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COBRA Subsidy - Part II

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The American Rescue Plan Act of 2021 (“ARPA”) includes a provision amending the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) to provide COBRA premium assistance to eligible individuals. The ARPA COBRA subsidy is very similar in many respects to the COBRA subsidy that was part of the American Recovery and Reinvestment Act of 2009 (“ARRA”). Fortunately, there are some key differences which will make the 2021 COBRA subsidy easier to administer. This will be a relief to those who remember the 2009 COBRA subsidy. However, the Department of Labor’s extension of COBRA election and payment deadlines on account of COVID-19 will add an additional layer of complexity.

Overview of the COBRA Subsidy

Eligible employees and their covered dependents who receive COBRA coverage during the period that begins on April 1, 2021 and ends on September 30, 2021 (the “COBRA Subsidy Period”) may receive a subsidy in the amount of 100% of the cost of COBRA coverage (the “COBRA Subsidy”). This means that they will not be required to pay for the coverage provided during these months. The cost of the COBRA Subsidy will be paid by the federal government.

The COBRA Subsidy is available for each health benefit which is subject to COBRA other than a health flexible spending account, including major medical, dental and vision plans. Employers are allowed, but not required, to allow individuals to elect mid-year a lower cost COBRA option under the employer’s plan.

The employer (or the multiemployer plan or insurer) “fronts” the amount of the COBRA premium subject to the subsidy (including the 2% administrative charge) and recovers it by claiming a credit against Medicare payroll taxes in the amount of the subsidy paid. For employer-sponsored health plans which are insured, it is unclear whether the employer or the insurer will be responsible for paying the COBRA premium and recovering the amount through a payroll tax credit.

Eligibility for the COBRA Subsidy

To be eligible for the COBRA Subsidy, an individual must (1) be eligible to receive COBRA coverage during the COBRA Subsidy Period (April 1 to September 30, 2021), (2) on account of an involuntary termination (other than for gross misconduct) or reduction in hours of employment, and (3) elect COBRA. This includes –

- Individuals who are currently receiving COBRA coverage.
- Individuals who are eligible for, but have not yet elected, COBRA coverage.
- Individuals who were previously eligible for, but did not elect, COBRA coverage.
- Individuals who dropped COBRA coverage (e.g., due to non-payment of premiums).

The COBRA Subsidy is not available to individuals who are eligible for COBRA on account of other qualifying events, such as a voluntary termination of employment, the employee's death or a divorce. It is anticipated that the Internal Revenue Service will issue guidance as to what qualifies as an "involuntary" termination as they did in 2009. Until guidance is issued, employers will need to make reasonable determinations on a uniform basis based on the particular facts and circumstances of each termination.

Calculation and Duration of the COBRA Subsidy

Individuals who are eligible for the COBRA Subsidy are not required to pay the premium for coverage provided during the COBRA Subsidy Period (April 1 to September 30, 2021). If an eligible individual pays a premium which should have been covered by the COBRA Subsidy, the employer must refund to the individual the amount paid no later than 60 days after the date on which the payment was made.

Eligibility for the COBRA Subsidy will terminate early (meaning before September 30, 2021) if –

- The individual becomes eligible for coverage under Medicare or under another group health plan (with some exceptions) even if the individual does not enroll in that coverage; or
- The individual's maximum COBRA period ends (e.g., 18 months).

For purposes of early termination of the COBRA Subsidy, coverage under certain excepted benefits, such as a limited dental or vision plan, or a health flexible spending account, is not considered other group health coverage. It is the individual's responsibility to notify the health plan upon becoming eligible for other coverage. The Department of Labor is directed to provide additional guidance regarding this notice. The individual's failure to provide this required notice will result in a penalty to the individual.

Employers must provide a written notice to eligible individuals regarding termination of the COBRA Subsidy at least 45 days (but not less than 15 days) prior to termination of the COBRA Subsidy. (This notice is not required if the COBRA Subsidy ends as a result of becoming covered under another group health plan or Medicare.) The notice must prominently display the date that the subsidy will end and include a statement that the individual may be eligible for COBRA coverage or group health coverage without premium assistance. The agencies are directed to provide model notices within 45 days of the ARPA enactment date, which was March 11, 2021.

Second Chance to Elect COBRA Coverage

Individuals who are eligible for the COBRA Subsidy but for the fact that (1) they did not elect (or have not yet elected) COBRA coverage or (2) they elected it and dropped the coverage must be given a second chance to elect COBRA continuation coverage. This includes anyone who has not elected COBRA coverage because they are within their extended election period on account of the COVID-19 national emergency. This special election period begins on April 1, 2021 and continues for 60 days following the date the individual receives notice of the special election period.

Persons who elect COBRA coverage during this special election period will be covered under COBRA beginning April 1, 2021 and continuing until the end of his or her original COBRA period unless coverage terminates early for another reason. The coverage is not retroactive to the date of the initial qualifying event. However, the individual may be entitled

to elect COBRA coverage retroactively to the date coverage was lost on account of the qualifying event if his or her deadline for electing COBRA has been extended on account of the COVID-19 national emergency. Guidance regarding the interaction of the COBRA Subsidy and the extended COBRA deadlines on account of COVID-19 would be helpful.

Required COBRA Subsidy Notices

Employers must provide written notice, in clear and understandable language, regarding the availability of the COBRA Subsidy and the option to enroll in a different benefit option (if allowed by the employer) to the following groups:

Individuals whose qualifying event occurs prior to April 1, 2021: Notice must be sent prior to May 31, 2021 to anyone who is eligible for the COBRA Subsidy and whose qualifying event occurred prior to April 1, 2021, including (1) anyone who is eligible for the special election period, (2) anyone who has elected COBRA coverage but has not yet paid the required premium, and (3) anyone who is receiving COBRA coverage currently.

The notice must include certain information, such as the forms used to establish eligibility for the COBRA Subsidy, contact information for the plan administrator (and any other person with information about the subsidy), a description of the extended election period, and the obligation of the qualified beneficiary to provide notice when he or she is no longer eligible for the COBRA Subsidy, a description displayed prominently of the right to a subsidized premium and any conditions on entitlement to the assistance, and a description of the right to enroll in a different coverage option (if allowed by the employer).

Individuals whose qualifying event occurs on or after April 1, 2021: For individuals who become entitled to COBRA coverage during the COBRA Subsidy Period (regardless of the reason for the qualifying event), employers must update their COBRA election notice to include the information described above. This could be done as part of the actual notice or as a supplemental notice. Because the notice will be sent to more people than are eligible for the COBRA Subsidy, there must be a process to ensure that only those individuals who are eligible for COBRA as a result of an involuntary termination or reduction in hours of employment are given the COBRA Subsidy.

The agencies are directed to provide model notices within 30 days of the ARPA enactment date. However, keep in mind that for the 2009 COBRA subsidy, employers and administrators waited for the DOL to issue model notices, only to discover how useless and unworkable the model notices really were.

Next Steps for Employers

Employers will need to work closely with their COBRA administrators to implement the requirements of the COBRA Subsidy. One of the most immediate concerns is to identify employees (and their covered dependents) who lost coverage on account of an involuntary termination (or reduction in hours of employment) prior to April 1, 2021 and are entitled to COBRA continuation coverage during the COBRA Subsidy Period. The COBRA administrator may be able to provide a list of all individuals who may fall within this group, but the employer will need to determine who incurred an involuntary termination or reduction in hours of employment.

Employers will also need to coordinate with their COBRA administrators to ensure that:

- The required notices are sent and that the COBRA election notices are updated to include the required information.
- A process is in place for the employer to notify its COBRA administrator which qualified beneficiaries are eligible for the COBRA Subsidy.
- The amount of the COBRA Subsidy paid by the employer is tracked appropriately so that the employer can claim the amount paid as a credit against Medicare payroll taxes. The employer must report information on its quarterly payroll tax return and must be able to attest to certain information (such as the amount of the COBRA Subsidy).

Although certain portions of the administration can be outsourced to COBRA administrators, employers will need to provide oversight to make sure that the COBRA Subsidy is administered correctly, especially the payroll tax credits.