

### **American Rescue Plan Act: COBRA Premium Subsidies and Increased Limits for Dependent Care Benefits**

On March 11, 2021, President Biden signed into law the American Rescue Plan Act of 2021 ("ARPA") which is another coronavirus stimulus package aimed at speeding up the United States' recovery from the economic and health effects of the COVID-19 pandemic. Among the many relief provisions in ARPA, this alert focuses on significant changes to the COBRA continuation coverage rules in the form of temporary subsidized premiums for certain individuals, and the expansion of dependent care flexible spending account (or other employer paid dependent care benefit) limits for 2021.

#### **COBRA Premium Assistance**

For the six-month period from April 1, 2021 to September 30, 2021, ARPA provides premium assistance for the full (100%) amount of the monthly COBRA premium (including state continuation coverage premiums) to an individual (including each of their covered family members) who qualifies (or qualified) for COBRA continuation coverage as a result of an involuntary termination of the individual's employment (other than due to the individual's gross misconduct) or an involuntary reduction of hours of the individual, and who elects (or elected) COBRA continuation coverage (including, as a result of any applicable new election opportunity provided under ARPA, as described below).<sup>1</sup>

However, the COBRA premium assistance will end prior to September 30, 2021 if either (i) such individual becomes eligible for coverage under any other group health plan (with certain exceptions<sup>2</sup>), or becomes eligible for Medicare, (and, in each instance, the individual has an obligation to notify the employer of such other group health plan coverage or Medicare eligibility) or (ii) the maximum period of continuation coverage<sup>3</sup> required under federal COBRA (and also under any state program that provides comparable continuation coverage) for such individual expires. For example, if an individual was involuntarily terminated such that the 18-month maximum federal COBRA period (assuming no state continuation coverage applies) would have begun on January 1, 2020 and would normally expire on June 30, 2021, such individual would only be eligible for premium assistance from April 1, 2021 to June 30, 2021 (and not until September 30, 2021, the end of the premium assistance period under ARPA). In this example, if state continuation coverage extended the COBRA period for an additional 18 months (for a total of 36 months), it is our understanding that the premium assistance would continue through September 30, 2021. The COBRA premium assistance does not extend the maximum period of federal and/or state COBRA continuation coverage.

<sup>1</sup> There are certain nuances regarding who is eligible for COBRA premium assistance under ARPA that are not clear in the statute. For example, an eligible individual under the statute is any individual (including a family member who is a COBRA qualified beneficiary) who is eligible for COBRA as a result of a qualifying event based on termination of employment or reduction in hours, but excludes any individual who voluntarily terminated employment. The exclusion in the statute does not clearly exclude a family member who is a COBRA qualified beneficiary where the employee voluntarily terminated employment (because the family member did not voluntarily terminate employment) or exclude an individual who had a voluntary reduction in hours. Although the exclusion of these groups might arguably be consistent with the intent of the statute, it would be helpful if formal guidance would be issued clarifying these eligibility points as well as the appropriate standard for determining what a "voluntary" and "involuntary" termination means for purposes of COBRA premium assistance.

<sup>2</sup> Eligibility for one the following group health plans does not result in the cessation of COBRA premium assistance: coverage under a health flexible spending account, coverage that consists solely of "excepted benefits", or coverage under a qualified small employer health reimbursement arrangement, or QSEHRA.

<sup>3</sup> The statute is not clear as to whether the maximum period of federal COBRA coverage could extend beyond 18 months, for example, if following an involuntary termination of employment there were a second qualifying event based on disability that extended the maximum COBRA coverage period to 29 months.

Where the COBRA premium assistance is to apply, the eligible individual is not required to pay the monthly COBRA premium, but the COBRA continuation coverage must continue to be provided (i) in a self-insured plan, by the employer or (ii) in a fully-insured plan, by the insurer. The person to whom premiums would have been payable (e.g., the employer or the insurer, as applicable) can recover the cost of the COBRA premiums through refundable payroll tax credits (as described below).<sup>4</sup> Under ARPA, COBRA premium assistance does not apply to elections made by an individual to continue coverage under a health flexible spending account. There is no income limit for the COBRA premium assistance. In addition, the COBRA premium assistance provided to a former employee under ARPA generally will be non-taxable to the former employee.

An individual who is eligible for premium assistance and is already on COBRA continuation coverage through April 1, 2021 generally will be able to continue such coverage, but will not need to pay the monthly COBRA premium beginning on April 1, 2021 and during the period in which premium assistance is in effect. On the other hand, an individual who is eligible for premium assistance, but who does not have an election of COBRA continuation coverage in effect on April 1, 2021 either because the individual initially declined to elect COBRA or initially elected COBRA but later discontinued the coverage, must be given a new 60-day COBRA election period<sup>5</sup> for coverage effective as of April 1, 2021. If permitted by the employer, the eligible individual may be allowed to elect a different lower cost coverage option (with certain exceptions<sup>6</sup>) under the employer's group health plan; provided that such election must be made no later than 90 days after the notice of such change in coverage option is provided to the individual.

#### *Notice Requirements*

ARPA requires that within 60 days after April 1, 2021, employers provide a notice to each eligible individual (including other qualified beneficiaries) who is entitled to elect COBRA continuation coverage during the period of the COBRA premium subsidy (April 1, 2021 to September 30, 2021) informing them of the availability of premium assistance and, if permitted by the employer, the option to enroll in different coverage. Specifically, the notice to the eligible individual must include (a) the forms necessary for establishing eligibility for premium assistance, (b) the name, address and telephone number necessary to contact the plan administrator (or another person) maintaining relevant information in connection with such premium assistance, (c) a description of the extended election period, (d) a description of the obligations of the individual to notify the employer of their eligibility for other group health coverage or Medicare, and of a \$250 penalty for failing to do so (or more if the failure is fraudulent), (e) a description of the right to a subsidized premium (including any conditions to receive such subsidized premium), and (f) a description of the option to enroll in different (less costly) coverage if the employer permits. The Department of Labor (in consultation with other agencies) is required under ARPA to provide model forms of such notice within 30 days following the passage of ARPA.

In addition, ARPA also requires that employers provide a notice between 15 and 45 days prior to the expiration of the premium assistance, informing the eligible individual of the upcoming expiration of the premium assistance, and that they may be eligible for coverage without any premium assistance under COBRA or another group health plan.

<sup>4</sup> Different rules apply to multiemployer plans, which are not discussed in this alert.

<sup>5</sup> The 60-day election period starts from the date that the new election notice is provided to the eligible individual. However, it is unclear whether the eligible individual who makes a new COBRA election has a choice to elect (or is required to elect) coverage retroactive either to the first day of the COBRA continuation period or to April 1, 2021 (the beginning of the premium assistance period). Although the COBRA premium assistance appears to extend to periods of state continuation coverage, it is also not clear under the statute whether the new 60-day election period applies in the situation where federal COBRA has expired and only state continuation coverage remains. There are also significant questions around whether or how this new COBRA election deadline could be delayed during the period of the federally declared national emergency due to COVID-19 (i.e., the "outbreak period" deadline extensions). If these COBRA election deadlines are extended (up to one year), it may be administratively difficult to retroactively provide the COBRA coverage, provide notices required by the statute in a timely manner, and timely claim the tax credit. It is hoped that formal guidance will be issued with regard to these questions.

<sup>6</sup> The types of plans described in footnote 2 above are not permitted to be offered as lower cost options to eligible individuals under ARPA, however.

This notice need not be provided if the individual ceases to be eligible for premium assistance as a result of becoming eligible for another group health plan or Medicare. The Department of Labor (in consultation with other agencies) is required under ARPA to provide model forms of this notice within 45 days following the passage of ARPA.

### *Tax Credits*

Self-insured employers (or, for fully insured plans, insurers) who, under ARPA, are required provide COBRA coverage to eligible individuals without the receipt of COBRA premiums are eligible to claim a refundable tax credit against certain payroll taxes imposed on the employer (e.g., generally the 1.45% Medicare tax).<sup>7</sup> As a result, the intent is that the refundable tax credits shift the cost of the COBRA premium assistance to the federal government. In certain situations, under rules determined by the Treasury Department, the tax credit may be advanced to the employer or the insurer. An employer may not claim a double benefit from tax credits for the same amount that is paid as COBRA premium assistance and as other qualifying wages eligible for tax credits (e.g., for the provision of Families First Coronavirus Relief Act leave on a voluntary basis).

### **Dependent Care Flexible Spending Account Increase**

ARPA increases the current contribution limit for Dependent Care Flexible Spending Accounts ("Dependent Care FSAs"), or for employer-paid qualified dependent care benefits eligible to be excluded from taxable income, from \$5,000 to \$10,500 (and from \$2,500 to \$5,250 for married individuals filing separately). The increase only applies with respect to taxable years beginning in 2021. The change is optional, and plan sponsors choosing to utilize the increase may amend their plans providing for dependent care assistance benefits retroactively to reflect that change, provided that the amendment is adopted no later than the last day of the plan year in which the amendment is effective (for example, for calendar year plans, December 31, 2021) and that the plan is operated in accordance with the provisions of the amendment during the applicable period prior to its adoption.

For employers who offer the opportunity to make pre-tax contributions to Dependent Care FSAs, in order to take advantage of this increase, plan participants would need to be able to make a new Dependent Care FSA election, which under most plans would be a mid-year election. Note that mid-year election changes are generally only permitted under a Section 125 cafeteria plan if a participant experiences a "change in status". However, recent legislative changes (described in a prior alert found [here](#)), allow such cafeteria plans to permit prospective, mid-year changes in election amounts for Dependent Care FSA benefits for plan years ending in 2021 without requiring a "change in status". A plan amendment would also be required to permit these special mid-year elections, but the deadline for this amendment is not until the end of the calendar year which starts after the plan year for which the change is effective. Therefore, a calendar year plan would have until the end of 2022 to adopt this amendment. From a practical standpoint, however, if the dependent care limit is to be increased under a cafeteria plan, it would make sense to approve both amendments simultaneously, prior to the end of 2021 for a calendar year plan.

It is important to note, however, that dependent care benefits continue to be subject to nondiscrimination testing requirements which, when applied, often require a reduction (to an amount below \$5,000) in available Dependent Care FSA election amounts for highly compensated employees when a \$5,000 maximum contribution toward those benefits is otherwise made available. We suggest that those nondiscrimination testing requirements and related administrative concerns be considered before a decision is made to increase the Dependent Care FSA limit, and that the impact of those tests be taken into account before implementation of any increased elections (particularly by highly compensated employees) if this change is made.

<sup>7</sup> The receipt of tax credits will generally increase the taxable income of the employer (or insurer) receiving the tax credit, although employers should consult their accountants to determine whether any offsetting deductions might be available as a result of the employer (or insurer) covering the COBRA premiums under ARPA.

This alert is for general informational purposes only and should not be construed as specific legal advice. If you would like more information about this alert, please contact one of the following attorneys or call your regular Patterson contact.

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