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EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

DOL ISSUES MODEL COBRA SUBSIDY NOTICE AND OTHER GUIDANCE

As discussed in our prior LEGALcurrents (available on our website [here](#)), the American Rescue Plan Act of 2021 (“Act”) includes a COBRA subsidy provision that took effect on April 1, 2021. On April 7, 2021, the United States Department of Labor (“DOL”) issued guidance on the COBRA subsidy provisions in the form of FAQs. The DOL indicated that the Department of the Treasury and Internal Revenue Service (“IRS”) concurred with the DOL FAQ guidance. The DOL FAQ guidance was primarily geared towards individuals and did not address many unanswered questions facing employers as they prepare to implement the Act. That said, we anticipate that the IRS will be issuing additional guidance soon that will hopefully provide some clarity.

In addition to the FAQ guidance, the DOL issued various “model notices” that can be used by employers to satisfy the various notice requirements set forth in the Act. These notices include the qualifying event notice (for qualifying events that take place from April 1, 2021 through September 30, 2021), the notice of an extended election period (for certain individuals who have not yet elected COBRA or who elected but then dropped COBRA), and the notice of the expiration of premium assistance. The model notices are available on the DOL website [here](#).

DOL FAQ Guidance

The noteworthy aspects of the DOL FAQ guidance are as follows:

- An individual can qualify for premium assistance if the individual experiences a qualifying event that is a reduction in hours—regardless of whether it is voluntary or involuntary—or an involuntary termination of employment. We anticipated this interpretation based on the text of the Act, but the DOL’s clarification that a voluntary reduction in hours could still qualify a person for a subsidy was helpful.
- The “Outbreak Period” guidance (see our prior LEGALcurrents published on [March 1, 2021](#) and [May 5, 2020](#)) that extends certain plan deadlines in light of the COVID-19 National Emergency does NOT apply to participant elections under the Act. Recall that otherwise assistance eligible individuals who had not elected COBRA or who had elected COBRA but dropped COBRA before April 1, 2021, will have an opportunity to enroll in the plan as of April 1, 2021 (provided their maximum COBRA period, measured from the date of the qualifying event, would otherwise have extended past April 1, 2021). Such individuals have 60 days (measured from the date they receive a notice of the enrollment opportunity) to enroll (or re-enroll) in the plan. This 60-day period is not extended by the Outbreak Period guidance. It also appears that if an individual experiences a qualifying event that is a reduction

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in hours or involuntary termination of employment during the April 1-September 30th period, the individual will have 60 days (measured from the receipt of the COBRA election notice) to elect subsidized COBRA coverage, and that this 60-day period is not extended by the Outbreak Period guidance. That is, while such an individual's date to elect COBRA would still be extended by the Outbreak Period guidance, the individual would have to elect COBRA within the 60-day period to qualify for the subsidy.

- In welcome news for employers, it appears that only individuals whose qualifying event was a reduction in hours or involuntary termination of employment and who either never elected COBRA or elected COBRA but then dropped it, will need to be notified of the special enrollment opportunity to enroll or re-enroll in the plan as of April 1, 2021 (provided that their normal maximum COBRA period, measured from the qualifying event date, would extend past April 1, 2021). As written, the Act technically allowed ANY individual who elected COBRA and then dropped COBRA before April 1, 2021, to re-enroll in COBRA as of April 1, 2021 (again, assuming their normal maximum COBRA period would have extended past April 1, 2021), even if the qualifying event was not a reduction in hours or involuntary termination of employment. This made little policy sense, since it would have required employers to notify and open up enrollment to a larger group of former COBRA qualified beneficiaries (e.g., divorced spouses and dependents who aged out of coverage). The DOL's narrow interpretation of the Act will help alleviate some of the burden on employers, since they will now only have to identify individuals whose qualifying event was a reduction in hours or involuntary termination of employment.

While the DOL guidance was a helpful start, there are still a number of unanswered questions that we expect guidance on. These include, at a minimum, the following:

- Whether individuals who had an extended maximum COBRA period (such as through the disability extension or a multiple qualifying event) could qualify for a subsidy if the qualifying event took place more than 18 months (the normal maximum COBRA period for a termination of employment or reduction in hours) before April 1, 2021.
- Whether an individual who had federal COBRA coverage followed by a period of "mini-COBRA" mandated by state insurance law could qualify for the subsidy during the "mini-COBRA" period.
- What precisely does an employer need to do to confirm that an individual is an assistance eligible individual that would qualify the individual for a subsidy? That is, must an employer receive a written attestation from the individual (as contemplated by the DOL's model notices), or could other methods be used (such as a presumption of eligibility for any individual whose right to COBRA resulted from a reduction of hours or involuntary termination unless the individual notifies the employer otherwise)?
- What constitutes an "involuntary" termination of employment?
- Will employers be able to take a full tax credit if the employer already obligated itself to subsidize COBRA coverage pursuant to a severance agreement?

Again, we expect guidance from the IRS on these and other issues and will provide updates as additional guidance is issued.

If you have any questions about COBRA or compliance with the COBRA subsidy or extended election period requirements, please contact any member of the [Employee Benefits and Executive Compensation](#) group at 585.232.6500, 716.853.1616, or visit www.hselaw.com.

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