

## Employee Benefits and Executive Compensation Practice

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# Guidance Issued on Implementation of ARPA COBRA Premium Subsidy

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**Group health continuation coverage under the Consolidated Omnibus Reconciliation Act of 1985 (“COBRA”) permits certain group health coverage to be continued by participants and beneficiaries (“qualified beneficiaries”) when coverage is lost due to certain “qualified events,” such as termination of employment or a reduction of hours.**

Under Section 9501 of the American Rescue Plan Act of 2021 (“ARPA”), an “assistance eligible individual” (“AEI”) is not required to pay the cost of COBRA coverage (“COBRA Subsidy”) for the period beginning April 1, 2021 through September 30, 2021 (“Subsidy Period”). The Employee Benefits Security Administration has issued guidance, including Frequently Asked Questions (“FAQs”) and Model Notices related to the COBRA Subsidy. Employers offering COBRA are required to provide the COBRA Subsidy to any AEI, which they then can recoup through a payroll tax credit. While the FAQs appear to provide guidance to potential AEIs, the guidance is also helpful to plan administrators. The COBRA subsidy guidance can be found [here](#). We expect more guidance to be issued in the near future to assist plan administrators in navigating the complexities of the COBRA Subsidy.

In addition to group health plans governed by the Employee Retirement Income Security Act of 1974, the COBRA Subsidy provisions apply to state and local governments under the Public Health Services Act. **Individuals who are not eligible for Federal COBRA continuation coverage, but are entitled to state mini-COBRA coverage are also eligible for the COBRA Subsidy.** There does not seem to be any limitation on the group health coverage subject to the premium assistance. In other words, all COBRA-eligible coverage (such as medical, dental, vision, employee assistance programs, wellness and Health Reimbursement Accounts) appears to be subject to the COBRA subsidy provisions of ARPA. More clarifying guidance will be needed from the regulators.

An AEI is a qualified beneficiary who is eligible for continuation coverage due to a reduction in hours or an involuntary termination of employment; and who elects such coverage.

Individuals who voluntarily quit their jobs or are terminated for “gross misconduct” are not eligible for the COBRA Subsidy. We anticipate that there will be questions about what may constitute an involuntary termination of employment where the facts and circumstances surrounding a voluntary quit may indicate otherwise. In addition, the date of the qualified beneficiary’s loss of coverage may trigger the commencement of the applicable COBRA coverage period, rather than the date of the qualified event.

An individual who is eligible for group health coverage through another employer’s plan (including the plan of a spouse)<sup>[1]</sup> or is eligible for Medicare will not be treated as an AEI. However, potential AEIs who have coverage through the Health Insurance Marketplace can use the election period to change, prospectively, from individual coverage to COBRA continuation coverage with the COBRA Subsidy.

The guidance requires plan administrators of group health plans (or their third-party COBRA administrators) to provide notice (on or before May 31, 2021) and a special COBRA election period to:

- A qualified beneficiary whose qualifying event was a reduction in hours or an involuntary termination of employment prior to April 1, 2021 and who did not elect COBRA continuation coverage when it was first offered before that date;
- A qualified beneficiary who elected COBRA coverage but is no longer enrolled (for example, an individual who dropped COBRA coverage due to the inability to pay the premium).

See: “Model COBRA Continuation Coverage Notice in Connection with Extended Election Periods (“Extended Election Period Notice”), “Summary of the COBRA Premium Assistance Provisions of the American Rescue Act of 2021” (“Summary”) and “Request

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for Treatment as an Assistance Eligible Individual,” (“AEI Request “).<sup>[2]</sup> The Extended Election Period Notice, Summary and AEI Request must be given to this group of qualified beneficiaries where the reduction in hours or involuntary termination occurred before April 1, 2021, by May 31, 2021. The individuals will have 60 days after receipt of the Extended Election Period Notice to elect COBRA coverage and request AEI status.

Those who initially qualify for treatment as an AEI will lose that status if, at any time prior to the end of the Subsidy Period, the qualified beneficiary becomes eligible for group health coverage through another employer’s plan, becomes eligible for Medicare, or reaches the end of the applicable COBRA continuation period. Penalties can be imposed if qualified beneficiaries who initially qualify for AEI status fail to notify the plan administrator that they no longer qualify for premium assistance.

Due to the declaration of the COVID-19 National Emergency, guidance issued jointly by the Internal Revenue Service and Department of Labor in 2020<sup>[3]</sup> and updated in 2021<sup>[4]</sup> tolled the deadlines for participants and beneficiaries to take required actions under certain health and welfare programs. The guidance included tolling of the 60-day period to elect COBRA continuation coverage and tolled the due date for payment of COBRA premiums until 60 days after the President declares that the National Emergency has ended (called the “Outbreak Period”). Under the updated Notice 2021-01, the duration of the Outbreak Period has been clarified to be earlier of (a) one year from the date participants were first eligible for relief, or (b) 60 days after the announced end of the National Emergency (the end of the Outbreak Period). In no case will the tolling of the deadline period exceed one year. This means that any qualified beneficiary who (for example) was required to make a COBRA election by March 1, 2020 had until February 28, 2021 to do so. In accordance with the FAQs, “a potential AEI has the choice to either elect COBRA continuation coverage prospectively starting on or after April 1, 2021 within the 60-day election period in order to qualify for the COBRA Subsidy or, if applicable, wait until the end of the tolled election period.” Any qualified beneficiary who fails to make a timely election to be treated as COBRA subsidy eligible, will be required to pay the full COBRA premium plus a 2 percent administrative fee for COBRA coverage. Any AEI must, likewise, pay the full COBRA premium, plus the administrative fee, for periods of continuation coverage on or after October 1, 2021.

In addition, a new ARPA General Notice and COBRA Continuation Coverage Election Notice, must be given to qualified beneficiaries who have a qualified event that is a reduction in hours or an involuntary termination of employment from April 1, 2021 through September 30, 2021. ARPA also permits plans to offer other coverage to AEIs that is also offered to similarly-situated active employees that do not have higher premiums than the coverage the individual had at the time of the qualifying event. The various Model Notices contain provisions that should be deleted if this option does not apply. Plans must also provide a Notice of Expiration of Premium Assistance Period.

It is important to note that nothing in the guidance requires plans to extend the period of COBRA coverage or provide any ARPA subsidy retroactively.

Implementing and administering the ARPA COBRA Subsidy and the new COBRA notice requirements will be challenging to plan sponsors, plan administrators and third-party COBRA providers.

Please contact Sarah Lockwood (Sally) Church and Dasha Brockmeyer if they can provide you with any assistance.

1. Coverage under excepted benefits (such as dental or vision care), a medical flexible spending account or a qualified small employer health reimbursement arrangement (QSEHRA) is not included in the types of arrangements that will keep a qualified beneficiary from either treatment as an AEI or to lose AEI status.
2. All guidance, including the various notices mentioned in this Alert, can all be found in both PDF and Word format at: <https://www.dol.gov/cobra-subsidy>
3. See: Disaster Relief Notice 2020-1 (“Joint Notice”) (See also: May 2020 ALERT – <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2020-01>)
4. See: Disaster Relief Notice 2021-1 (Notice 2021-01) <https://www.dol.gov/agencies/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2021-01>. The details of the deadline tolling are beyond the scope of this Alert.

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