New DOL Guidance and Model Notices Assist Employers with Their New COBRA Subsidy Obligations

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As we previously reported, the recently enacted American Rescue Plan Act of 2021 (ARPA) includes a six-month COBRA premium subsidy whereby the federal government subsidizes 100% of the COBRA premium during the period of April 1, 2021 through September 30, 2021. On April 7, 2021, the U.S. Department of Labor (DOL) released guidance which includes helpful FAQs and model notices to assist employers with their compliance obligations related to the new COBRA subsidies under ARPA. This *Fast Laner* article updates our prior article on this topic based on the DOL's new guidance as well as additional observations of the law since its enactment.

Plans Eligible for the Subsidy

As noted in the DOL's FAQs, the COBRA subsidy applies to all group health plans sponsored by private-sector employers or employee organizations (e.g., union multiemployer plans) subject to COBRA under the Employee Retirement Income Security Act of 1974 (ERISA). It also applies to plans sponsored by State or local governments subject to the continuation provisions under the Public Health Service Act.

Update: The premium assistance is also available for group health insurance required under state "mini-COBRA" laws so even small employers not subject to federal COBRA will need to be mindful of the COBRA subsidies. In most mini-COBRA cases, the insurance company will

Practice Areas

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Employee Benefits and Executive Compensation be the party expected to provide the subsidy and receive the tax credit instead of the employer.

Eligibility for the Subsidy

The subsidy is available to any employees (and their family members) who experience a loss of health coverage due to an involuntary job loss or reduction in hours. However, the subsidy will not be available if the employee voluntarily terminates employment or is terminated for gross misconduct.

An eligible individual would need to:

- be enrolled in COBRA, or become eligible for COBRA, on or after April 1, 2021, and before the subsidy ends on September 30, 2021, or
- become eligible for COBRA prior to April 1, 2021, with an 18-month COBRA period that includes any month between April and September of 2021, even if the employee did not elect COBRA when it was initially offered or elected COBRA but discontinued it before April 1, 2021. This individual would need to elect COBRA within 60 days of April 1, 2021 in order to be eligible for the subsidy.

Update: The DOL provided examples of when a reduction of hours may take place (such as due to a change in a business's hours of operations, a change from full-time to part-time status, taking a temporary leave of absence, or an individual's participation in a lawful labor strike, as long as the individual remains an employee at the time that hours are reduced). Additionally, based on the guidance and the language in the model notices, it appears that only a termination needs to be "involuntary" whereas any reduction in hours that triggers COBRA will be eligible for premium assistance.

Update: Due to the COVID-19 National Emergency, the DOL and the IRS issued prior guidance that extended certain deadlines related to employee benefit plans subject to ERISA and the Code, including the 60-day initial election period for COBRA continuation coverage. This extended deadline relief does not apply, however, to the 60-day notice or election periods related to COBRA premium assistance under ARPA.

Length of the Subsidy

The subsidy lasts for up to six months (e.g., April 2021 through September 2021) unless the individual's maximum COBRA coverage period ends before September 2021. The subsidy could also end earlier if the individual becomes eligible for coverage under another group health plan or Medicare. Individuals are required to notify their group health plan if they become eligible for such coverage or face penalties for failing to do so. Eligibility for excepted benefits, such as limited-scope dental or vision coverage, a qualified small employer health reimbursement arrangement (QSEHRA), or a health flexible spending arrangement, alone would not terminate subsidy eligibility.

Plan Enrollment Option

Employers have the option to give subsidy-eligible employees up to 90 days (following notice of this new enrollment option) to elect to enroll in a different group health plan offered by their employer. If the employer elects to implement this option, the following restrictions apply:

- the premium for the alternative coverage choice cannot be higher than the premium for the plan in which the employee had been enrolled at the time of the qualifying event;
- the different coverage in which the individual elects to enroll is coverage that is also offered to similarly-situated, active employees of the employer at the time at which such election is made; and
- the different coverage in which the individual elects to enroll is not coverage that only provides excepted benefits, a QSEHRA or a health flexible spending arrangement.

New Notice Requirements for Plans and Employers

Update: The new DOL guidance clarifies the following notice obligations applicable to plans and issuers and has provided model notices for each of these obligations:

- General Subsidy Notice – Plans must provide an election notice that includes a general notice about the availability of the new subsidy to any subsidy-eligible individual who incurs a qualifying event between April 1, 2021 and September 30, 2021. Note: This notice would also have to include information about the plan enrollment option if implemented by the employer.
- Notice of Extended Election Period – Additionally, plans must provide a notice to any subsidy-eligible individual who incurred a qualifying event prior to April 1, 2021. This notice is due within 60 days of April 1, 2021 (e.g., May 31, 2021). Note: This notice would also have to include information about the plan enrollment option if implemented by the employer.
- Notice of Expiration of Subsidy – Plans also must notify individuals if their subsidy will terminate before September 30, 2021. This notice must be provided between 15 and 45 days before the termination of the subsidy. This notice would not be required if the subsidy will terminate due to the individual's eligibility for other coverage.

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Update: Subsidy-eligible individuals can begin their coverage prospectively from the date of their election, or, if an individual has a qualifying event on or before April 1, 2021, choose to start their coverage as of April 1st, even if the individual receives an election notice and makes that election at a later date.

Paying for the Subsidy

In general, the subsidy will be paid to employers that are subject to COBRA, the insurance provider, or the multiemployer plan as a credit against quarterly payroll taxes. If the insurer does not have payroll tax obligations, such as in the case of some multiemployer plans, it will have to claim the tax subsidy separately. Governmental plan sponsors are eligible to receive the credit too. If the credit exceeds the amount of payroll taxes due, the credit would be refundable and treated as an overpayment. The credit may also be advanced under future rules established by the Treasury Department. Treasury is expected to issue guidance related to claiming the federal COBRA subsidy in the near future.

Action Items

- Compile a list of all individuals who would be eligible for at least one month of the COBRA subsidy. This list will include anyone whose COBRA coverage period would have begun as early as November 2019 because the 18-month COBRA period would include April 2021.
- Decide whether to offer subsidy-eligible individuals the option to enroll in different health coverage.
- Coordinate efforts with applicable third-party COBRA administrators and payroll vendors so that the new election notices are provided in a timely fashion and any applicable payroll tax credit is accurately calculated.
- Be mindful of the extended deadline to elect COBRA under guidance issued by federal regulating agencies. Specifically, those individuals who are eligible for delayed COBRA election deadlines will also be covered by the COBRA subsidy.
- Be mindful of the impact of the COBRA subsidies on separation agreements. Many employers offer subsidized COBRA as consideration for an employee to enter into a separation agreement. Because the COBRA subsidies are available by law, only offering a COBRA subsidy in a separation agreement for the period of April 2021 through September 2021 would not be adequate consideration.

Please contact your Laner Muchin servicing attorney or a member of our Employee Benefits Group with any questions.

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