

# EMPLOYEE BENEFITS ADVISORY

## Employee Benefit Plan Changes Under the American Rescue Plan Act



March 16, 2021

On March 11, 2021, President Biden signed the American Rescue Plan Act (ARPA). This Client Advisory focuses on the new mandatory and voluntary provisions for employee benefit plans and raises questions about the impact of the changes in the affordability thresholds for premium tax credits on group health plans for 2021 and 2022.

### NEW COBRA PROVISIONS

ARPA includes a number of new mandatory rules that will apply generally beginning in April through September of 2021.

**Premium Assistance:** For COBRA premiums imposed beginning April 1 through September 30, 2021, Assistance Eligible Individuals (AEIs) must be treated as if they have paid their COBRA premium payments, effectively providing a 100% premium subsidy. For purposes of ARPA, "COBRA continuation coverage" includes coverage under comparable state continuation coverage laws that often apply to small employers. An AEI is any individual who is a qualified beneficiary at some point from April through September, who is eligible for COBRA continuation coverage by reason of a termination of employment or reduction of hours, other than a voluntary termination, and who elects that coverage. This would include:

- Coverage under any type of group health plan (including medical, dental, and vision) but not health flexible spending accounts.
- Eligible individuals who became eligible for COBRA before April 1 and are still within their maximum COBRA period.
- The eligible covered employee and dependents.
- Covered employees who reduce their hours for any reason. (The exclusion for voluntary actions applies only to terminations of employment.)

AEIs include individuals who lose coverage due to voluntary termination, retirement, death, divorce, or loss of dependent status. However, note that domestic partners and their dependents who lose coverage and have COBRA-like benefits are not considered AEIs.

An AEI will lose this COBRA premium assistance before September 30, 2021, as of the earliest of the following:



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- The individual becomes *eligible* for coverage under any other group health plan (other than a plan consisting only of excepted benefits, coverage under a flexible spending account, or coverage under a qualified small-employer health reimbursement account (QSEHRA) or eligibility for Medicare)
- The expiration of the maximum period of continuation coverage required under COBRA
- The end of the period of COBRA that would be required if coverage had been elected or had not been discontinued

**Note:** *Don't confuse this rule with the COBRA rule that allows a plan to terminate COBRA coverage when an individual becomes enrolled in other employer group health plan coverage after COBRA election. A participant will still have the right to continue COBRA, even if he or she loses the premium assistance under ARPA. In addition, while premium assistance must be provided for dental and vision plan COBRA coverage, eligibility for other dental and vision plan coverage will not terminate the ARPA premium assistance.*

In exchange for treating an AEI as having paid for COBRA during this period, the person to whom the premiums are payable (in many cases, the employer) will receive credit against employment taxes each calendar quarter equal to the premiums not paid by the AEIs for the coverage by reason of the premium assistance for that calendar quarter. If the amount of the credit exceeds the amount of taxes, then the excess will be treated as an overpayment that will be refunded. The credit also can be advanced.

Employers will need to create and use forms for individuals to establish their eligibility for premium assistance. In addition, ARPA requires that AEIs notify employers and a group health plan in a timely manner that they are no longer eligible for a subsidy (but that deadline has yet to be determined under ARPA). The DOL may impose a penalty of \$250 for each failure. If the failure is considered fraudulent, the responsible person will pay a penalty equal to the greater of \$250 or 110% of the premium assistance provided after termination of eligibility; however, the penalty will not be imposed in cases due to reasonable cause and not willful neglect.

**New COBRA Election Right:** In addition, ARPA requires that a group health plan offer to certain individuals a new COBRA election period. Individuals eligible for this right are:

- Individuals who do not have an election of COBRA in effect on April 1, 2021, but would be an Assistance Eligible Individual
- An individual who elected COBRA continuation coverage and discontinued from such coverage before April 1, 2021

This group appears to include both AEIs eligible for the premium assistance, as well as any other individual who elected COBRA, dropped it before April 1, and is still eligible for coverage. These individuals will be allowed to elect COBRA continuation coverage effective April 1, 2021, through the 60<sup>th</sup> day after receiving notice of this new right. If coverage is elected during this period, coverage will begin April 1, 2021, and will not extend beyond the period of COBRA continuation coverage that would have been required under COBRA if the coverage had been elected as required under the provision or had not been discontinued.

**Note:** *Plan administrators will need to consider how the rolling end of the Outbreak Period will impact these elections. Due to the COVID-19 pandemic, an individual who was due to elect COBRA or pay for COBRA premiums on or after March 1, 2020, had their deadline to elect or pay extended until the end of the Outbreak Period. In EBSA Disaster Relief Notice 2021-01, the Department of Labor stated that extensions will need to be calculated differently for each qualified beneficiary. Now, the duration of the extension will last until the earlier of one year from the date the qualified beneficiary was first eligible*

for relief or the end of the Outbreak Period (which is still ongoing and will generally end 60 days after the announced end of the National Emergency due to COVID-19). This means that an AEI may have two options for exercising COBRA elections:

- The right to elect COBRA back to the original effective date of their qualifying event, paying all premiums for coverage from that date through April 1, 2021
- The right to elect COBRA only back to April 1, 2021, and with the premium assistance

**Notices:** Both of these two requirements will require new notices. For individuals who become eligible for COBRA from April through September, the qualifying event notice must include information about the availability of the premium assistance. Notices will also need to include:

- Forms necessary for establishing eligibility for premium assistance
- The name, address, and number to contact regarding premium assistance
- A description of the extended election period
- A description of the obligation of the qualified beneficiary and the penalty for failure to notify the plan of eligibility for other coverage
- A description of the qualified beneficiary's right to a subsidized premium and any conditions on the entitlement to the subsidized premium

For individuals who were entitled to elect COBRA before April 1 and have a new right to elect COBRA effective April 1, a new notice must be provided within 60 days after April 1 and must include all of the information above.

For any AEI for whom COBRA premium assistance expires for any reason other than eligibility for another group health plan or Medicare eligibility, the plan administrator must notify the individual, no earlier than 45 days and no later than 15 days before the date the premium assistance will expire, that the premium assistance is expiring, including the date of the expiration, and that the individual may be eligible for coverage without any premium assistance through COBRA or coverage under another group health plan.

The Department of Labor, in consultation with Treasury and Health and Human Services, is required to issue model notices within 30 days of enactment of ARPA (for the notices regarding availability of the premium assistance and new election period) and within 45 days of enactment of ARPA (for the early expiration notice). Employers may wish to wait for these model notices to be issued prior to satisfying the notice requirements.

**Coverage Elections:** Under ARPA, an employer could, but is not required to, amend its plans to allow any AEI who is enrolled a 90-day enrollment period where the participant can elect to enroll in coverage under a plan also offered by the employer that is different than the coverage in which the individual was enrolled at the time of the qualifying event, and that coverage would be treated as COBRA continuation coverage. Under this option, the premium for the different coverage must be less than or equal to the premium for the coverage the individual was enrolled in at the time the qualifying event occurred. The different coverage also must be coverage that is also offered to similarly situated active employees of the employer at the time at which the election is made, and the different coverage is not that which provides only excepted benefits, a QSEHRA, or an FSA. Employers who elect this option are also required to supplement their required notices above with information about this opportunity.

**Note:** Before adding this option, employers should reach out to their COBRA administrators, third party administrators, and/or insurers to make sure they can add this option.

## PREMIUM TAX CREDITS/CALCULATION OF AFFORDABILITY

ARPA also temporarily expanded eligibility for individuals to qualify for premium tax credits when enrolling in coverage through an Exchange or Marketplace. Effective as of January 1, 2021, for 2021 and 2022, the affordability threshold for group health coverage has been reduced to 8.5% from 9.5% of the employee's household income (adjusted for cost of living), and the limit of 400% of the federal poverty level has been removed. This means that more individuals joining the Exchange may be eligible for a premium tax credit.

Employees who obtain premium tax credits when enrolling in the Exchange or Marketplace can trigger assessments for employer-shared responsibility payments. Under the Affordable Care Act, certain large employers are subject to the assessable payments for either failing to offer minimum essential health care coverage for all full-time employees (and their dependents) or for offering eligible employer-sponsored coverage that is not affordable or does not offer minimum value. This assessment is due if any full-time employee is certified as having purchased health insurance through the Exchange or Marketplace with respect to which a premium tax credit is allowed or paid to the employee. While ARPA did not directly touch the 9.5% (adjusted for cost of living to 9.83% for 2021) affordability threshold for purposes of determining whether an offer of coverage is affordable and provides minimum value, it remains to be seen how the new premium tax credit eligibility for 2021 and 2022 will impact potential assessments. Employers who have been tying their affordability calculations close to the affordability threshold and those who have not considered affordability for employees making more than 400% of the federal poverty level will want to pay close attention to additional guidance that may be issued.

## DEPENDENT CARE

Adding to the relaxed election, carryover, and grace period rules enacted late last year, ARPA also increased the limit allowed for employer-provided dependent care assistance excluded from an employee's income from \$5,000 (\$2,500 for married participants filing separately) to \$10,500 (\$5,250 for married participants filing separately). This increase is allowed only for 2021. If an employer decides to offer this increased limit, it will need to amend its plan retroactively by December 31, 2021, and will need to notify participants of the availability of this increased limit as soon as possible. If the limit will only apply to salary reduction contributions, the employer will also want to consider adding rules allowing participants to change their current elections to take advantage of this limited opportunity.

## QUESTIONS

Employers will have a lot to consider and change with the enactment of ARPA. Please contact a member of our Employee Benefits Group if you have questions or want more information about these new rules.