Published on *The National Law Review* https://natlawreview.com

COBRA Subsidies under ARPA Present Numerous Challenges for Employers

Article By:

Alex H. Glaser

Ricardo X. Carlo

John C. Blackman, IV

Timothy P. Brechtel

Shawn J. Daray

Richard Fisch

The American Rescue Plan Act of 2021 (ARPA), signed into law March 11, 2021, provides relief for individuals eligible for continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) as a result of involuntary termination from employment or reduction in hours. The relief comes in the form of a 100% COBRA premium subsidy for the six-month period beginning April 1, 2021, and ending September 30, 2021. Below is a summary of key highlights and issues to consider as employers and plan administrators scramble to comply with these new requirements.

What plans are subject to the ARPA requirements? These new requirements apply to group health plans subject to COBRA (both fully and self-insured) as well as health plans subject to similar continuation coverage requirements under applicable state laws (commonly known as "mini-COBRA" laws). Although not entirely clear, these requirements also appear to apply to dental and vision plans as well as health reimbursement arrangements (HRAs). However, they do not apply to health flexible spending arrangements (FSAs).

Who is eligible? Premium subsidy relief is only available to "assistance eligible individuals." An assistance-eligible individual (AEI) generally includes any individual (i.e., the covered employee and his or her dependents covered under the plan immediately prior to the event, but excluding domestic partners) who loses health coverage due to a reduction in hours or involuntary termination from employment (other than by reason of gross misconduct) and whose COBRA maximum period has not expired by April 1, 2021. This includes the following groups:

- Individuals who become eligible for COBRA during the COBRA subsidy period (defined below) (e.g., an employee who is involuntarily terminated on April 3, 2021)

- Individuals who previously elected COBRA but dropped coverage for any reason (including for failure to pay premiums) and whose eligibility for coverage would have extended through the COBRA subsidy period

- Individuals who previously did not elect COBRA but are eligible for coverage during the COBRA subsidy period (e.g., an employee terminated in January 2021)

How does an individual enroll in subsidized coverage? AEIs enroll in subsidized coverage through the normal COBRA enrollment process. For AEIs who were previously eligible for COBRA but did not enroll or who dropped coverage, a new 60-day special enrollment period must be provided, commencing on April 1, 2021, and ending 60 days after the notice of election (discussed below) is provided to the AEI. Although not entirely clear, this special enrollment requirement does not appear to apply to plans subject to state mini-COBRA laws.

Importantly, this special enrollment period does not extend or create a new maximum COBRA period. For example, if an AEI was originally eligible for a maximum of 18 months of COBRA coverage starting on February 1, 2020, COBRA coverage will only be available through August 31, 2021, and the AEI will only be eligible for five months of subsidized COBRA coverage (from April 1 to August 31).

Can AEIs be allowed to elect a different coverage option? Yes, if the employer allows. Under COBRA, continuation coverage is typically limited to the same coverage the individual is enrolled in at the time of the qualifying event. However, under ARPA, AEIs may be allowed to elect, within 90 days of notification of this right, to enroll in a coverage option different from the one they were enrolled in at the time of the qualifying event, provided that:

- The premium for such coverage is equal to or less than the premium for the coverage in which the AEI was enrolled at the time of the qualifying event.

- The alternative coverage does not qualify as “excepted benefits” coverage (e.g., standalone dental coverage).

- The alternative coverage is also offered to similarly situated active employees.

How long does the subsidy last? The ARPA subsidy is available from April 1, 2021, through September 30, 2021 (the COBRA subsidy period). For COBRA coverage outside this period, qualified beneficiaries will have to pay premiums according to the employer’s standard payment procedures. For AEIs who already paid their COBRA premiums for any period to which the subsidy applies, employers must refund those premiums within 60 days of the date the payment was made.

***Does the employer bear the cost of providing the subsidy*?** No. Generally, the employer will be able to claim a refundable payroll tax credit equal to the aggregate value of unpaid COBRA premiums against the employer’s Medicare hospital insurance tax liability (or similar tax under the Railroad Retirement Tax Act). Although unclear, it appears that the subsidy applies to the entire COBRA premium, including any administrative surcharge (generally 2%). ARPA includes a mechanism by which tax credits may be advanced, although the specifics of how that process will work are still unclear.

The entity entitled to claim the tax credit varies depending on the plan involved. For most group health plans, the entity claiming the credit is the employer. For small plans subject to state mini-COBRA laws, the entity entitled to the credit will generally be the insurer, and in the case of multiemployer (i.e., union) plans, it will be the plan. However, ARPA is silent as to who or how the credit is claimed in the context of multiple employer welfare arrangements (MEWAs) and third-party payers such as professional employer organizations.

When does the subsidy end? Subsidies end on the earliest of (1) September 30, 2021; (2) the date on which the AEI becomes eligible for coverage under another group health plan (other than coverage consisting solely of excepted benefits, a health FSA, or a qualified small-employer HRA) or Medicare ("disqualifying coverage"), regardless of whether the individual actually enrolls in such coverage; or (3) the end of the AEI's maximum COBRA period (typically 18 months). AEIs who become eligible for disqualifying coverage must inform the employer or face a penalty.

What are an employer's notice obligations? ARPA requires employers to provide the following three notices:

- A COBRA election notice to all individuals (not just to AEIs) who become entitled to COBRA during the COBRA subsidy period; which, among other things, must inform the individual of the availability of the COBRA subsidy and, if allowed by the plan, the right to switch to a lower-cost coverage option. Employers may satisfy this requirement by either modifying the plan's existing COBRA election notice or via a supplemental notice.

- A COBRA election notice to AEIs who became eligible for COBRA prior to April 1, 2021, as well as those who previously did not elect COBRA or who dropped COBRA who are eligible for the new 60-day special enrollment period. This notice must satisfy the same content requirements as described above and be provided by May 31, 2021.

- A notice informing AEIs of the date on which the COBRA premium subsidy will expire (if expiring before the end of the COBRA subsidy period), which must be provided within the 30-day period that begins 45 days before the subsidy expiration date. This notice requirement does not apply if the subsidy is expiring due to the AEI becoming eligible for disqualifying coverage or to AEIs covered under state mini-COBRA laws.

Under ARPA, the Department of Labor (DOL) is required to issue model notices by April 11, 2021, but as of publication of this alert, model notices have not yet been issued.

Next Steps

Employers and plan administrators need to act quickly in order to ensure timely compliance and avoid penalties. Specifically, they will need to:

- Monitor guidance from the DOL and IRS for further developments and clarifications, including model notices.

- Decide whether to adopt the alternative coverage election feature. It is unclear whether employers adopting this feature will need to amend their plans and update other relevant plan documents.

- Prepare and/or update existing COBRA notices to include the required information. Employers and plan administrators who use a COBRA third-party administrator (TPA) should coordinate with their TPA to determine who will be responsible for preparing and sending out the notices. Note that the COVID-19 time extension relief does not apply to these notices.

- Begin identifying individuals who qualify for the subsidy and send the required election notices to their last known address on record. Currently, there is no mandate to locate any missing AEIs who may have moved or relocated following their termination from employment.

- Employers will need to retool their payroll systems or coordinate with their third-party payroll providers to allow for the efficient recapture of the subsidy via the payroll credit.

- Coordinate with their insurance carrier to make sure they provide coverage for AEIs for whom no premium payments are being received.

- Refund any COBRA premiums paid by employees that were eligible for the 100% subsidy, within 60 days.

Finally, employers who subsidize COBRA coverage (e.g., as part of a severance package), should consider whether and how the subsidy may impact current and future arrangements.

If you have questions regarding the ARPA COBRA premium subsidy or would like assistance with implementing these requirements, please contact your Jones Walker relationship attorney or one of the employee benefit attorneys listed below.

Remember that legal principles may change and vary widely in their application to specific factual circumstances. You should consult with counsel about your individual plan, any plan amendments, and participant notices.

Katelyn P. Gunn, Hobie A. Hotard, Linda Bounds Keng, Rudolph R. Ramelli, Michael C. Seibert, Kelly C. Simoneaux, Hope M. Spencer*, and* B. Trevor Wilson *contributed to this article.*

National Law Review, Volume XI, Number 90