

The American Rescue Plan Act Requires Employers to Provide Tax-Free COBRA Subsidy

April 02, 2021

The American Rescue Plan Act (ARPA), signed into law on March 11, 2021, requires employers to pay 100% of the cost of continuing group health plan coverage under COBRA for certain qualified beneficiaries and their eligible dependents for up to six months, from April 1, 2021 through September 30, 2021 (the "Subsidy Period"). Employers will receive a payroll tax credit for providing the ARPA subsidy on their quarterly payroll tax filings. The ARPA subsidy applies to both insured and self-insured plans subject to COBRA, as well as self-funded and insured plans not subject to COBRA but subject to continuation coverage under state law. The ARPA subsidy does not apply to flexible spending accounts, and it is presently unclear whether it applies to dental or vision plans.

Assistance Eligible Individuals

The ARPA subsidy only applies to "assistance eligible individuals," defined as qualified beneficiaries and eligible dependents who: i) lost coverage under their employer's group health plan and are eligible for COBRA continuation coverage during the Subsidy Period due to a reduction in hours or involuntary termination (other than for gross misconduct); and ii) elected COBRA coverage. The ARPA subsidy specifically does *not* apply to employees who voluntarily terminated their employment or to individuals who are eligible for coverage under another employer's group health plan or under Medicare.

The ARPA also extended the COBRA election period, thereby enabling individuals who would not otherwise be eligible for the subsidy to become assistance eligible individuals. Under the ARPA employers must provide notice to individuals who did not elect COBRA when it initially became available to them, or who elected COBRA initially but let the coverage lapse, of the ARPA subsidy and allow those individuals to elect coverage during a special enrollment period that begins April 1, 2021 and ends 60 days after the employer provides notice of the extended COBRA election opportunity. Individuals who elect COBRA coverage during the extended election period will then become assistance eligible individuals and their COBRA coverage will be retroactive to April 1, 2021, at no cost to the assistance eligible individual.

Employers should note, however, that the extended election period does not extend the 18-month COBRA period. An assistance eligible individual who elects COBRA coverage during the extended election period will only be covered through the expiration of the COBRA coverage period that the individual would have had if they had elected COBRA when first eligible. Additionally, if an individual's COBRA coverage period begins after April 1, 2021 or ends before September 30, 2021, the ARPA subsidy for that individual will be shorter than six months.

Notice Requirements

Employers should take care to comply with ARPA's notice requirements. By May 31, 2021 employers (or plan administrators) must notify assistance eligible individuals who have become eligible for the ARPA subsidy of the subsidy's availability and, if permitted by the employer, the option to enroll in a different plan. Employers can include this notice in the COBRA election notice or in a separate written notice with the COBRA election packet.

Employers (or plan administrators) must also notify assistance eligible individuals who are eligible for the extended COBRA election period of the opportunity to elect COBRA continuation coverage by May 31, 2021. The 60-day extended election period begins when the assistance eligible individual receives notification.

All notices to assistance eligible individuals must include the following information:

- the forms necessary for establishing assistance eligibility;
- contact information of the plan administrator and any other person maintaining relevant information in connection with the subsidy;
- a description of the extended COBRA election period;
- a description of the qualified beneficiary's obligation to notify the plan of ineligibility and penalties for failure to do so;
- a description, displayed in a prominent manner, of the qualified beneficiary's right to a subsidized premium and any conditions on entitlement to the subsidized premium;
- a description of the assistance eligible individual's right to enroll in different coverage if the employer permits.

The ARPA directs the Department of Labor (DOL) to provide model notices to assistance eligible individuals by April 10, 2021. As of the date of this client alert, the DOL has not published the model notices.

The ARPA also requires employers to provide written subsidy expiration notification to assistance eligible individuals. The expiration notice must be provided no more than 45 days and no less than 15 days before the individual's subsidy expiration date. The DOL is expected to provide model language for this notification by April 25, 2021.

Conclusion

Employers should consult with counsel to determine their COBRA subsidy obligations under the ARPA, especially with respect to terminations resulting from the COVID-19 pandemic and severance plan documents.

* * *

Carter Ledyard & Milburn LLP uses Client Advisories to inform clients and other interested parties of noteworthy issues, decisions and legislation which may affect them or their businesses. A Client Advisory does not constitute legal advice or an opinion. This document was not intended or written to be used, and cannot be used, for the purpose of (i) avoiding penalties under the Internal Revenue Code or (ii) promoting, marketing or recommending to another party any transaction or matter addressed herein. © 2021 Carter Ledyard & Milburn LLP.

related professionals

Jeffrey S. Boxer / Partner

D 212-238-8626

boxer@clm.com

Judith A. Lockhart / Partner

D 212-238-8603

lockhart@clm.com