Employers Should Brace Themselves for the ARPA's Burdensome Paid COBRA Mandate

Description

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On March 11, 2021, President Biden signed into law a $1.9 trillion stimulus bill, the American Rescue Plan Act of 2021 (ARPA). The reach of the ARPA extends far and wide, including to healthcare coverage available to employees and their families following separation of employment under certain circumstances—commonly referred to as "COBRA." The ARPA makes a sweeping change to COBRA, requiring employers to pay for eligible employees (and their family members) COBRA costs for up to six months while also providing employers a tax credit to recoup those costs.

Before diving into how COBRA will change as a result of the ARPA, it's worth revisiting the basics of COBRA and how it operates. COBRA stands for the "Consolidated Omnibus Budget Reconciliation Act," which became law in 1985, and it requires group health plans to provide a temporary continuation of group health coverage to covered employees, their spouses, former spouses, and dependent children when group health coverage would otherwise be lost due to certain specific events, such as the employee's separation from employment (other than for gross misconduct), the employee's reduction in the hours worked, or certain life events relating to the employee's family members (such as death, divorce, or loss of dependent child status). Generally speaking, COBRA applies to all group health plans maintained by private-sector employers with 20 or more employees. To be eligible for COBRA coverage, employees must have been enrolled in their employers' health plan when they were employed and the health plan must continue to be in effect for active employees and must not be eligible for health care coverage under another group health care plan or Medicare benefits. COBRA requires group health plans to provide covered employees with specific notices explaining their COBRA rights and individuals have at least 60 days to elect COBRA coverage. To pay for COBRA coverage, group health plans can (and usually do) require individuals to pay the full cost of COBRA premiums. Finally, other than as discussed below, the requirements of COBRA remain unchanged.

Regulations and guidance will issue as to the new Free COBRA requirements, which could have a substantial impact on the logistics; however, given the new rules will be in effect April 1st, employers cannot wait to take compliance steps.

1. Mandatory COBRA Premium Subsidy for Certain Individuals on COBRA or who Become Eligible for COBRA prior to September 30, 2021. From April 1, 2021 through September 30, 2021, employers *must* pay 100% of COBRA premiums (Free COBRA) for individuals on COBRA or who elect COBRA coverage due to an employee's involuntary termination or reduction of hours. Family members of the employee and the employee are ***not*** eligible for the Free COBRA if the employee quits or if they qualify for COBRA for other reasons (such as the employee's death). As is the case with COBRA, Free COBRA is not available to employees who were terminated for gross misconduct, individuals who are eligible for other group health coverage, or if they are eligible for Medicare. Importantly, the reason for termination or cut in hours ***does not have to be COVID related***. The ARPA does not extend the total COBRA period, so if the employee's COBRA normally would expire on May 1, 2021, the employee only gets one month of Free COBRA. Individuals already on COBRA do not need to re-elect or re-enroll to start receiving Free COBRA starting April 1, 2021.

2. Mandatory Free COBRA for Former Employees who Opt in during "Second Chance" Election. The ARPA also allows employees and their qualifying family members who would have been on COBRA following April 1st if the individual had opted COBRA or remained covered by COBRA a second enrollment period to elect coverage and receive Free COBRA if the COBRA eligibility was triggered by the employee's involuntary termination (other than gross misconduct) or reduction in hours. If COBRA coverage is elected pursuant to this "second chance" period, the applicable COBRA period will not be extended and will run from the original date that would have applied if the individual had initially elected COBRA, or from the original date COBRA coverage commenced in the case of those who discontinued COBRA coverage. Coverage must be elected 60 days after receipt of notice and coverage will begin April 1st. Eligible rules discussed in Section 1 apply to individuals who take advantage of the second chance election period, so that these individuals still can only continue COBRA for no longer than 18 months[1] from the date they initially lost coverage and are still not eligible if they currently have group health care coverage.

3. Employers to Receive Dollar-for-Dollar Tax Credit for Free COBRA. The ARPA does require employers to cover the cost of Free COBRA. However, the federal government will reimburse employers for the payments made for Free COBRA through a new dollar-for-dollar tax credit on quarterly payroll tax filings as applied against the employer's share of the Medicare hospital insurance tax. In the event that the employer's Medicare hospital insurance payroll tax is less than the tax credit amount, the employer may still claim a tax credit for the excess credit amount. The ARPA also contemplates employers being able to receive an advance of credit for estimated future costs, but the logistics of the same have not yet been released.

4. Notice Requirements. Employers must amend their COBRA notices to include notice concerning the availability of Free COBRA and the option to enroll in different coverage if the employer permits individuals to elect different coverage. Notice to former employees who are entitled to enroll in COBRA coverage through the second chance enrollment period must be provided notice by **May 30, 2021**. Thus, employers will have to review their records and identify employees (and family members on the employee's health care plan) who were involuntarily terminated or lost coverage due to a reduction in hours since November 1, 2021 in preparation of sending proper notice. For example, if an employee was terminated in November of 2019, that person is technically eligible for COBRA coverage through April 30, 2021 and thus should be receiving notice. Rules concerning notice to qualifying individuals on COBRA impacted by the APRA are forthcoming and the Department of Labor (DOL) is required to publish model notices by May 10, 2021. In addition, no more than 45 days and no less than 15 days before the Free COBRA expiration date, notice must be provided detailing when the Free COBRA will end (a model notice of the expiration notice will be released by April 25). So, for example, the expiration notice for someone whose Free COBRA ends on May 30th would have to be transmitted between May 16 through July 15. Under the ARPA, qualifying individuals who have already paid their COBRA premium(s) during a portion of the Free COBRA period will be entitled to a refund.

Finally, individuals themselves are responsible for notifying the health care plan when they become eligible for other group insurance, subject to a tax penalty.

Employers should monitor developments expected under future regulations and guidance concerning the ARPA as it relates to COBRA. The Employment & Labor Practice Group at Partridge Snow & Hahn is available to answer your questions about the ARPA.

[1] Employers should watch for the regulations to be sure the ARPA is not interpreted to include those eligible for COBRA under a longer COBRA period (29 months for a disabled employee or 36 months for a "second qualifying event").

Previously published Client Alerts regarding ARPA include:

• American Rescue Plan Expands Employee Retention Credits and Provides Relief for Restaurants March 2021

• New FFCRA Leave Starts April 1, 2021, March 2021

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