

What Employers Need to Know About Subsidized COBRA Under the American Rescue Plan

The American Rescue Plan Act of 2021, or ARPA, will allow some current and past employees and their dependents to receive fully subsidized COBRA continuation coverage for periods from April 1, 2021 through September 30, 2021 – even if they never elected COBRA or dropped coverage. Here is what employers with group health plans subject to federal COBRA need to know about the new law.

The Relief

Overview

ARPA provides three main areas of relief for affected individuals: (1) free COBRA coverage for "assistance eligible individuals" (AEIs) for periods of coverage from April 1, 2021 through September 30, 2021, with the premiums reimbursed by federal refundable tax credits; (2) a special election period for individuals who would have been AEIs as of April 1, 2021, if they had elected COBRA coverage when offered previously or if their COBRA coverage had not been discontinued; and (3) if an employer elects, the chance for AEIs to switch their COBRA coverage to a plan option with the same or a lower premium.

Premium Subsidies

COBRA premiums for periods from April 1, 2021 through September 30, 2021, will be fully subsidized by the federal government for AEIs. AEIs are those individuals who are eligible for COBRA coverage because of a reduction in hours or an involuntary termination of employment qualifying event, and who elect COBRA coverage.

Neither ARPA nor existing COBRA guidance defines when an "involuntary termination of employment" occurs for COBRA purposes. However, a similar "involuntary termination of employment" standard applied when COBRA subsidies were offered in 2009 under the American Recovery and Reinvestment Act (Recovery Act). The IRS issued guidance under the Recovery Act taking the position that whether a termination of employment is voluntary or involuntary is based on all of the facts and circumstances, but an involuntary termination essentially included a severance of employment due to the independent exercise of unilateral authority of the employer where the employee was willing and able to continue performing services. Due to the similarity between the two laws, the

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IRS could take the same approach for ARPA.

The premium subsidies will end for an AEI on the earliest of September 30, 2021, upon becoming eligible under another group health plan or Medicare or at the end of the 18-month maximum coverage period. These individuals must notify the plan administrator of their new group health plan or Medicare eligibility. Otherwise, the AEI will be subject to a penalty of \$250 or possibly 110 percent of the amount of the subsidized COBRA premium provided while they were ineligible.

Individuals Eligible for Special Election Period

ARPA provides a special COBRA election period for those individuals who would be AEIs, but for the fact that they do not have a COBRA election in effect on April 1, 2021. This group includes individuals who did not elect COBRA coverage following a reduction in hours or an involuntary termination of employment who remain ineligible for coverage under the group health plan. It also includes individuals who elected COBRA as the result of one of those two qualifying events, but later had their COBRA coverage dropped (for example, because they did not pay premiums on time). Eligibility for these two groups normally will reach back to those who had, or could have had, COBRA coverage starting in November 2019, because these individuals would still be within their original 18-month maximum coverage period under COBRA for coverage beginning on or after April 1, 2021.

These "second chance" COBRA electors will have their coverage start with the first coverage period (e.g., week or month) beginning on or after April 1, 2021, including for purposes of the premium subsidy. Their COBRA coverage will last until the end of the 18-month maximum coverage period that would have applied if they had elected COBRA initially or had their coverage not dropped or, if earlier, they otherwise become ineligible for COBRA. The subsidy may end for this group before their COBRA coverage expires.

Option to Switch Plans

Under ARPA, employers can allow AEIs to switch to a different plan coverage option. The plan that the individual could switch to cannot have a higher premium and must be available to similarly situated employees

Notices

ARPA imposes two new notice requirements. The first notice describes the premium subsidies, second election period, and if offered, option to switch coverages. This notice must be provided with the COBRA election notice for



individuals electing COBRA on or after April 1, 2021. For an AEI who already has COBRA coverage as of April 1, 2021, or an individual who is eligible for the special second election period, the notice must be provided by May 31, 2021. The U.S. Department of Labor (DOL) will provide a model notice by April 10, 2021.

Second, AEIs must receive between 15 and 45 days advance notice when their premium subsidy will expire. No notice is required for an AEI whose subsidy ends due to eligibility for another group health plan or Medicare. The DOL will provide a model for this notice by April 25, 2021.

If employers do not provide these notices, they may face excise taxes and penalties under the Internal Revenue Code and the Employee Retirement Income Security Act (ERISA), the same as if they failed to provide a standard, initial COBRA election notice.

Tax Credits

The federal government will provide tax credits for the subsidized premiums. If an employer maintains a group health plan under which some or all of the coverage is self-insured, the employer is entitled to the credit. For insured coverage, the credit will go to the insurer. If an employee receives group health plan coverage from a multiemployer plan under ERISA, the multiemployer plan will receive the credit. If an AEI pays any amount of the COBRA premium that should be subsidized under ARPA, the employer, insurer or plan must reimburse the individual within 60 days to claim the tax credit for the individual's premium.

The credit will be refundable and may be advanced quarterly. Before the government issues a check, however, the credit will be applied against payroll taxes – specifically, the Medicare Hospital Insurance (HI) taxes and Railroad Retirement Tax Act (RRTA) Tier 1 taxes attributable to the HI tax rate.

Action Items

Employers should coordinate with the COBRA administrators for their group health plans to determine responsibilities for complying with ARPA's requirements. Employers will likely need to identify AEIs and those individuals who will receive the special election notice. Employers will also need to decide whether to allow AEIs to elect a lesser benefit option for COBRA purposes.

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