“FREE” COBRA GROUP HEALTH CARE FOR UP TO SIX MONTHS FOR INVOLUNTARILY TERMINATED (OR REDUCED HOURS) EMPLOYEES

The American Rescue Plan Act of 2021 (ARP), enacted on March 11, 2021, creates a requirement that employers treat the total payment for Consolidated Omnibus Budget Reconciliation Act (COBRA) continuation coverage due from certain eligible individuals as being “paid in full” for April 1 through September 30, 2021 (Subsidy Period). The eligible individuals with COBRA coverage will not receive the subsidy directly from the government; rather, they will have a premium holiday during which time the employer pays 100% of the applicable COBRA premium. The employer will be reimbursed in full through refundable payroll tax credits.

COBRA gives workers and their families who are losing employer health care coverage the right to retain the coverage by paying a premium amount. The ARP provisions do not apply to all COBRA-eligible individuals; eligibility is limited to employees who lost health care benefits due to an involuntary termination or reduction in hours. While the loss of coverage event can be linked to COVID-19, it is not required to be. A loss of coverage event could have occurred as far back as November 1, 2019, since the law requires an employer to offer a continuation of COBRA coverage for 18 months after an involuntary termination (18 months from November 1, 2019 is April 30, 2021). Eligible individuals who opted not to pay for COBRA coverage will be given another opportunity to elect the free coverage.

Employers and COBRA administrators should prepare to distribute new COBRA election and subsidy notices and to make operational changes soon after further guidance is released. Eligible individuals who are not already on COBRA will need to act quickly after receiving the notice to elect subsidized COBRA coverage. Failing to timely elect COBRA coverage could result in forfeiting this valuable benefit.

It is expected that many people will rush to take advantage of this opportunity, which can provide up to six months of health insurance at no cost. However, employers should keep in mind that the subsidy is available only for certain limited situations.

Which Employers Are Eligible for the New Subsidy?

Employers who are subject to federal COBRA provisions or to a state program that provides comparable group health care continuation coverage are not allowed to charge eligible individuals for COBRA coverage during the Subsidy Period. The subsidy applies to workers in every industry, most tax-exempt employers (except churches who are exempt from COBRA) and union, governmental and Indian tribal government workers. The federal COBRA provisions generally apply to all private-sector group health plans maintained by employers that had at least 20 employees on more than 50% of its typical business days in the previous calendar year. Both full- and part-time employees are counted to determine whether a plan is subject to federal COBRA coverage. Many states have “mini-COBRA” laws that apply to employers who have fewer than 20 employees. The subsidy is mandatory for all employer-sponsored group health plans (i.e., all employers must offer the subsidy, regardless of whether the plan is fully or partially insured, or self-insured).

During the Subsidy Period, generally, the federal government will reimburse COBRA costs to employers by allowing credits against employers' Medicare (not Social Security or income) taxes (but for union plans, the plan would receive the subsidy and for insured, state “mini-COBRA” plans, the insurer would receive the subsidy). Guidance is needed to clarify how the flow of funds for the subsidy would work. The full cost of COBRA continuation coverage (including up to a 2% administrative fee) at any coverage level (e.g., single, “single-plus-one” or family coverage) for employees and former employees and their spouses and dependents is eligible for the subsidy via the payroll tax credit. The subsidy applies to health, prescription drug, dental and vision plans, but does not apply to health flexible spending accounts (FSAs), health savings accounts (HSAs) or long-term care plans (further guidance is needed to clarify the scope of the subsidy).

Due to the fact that most individuals who elect COBRA group health care continuation coverage usually pay 100% of those premiums (and in many cases they must also pay up to a 2% administrative fee), the new subsidy via the employment tax credit keeps the free COBRA coverage at zero cost to the employer. While the employment tax credit is taxable income, it will be offset by the employer’s deductible payment of the healthcare premiums.

Impact on Eligible Individuals

An eligible individual with an existing or new COBRA election will be provided tax-free health care coverage (both the premium and any administrative charge) at no charge for their remaining COBRA period that overlaps with the Subsidy Period.

The free COBRA provided during the Subsidy Period would be “affordable” coverage under the Affordable Care Act (ACA). But it is not clear how this “affordable” coverage affects an individual who has purchased coverage on the exchange before they had an offer of affordable coverage.

A recipient of the free health care coverage must notify the employer or plan administrator when they become eligible for Medicare or another group health plan—other than coverage under an excepted benefit, an FSA or a qualified small employer health reimbursement arrangement (QSEHRA). Individuals who fail to promptly give this notice could be subject to a $250 fine and other penalties.

Who is Eligible?

Generally, individuals are eligible for free COBRA coverage if (1) they are involuntarily terminated or have a reduction in hours that qualifies them for federal or state COBRA coverage and (2) the Subsidy Period overlaps with their COBRA coverage period.

The new COBRA premium assistance is not available to the following individuals:

- Employees who are terminated for gross misconduct.
- Employees who voluntarily terminated their employment or who retired.
- Individuals who are eligible for COBRA due to other reasons, like divorce, death or loss of dependency status.

- Individuals who are eligible for other group health care coverage (such as from a new employer) or Medicare.
- Individuals who are beyond their normal COBRA coverage period connected to the original qualifying event (i.e., the employee's involuntary termination or reduction in hours that caused a loss of group health plan coverage).
- Domestic partners who are not federal income tax dependents of the employee.

What's the Coverage?

Generally, the COBRA coverage will be the same as the coverage elected just prior to the involuntary termination or reduction in hours. However, employers can (but are not required to) allow individuals who are eligible for premium assistance to change their coverage provided it does not result in an increased premium cost. Further guidance is needed regarding the scope of who can change to a lower cost health plan as a result of the new law.

Eligible individuals who lost health care coverage after October 31, 2019 but do not have COBRA coverage on April 1, 2021 due to nonelection or lapse of payment will have a new, 60-day opportunity to elect COBRA coverage. If timely elected, the COBRA covered period will begin on the date of the individual's qualifying event, but it appears that no payment is due for months prior to April 2021 and no claims can be filed prior to April 1, 2021. For the months remaining in the COBRA period that coincide with April 1 through September 30, 2021, the employee makes no payment but will have claims paid in accordance with the plan's provisions. To have continued coverage after September 30, 2021, the employee must make the payments required under the plan. If the individual finds this unaffordable, they can simply drop the coverage.

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Consider the following example. An employee who was involuntary terminated on December 1, 2020 but did not elect COBRA coverage at that time would be eligible for 100% subsidized COBRA coverage from April 1 through September 30, 2021 and could continue self-paid COBRA coverage afterwards, for a total of 18 months of COBRA coverage measured from December 1, 2020.

But if an employee already had COBRA coverage for 15 months on March 30, 2021, then that employee would only be eligible for three more months of COBRA coverage (April, May and June 2021) and would be entitled to the subsidy for only those three months. Unless that employee has another COBRA-qualifying event during the original COBRA coverage period (such as becoming disabled), that employee would not be entitled to any COBRA coverage thereafter (so that employee would not qualify for the subsidy in July, August and September 2021, even though the coverage is "free" during those months).

It appears that an individual whose COBRA qualifying event was earlier than April 1, 2021 can elect COBRA starting on April 1, 2021 (and get the subsidy) and simply skip the period before April 1, 2021 if they did not need COBRA coverage for that earlier period of time. Such individual may also be offered a lower cost group health care option if the employer decides to offer that choice.

Since COBRA election deadlines have been extended due to COVID-19, many individuals may still be within their original COBRA election periods. This special COBRA election window allows these people to make a COBRA election for the period beginning on April 1, 2021 without having to pay premiums retroactively to their COBRA initial eligibility date. This is a significant departure from the regular COBRA rules. But the maximum COBRA coverage period is still counted from the date of the individual's original COBRA qualifying event.

What Notices Are Needed?

The federal government is expected to issue model required notices addressing the existence of the subsidy, the availability of the 60-day election period and advance notice of when the Subsidy Period will be ending. In the meantime, employers should prepare for the following new notice requirements.

- Group health plans must modify their COBRA election notices for individuals who become eligible for federal or state COBRA during the Subsidy Period to notify them of the premium assistance (and, if applicable, the option to enroll in a lower priced plan).
- By May 31, 2021, individuals who previously rejected (or terminated) COBRA coverage and to whom a new election period must be offered must be notified of their new election period and the availability of the premium assistance. This essentially creates a special COBRA enrollment period for such individuals.
- Between August 17 and September 15, 2021, group health plans must provide a notice to individuals receiving the premium assistance stating that the subsidy will expire on September 30, 2021, and that they may be eligible for COBRA coverage without the subsidy. But if the subsidy would end earlier for any individual, the plan must provide a notice that the subsidy is expiring no earlier than 45 days and no later than 15 days before the subsidy expiration date.

It is not clear how these required notices must be delivered (sending paper mail to former employees may be needed).

How Does the Subsidy Work?

Individuals who are eligible for COBRA premium assistance do not receive a payment from the federal government, group health plan, employer or insurer. Rather, their COBRA costs are waived during the Subsidy Period.

Employers that sponsor a fully insured plan would continue paying the full premium to the insurer for the assistance eligible participants. Employers that sponsor a self-insured plan would pay the claims incurred by the assistance eligible participants. In both cases, the employer would receive no payment from the eligible individual during the Subsidy Period but would instead recover its COBRA costs (102% of the COBRA premium) for the assistance-eligible individuals by claiming a refundable federal tax credit against the employer's Medicare taxes.

The COBRA subsidy is prospective only and cannot begin before April 1, 2021.

Although the law does not require employers to pay for any COBRA coverage, some employers pay for some or all of COBRA coverage (for example, as part of a severance package). Such employers can cease those contributions during the Subsidy Period and the federal government will provide the subsidy for 6 months. And

although the subsidy is tax-free to employees, employers who take the COBRA premium tax credit must increase their gross income by the amount of such credit for the taxable year which includes the last day of any calendar quarter with respect to which such credit is allowed.

Also, under a “no double dipping” rule, employers cannot take the COBRA premium tax credit for any amount which is taken into account as qualified wages for the employee retention credit (ERC) under the Coronavirus Aid, Relief, and Economic Security Act and Consolidated Appropriations Act, 2021 (CAA), or as qualified health plan expenses for the Families First Coronavirus Response Act (FFCRA), as amended by CAA and ARP. Likewise, amounts attributable to the COBRA premium tax credit would not be eligible payroll costs under the Paycheck Protection Program (PPP).

Guidance from the Internal Revenue Service (IRS) is needed to clarify how exactly employers would claim the tax credit, but it appears that employers would claim the credit on their quarterly IRS Form 941 or in advance on IRS Form 7200 if the actual or estimated amount of the credit exceeds the employer's Medicare taxes for any calendar quarter. Further guidance is also needed regarding the mechanics of the subsidy for employers that have insured state COBRA coverage, since under Section 9501(b) of the ARP the tax credits reimbursements would go to the insurer, not the employer.

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For past COVID-19 relief tax credits, such as the ERC and FFCRA, IRS guidance allowed employers to dip into withheld income and Social Security taxes as a source of claiming those refundable tax credits. But the IRS has not yet authorized such actions for the ARP COBRA subsidy tax credit. Social Security taxes may not be available as a source for the new COBRA tax credits, since the ARP was enacted under budget reconciliation rules which prohibit any changes to Social Security.

Employers are not allowed to voluntarily expand the group of people who are eligible for the special COBRA premium subsidy, because the federal government is paying the full COBRA premium for the designated class of assistance-eligible individuals.

We expect the IRS to issue FAQs on the new COBRA Medicare tax credits, similar to the FAQs that the IRS issued on the ERC and FFCRA payroll tax credits.

This new COBRA subsidy may be economically more valuable than using qualified health care expenses for the ERC, because ERC nets 70% on the dollar whereas the COBRA subsidy is 102% (premium plus administrative charge).

What Should Employers Do Now?

Employers should immediately identify all employees who lost group health plan coverage after October 31, 2019 due to an involuntary termination or reduction in hours, without regard to their COBRA elections, because such event would have entitled the individual to 18 months of COBRA coverage (i.e., through April 30, 2021). Guidance is needed on whether notices must be given to individuals in this group that declined COBRA due to eligibility in another employer’s plan or Medicare. Employers will need to notify individuals who have an

unexpired COBRA period that premium assistance is available, and they have a right to reconsider their original COBRA election.

Employers will also need to review and perhaps modify any existing, automatic processes that might otherwise terminate COBRA coverage when premiums are not received during the Subsidy Period.

Year-end reporting on health benefits should also be reviewed to ensure these increased COBRA participants receive the appropriate Form 1095-B or C for 2021.

Employers should develop a procedure to identify COBRA recipients who are eligible for the premium assistance and those who do not qualify (for example, employers will need to distinguish a voluntary quit from an involuntary termination of employment and whether the employee was fired for gross misconduct). For premium-assistance eligible individuals, employers must refund within 60 days any premiums paid during the Subsidy Period. Not all COBRA participants will qualify for the subsidy, so the plan administrator will still need to handle some premium payments from non-eligible individuals.

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Many employers use outside service providers for their COBRA administration, so employers should reach out to their vendors as soon as possible to coordinate their response to the ARP changes to current COBRA rules, especially the special election period for certain assistance-eligible individuals.

Keep in mind that, separate from the ARP COBRA subsidy, many employees (and their family members) may currently have extended COBRA election rights due to COVID-19 deadline extensions. For example, ERISA Disaster Relief Notice 2021-1 issued on February 26, 2021, announced an individualized one-year deadline extension for COBRA elections, which begins on the date the clock for the particular deadline would have started running (i.e., the one-year extension is applied on a rolling basis to each deadline for each affected individual). But individuals electing retroactive COBRA coverage under those extended deadlines will generally have to pay the full COBRA premiums for such periods. Guidance is needed on how the deadline extension coordinates with the new COBRA subsidy.

Employers may recall that in February 2009, under the American Recovery and Reinvestment Act of 2009 (ARRA) (when President Biden was then Vice President Biden), the federal government subsidized 65% of COBRA premiums for certain individuals who were terminated or laid off between September 1, 2008 and March 31, 2010 due to the financial crisis linked to the bursting of the home mortgage lending bubble. The ARRA subsidy was extended through May 31, 2010, so perhaps with Democrats currently controlling both Congress and the White House, the ARP COBRA subsidy may be extended beyond September 30, 2021. Also, the ARRA may be a model for how the flow of funds will work for the ARP premium tax credits for insured state COBRA coverage.