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American Rescue Plan Act of 2021 Requires Employers to Pay Six Months of COBRA Coverage

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The American Rescue Act of 2021 ("ARPA") requires that employers implement temporary, but significant, changes to Consolidated Omnibus Budget Reconciliation Act of 1985 ("COBRA") insurance coverage. These changes require that employers provide:

- 100% COBRA subsidy for the period of April 1 through Sept. 30, 2021.
- An option for COBRA qualified beneficiaries **who previously did not elect COBRA** or who previously elected COBRA and dropped the coverage to now elect COBRA.
- An option for COBRA-covered insureds to revise their elected coverage option to a less expensive option.

Subsidy Option Requirements

Only "assistance eligible individuals" ("AEIs") qualify for a subsidy. An AEI is someone who, in the time period between April 1 and Sept. 30, 2021, is eligible for COBRA coverage due to an involuntary termination (other than for gross misconduct) or a reduction in hours and elects such coverage. An AEI no longer is eligible for a subsidy upon the earliest of them becoming eligible for other group health plan coverage (that is not an excepted benefit) or Medicare or the expiration of their maximum COBRA period.

Extended Election of COBRA for AEIs

However, if a terminated employee **could have had** a COBRA election in effect between April 1, 2021 and September 30, 2021, due to involuntary termination or a reduction in hours, **but did not elect COBRA, or elected and then dropped it,** they can take advantage of ARPA's extended election period. Under ARPA, a group health plan sponsor **must give such individuals another opportunity to elect COBRA** coverage. If an individual elects COBRA, they then will eligible for the subsidy. Such individuals may elect COBRA starting on April 1, 2021, until 60 days following the sponsor's providing notice of the extended election opportunity. If elected, the coverage will be retroactive to April 1, 2021, at no cost. However, an individual electing COBRA through the extended election period may maintain the coverage only until the expiration of the COBRA coverage period the individual would have had if the individual had elected COBRA when first eligible. For example, an individual first eligible for COBRA on March 1, 2020, who did not elect COBRA effective until April 1, 2021, will be eligible for COBRA only through August 31, 2021.

Employer Tax Credits under ARPA

Employers who pay the subsidy will receive a refundable Medicare payroll tax credit for providing the subsidy. The credit will be an amount equivalent to the aggregate amount of the provided subsidies.

Except as may otherwise be provided by the Secretary of the Treasury, the tax credits are provided to the following persons:

- If a multiemployer plan, the multiemployer plan itself

- If the plan is fully or partially self-insured, to the employer that sponsors the plan (including state and local governmental employers)
- If the plan is neither option described above, to the insurance company

Employers with Fully Insured Plans

Employers with a fully insured plan will presumably have to continue to pay premiums to the insurer for the enrollment of any qualified beneficiaries. However, the law provides that the tax credit is granted to the insurance company only, and not to the employer. The law does not obligate an insurer to give the employer any portion of the tax credits as an offset to employer premiums. Therefore, the employer will need to negotiate with the insurer to have the insurer's tax credits used as an offset the employer's premiums that are due under the plan for the qualified beneficiaries.[1]

ARPA provides that the plan administrator may offer an option to provide COBRA participants with the chance to change their coverage to a less expensive option. This option must include the following limitations:

- Participants may only elect an equally or less-expensive option, not a more expensive option.
- The equally or less-expensive option must be available to similarly situated active employees.
- The equally or less-expensive option cannot be a health flexible spending account, a qualified small-employer health reimbursement arrangement or an excepted benefit.

ARPA Notice Obligations

ARPA requires several new notice obligations:

1. Initial Election Notices: COBRA election notices for qualified beneficiaries who are eligible between April 1 and Sept. 30, 2021, must include information related to premium subsidies and, if the sponsor makes it available, the option to elect a less-expensive benefit option. In addition, the notice must include: the forms required for an AEI to establish eligibility for the premium subsidy, a description of the extended election period and a description of the COBRA participant's obligation to notify the plan when the individual is no longer is eligible for the premium subsidy and the penalties for failure to give such notice. ARPA provides a tax penalty if an individual fails to notify the group health plan that the individual is eligible for coverage under another group health plan. The tax penalty generally is $250 (or a much higher amount if the failure is intentional).
2. Extended Election Notices: Individuals who are eligible for the extended election period must be provided notice of the opportunity by May 31, 2021.
3. Subsidy Termination Notice: Plan sponsors must provide notice to each AEI no more than **45 days but no less than 15 days before his or her subsidy end date**. This notice must prominently identify the date the subsidy will conclude and state that coverage may be available through unsubsidized COBRA or group health plan coverage. No such notice is required if an AEI loses subsidy eligibility because the individual becomes eligible for other group health plan coverage or Medicare.

Regulations and ARPA Guidance for Employers

ARPA requires the Departments of Treasury, Labor and Health and Human Services to issue, within thirty (30) days regulations and guidance, including model notices, to support group health plan sponsors in their provision of these benefit opportunities.

Plan Administrators should gather information now to prepare to send out the required notices. In general, COBRA notices can be sent by first-class mail to the last known address of a qualified beneficiary. However, it might be advisable to send a letter that has a return receipt mechanism.

Once an eligible qualified beneficiary receives a notice, the individual is entitled to a 60 day period to elect the COBRA coverage. Any coverage elections will be made retroactive back to April 1, 2021.

If you are an employer with questions about this legal alert, please contact Tracy Armstrong or another Wilentz Employment Law attorney.

[1] In the case of a self-insured plan, the employer will directly receive the tax credits. However, a secondary issue might be lurking in relation to the employer's coverage under a stop-loss insurance policy. The law does not address stop-loss policy coverage. Thus, self-insured employers may want to promptly determine whether the plan's stop-loss coverage will apply to claims incurred by COBRA qualified beneficiaries who obtain free COBRA coverage or extended enrollment rights under the ARPA. If the stop-loss policy will not apply to claims from those qualified beneficiaries, the employer may want to try to negotiate with the stop-loss carrier for additional coverage.

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