

CLIENT ALERT

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NEW COBRA SUBSIDY AVAILABLE APRIL 1, 2021

By Cynthia A. Moore

The American Rescue Plan Act of 2021 (“ARPA”) includes a 100% COBRA subsidy for “assistance eligible individuals” during the six-month period of April 1, 2021 through September 30, 2021. Following is a summary of the COBRA subsidy provisions.

Assistance Eligible Individuals

Those who may be eligible for the subsidy include:

- A qualified beneficiary who is eligible for COBRA continuation coverage by reason of termination of employment (other than for gross misconduct) or a reduction in hours; and
- Elects COBRA coverage.

An assistance eligible individual would include not only the affected employee but also his/her spouse and eligible dependent children. An employee who voluntarily terminates employment would not be eligible for the subsidy. In this Client Alert, assistance eligible individuals refer to those who have experienced an “involuntary” termination of employment. Qualified beneficiaries who have experienced other types of qualifying events (such as divorce) are not assistance eligible individuals.

Assistance eligible individuals include any employee (and covered spouse and dependent children) whose involuntary termination of employment occurs during the subsidy period, or who has already elected and is paying for COBRA as of April 1, 2021. An assistance eligible individual also includes an individual whose maximum period of coverage has not expired and (a) did not elect COBRA when it was first offered, or (b) elected COBRA but dropped it. The individuals described in the preceding sentence have a “second bite of the apple” known as an “extended election period” to elect COBRA during the subsidy period. For example, if an employee was involuntarily terminated on March 31, 2020 with a COBRA coverage period of April 1, 2020 to September 30, 2021, the former employee would be able to elect 100% subsidized COBRA for the last six months of his/her maximum coverage period. If COBRA coverage is elected during an extended election period, it would be effective on April 1, 2021 – it would not relate back to the original qualifying event or the date COBRA was dropped.

Subsidy Period

The period for which subsidized COBRA is available is April 1, 2021 through September 30 2021. The subsidy period will end earlier if:

- The individual reaches the end of his/her maximum coverage period; or
- The individual becomes eligible for another group health plan or Medicare.

This is different than the normal rule in which COBRA coverage ends when an individual becomes covered by another group health plan or entitled to Medicare.

Other Rights

In addition to the ability to receive six months of subsidized coverage, an assistance eligible individual may elect coverage under a lower-cost medical plan option if allowed by the employer. The lower-cost option must be one offered to similarly-situated active employees and not be an excepted benefit, a qualified small employer health reimbursement arrangement, or a health flexible spending account. A former employee may find this option appealing if he/she is early in the 18-month COBRA period and wants to continue COBRA after September 30, 2021. This flexibility is a variation from the normal COBRA rule that a qualified beneficiary can only continue the coverage that was in effect on the date of the qualifying event.

Plans Subject to the Subsidy

The ARPA subsidy applies to any group health plan subject to the federal COBRA rules (generally, sponsored by an employer with 20 or more employees) and to any group health plan subject to state “mini COBRA” laws. A qualified beneficiary may not elect subsidized COBRA for a health flexible spending account.

New Notice Requirements – Employers

1. *Individuals who become entitled to COBRA during the subsidy period:*

The COBRA notice provided to individuals who become entitled to COBRA during the subsidy period must include a description of the availability of premium assistance and, if allowed by the employer, the ability to elect coverage under a lower-cost medical plan option. This new information may be included in the COBRA election notice or as a separate document. Presumably, this notice must also be sent to any currently qualified beneficiary. The Department of Labor (DOL) is directed to provide a model notice by April 10, 2021.

2. *Individuals who are entitled to an extended election period:*

The plan administrator must provide a notice to individuals who are entitled to an extended election period, advising them of their right to elect subsidized coverage during the subsidy period. This notice must be given within 60 days after April 1, 2021. Eligible individuals have 60 days after the date of the notice to elect coverage. The DOL is directed to provide a model notice by April 10, 2021.

3. *Notice of expiration of subsidy period:*

The plan administrator must provide a notice to any assistance eligible individual who elects subsidized COBRA indicating the date that the subsidy period will end and explaining that other coverage

may be available under unsubsidized COBRA. This notice must be provided within the 30-day period ending 15 days before the end of the subsidy period. For example, if an individual's subsidy period ends September 30, 2021, the notice of expiration would need to be provided between August 16 and September 15, 2021. The DOL is directed to issue a model notice that can be used for this purpose by April 25, 2021.

New Notice Requirements – Individuals

An assistance eligible individual who elects subsidized COBRA and becomes eligible for another group health plan or Medicare during the subsidy period must notify the plan of such eligibility, in a time and manner to be specified by the DOL. If an assistance eligible individual fails to notify the plan, he/she is subject to a penalty of \$250 for each failure under Section 6720C of the Internal Revenue Code ("Code"). If the failure was fraudulent, the penalty is greater than (a) \$250 or (b) 110% of the premium assistance received after termination of eligibility for subsidized COBRA. The penalty can be waived if notice was not given due to reasonable cause and not willful neglect.

Delay in Giving Notices – Outbreak Period Still in Effect

Under guidance issued by the DOL, IRS, and the Department of Treasury, plans and individuals may disregard certain COBRA notice periods until the earlier of one year after the due date or 60 days after the end of the "Outbreak Period," which began March 1, 2020 and is ongoing. This delay applies to:

- The 60-day period for electing COBRA;
- The due date for making premium payments;
- The date for individuals to notify the plan of a qualifying event or a disability determination; or
- The date when the plan must provide a COBRA election notice.

Presumably, the delay period applies to the notices required by ARPA, although the Act is silent on this point. Guidance from the DOL on this issue would be welcome.

Income Tax Considerations – Individuals

New Code Section 139I provides that any premium assistance received under ARPA is not included in the assistance eligible individual's gross income.

Premium Refunds

If an assistance eligible individual pays a COBRA premium for a period when he/she is eligible for subsidized coverage, the person to whom the premium is payable must reimburse the individual for the premium paid within 60 days after the date that the premium payment was made.

Employer Cost Recovery

During the COBRA subsidy period, an employer that sponsors an insured plan and has the right to claim the credit described below will presumably need to pay premiums to the insurer to keep coverage in effect for an assistance eligible individual. Further, an employer that sponsors a self-funded plan will need to pay claims without receiving a COBRA premium payment from an assistance eligible individual. The foregone premiums are recovered by a credit that is taken against the 1.45% Medicare portion of the FICA tax. The credit is claimed by:

- The employer maintaining the plan, for a single employer plan that is subject to federal COBRA or is self-insured;
- By the plan, for a multiemployer plan; or
- By the insurer for any other plan.

If an employer, plan, or insurer refunds a premium payment made by an assistance eligible individual during the subsidy period, the refunded amount can also be claimed as a credit.

The credit is refundable, so if the amount of premium assistance provided exceeds the tax owed in a quarter, it can be refunded. The credit may also be advanced, under guidance to be issued by the IRS.

Action Steps for Employers

- As an initial matter, an employer should identify all individuals who lost group health plan coverage due to involuntary termination or a reduction in hours, are within their maximum coverage period, and are potentially assistance eligible individuals. This period may be as far back as October 2019 (pre-pandemic) for any individual with an 18-month maximum coverage period.
- Once potential assistance eligible individuals have been identified, the employer should coordinate with its COBRA administrator to make sure that appropriate notices are sent to the assistance eligible individuals.
- If an election of subsidized COBRA is made, the employer will need to ensure that premiums continue to be made to insurers, if required, or are credited to self-funded plans, so that coverage is maintained during the subsidy period.
- The foregone premiums should be tracked so that a credit against the 1.45% Medicare tax can be claimed at the end of each quarter.
- Confirm that the COBRA administrator will send the appropriate notice when an assistance eligible individual is coming to the end of his/her subsidy period. Even though the COBRA administrator may be contractually obligated to send relevant COBRA notices, the plan administrator is ultimately responsible for compliance with COBRA.

If you have any questions about the new COBRA subsidy, please contact Cynthia A. Moore or any other member of Dickinson Wright's Employee Benefits and Executive Compensation Group.

KEY CONTACTS



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