EMPLOYEE BENEFITS

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American Rescue Plan Act Ushers In More Benefit Changes

March 12, 2021

On Thursday, March 11 President Biden signed the American Rescue Plan Act ("ARPA") into law. It includes significant employee benefits-related provisions, such as a temporary 100% federal government subsidy of COBRA continuation coverage, a temporary increase in the amount employees may contribute to a dependent care assistance program ("DCAP"), extensions of various tax credits, and pension relief.

COBRA Subsidy

The ARPA COBRA subsidy will be available for qualified beneficiaries beginning April 1, 2021 and ending on September 30, 2021. The subsidy will cover the entire COBRA premium for eligible individuals who have elected, or elect COBRA (which may also include a state program that provides comparable continuation coverage) during this period. The subsidy will be funded through a refundable payroll tax credit against the employer's quarterly Medicare payroll taxes. Key provisions of the ARPA's detailed COBRA provisions are summarized below.

Which employees qualify?

For the period beginning on April 1 and ending on September 30, 2021, an individual who experiences (or has experienced) a reduction in hours or involuntary termination of employment, is eligible for COBRA, and elects COBRA continuation coverage, is eligible for the subsidy. The premiums for a qualified beneficiary spouse and/or dependent are also eligible for the subsidy. The subsidy does not apply to healthcare flexible spending arrangements. Employees who voluntarily terminate their employment are not eligible for the subsidy.

How long does the subsidy last?

In general, the subsidy lasts until the earliest of: the date the individual becomes eligible for coverage under another group health plan, the date the individual becomes eligible for Medicare benefits, when the applicable COBRA coverage period ends, or September 30, 2021.

- Subsidy recipients are required to notify their group health plan if they become eligible for alternative coverage under another group health plan or Medicare and are subject to monetary penalties if they fail to provide that notification. Further guidance is expected from the Department of Labor.
- ARPA does not extend the general maximum period of COBRA coverage (18 months).

Is the COBRA election period extended?

Qualified beneficiaries who did not elect COBRA as of April 1, 2021, but are otherwise eligible for such coverage if such an election was in effect, and any individual who previously elected COBRA coverage but discontinued it before April 1, 2021, may elect COBRA coverage beginning April 1, 2021 and ending 60 days after the date the updated notice (described below) is provided to the individual.

What are the notice requirements?

Updated Notices

- Employers must amend their current COBRA election notices to include additional information regarding the availability of COBRA premium assistance and how to qualify for the assistance.

Beginning April 1 and ending September 30, 2021, plan administrators must also provide a specified notice to any qualified beneficiary who:

- Is eligible for the premium subsidy and has not elected COBRA coverage, or
- Previously elected COBRA coverage and discontinued it.

The notice must be provided on or before May 31, 2021. The DOL is expected to provide a model notice by May 1, 2021.

Notice of Expiration of Period of Premium Assistance

A plan administrator must send a notice to qualified beneficiaries who have received the COBRA subsidy that includes the date when the subsidy ends (and additional information). It must be sent no earlier than 45 days, and no later than 15 days, before the subsidy expiration date. The notice is not required if the qualified beneficiary becomes ineligible for the premium subsidy due to gaining coverage under another group health plan or Medicare.

Can Qualified Beneficiaries change their health plan election?

Employers are *permitted* (but not required) to offer qualified beneficiaries up to 90 days following the employee's receipt of the Updated Notice referenced above to enroll in another group health plan offered by the employer, rather than retain the coverage in which the individual was covered at the time of the qualifying event. This option, which will be considered COBRA coverage, is subject to the following requirements:

- It must be otherwise permitted by the plan (i.e., the plan permits a qualified beneficiary to enroll in coverage even though that individual was not enrolled in that particular coverage when the qualifying event occurred);
- The individual may not select coverage with a premium that exceeds that of the prior coverage;
- The different coverage must be offered to similarly situated active employees; and
- The different coverage cannot be excepted benefits-only coverage, a qualified small employer health reimbursement arrangement, or a health flexible spending arrangement.

COBRA Premium Subsidy and Extension of COBRA Deadlines

Recent guidance from the Department of Labor and Internal Revenue Service clarified the tolling of various COBRA deadlines. Our previous **Client Alert** explores that guidance in detail. There will be substantial interplay between the extension of COBRA deadlines and qualified beneficiaries' eligibility for premium subsidies. Administering a group health plan and communicating all applicable deadlines to employees will require employers to pay close attention to each terminated employee in order to comply with ARPA and the recent guidance.

Other Notable Employee Benefits Provisions

Dependent Care Assistance Program – For the 2021 tax year, ARPA allows a plan sponsor to amend its DCAP to increase the maximum excludable amount from an employee's gross income from $5,000 ($2,500 if married filing separately) to $10,500 ($5,250 married filing separately). This permissive

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amendment may be retroactively applied to January 1, 2021 if it is adopted by the last day of the 2021 plan year and the plan is operated consistent with the amendment before it is adopted.

Extension of FFCRA Paid Sick and Family Leave Tax Credits – The paid sick and family leave tax credits under the FFCRA have been extended through September 30, 2021 for those employers who continue to voluntarily provide paid leave under that law. Additionally, as of April 1, 2021 employers will be able to take credit for an additional 10 days of qualified paid sick leave. ARPA also expands the acceptable reasons for taking leave to include receiving and recovering from a COVID-19 vaccination. For more on paid sick and family leave, see our **Client Alert**.

Extension of Employee Retention Tax Credit – The Taxpayer Certainty and Disaster Tax Relief Act of 2020 previously extended the CARES Act employee retention tax credit until June 30, 2021. ARPA further extends that tax credit for wages paid before January 1, 2021. For more on the employee retention tax credit, see our **Client Alert**.

Single-Employer Pension Plan Relief – For the plan year beginning in 2022 (or 2019, 2020, or 2021 at the plan sponsor's election), all of the plan's shortfall amortization bases for plan years preceding the applicable plan year will be reduced to zero. Beginning in the applicable plan year, the new shortfall amortization base will be over a 15-year period, as opposed to the previous 7-year period.

Multiemployer Pension Plan Relief – ARPA creates a special financial assistance program for financially troubled multiemployer plans under the Pension Benefits Guaranty Corporation. Financially troubled multiemployer plans may apply for a single, lump-sum payment to prevent their plan from becoming insolvent. The application deadline for such assistance is December 31, 2025. The ARPA also contains several other stop-gap provisions to help multiemployer plans deal with the financial impacts of the pandemic.

Next Steps

- Employers should update their COBRA notices to reflect the new ARPA requirements and ensure their third-party administrators use the updated notices. The Department of Labor is expected to provide model provisions.
- Employers should contact their third-party administrators to confirm they are taking steps to account for the interplay between the COBRA deadline extensions and COBRA subsidies.
- Employers should decide whether to allow COBRA qualified beneficiaries to change plan enrollment options and, if so, ensure the plan documents and, for self-insured plans, the stop-loss carrier, permit such enrollment.
- Employers should consider amending their DCAPs to allow the increased contributions for 2021 and, if so, communicate that change to employees.
- Employers should consider whether they wish to voluntarily offer paid sick and family leave under the FFCRA in order to take advantage of the tax credit extensions.

If you have any questions or need assistance, please contact a member of the Kutak Rock **Employee Benefits Practice Group**.

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