

Harter Secrest & Emery LLP

ATTORNEYS AND COUNSELORS

EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

COBRA SUBSIDY PROVISIONS IN THE AMERICAN RESCUE PLAN ACT WILL REQUIRE EMPLOYER ACTION

The American Rescue Plan Act of 2021 (“Act”) signed by President Biden on March 11, 2021, contains a COBRA subsidy provision that will require employers to take action quickly.

Summary

The Act provides a 100% subsidy for the cost of COBRA coverage for up to six months for individuals who qualify for COBRA due to a reduction in hours or an involuntary termination of employment.¹ All group health plan coverage (e.g., medical, dental, vision, employee assistance program), except for health care flexible spending account coverage, is apparently subject to the subsidy. For employers who maintain group health plans, the subsidy will be delivered through the employer, with the employer paying COBRA premiums to the insurance carrier (or covering the cost of providing COBRA coverage under a self-insured plan) and then taking a payroll tax credit to recoup the cost of covering COBRA premiums or costs. The Act provides for an additional COBRA election opportunity for eligible individuals who either do not have a COBRA election in effect on April 1, 2021, or who had a COBRA election in effect previously, but discontinued COBRA before April 1, 2021. Employers are required to provide notices to eligible individuals, as described below. The Act also requires individuals who are enrolled in subsidized COBRA coverage to notify the plan administrator if the individual becomes eligible for coverage under another group health plan or Medicare, both of which would disqualify the individual from the subsidy as described below. Individuals who fail to provide notice are subject to a tax penalty.

Who is Eligible?

The Act defines an “assistance eligible individual” as any individual who is a COBRA qualified beneficiary who is eligible for COBRA due to a reduction in hours or an involuntary termination of employment and who elects COBRA coverage. By using the term “qualified beneficiary” in the definition, the Act applies the subsidy to not only the employee who lost coverage due to a reduction in hours or an involuntary termination, but also to any other qualified beneficiaries who were covered through the employee and lost coverage as a result of the employee’s reduction in hours or an involuntary termination of employment (e.g., spouse, children).² The definition (and thus the assistance) only applies for COBRA coverage during the period from April 1, 2021 through September 30, 2021.

¹ It appears that a reduction in hours (whether or not involuntary) would allow the person to qualify.

² Note that the definition does not include a domestic partner or child of a domestic partner, even if a group health plan provides COBRA-like coverage to domestic partners and their children.

Practice Group Leader
Paul W. Holloway

Health and Welfare
Thomas J. Hurley
John W. Brill

Counsel
Leslie E. DesMarteau
Lisa G. Pelta
Joseph E. Simpson

Associates
Amanda M. Karpovich

Benefits Litigation
Jessica N. Clemente
Erika N. D. Stanat

Retirement
Mark R. Wilson

Executive Compensation
Christopher M. Potash

An individual ceases to be an assistance eligible individual for months of coverage that begin on or after the earlier of:

- The first date the individual is eligible for coverage under Medicare or any other group health plan (other than coverage that is only “excepted benefits,” coverage under a health flexible spending account, or coverage under a qualified small employer health reimbursement arrangement)³, or
- The date following the expiration of the normal maximum COBRA period, which generally would be 18 months from the qualifying event.⁴ For an individual who didn’t originally elect COBRA or who originally elected but then discontinued COBRA coverage, this period is measured from what would have been the beginning of the COBRA coverage period if the individual had elected when originally eligible or had not discontinued COBRA (in other words measured by reference to a reduction in hours or an involuntary termination of employment that caused the loss of coverage).

Extended Election Period

The Act provides an additional opportunity to elect COBRA to individuals who do not have a COBRA election in effect on April 1, 2021 but who would be an assistance eligible individual if such an election was in effect, or who had a COBRA election in effect, but discontinued COBRA before April 1, 2021. The second category of individuals (those who discontinued COBRA), apparently doesn’t have to be assistance eligible in order to take advantage of this extended election period. Note that the Act does not address the recently updated Department of Labor (“DOL”) guidance regarding extensions of time periods for taking certain actions, including electing and paying for COBRA (see our LEGALcurrents on the “DOL Extension Guidance” [here](#)). By its terms, the DOL Extension Guidance would seem to apply to the elections required under the Act, but since individuals need to elect coverage quickly (see below) to secure COBRA premium assistance under the Act, it is unlikely that individuals will delay electing COBRA as permitted by the DOL Extension Guidance.

The Act provides that eligible individuals may elect COBRA during the period beginning on April 1, 2021 and ending 60 days after the date on which they are provided notice by the employer/plan administrator as required by the Act (see below). COBRA coverage elected pursuant to the Act begins with the first period of coverage that begins on or after April 1, 2021, and does not extend beyond the maximum period of COBRA

³ Note that under normal COBRA rules, COBRA coverage ends on the date a COBRA qualified beneficiary first becomes *enrolled* in another group health plan or Medicare after electing COBRA. Under the Act, the assistance eligible individual would be ineligible for the subsidy if he/she merely became *eligible* for another group health plan or Medicare.

⁴ The Act defines “COBRA continuation coverage” to include coverage under a State program that provides continuation coverage comparable to COBRA. It is unclear as to whether this would include continuation coverage under state insurance laws—such as New York’s “mini-COBRA” law—that require insurance carriers to make COBRA-like coverage available under their insurance products. In New York, for example, medical insurance carriers must make COBRA-like coverage available for up to 36 months, regardless of whether the employer is subject to COBRA and regardless of the qualifying event. Guidance on whether this sort of COBRA-like coverage would qualify under the Act would be welcome.

coverage that would have been required if the individual had elected COBRA at the time of the original event (or had not discontinued coverage that was elected at that time).

Notably, the starting date for COBRA coverage elected pursuant to the Act is April 1, 2021. This is different than what would be the starting date for COBRA coverage for an individual who had delayed making his or her COBRA election under the DOL Extension Guidance. Under the DOL Extension Guidance, a delayed COBRA election results in COBRA coverage that is effective retroactively to the date coverage was originally lost due to the qualifying event (with COBRA premium payments due for the entire retroactive period). Some individuals who have delayed making their COBRA election under the DOL Extension Guidance and who have not needed coverage since their qualifying event may find the Act relief preferable, since it does not require that coverage (and premium payments) be retroactive to the date of the qualifying event.

Option to Permit Coverage Change

The Act permits, but does not require, an employer to allow assistance eligible individuals who are enrolled in coverage under the employer plan to change to a different coverage option offered under the plan. The election to change coverage options must be made by the individual no later than 90 days after the date of notice of the right to change options is provided to the individual (see below). The premium for the new coverage option must not exceed the premium for the coverage in which the individual was enrolled at the time of the reduction in hours or involuntary termination of employment, and the new coverage option must be coverage that is offered to similarly situated active employees at the time the election to change is made, and cannot be coverage that provides only “excepted benefits,” a flexible spending account, or a qualified small employer health reimbursement arrangement. Given the complexity of administering the Act’s other requirements, we expect that most employers will choose not to offer this option. (Because the coverage would be free and because an assistance eligible individual would only be able to change to an option with a cost equal to or less than the person’s current option, it is unlikely that many individuals would even want to change options.)

Notice Requirements

The Act imposes notice requirements on employers/plan administrators and on individuals.

Additional Information for COBRA Election Notices. The Act requires that COBRA election notices provided to individuals who become eligible to elect COBRA coverage during the period between April 1, 2021 and September 30, 2021 include additional information regarding the subsidized coverage available under the Act. The additional information can be incorporated into the normal election notice or can be provided by including a separate document with the normal election notice. We suspect that most employers, particularly those who outsource COBRA administration to third parties, will use a separate document that is included with the normal election notice. The notice must be in writing and must communicate to the recipient in “clear and understandable language” the availability of premium assistance under the Act and, if the employer has chosen to offer the optional plan coverage option change described above, the notice must describe that option. The Act specifies that the notice must include all of the following:

- The forms necessary for establishing premium assistance under the Act
- The name, address, and telephone number necessary to contact the plan administrator and any other person maintaining relevant information in connection with premium assistance
- A description of the extended election period
- A description of the individual's obligation to provide notice if the individual becomes eligible for other group health coverage or Medicare, and of the penalty for failure to provide such notice (see below)
- A description "displayed in a prominent manner" of the individual's right to a subsidized premium and any conditions on entitlement to the subsidized premium
- If the employer has chosen to offer the optional plan coverage option change, a description of that option

The Act requires the DOL to issue a model notice within 30 days after enactment (i.e., by April 10, 2021).

Notice of Extended Election Period. For individuals who became entitled to elect COBRA before April 1, 2021, the plan administrator must provide notice to the individual no later than May 31, 2021 (60 days after April 1, 2021). The notice must satisfy the requirements described above. This notice must be sent to individuals who are assistance eligible individuals, individuals who would be assistance eligible if they had a COBRA election in effect on April 1, 2021, and individuals who had elected COBRA previously but discontinued COBRA before April 1, 2021 (whether or not assistance eligible).⁵ The Act requires the Department of Labor to issue a model notice within 30 days after enactment (i.e., by April 10, 2021).

Notice of Expiration of Premium Assistance. Between 45 days and 15 days before the premium assistance period ends for an individual (not including premium assistance that ends because the individual becomes eligible for other group health plan coverage or Medicare), the plan administrator must provide written notice to the individual in "clear and understandable" language that premium assistance for the individual will "expire soon" and include prominent identification of the date of such expiration and that the individual may be eligible for continued COBRA without premium assistance or coverage under a group health plan. The Act requires the DOL to issue a model notice within 45 days after enactment (i.e., by April 25, 2021).

Notice by Individual. As noted above, an individual ceases to be eligible for premium assistance for months of COBRA coverage that begin on or after the date the person is eligible for Medicare or coverage under any other group health plan (other than coverage that is only "excepted benefits," coverage under a health flexible spending account, or coverage under a qualified small employer health reimbursement arrangement). The Act requires that an assistance eligible individual notify the group health plan of such eligibility "in such time and manner as may be specified by the Secretary of Labor." The Act also adds a new provision to the Internal Revenue Code to impose a \$250 penalty on an individual who fails to provide such notice, except where the failure was due to reasonable cause and not willful neglect. The penalty may

⁵ It would appear that this notice would need to go out to ANY qualified beneficiary—including those who lost coverage as a result of a divorce or ceasing to be a dependent—who elected COBRA before April 1, 2021 and who dropped it before that date. Though the Act does not specify this, presumably the notice would not have to go to an individual whose maximum COBRA period ended before April 1, 2021.

be increased where the failure to provide notice was fraudulent. In that case, the penalty is the greater of \$250 or 110% of the premium assistance provided to the individual after the individual's eligibility ended due to the other coverage.

Tax Credit

Tax Credit to Employer. The Act provides a payroll tax credit to the "person to whom premiums are payable." For most employers who maintain group health plans, the Act treats the employer as the person to whom premiums are payable. In the case of multiemployer plans, the Act treats the multiemployer plan as this person. In any case where it is not the employer or a multiemployer plan, the Act treats the insurer as the person to whom premiums are payable. For most employers, this will mean that the employer will pay the COBRA premium payment to the insurer (in the case of insured plans) or cover the cost of COBRA benefits (in the case of a self-insured plan) and recoup the applicable COBRA premium by claiming a quarterly tax credit.

Employers who handle their own COBRA administration will need to develop appropriate notices required by the Act and be prepared to administer the subsidy. Employers who outsource their COBRA administration will need to work with their COBRA administrator to ensure compliance.

If you have any questions regarding the COBRA provisions in the Act, please contact any member of the [Employee Benefits and Executive Compensation](#) group at 585.232.6500 or 716.853.1616, or visit www.hselaw.com.

Attorney Advertising. Prior results do not guarantee a similar outcome. This publication is provided as a service to clients and friends of Harter Secrest & Emery LLP. It is intended for general information purposes only and should not be considered as legal advice. The contents are neither an exhaustive discussion nor do they purport to cover all developments in the area. The reader should consult with legal counsel to determine how applicable laws relate to specific situations. © 2021 Harter Secrest & Emery LLP

