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## COBRA Subsidy in ARPA

The American Rescue Plan Act of 2021 (ARPA) includes a federally-financed COBRA subsidy that is available for up to six months for eligible individuals. The COBRA subsidy will be available beginning on April 1, 2021 and end on September 30, 2021. Because of the short time frame before the subsidy begins, employers should dig in sooner rather than later to meet the new notice and coverage obligations required by ARPA.

### Assistance Eligible Individuals

The following individuals who are or become qualified beneficiaries as the result of an involuntary termination of employment or reduction in hours (thus excluding voluntary termination of employment) may be eligible for the subsidy (Assistance Eligible Individuals):

- Individuals who were previously eligible for COBRA continuation coverage, but who did not elect COBRA and have coverage that would have extended into the subsidy period (e.g., an individual involuntarily terminated on October 1, 2020 who did not elect COBRA)
- Individuals who were previously eligible for COBRA continuation coverage, elected, but dropped, coverage, and have coverage that would have extended into the subsidy period (e.g., an individual involuntarily terminated on October 1, 2020, who elected COBRA, but did not pay premiums after December 31, 2020)
- Individuals who are or become eligible during the subsidy period (e.g., an individual involuntarily terminated on March 15, 2021 or an individual involuntarily terminated on May 1, 2021)

Assistance Eligible Individuals include employees plus affected spouses and children.

### Eligible Coverage

Coverage eligible for the subsidy includes all health coverage for which COBRA must generally be provided with the exception of health flexible spending accounts (FSA). Thus, individuals may receive subsidized coverage for dental and vision coverage as well as medical coverage. The subsidy is also available for continuation coverage required by State “mini-COBRA” laws if that coverage is similar to federally-mandated COBRA coverage.

### Duration of Eligibility

The COBRA subsidy begins on April 1, 2021, and will end on September 30, 2021; however, the subsidy for an individual will end earlier than September 30, 2021 if the

individual loses eligibility for continuation coverage under the normal COBRA rules – e.g., when the 18-month maximum COBRA period has ended – or becomes *eligible* for disqualifying coverage. Disqualifying coverage includes coverage under another group health plan (other than coverage consisting only of excepted benefits, coverage under a health FSA, or a Qualified Small Employer Health Reimbursement Arrangement (QSEHRA)) and Medicare.<sup>1</sup>

Individuals who become eligible for other group health plan coverage or Medicare are required to notify their group health plans. The timing and format for that notification will be provided in future regulations. Individuals who do not notify their group health plans as required may be penalized. The general penalty is \$250 per failure, but if the failure is intentional, the penalty is the greater of \$250 or 110% of the amount of the subsidy. Penalties will not be assessed if a failure was due to reasonable cause and not willful neglect.

## Extended Election Periods

An Assistance Eligible Individual must be given a new 60-day COBRA election period. In other words, Assistance Eligible Individuals may make COBRA elections during the period beginning on April 1, 2021, and ending 60 days after they are given the required notification of the extended election period. Thus, individuals who had not previously elected COBRA continuation and those who had coverage, but dropped coverage and are still eligible are entitled to a new (or additional) COBRA election period.

## Enrollment Options

Generally, the coverage made available to Assistance Eligible Individuals should be the same coverage in effect prior to their COBRA qualifying events. However, solely for purposes of ARPA, employers may – but are not required to – permit Assistance Eligible Individuals to select coverage under other options (other than a health FSA, an excepted benefit, or a QSEHRA) offered by the employer. Enrollment in different coverage may be permitted only if:

1. The premium is not greater than the premium for the coverage in which the individual was enrolled at the time of the qualifying event;

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<sup>1</sup> Individuals who become eligible for other group health plan coverage or Medicare are not eligible for the subsidy. But note that these individuals may still be eligible for COBRA. Under COBRA rules, COBRA coverage may be terminated only if the individual first enrolls in a group health plan or Medicare after the date of the COBRA election. State rules for similar continuation coverage may be slightly different and may terminate continuation coverage under different circumstances (for example, when an individual becomes *eligible* for Medicare).

2. The other coverage is also offered to similarly situated active employees at the time of the election; and
3. The other coverage is not coverage that provides only excepted benefits (e.g., a separate dental or vision benefit), a QSEHRA, or a health FSA.

An individual must make an election within 90 days after the date of notice informing the individual of the enrollment option.

## **Subsidy Amount**

Individuals who qualify for the COBRA subsidy are not required to pay a COBRA premium. The group health plan will cover the cost, which will be reimbursed (including the administrative fee) by the Federal government via a payroll tax credit.

## **COBRA Notices**

ARPA will require notification to Assistance Eligible Individuals in three forms: notice of the availability of premium assistance; an extended election notice; and notice of expiration of subsidy.

### *Notice of Availability of Premium Assistance*

Group health plans are required to provide a general COBRA notice that includes information about the availability of the COBRA subsidy. Plans are permitted to modify existing notices to include the additional language or, alternatively, to provide the additional information in a separate notice. ARPA instructs the Secretary of Labor (Secretary), in consultation with the Secretary of Health and Human Services and the Secretary of the Treasury, to provide a model notice within 30 days after enactment of ARPA. Employers may use the new model, or as in the past, use their own notices as long as the content requirements are satisfied.

Contents of the new general notice (or the separate COBRA subsidy notice) include:

- Forms needed to establish eligibility for premium assistance
- The name, address, and telephone number of the plan administrator and any other entity maintaining relevant information in connection with the subsidy (e.g., COBRA administrator)
- A description of the additional election period

- A description of the individual's responsibility to notify the plan of eligibility for other group health plan coverage or Medicare, including information about the penalty for failure to do so
- A prominently displayed description of the individual's right to the COBRA subsidy
- If the employer has decided to permit medical plan option changes, a description of the available option(s)

#### *Notice of Extended Election Period*

A new COBRA election notice must be sent to individuals who are eligible for the new 60-day election period – i.e., individuals who were eligible previously but did not elect and those who elected but discontinued COBRA coverage. Similar to the general COBRA notice, the Secretary is required to provide a new model election notice within 30 days after enactment of ARPA.

#### *Notice of Expiration of Subsidy*

ARPA also adds one new COBRA notice – a notice advising an individual who is receiving a COBRA subsidy about the expiration of the subsidy if the subsidy terminates before September 30, 2021. This notice must be sent within a 30-day time period that begins 45 days before, and ends 15 days before, the date on which the COBRA subsidy will expire. The notice must advise the individual that the individual's COBRA subsidy will be ending soon and must include the actual expiration date. It must also include a statement that the qualified beneficiary may be eligible for continued coverage without the COBRA subsidy. The notice is not required if the individual is losing eligibility for the subsidy as the result of becoming eligible for coverage under another group health plan or Medicare. ARPA requires the Secretary to provide a model notice within 45 days after enactment of ARPA.

### **Reimbursement via Payroll Tax Credit**

Similar to the tax credit available to employers who provide paid leave and health coverage as required under the Families First Coronavirus Response Act (FFCRA), employers sponsoring group health plans may be reimbursed for the 100% COBRA premium subsidy via credits against certain payroll taxes. The tax credit is available to private employers and non-federal governmental employers subject to COBRA. Additional rules governing the coordination of this credit with credits under the FFCRA will apply (e.g., no double counting). The Secretary of the Treasury is directed to

provide forms and instructions for employers and group health plans and to provide additional guidance for multiemployer plans and Professional Employer Organizations.

## Employer Action Steps

- Identify individuals who may be eligible for the COBRA subsidy and who may be eligible to make a new election
- Determine if they will modify their current COBRA general and election notices or will send a supplemental notice to individuals eligible for a new COBRA election
- Determine if they will modify and use their own COBRA general and election notices for new qualifying events, or will wait until the Secretary provides model notices
- Decide if they want to permit individuals eligible for the COBRA subsidy to elect a less expensive medical option
- Coordinate with their COBRA administrator to ensure that they are in agreement concerning who will perform the actions required (e.g., send notices, determine if an individual is eligible for the subsidy)

Additional steps may be required once regulatory guidance is released.

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*The intent of this analysis is to provide general information regarding the provisions of current federal laws and regulation. It does not necessarily fully address all your organization's specific issues. It should not be construed as, nor is it intended to provide, legal advice. Your organization's general counsel or an attorney who specializes in this practice area should address questions regarding specific issues.*