The American Rescue Plan Act of 2021

The most recent response from Congress to the COVID-19 pandemic is another far-reaching bill that contains several significant provisions affecting health and welfare benefit plans. Among other terms, the American Rescue Plan Act of 2021 (“ARPA”) contains a COBRA premium subsidy provision that is—for good reason—generating a lot of interest. This newsletter is focused on that ARPA provision.

COBRA Subsidies

Under the ARPA, “assistance eligible individuals” (“AEIs”) will be entitled to free COBRA coverage (including the 2% administrative fee) for up to 6 months. The subsidy is available beginning on April 1, 2021 and ending on September 30, 2021 (the “subsidy period”).

Who is an “assistance eligible individual”? An “assistance eligible individual” (“AEI”) is a person who becomes eligible for continuation coverage due to either an involuntary termination of employment (other than for gross misconduct) or a reduction in hours that results in the loss of coverage—it is not necessary that the qualifying event be connected to COVID-19. Those who terminate employment voluntarily do not qualify as AEIs.

With these limitations in mind, AEIs could include:

- Individuals who experience a qualifying event during the subsidy period.
- Individuals who experienced a qualifying event prior to the subsidy period, who are currently on COBRA, and who have not exhausted their maximum 18 months of continuation coverage.
- Individuals who experienced a qualifying event prior to the subsidy period, who did not elect COBRA or allowed their COBRA coverage to lapse, and who have not exhausted their maximum 18 months of continuation coverage.

What is the “extended election period”? Individuals who experienced a qualifying event prior to the subsidy period, whose maximum period of COBRA coverage has not yet ended, and who either did not elect COBRA or allowed their COBRA to lapse—but who would be AEIs if their COBRA were in effect—have a new opportunity to elect COBRA and take advantage of the subsidy. In such an event, their COBRA coverage is prospective—it will not begin before April 1—and it will not extend beyond the length of their maximum coverage period had they elected COBRA when originally eligible. Under this extended election period, AEIs have 60 days to elect COBRA after they receive notice from the plan administrator of the right to do so.

Who is not eligible for the subsidy? An AEI is not eligible for the subsidy as of the first date the individual is eligible for coverage under any other group health plan (other than coverage consisting only of excepted benefits, coverage under a health FSA, or coverage under a QSEHRA) or Medicare.

If an AEI becomes ineligible for the subsidy because the AEI becomes eligible for other coverage or Medicare, the AEI must notify the group health plan (the Department of Labor will issue further guidance on this notice requirement). Failure to provide the notice could subject the AEI to an IRS penalty.

What type of coverage is eligible for the subsidy? The subsidy applies to group health plans subject to COBRA continuation coverage requirements, including medical, dental, and vision plans (because there appears to be some debate on this point, official confirmation that the subsidy applies to dental and vision coverage would be helpful). The subsidy does not apply to health flexible spending arrangements (health FSAs).

Does the subsidy apply to Cal-COBRA and other state mini-COBRA laws? Maybe. ARPA says that continuation coverage provided "under a State program that provides comparable continuation coverage" to COBRA will also be eligible for the subsidy. Under this provision, certain state mini-COBRA laws—such as continuation coverage under Cal-COBRA for those working for employers with 2 to 19 employees—should be eligible for the subsidy. Further guidance on the meaning of "comparable" would be helpful, however.

What is the length of the subsidy? Up to 6 months, beginning on April 1, 2021 and ending on September 30, 2021. However, the subsidy period can end early in certain circumstances. For example, the subsidy would end prior to September 30th if the AEI's 18-month continuation coverage period ends prior to that date. Or, the subsidy ends if the AEI becomes eligible for coverage under another group health plan (other than coverage that is only excepted benefits, a health FSA, or a QSEHRA) or Medicare.

If the AEI does not pay the COBRA premium, who is responsible for payment? It depends. In the case of a multiemployer plan, the plan. In the case of a plan that either is subject to COBRA (under ERISA, the IRC, or the PHSA) or is self-funded, the employer. If one of these circumstances does not apply—such as in the case of a fully insured group plan that is subject to a state continuation coverage law—the insurer.

The employer, insurer, or plan (as applicable) is then entitled to reimbursement of the premium in the form of a federal tax credit against certain quarterly payroll taxes. If the credit exceeds the payroll tax liability, a refund will be available.

Under this approach, an employer offering a fully insured health plan that is subject to COBRA would pay the COBRA premium for an AEI to the insurer, and then would seek reimbursement from the federal government through the payroll tax credit. An employer offering a self-funded health plan--whether subject to COBRA or not--would provide coverage to AEIs and then, through the payroll tax credit, seek reimbursement from the federal government for subsidizing AEI coverage. Further guidance on how these provisions will be implemented is expected.

With regard to the tax credit, there are restrictions on double dipping. For example, if the employer is receiving a tax credit for qualified health plan expenses because the employer is providing paid leave under the Families First Coronavirus Response Act ("FFCRA"), the employer cannot also take this tax credit.

If the AEI goes ahead and pays the COBRA premium even though it should have been subsidized, the employer, insurer, or plan (as applicable) must reimburse the AEI within 60 days.

Are the subsidies taxable to the employee? No, the subsidy amount is not included in the employee's gross income.

Are there new notice requirements under the law? Yes—several. The new notices that will have to be drafted and sent out include:

- A notice to those who are entitled to the extended election period. Under this mandate, employers will have to send newly revised COBRA election notices to individuals who previously experienced a qualifying event and are still within their maximum coverage period. The law outlines the information that must be included in the updated notices. Employers must provide the notice by May 31, 2021.
- COBRA election notices must be updated for those who become AEIs during the subsidy period. The law outlines the information that must be included in the updated notices. Either the employer's existing election notice can be amended, or a separate document can be attached.
- A notice of expiration of the subsidy must be provided to AEIs (unless the AEI is eligible for other coverage or Medicare). This notice—an entirely new requirement—must be provided no earlier than 45 days, and no later than 15 days, of the date the subsidy will expire.

The Department of Labor must provide model notices by April 10, except for the notice of expiration of the subsidy, which must be issued by April 25.

Although the model forms may not be issued for a couple of weeks, in the meantime employers should work with internal staff or their COBRA administrator to start preparing for the distribution of the new and revised notices.

What is the plan enrollment option? Employers may—but do not have to—offer AEIs the opportunity to change their coverage from the plan they are currently enrolled in to another one offered by the employer. In such a case, the cost of the coverage in the alternative plan cannot exceed the cost of the current plan the AEI is enrolled in, and the coverage must be offered to similarly situated active employees. The alternative coverage cannot be only excepted benefits, a QSEHRA, or a health FSA. The employer must provide notice—information about the option should be included in the updated COBRA election notices discussed above—and AEIs then have 90 days to elect the coverage change.

Can we expect further guidance? Yes. In addition to the model notices the DOL must issue, the bill instructs the Departments of Treasury and Labor to issue regulations or other guidance to help implement the COBRA subsidy provisions. It is possible our current understanding of the law could change depending on what that guidance says.

Interestingly, the ARPA's COBRA premium subsidy provision is similar (but not identical) to the COBRA premium subsidy provision contained in the American Recovery and Reinvestment Act of 2009 ("ARRA"). To the extent the regulators can dust off and re-work some of the guidance documents issued in 2009, the similarities between the two bills might help expedite issuance of the ARPA guidance we are waiting for now.

Will the government educate the public on the COBRA subsidies? Yes. The bill requires the Departments of Health and Human Services, Labor, and Treasury to provide outreach consisting of public education and enrollment assistance. The audiences to be targeted include AEIs, employers, group health plan administrators, public assistance programs, insurers, and Medicare eligible individuals.

Other ARPA Provisions

Other key provisions in the ARPA include:

DCAP Contribution Limit Increase: For the 2021 tax year, the amount that can be contributed to an employer-sponsored dependent care assistance program (a.k.a. a DCAP or dependent care FSA) is increased from $5,000 to $10,500 (or $5,250 if married filing separately). This change may be adopted retroactively so long as a written cafeteria plan amendment is adopted no later than the last day of the plan year, and the plan is administered according to the change in the interim.

Tax Credit for Paid Leave: The Families First Coronavirus Response Act ("FFCRA") contained two mandatory paid leave provisions; the mandates expired on December 31, 2020. The Consolidated Appropriations Act, 2021 (the "CAA"), which was signed on December 27th, did not extend the FFCRA's mandatory paid sick leave provisions, but it did include a provision allowing employers that voluntarily provide paid sick leave (under the same terms and conditions as FFCRA leave would be offered) to receive a tax credit through March 31, 2021. The ARPA now extends the CAA's tax credit provision through September 30, 2021. The IRS is in the process of updating its FAQs to reflect the changes made by the ARPA.

The ARPA also added new bases for a qualifying leave. Now, the employer is entitled to a tax credit if the employer pays wages (up to the statutory limits) for the following additional reasons:

- The employee is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID–19 and such employee has been exposed to COVID–19 or the employee's employer has requested such test or diagnosis; or
- The employee is obtaining immunization related to COVID–19 or recovering from any injury, disability, illness, or condition related to such immunization.

Don't forget: In addition to receiving a credit for 100% of wages paid (up to the statutory limits), employers can also receive credit for "qualified health plan expenses." But beware: If you intend to seek a tax credit under the COBRA subsidy provision discussed above, be aware of the limits on double dipping.

Affordable Care Act Premium Tax Credits: Under the Affordable Care Act ("ACA"), if you purchase an individual health policy from a Marketplace (such as Covered California) you may be eligible for a premium tax credit to help pay for the cost of that coverage. For 2021 and 2022, the ARPA is expanding eligibility for the tax credits. CMS has announced that these credits will be available through the federal Marketplace starting April 1, 2021.

Upcoming Webinars

The ARPA and Outbreak Periods: What Do Benefit Professionals Need to Know?

Friday, March 19, 2021
Noon – 1:00 p.m.
Presenter: Marilyn A. Monahan

The newest stimulus bill—the American Rescue Plan Act of 2021 ("ARPA")—includes provisions affecting health and welfare plans that producers and employers need to know about. During this program we will discuss key provisions in ARPA, along with other essential benefit updates, including:

- COBRA premium subsidies
- Increase in DCAP contribution limits
- Tax credits for paid leave
- EBSA Disaster Relief Notice 2021-01 and the duration of the Outbreak Period timeframe extensions
- Recent guidance on COVID-19 vaccines and testing
- A summary of ACA updates

Please grab a brown bag—or your favorite take out—and join us for this lunch and learn, and together we will work our way through some important new developments.

Please register: **https://attendee.gotowebinar.com/register/5279925618980743952**

The Consolidated Appropriations Act, 2021: What Do Benefit Professionals Need to Know?

Friday, March 26, 2021
Noon – 1:00 p.m.
Presenter: Marilyn A. Monahan

The Consolidated Appropriations Act, 2021 (the "CAA"), which was signed on December 27th, is--to state it mildly--a comprehensive bill with numerous provisions that affect health and welfare benefit plans. Some provisions are optional, and some are mandatory. However, whether your plan is fully insured or self-funded, grandfathered or non-grandfathered, there are provisions in the CAA that will impact your plan.

Please grab a brown bag—or your favorite take out—and join us for this lunch and learn, and together we will work our way through key provisions in the law.

Please register: **https://attendee.gotowebinar.com/register/2515118967989718030**

| 310-989-0993 | www.monahanlawoffice.com | **@MonahanLawCA**