Updates
March 25, 2021
Employer Responsibilities Under the ARPA COBRA Subsidy

The American Rescue Plan Act of 2021 (ARPA) includes a number of provisions requiring immediate action by employers. One such provision provides for a 100% federal subsidy of COBRA premiums (including the up-to-2% administrative fees) during the period of April 1, 2021, through September 30, 2021. The subsidy applies to group health coverage typically subject to COBRA, except for health flexible spending accounts. This update summarizes the ARPA's COBRA subsidy provisions and flags key implementation considerations to assist employers and plans with planning as we await critical additional guidance from the U.S. Department of Labor (DOL) and Internal Revenue Service (IRS).

Identifying Assistance Eligible Individuals

The ARPA COBRA subsidy is available to "assistance eligible individuals" (AEIs), generally defined as employees who were involuntarily terminated, or who experienced a reduction in hours, as well as their covered dependents. We anticipate agency guidance will clarify the scope of qualified beneficiaries who qualify as AEIs, including the meaning of "involuntary" for terminated workers.

There are two ways an AEI may qualify for the six-month subsidy window:

(1) The AEI is entitled to COBRA at any time after April 1, 2021, and before September 30, 2021, and (a) they timely elected COBRA continuation coverage, **and** (b) they have been paying COBRA premiums per the plan's terms.

(2) The AEI was entitled to COBRA but (a) they failed to elect COBRA continuation coverage, **or** (b) they timely elected but dropped the coverage prior to April 1, 2021 (Group (2) AEIs).

Group (2) AEIs are entitled to a COBRA subsidy if they make an election within a new 60-day period required under the ARPA. We expect to see model language for this "Group (2) AEI special election period" from the DOL sometime in April.

Also, while the subsidy cannot apply for periods of coverage prior to April 1, 2021, Group (2) AEIs likely include individuals who have been enjoying "Outbreak Period" relief under joint agency guidance issued in 2020. A few weeks before the ARPA was enacted, the DOL's Employee Benefits Security Administration issued EBSA Disaster Relief Notice 2021-01, explaining how to apply the one-year statutory period under ERISA for purposes of that relief. Employers and plans had only just begun to strategize how to implement this new notice guidance before the ARPA was enacted. The federal agencies have been asked to provide additional guidance on how to identify Group (2) AEIs and ensure plan compliance with both sets of relief.

From the AEI's perspective, they should not receive invoices for COBRA premiums applicable to coverage to which their subsidy applies. If they do pay a COBRA premium when eligible for the subsidy, they should receive a refund within 60 days of the plan receiving their premium payment.

AEIs cannot receive the subsidy once they become eligible for other employer coverage or Medicare, or beyond their maximum COBRA coverage period. An AEI must notify their plan if they become eligible for other coverage, or be subject to statutory penalties.

Plan Notice Requirements

Under the ARPA, plans must modify their election notice packets to ensure individuals are informed about the new subsidies. Specifically, for any individual who first becomes eligible for COBRA during the six-month subsidy period (whether or not they are an AEI), the plan's COBRA election notice must include the following additional information:

- The procedure, including any necessary paperwork, for establishing eligibility for the COBRA subsidy.
- Contact information for the individual responsible for providing additional information about the premium subsidy.
- A description of the Group (2) AEI special election period described above.
- An explanation that a qualified beneficiary is obligated to notify the plan if they are disqualified from receiving the COBRA subsidy due to eligibility for other group health plan or Medicare coverage.
- A description of the penalty for failure to notify the plan of disqualification.
- An explanation of a qualified beneficiary's right to subsidized COBRA coverage, and any conditions on eligibility to the subsidy.

Also, if the employer chooses to permit this, the election notice should describe the option to enroll in a different, less expensive coverage option available under the plan.

The plan could do this either by amending its standard COBRA election notice for this six-month subsidy period, or by preparing a separate document or "insert" to be distributed along with its standard COBRA election packet. While plans can draft their own version, provided that it satisfies the content requirements, we expect to see model notice language from the DOL sometime in April.

As noted above, the ARPA also requires the plan to issue an election notice for the Group (2) AEI special election period described above. This notice must be provided by May 31, 2021, and we similarly expect to see model notice language from the DOL for this.

Finally, the plan must also notify AEIs in writing when their COBRA subsidized coverage is set to expire. This must be issued no more than 45 days and no fewer than 14 days before the COBRA subsidy expiration date.

Claiming a Credit or Refund

Much like the coverage provided in the CARES Act for paid family leave, the COBRA subsidy in ARPA is funded through tax credits and refunds. The entity responsible for covering COBRA premium costs upfront depends on the type of plan. Unless the federal agencies provide otherwise in subsequent guidance, the responsible entity for most employer plans will be the employer. Exceptions are for multiemployer plans (where the plan is responsible), and small plans exempt from federal COBRA (where the insurer is responsible with respect to state-mandated continuation coverage). There are outstanding questions as to how this should work in certain scenarios, such as where COBRA is handled by a third-party administrator or where the coverage is provided under a multiple-employer welfare arrangement or association health plan. The IRS has been directed to provide additional guidance on the credit and refund process, which may address some of these questions.

The responsible entity will be eligible to claim a credit against taxes otherwise imposed under Internal Revenue Code Section 3111(b) (commonly referred to as the Medicare tax, generally equal to 1.45% of an employee's wages). This credit is claimed on the responsible entity's quarterly payroll tax filing. If the COBRA premium costs that the responsible entity covered upfront exceeds its liability under Code Section 3111(b), it can request an additional refund. The IRS has not yet outlined how this refund will be processed, but additional guidance is expected on this point.

Potential Planning and Action Items

While we await clarifying guidance on these ARPA COBRA provisions, employers and plans can start planning now, for example:

- Contact vendor partners of the employer or plan that currently support on payroll, eligibility or enrollment, and/or COBRA administration to discuss how these partners can assist with ARPA compliance.
- Start identifying the population likely to be "AEIs." It may be possible to leverage payroll or COBRA vendor data reports for this. Generally, though, these would be individuals who experienced a qualifying event (QE) due to involuntary termination or reduction in hours in the past 18 months (which is the maximum COBRA coverage period required by law). For plans with group health coverage continuing through the last day of the month, this should include qualifying events at least as early as October 1, 2019.
- Begin to pull employment or payroll records needed to determine whether a termination was voluntary or involuntary. Flag cases that may be unclear, to revisit once additional clarifying agency guidance is available (e.g., voluntary layoffs, early retirements, severance agreements).
- Confirm how the plan will ensure that AEIs who receive subsidized coverage during the six-month window do not get dropped from coverage, except as permitted by the ARPA (e.g., upon eligibility for other employer coverage or Medicare, or expiration of maximum COBRA period). This may require coordination with a COBRA vendor and/or the insurance carrier or third-party administrator for the group health coverage.
- If the employer provides multiple coverage options under its plan, determine whether to permit AEIs to switch to a different, less expensive option than the one in which they were enrolled at their qualifying event.
- Review the plan's COBRA communications, particularly the election notice packet and any special communications being issued as part of federal or state relief during the pandemic. Begin coordinating with COBRA vendors and human resource personnel to ensure communications are updated and provided as needed.

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