject to federal COBRA (under the Internal Revenue Code, ERISA, or the Public Health Service Act), whether or not they are insured
- Plans that are partially or fully self-insured

#### *Other Group Health Plans*

For all other group health plans, which generally means plans not subject to federal COBRA and which are fully insured, such as insured small-employer plans or insured church plans subject to state continuation coverage, the person to whom premiums are payable for this purpose is the insurer of the group health plan.

The law does not clearly address who is the person to whom premiums are payable in the context of multiple employer welfare plans (MEWAs). It is also not clear when certain third-party payors involved in COBRA premium administration may receive a tax credit. However, the IRS has authority to issue regulations and other guidance related to tax credit issues, specifically

including the authority to allow professional employer organizations (PEOs) and other third party payors to receive the tax credit.

### **Who Is Eligible for the Premium Subsidy?**

An “assistance eligible individual” includes any qualified beneficiary who loses group health coverage on account of a covered employee’s reduction in hours of employment or involuntary termination of employment (other than by reason of gross misconduct) and elects COBRA coverage. All such individuals whose maximum COBRA periods have not expired by April 1, 2021 are potentially eligible for the subsidy for some number of months, depending on when their COBRA coverage period expires.

It is important to note that ARPA includes a second election opportunity for eligible individuals who have not elected COBRA by April 1, 2021, as well as individuals who previously elected COBRA but discontinued that coverage before April 1, 2021. This second election period, which seems to apply only to individuals receiving federal COBRA coverage, is described in greater detail below.

Assistance eligible individuals include any qualified beneficiary associated with the relevant covered employee (such as a dependent child or a spouse, either of whom is covered immediately before the reduction in hours or involuntary termination of employment). These other individuals may independently elect COBRA coverage and benefit from the subsidy as long as they are qualified beneficiaries (*e.g.*, non-spouse domestic partners are not qualified beneficiaries and cannot benefit from the premium subsidy even if they are otherwise covered by continuation coverage under a group health plan).

An assistance eligible individual is *not* eligible for the premium subsidy for any month of coverage beginning on or after the first date the individual is eligible for Medicare or coverage under any other group health plan, as described below.

### **What Is an Involuntary Termination?**

In considering these rules, it will be important to know what type of termination of employment qualifies as involuntary. A *voluntary* resignation or retirement does not qualify. However, whether any particular type of termination of employment is treated as involuntary is subject to further interpretation. In 2009, when Congress enacted a 65% COBRA premium subsidy under the American Recovery and Reinvestment Act of 2009 (“ARRA”), the IRS issued guidance defining various types of involuntary terminations that could qualify for the ARRA subsidy. We would expect similar guidance to be issued under ARPA.

Interestingly, unlike federal COBRA, some state continuation coverage laws do not exclude employees who are terminated for gross misconduct from eligibility for continued health coverage. However, such an employee would not qualify for the ARPA subsidy because the law limits eligibility to individuals who experience a qualifying event under the *federal* COBRA definition, even though the subsidy generally is available for state continuation coverage.

## **What Type of COBRA Coverage Is Eligible for the Subsidy?**

The ARPA premium subsidy is available for COBRA coverage that is otherwise available under a group health plan subject to ERISA, the Internal Revenue Code or the Public Health Service Act, as well as coverage under state law that requires continuation coverage comparable to federal COBRA coverage. For this purpose, state laws include the laws of the District of Columbia, Puerto Rico, the Virgin Islands, Guam, American Samoa, and the Commonwealth of the Northern Mariana Islands. However, the ARPA subsidy does not apply to health care flexible spending arrangements (FSAs).

## **How Long Does the Subsidy Last?**

An individual's eligibility for the subsidy ends as of the first month of coverage that begins on or after the earlier of:

- The first date that the individual becomes eligible for Medicare benefits or eligible for coverage under another group health plan (other than coverage consisting solely of excepted benefits (like typical dental-only or vision-only coverage), a health care FSA, or a qualified small employer health reimbursement arrangement), or
- The end of the maximum required period of COBRA coverage.

### *Individuals Have Notice Responsibility*

If an assistance eligible individual becomes eligible for other group health plan coverage or Medicare, he or she is required to notify the plan providing COBRA coverage of that status. The U.S. Department of Labor ("DOL") is supposed to issue rules on this notice requirement. If an assistance eligible individual fails to provide notice in a timely manner, the individual is liable for a penalty equal to \$250 or, if the failure is fraudulent, a penalty equal to the greater of \$250 or 110% of the subsidy provided after eligibility ended. No penalty is imposed if it can be shown that the failure was due to reasonable cause and not willful neglect.

## **How and When Is One Required to Elect the Subsidy?**

For all future qualifying events, the premium subsidy applies through the normal COBRA coverage election process. That is, the assistance eligible individual need only make a timely election for COBRA coverage to receive fully-subsidized COBRA coverage during the subsidy period. Currently, COBRA election periods continue to be tolled due to the pandemic. This means that the normal COBRA election period may be longer than usual. Nevertheless, it is likely that assistance eligible individuals would elect relatively quickly because COBRA coverage would be free during the subsidy period.

*Reduction in Hours or Involuntary Termination of Employment with No COBRA Election in Effect on April 1, 2021 or Previously Elected COBRA but Discontinued Coverage*

The law includes a special second election opportunity for (i) eligible individuals who do not have a COBRA election in effect on April 1, 2021, and (ii) eligible individuals who previously elected COBRA coverage but are no longer enrolled as of April 1, 2021, for example, because they stopped paying the applicable premium (presumably because it was too expensive). This special election period seems to apply only to individuals receiving federal COBRA coverage.

The special election period effectively reaches back to qualifying events that happened before ARPA's enactment and allows affected individuals to make a COBRA election (for coverage on a prospective basis) and take advantage of the ARPA subsidy if they are still eligible for COBRA coverage during the subsidy period. As an example, this potentially applies to employees who lost health coverage in the fall of 2019; that is, the 18-month COBRA period would end in April 2021, and they may be eligible for the subsidy for all or part of April 2021.

The special election period begins on April 1, 2021 and ends 60 days after notice of the election right is provided by the group health plan administrator. In this regard, plan administrators must provide notice of the subsidy and election right within 60 days of April 1, 2021. Failure to do so could subject the plan administrator to COBRA notice penalties. Presumably, the DOL and IRS guidance tolling COBRA election periods during the pandemic would *not* apply to this election period.

*No Impact on Duration of COBRA Coverage*

Importantly, the special election period does not extend the period of COBRA coverage beyond the original maximum required period (generally 18 months after the qualifying event), and any COBRA coverage elected based on the special election period is effective for periods of coverage beginning on or after April 1, 2021 (including for purposes of any plan cost-sharing requirements).

*Refunds of Previously Paid COBRA Premiums*

If an assistance eligible individual already paid the applicable premium for any period to which the subsidy applies, the person to whom the premium is payable (that is, the multiemployer plan, employer, or insurer) is required to reimburse the individual for the amount previously paid. Separately, the entity providing the refund can apply for the payroll tax credit for these amounts. Note that this refund is due within 60 days of the date on which payment was made. Therefore, employers and plans will likely have to identify affected individuals right away and determine whether they have COBRA coverage due to a reduction in hours or involuntary termination of employment and, if so, whether they are entitled to subsidized COBRA coverage and a refund of premiums paid (*e.g.*, they are not eligible for disqualifying group health coverage or Medicare).

## **Are There Other Alternative Coverage Rights?**

Under COBRA coverage generally, a qualified beneficiary may only continue the coverage in effect immediately before the qualifying event, subject to changes from family to single coverage or other generally available open enrollment or HIPAA special enrollment rights.

Under ARPA, an employer or other plan sponsor may allow assistance eligible individuals to elect, within 90 days of being notified of this right, to change their coverage to an option that is different from the coverage they had at the time of the qualifying event, if the premium for the other option is equal to or less than the premium for the coverage they had at the time of the qualifying event. However, this right is available only if the alternative coverage is also offered to similarly situated active employees and only if the plan sponsor chooses to make it available. For this purpose, the alternative coverage cannot include:

- Coverage that provides only “excepted benefits” (such as separate limited scope dental or vision benefits, or coverage through on-site medical clinics)
- A health care FSA
- A qualified small employer health reimbursement arrangement

### *What if the Employer Subsidizes COBRA Coverage?*

Many employers provide for subsidized COBRA coverage in involuntary termination situations. Employers should consider carefully how to design alternative coverage packages (or amend existing packages) in light of the availability of the ARPA subsidy and associated tax credit.

## **Notices: What Are They and When Must They Be Provided?**

Under ARPA, any COBRA election notices provided by plan administrators to individuals who become entitled to elect COBRA coverage during the subsidy period must include information regarding the availability of the ARPA subsidy and, if permitted by the employer, the option to enroll in different coverage. This means that *all* COBRA election notices (including for qualifying events *other than* termination or reduction in hours of employment) must include this information. For plans not subject to federal COBRA, the government agencies are supposed to provide rules requiring the furnishing of this notice, in consultation with plan administrators and other entities that provide or administer continuation coverage.

### *Subsidy Information Required in COBRA Election Notices*

COBRA election notices provided by plan administrators upon the occurrence of qualifying events (during the subsidy period) must include the following additional information:

- The forms necessary for establishing eligibility for the premium assistance
- The name, address and telephone number necessary to contact the plan administrator and any other person maintaining relevant information in connection with the premium subsidy

- A description of the special second 60-day election period
- A description of the qualified beneficiary's obligation to notify the plan of eligibility for other group health plan or Medicare coverage that would disqualify the person from receiving the subsidy, and the penalty for failure to so notify the plan
- A description, displayed in a prominent manner, of the qualified beneficiary's right to subsidized COBRA coverage and any conditions on entitlement to the subsidy
- A description of the qualified beneficiary's option to enroll in different coverage if the employer allows this option

The additional information may be provided by revising the plan's current COBRA notices or by including a separate document containing the additional information.

The government agencies are required to issue model notices within 30 days of ARPA's enactment.

*Subsidy Information Required to be Provided to Additional Groups*

Plan administrators also must provide the above additional information to assistance eligible individuals who became entitled to elect COBRA *before* April 1, 2021, and to individuals entitled to the special second election period. This notice must be provided within 60 days of April 1, 2021. Failure to provide this notice is treated as a failure to meet the notice requirements under the applicable COBRA provisions. It might be a challenge to locate some of these individuals. Under COBRA rules generally, though, a plan administrator's obligation is to provide notice to the affected individual's last known mailing address.

Currently, due to the pandemic, the DOL has indicated that plan administrators may disregard the "outbreak period" (generally defined as the period ending 60 days after the end of the National Emergency due to COVID-19) in determining whether they are late in providing COBRA election notices. Presumably, that relief will not apply or be extended to the ARPA subsidy notices.

*Notice of Expiration of Subsidy Period*

Another ARPA notice requires plan administrators to inform assistance eligible individuals when their ARPA subsidy will expire, before the end of the subsidy period. Specifically, no more than 45 days, or less than 15 days, before the subsidy expiration date, plan administrators must notify assistance eligible individuals, in writing, of the date their subsidized COBRA coverage will expire. The notice also must inform them that they may be eligible for unsubsidized coverage through COBRA or coverage under a group health plan. Importantly, this requirement does *not* apply if the subsidy period is expiring due to an individual's eligibility for other group health coverage or Medicare, and only applies to individuals receiving federal COBRA coverage. The government agencies are required to issue a model notice for this notification within 45 days of ARPA's enactment. Again, the COVID-19 relief from time periods for providing certain notices likely does not apply to this type of ARPA-specific required notice.

### *How to Notify*

Presumably, like all other COBRA notices, notice provided by first-class mail to the individual's last known address will suffice for purposes of the additional notices required by ARPA. It is worth noting, however, that many of the individuals to whom the notice of special election rights must be provided may have moved after having lost their jobs or relocated due to the pandemic. Therefore, the last known address may not be as helpful as it was at the time of an initial termination or reduction in hours of employment. This is why the government outreach efforts (described below) could become important. Notification by email may be sufficient in some circumstances, particularly with respect to current employees (who lost coverage due to reduced hours of employment), if the DOL requirements for electronic disclosure are satisfied.

### *Government Outreach*

The government agencies (primarily the DOL) are required to provide outreach consisting of public education and enrollment assistance concerning these new ARPA rules. Also, as part of this outreach effort, the agencies are required to make information available on their websites. The initial focus of the government's outreach will be on those individuals who became entitled to COBRA before ARPA's enactment and who need to learn about the new law. Those individuals may need to make their elections within a relatively short time during the second election period, if they are seeking coverage only on a prospective basis (or if their COBRA election period is no longer tolled due to the pandemic). Because COBRA election periods have been on "pause" since March 1, 2020 due to the pandemic, some individuals still have time to elect COBRA coverage on a retroactive basis for extended periods of time, but now may have an opportunity to receive some free COBRA coverage for a limited period of time without paying retroactive premiums.

### **Penalties: How Are the New Provisions Enforced?**

Presumably ARPA's requirements are enforceable as if part of ERISA. This means that eligible individuals would be able to sue under ERISA to enforce their rights under ARPA and the DOL could investigate and enforce its provisions. In addition, based on the statutory language, it appears that COBRA notice penalties (and COBRA excise tax penalties) may be assessed against a plan administrator that fails to provide ARPA-required notices on time.

### **What Does It All Mean?**

Employers and plan administrators need to work quickly. New notices must be created to explain these rights to affected individuals. On top of that, employers and administrators will need to try to locate individuals who were involuntarily terminated and lost coverage to advise them of their new COBRA rights, as such individuals may be eligible for subsidized COBRA for some period of time beginning April 1, 2021. Employers, plans, and insurers should be attentive to new developments as the government agencies should be issuing guidance in the weeks ahead which could significantly impact ARPA implementation and compliance.

What about updating plan documents and/or summary plan descriptions? Because the ARPA subsidy is only scheduled to be available from April 1 through September 30, 2021, and affected individuals will have to otherwise be provided with notice of the applicable rules, it is not clear

that updated plans and/or summary plan descriptions should be required. Perhaps this issue will be addressed when the DOL issues model notices and other guidance.

Another important implementation step is that employers and plans must coordinate these ARPA rules with plan insurers and third-party administrators (TPAs), including COBRA administrators. If there are a group of COBRA qualified beneficiaries not paying for COBRA coverage, questions inevitably will arise related to issues such as: (i) How will a COBRA administrator calculate and collect any COBRA administrative fee (the 2% or 50% additional COBRA fee)? (ii) How will an insurer know to keep a qualified beneficiary on coverage if no premium is paid due to ARPA? Will an employer have to pay the insurer before the employer receives the tax credit? (iii) Who will be responsible for monitoring when assistance eligible individuals are no longer eligible for the ARPA subsidy? Admittedly the assistance eligible individual has to tell the plan when the subsidy no longer applies; but plans and TPAs might want to be proactive on this point and try to identify when the subsidy expires (and a tax credit is no longer available).

These are just a few of the many questions employers, plans, and TPAs/insurers will have as the new ARPA rules are being implemented.