

## BENEFITS BRIEF

### TWO CRITICAL ADDITIONS TO GROUP HEALTH PLAN SPONSORS' "TO-DO" LIST (Part 2 of 2)

April 2021

This is the second installment in our overview of the Department of Labor's COBRA group health plan continuation election and payment deadline extensions and the new temporary 100% COBRA subsidy and special COBRA enrollment election added in the American Rescue Plan Act of 2021. In Part 1, we discussed the COBRA deadline extensions; in this Part, we will discuss the new COBRA subsidy and special COBRA enrollment election.

#### **TO-DO LIST ADDITION #2 - Addressing the COBRA Subsidy and Special COBRA Enrollment Election**

##### **COBRA Subsidy**

###### ***In General***

Included in the American Rescue Plan Act of 2021 recently signed by the President is a fully-government paid subsidy of COBRA premiums ("premium assistance" in the statute's parlance) for up to six months for individuals who lose group health plan coverage due to a reduction in hours or an involuntary termination of employment. Beneficiaries of those employees who were covered by the group health plan at the time of the reduction of hours or involuntary termination of employment are also eligible for the subsidy.

###### ***Assistance Eligible Individuals***

The subsidy is available to "assistance eligible individuals," which is defined as employees who lose group health plan coverage due a reduction in hours or involuntary termination of employment other than for gross misconduct, for example, by reason of termination, job elimination, or layoff. These employees must also be enrolled in COBRA on April 1, 2021 or become eligible and elect COBRA on or after April 1, 2021.

Also considered "assistance eligible individuals" are employees who lost coverage due to a reduction in hours or involuntary termination of employment other than for gross misconduct, who became eligible for COBRA before April 1, 2021, and whose maximum COBRA coverage period would not have expired by April 1, 2021 (had COBRA been elected and continued), regardless of whether COBRA was declined previously or COBRA was previously elected and discontinued before April 1, 2021.

In either case, "assistance available individuals" also includes the qualified beneficiaries of the employee who were covered by the plan at the time of the reduction of hours or involuntary termination of employment.

No proof of hardship by assistance eligible individuals is required and the subsidy is available regardless of the individual's income level.

## ***Eligible Plans***

The subsidy applies to group health plans subject to the Employee Retirement Income Security Act of 1974 and the Public Health Service Act, which includes group health plans of for-profit and tax-exempt employers and governmental entities. The statute is silent but dental and vision plans are likely eligible plans (in addition to major medical plans). Specifically excluded are health care flexible spending accounts under a cafeteria plan.

Also eligible are plans of small employers that are exempt from COBRA under federal law but are covered by a State “mini-COBRA” statute.

## ***Optional Change in Coverage***

The employer can allow an assistance eligible individual to enroll in a group health plan with a lesser premium if:

- the option is offered to similarly situated individuals;
- the other coverage is not an “excepted benefit” (i.e., a stand-alone dental or vision plan); and
- the group health plan is not a qualified small employer health reimbursement arrangement or a flexible spending account under a cafeteria plan.

## ***Amount and Commencement***

The subsidy amount is 100% of the COBRA premium (including the 2% administrative fee) and is tax-free to the assistance eligible individual. Eligibility for the subsidy commences on the later of April 1, 2021 or the eligibility for COBRA coverage after April 1, 2021.

## ***Subsidy Duration***

An assistance eligible individual is entitled to the COBRA subsidy until the earliest of:

- September 30, 2021;
- The expiration of the maximum COBRA coverage period for the individual;
- The eligibility for coverage under another group health plan (including the plan of another employer or a spouse’s employer) that is not an “excepted benefit” (i.e., a stand-alone dental or vision plan), a health flexible spending account under a cafeteria plan, or a qualified small employer health reimbursement account; or
- The eligibility for coverage under Medicare, even if the individual does not enroll in Medicare.

## ***How Premiums are Reimbursed***

The type of plan dictates how the premiums subject to the subsidy are reimbursed. In the case of a self-funded or fully-insured plan subject to federal COBRA (i.e., plans not subject to a State mini-COBRA statute), the employer is entitled to a credit for the applicable premiums against the Medicare taxes it reports and pays on the quarterly Form 941. If the premiums exceed the amount of Medicare taxes due, there is a mechanism for refund of the

excess to the employer. Advances may also be permitted in accordance with Treasury guidance to be issued.

In the case of a fully-insured plan subject to a State mini-COBRA statute, the insurance company is entitled to a credit against its Medicare tax liability in the same manner as plan sponsors of plans subject to federal COBRA.

The statute is unclear how premiums are recovered in the case of a multiple employer welfare arrangement (or MEWA).

### ***Revised General Notice Requirement***

For the six month period beginning April 1, 2021 and ending September 30, 2021, the normal COBRA notice and election forms used for all qualified beneficiaries (not just assistance eligible individuals) must include an explanation of the right to the subsidy and if applicable the lower cost option allowed by the plan sponsor (described above). This Notice must also include:

- An explanation of the right to a subsidized premium, any conditions on entitlement, and if applicable, description of the lower-cost coverage options available;
- The forms necessary to establish eligibility for premium assistance;
- The name, address, and telephone number of the plan administrator and other persons maintaining the relevant information relating to premium assistance;
- A description of the extended election for persons who previously declined coverage or elected and later discontinued coverage; and
- An explanation of the obligation to notify the plan administrator of eligibility for other group health plan coverage.

These additional disclosures may be accomplished by an addendum to the standard COBRA forms utilized or a separate COBRA notice package.

In addition, assistance eligible individuals whose reduction in hours or involuntary termination occurred prior to April 1, 2021 and whose maximum COBRA coverage period would not have expired by April 1, 2021 must be notified by May 31, 2021.

The Department of Labor has just published a model General Notice for use by plan sponsors and plan administrators to satisfy these requirements. Existing COBRA penalties apply to failures to timely comply with the enhanced notice requirements.

### ***Notice of Early Termination***

Employers must also provide a notice to assistance eligible individuals to explain that the COBRA assistance will soon expire, including the actual date of termination and an explanation that the individual may be eligible for coverage without a subsidy through COBRA or under a group health plan. The Notice of Early Termination must be provided between 15 and 45 days before the termination of coverage, although notice is excused if the loss of coverage is due to eligibility for another group health plan.

The Department of Labor has just published a model Notice of Early Termination for use by plan sponsors and plan administrators to satisfy this requirement.

### ***Employee and Employer Duties***

An assistance eligible individual must notify the employer of his/her eligibility for a group health plan. The penalty for failure to notice is the greater of \$250 or 110% of the COBRA subsidy, with exceptions for reasonable cause and enhanced penalties in the case of fraud.

Employers or insurers which receive erroneous COBRA premium payments from assistance eligible individuals must refund the excess payment within 60 days of the payment.

### **Special COBRA Enrollment Election**

Assistance eligible individuals whose reduction in hours or involuntary termination occurred prior to April 1, 2021, who are not on COBRA at April 1, 2021, and whose maximum COBRA coverage did not expire by April 1, 2021 are provided a special enrollment election. Those individuals can elect coverage effective April 1, 2021 or on a prospective basis from the date of the election if the election is made within 60 days after the General Notice is provided. Coverage can last until the maximum COBRA coverage period (based on the initial qualifying event), although the subsidy will still terminate as described above.<sup>1</sup> Although not clear from the statute, this special enrollment likely only applies to plans subject to federal COBRA, not plans subject to State mini-COBRA requirements.

### ***Observations and Action Items***

The statute leaves many unanswered questions that hopefully will be answered by forthcoming further Department of Labor and Internal Revenue Service implementation guidance, including guidance on the meaning of “involuntary termination” and the verbiage for notices for plans not subject to federal COBRA. We expect most plan sponsors and service providers will use the Department of Labor model COBRA disclosures.

Plan sponsors and plan administrators will want to start discussions with its COBRA administrator (if applicable) and other service providers to plan out the actions needed, including tracking the affected individuals to assure that the premium amounts can be reimbursed. The reason for prior loss of COBRA coverage will also need to be compiled as most COBRA administration systems would not have originally captured that information. Based on the statute, information will be needed on former participants going back as far as losses of coverage since November 1, 2019 – as the maximum COBRA coverage period for these individuals would not have expired by April 1, 2021.

In addition, plan procedures that would otherwise “pend” claims for failure to pay premiums will need to be revised effective April 1, 2021 for assistance eligible individuals who have elected COBRA.

Plan sponsors and plan administrators should to be attuned to future guidance and may need to prepare themselves for a possible extension of the subsidy; a less-generous COBRA subsidy granted after the 2008 financial crisis was extended beyond its original 9-month duration.

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<sup>1</sup> This special enrollment election does not affect the COBRA initial election rights under the extended deadlines (described in Part 1) but the premium subsidy is only available between April 1, 2021 and September 30, 2021.

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