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## EMPLOYEE BENEFITS AND EXECUTIVE COMPENSATION

**IRS ISSUES SUPPLEMENTAL GUIDANCE ON AMERICAN RESCUE PLAN COBRA SUBSIDY**

On July 26, 2021, the IRS issued additional guidance on the COBRA subsidy provisions in the American Rescue Plan Act of 2021 (“ARP”). This additional guidance comes more than two months after the IRS published its initial guidance on the subsidy provisions, which left some questions unanswered (see our prior LEGALcurrents on ARP published [May 20, 2021](#), [April 8, 2021](#), and [March 11, 2021](#)). With only two months left in the ARP subsidy period, this new guidance raises some new questions. Below we discuss the highlights of the guidance:

**Eligibility for Subsidy during Extended Continuation Coverage Periods**

Under normal COBRA rules, the maximum continuation coverage period is 18 months when the qualifying event is termination or reduction in hours of employment. Normal COBRA rules extend that maximum period in several situations:

- when a qualified beneficiary is disabled for purposes of Social Security disability benefits during the first 60 days of COBRA
- when a second COBRA qualifying event occurs during the initial 18 months of COBRA coverage. These second events are: a dependent child ceasing to satisfy the plan’s eligibility requirements; divorce or legal separation of the employee/former employee and spouse; death of the employee/former employee; or the employee/former employee’s entitlement to Medicare.<sup>1</sup>

In addition, under some State “mini-COBRA” laws (for example, New York Insurance Law), coverage under an insured group health plan may be continued beyond the normal 18-month COBRA period.

The wording of the ARP law itself caused employers to question whether the subsidy would be available if an employee’s reduction in hours/involuntary termination of employment event occurred more than 18

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<sup>1</sup> Note that for such an event to constitute a second qualifying event (and thus extend the maximum COBRA period), the event would have had to have caused a loss of coverage had it been the first qualifying event. For example, if a spouse of an active employee would have not lost coverage under the terms of the plan in the event of a legal separation, then a legal separation could not be a second qualifying event. Similarly, if a spouse or dependent would not lose coverage upon an active employee’s entitlement to Medicare (for most group health plans, such a rule would violate the Medicare secondary payer rules), then a former employee’s entitlement to Medicare during the first 18 months of COBRA could not constitute a second qualifying event for the spouse and dependents.

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months before April 1, 2021 (meaning the normal 18-month COBRA period would have ended before April 1, 2021, when the subsidy became available), but the individual was eligible for extended COBRA coverage beyond April 1, 2021, due to disability, the occurrence of a second qualifying event, or a State mini-COBRA law.

The initial IRS ARP guidance expressly provided that the subsidy would be available (assuming other eligibility conditions were also satisfied) in such situations if the individual had “elected and remained on COBRA” for an extended period that falls between April 1, 2021 and September 30, 2021. For example, under the initial IRS ARP guidance, if an involuntarily terminated employee’s normal 18-month COBRA period ended February 1, 2021, but the employee had received a Social Security disability determination that qualified the employee to purchase extended COBRA coverage, and he or she had elected and maintained his or her COBRA coverage through April 1, 2021, the employee could qualify for the ARP subsidy effective April 1, 2021, even though the COBRA coverage at that point had extended beyond the normal 18-month COBRA period.

The implication of the initial guidance was that an individual whose normal 18-month COBRA period expired prior to April 1, 2021, and who, although eligible, had not elected and maintained extended COBRA coverage (or extended coverage under a State mini-COBRA law) would not be eligible for the subsidy. The new guidance definitively states that an individual “who is entitled to notify the plan or insurer” of his or her intent to elect extended COBRA coverage due to a disability determination, second qualifying event, or an extension under State mini-COBRA is eligible for the ARP subsidy (assuming he or she satisfies the other ARP eligibility requirements). The requirement that the individual be “entitled to notify the plan or insurer” of his or her election of extended continuation coverage is a reflection of the fact that the DOL/IRS “Outbreak Period” guidance (see our LEGALcurrents published [March 1, 2021](#) and [May 5, 2020](#)) is still in effect, extending the time period for individuals to provide certain notices and make certain elections. Under the Outbreak Period guidance, an individual who received a disability determination or experienced a second COBRA qualifying event as long as a year ago, but who hasn’t yet provided the employer/plan with the required notice of the determination or event, may still be eligible under the Outbreak Period guidance to provide the notice and elect the extended COBRA coverage.

The new guidance provides as an example of this rule an individual who was involuntarily terminated and elected COBRA coverage effective October 1, 2019. The normal 18-month COBRA period would end March 31, 2021 (before the ARP subsidy became effective). The individual received a disability determination from the Social Security Administration on March 1, 2020 (the first day of the DOL/IRS “Outbreak Period”), stating that the individual was disabled as of November 1, 2019. Because the individual was considered disabled during the first 60 days of COBRA coverage, he or she is entitled to purchase up to an additional 11 months of COBRA coverage (for a total of 29 months) provided that he or she timely provides the employer/plan with notice of the disability determination (and remains disabled). Under normal COBRA rules, the individual would be required to notify the employer/plan of the disability determination within 60 days after the date it was issued (i.e., by April 30, 2020). However, under the Outbreak Period guidance, the individual’s time period for providing notice would be extended to April 30, 2021. If the individual provided the employer/plan with notice of the disability determination by April 30, 2021 (and was still disabled), the individual would be entitled to extended COBRA coverage and would be eligible for the ARP

subsidy beginning April 1, 2021, provided that the individual was not eligible for Medicare or other disqualifying coverage.

Where extended continuation coverage is available only because of State mini-COBRA and not due to a second COBRA qualifying event or disability determination, the new guidance wouldn't create any new right to the ARP subsidy for an individual who had not "elected and remained" on continuation coverage, unless the applicable State mini-COBRA law provided for a special enrollment right. The initial IRS guidance expressly provided that the special ARP extended election right did not apply to plans where the only right to continuation coverage was through State mini-COBRA. For example, if State mini-COBRA provides that all qualifying events permit a qualified beneficiary the right to purchase 36 months of continuation coverage (as New York Insurance Law provides), an individual who was involuntarily terminated, never elected or elected and then dropped COBRA coverage and whose normal 18 months of COBRA coverage ended before April 1, 2021, would not be eligible to re-enroll in continuation coverage (and thus would not be eligible for the subsidy), unless the State mini-COBRA law provided a special enrollment right.

While this new guidance seems relatively simple, it raises a question regarding compliance with the ARP COBRA notice requirements. As noted in our [LEGALcurrents](#) on the initial IRS ARP guidance, many employers only notified individuals of the ARP extended election right to enroll (or re-enroll) in COBRA as of April 1, 2021, if the individual's original qualifying event occurred within the 18 months prior to April 1, 2021 (in other words, to individuals who were not enrolled in COBRA as of April 1, 2021, but whose initial 18-month COBRA period would still have been in effect as of April 1, 2021). The new guidance raises the question of whether an employer should have (or now should) provide notice of the ARP extended election right to anyone whose reduction in hours or involuntary termination of employment occurred within a longer period of time prior to April 1, 2021, and who under the Outbreak Period guidance might have had the ability to provide notice of a disability determination or second qualifying event as of April 1, 2021, or later. It would seem to be impractical (not to mention confusing to the recipient) to send such notices. It would be helpful for the DOL (which has jurisdiction over COBRA notice matters) to weigh in on the new issue the IRS has created.

### **Termination of ARP Subsidy for Dental and Vision Coverage**

In addition to being available for medical coverage, the ARP subsidy is available for dental and vision coverage. The new guidance clarifies that an individual's eligibility for the ARP subsidy for dental and/or vision coverage will terminate if the individual becomes eligible to enroll in Medicare or other disqualifying group health plan coverage even if that other coverage or Medicare does not provide coverage for dental and/or vision expenses.

### **Entity Eligible to Claim Premium Assistance Tax Credit**

ARP provides that the tax credit (by which an employer or other eligible entity recoups the subsidy funds from the IRS) is taken:

- in the case of a multiemployer plan, by the multiemployer plan;

- in the case of a plan other than a multiemployer plan, by the common law employer maintaining the plan; and
- in the case of a plan that isn't either of the above, by the insurance carrier providing the coverage.

For most employers that maintain group health plans, the employer will take the tax credit. The new guidance reaffirms that basic rule and provides the following additional clarifications:

- If a group health plan is subject to Federal COBRA and also subject to State mini-COBRA, it is the employer that takes the tax credit, even if a period of the continuation coverage that falls within the ARP subsidy period (April 1 - September 30, 2021) is State mini-COBRA coverage. For example, if State mini-COBRA provides for 36 months of continuation coverage in the case of a termination of employment, and the employer plan is also subject to Federal COBRA (which provides for 18 months), if the individual's first 18 months of continuation coverage ends before April 1, 2021, but the individual remains enrolled in continuation coverage pursuant to State mini-COBRA on and after April 1, 2021 (and continues to satisfy other ARP eligibility requirements), the employer that maintains the group health plan continues to take the tax credit. By contrast, if an employer group health plan was only subject to State mini-COBRA (e.g., an employer with fewer than 20 employees and not subject to Federal COBRA), the insurance carrier would take the tax credit.
- If several employers in a controlled group of corporations (e.g., parent-subsidary) participate in a single plan (e.g., the parent corporation maintains the group health plan and employees of the parent, plus employees of one or more subsidiaries participate in the plan), it is the common law employer of the employee or former employee who takes the tax credit. So, for example, if a former employee of the subsidiary qualifies for ARP subsidy for COBRA coverage elected under the group health plan (which is maintained by the parent corporation), it would be the subsidiary that would take the tax credit. Special rules described in the original IRS guidance apply in the case of professional employer organizations (PEOs) and similar entities.
- If a group health plan (other than a multiemployer plan) subject to Federal COBRA covers employees of two or more unrelated employers (a multiple employer welfare arrangement or "MEWA"), the employee or former employee's common law employer is entitled to take the tax credit.
- In the case of a business reorganization (e.g., a business sale or merger), if under normal COBRA rules the selling group remains obligated to make COBRA coverage available to individuals who are considered "M&A qualified beneficiaries" under COBRA rules, the entity in the selling group that maintains the group health plan is entitled to take the tax credit.

The new guidance also addresses the tax credit in situations involving continuation coverage maintained by State agencies, as well as insured plans not subject to COBRA that are offered by an employer through a Small Business Health Options Program (also known as "SHOP").

Almost four months into the ARP subsidy period and with only two months remaining, it is surprising that the IRS has issued additional guidance, particularly guidance that raises the puzzling questions discussed at the beginning of this LEGALcurrents. It would be helpful if the DOL could clarify what, if any, additional

notice obligation an employer may have with respect to the group of individuals identified by the IRS in this new guidance.

If you have any questions regarding this LEGALcurrents, 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](http://www.hselaw.com).

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