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Benefits BULLETIN

The American Rescue Plan Act: Key COBRA, FSA and Tax Provisions

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The American Rescue Plan Act of 2021 (ARPA) was signed into law by President Biden on **March 11, 2021.** ARPA is the latest COVID relief package intended to deliver a $1.9 trillion economic stimulus aimed at providing financial assistance to employers and individuals affected by the COVID-19 public health emergency. ARPA includes a number of provisions that relate to employee benefits, including some important health and tax provisions detailed below.

COBRA Premium Subsidy

One of the provisions in ARPA includes a 100% fully subsidized COBRA premium for certain individuals **beginning on April 1, 2021 and ending on September 30, 2021** (subsidy period). This law applies not only to employers subject to federal COBRA but also to employers who have less than 20 employees and are subject to state continuation laws comparable to federal COBRA:

- **Eligibility:** COBRA qualified beneficiaries who lose coverage before or during the subsidy period due to a qualifying event of **involuntary termination of employment or reduction of hours** are eligible for the subsidy. If an employee becomes a qualified beneficiary due to another COBRA qualifying event (e.g., divorce or legal separation, death of the covered employee, dependent child's ceasing to be a dependent or entitlement to Medicare), they would be ineligible for the subsidy. Notably, an employee who *voluntarily* terminates their job will also be ineligible for the subsidy.
- **Extended Election Period:** ARPA also extends another opportunity to elect COBRA for certain individuals who would be eligible for a subsidy *if they had elected COBRA*. This includes individuals who do not have COBRA coverage in

effect as of April 1, 2021 because they never elected COBRA or individuals who elected COBRA but discontinued COBRA before April 1, 2021 (for another reason besides exhausting their maximum coverage period). These individuals may elect COBRA 60 days after they are provided required notification of the extended election period. COBRA coverage elected during the extended election period will begin on April 1, 2021 and may not extend beyond the individual's original maximum coverage period. For example, an employee who was involuntarily terminated on September 1, 2020 and never elected COBRA could now elect COBRA from April 1, 2021 to February 28, 2022 (the end of the original maximum coverage period).

- **Subsidy Amount:** Qualified beneficiaries will be able to elect COBRA, for the subsidy period, at no cost. Typically, an employer requires an electing employee to pay up to 102% of the cost of the coverage in order to continue coverage under COBRA (i.e., the total premium plus a 2% administrative fee). The IRS has confirmed that the 100% subsidy includes the 2% fee that group health plans can charge to offset the cost of administering COBRA.

- **Duration:** The subsidy is available for any period of coverage during the period beginning on April 1, 2021, and ending on September 30, 2021. If, however, a qualified beneficiary becomes **eligible** (they do not have to be enrolled) for coverage under another group health plan or Medicare, or has exhausted their maximum COBRA period within the subsidy period, the assistance will end. Importantly, the qualified beneficiary is required to notify the group health plan if they cease to be eligible for the subsidy.

- **Funding:** Initially, the premium amount is advanced by one of these three entities: (1) the insurer of a fully insured group health plan, (2) the plan sponsor of a self-funded group health plan, or (3) a multiemployer plan. These entities will then be eligible for a refundable tax credit (against their Medicare hospital insurance taxes). Employers with fully insured and self-insured plans will apply for the tax credit and be able to claim the tax credit. For a multiemployer plan, the plan would claim the tax credit.

- **Changing Plan Option**: Group health plan sponsors may, **but are not required to**, allow qualified beneficiaries to elect to enroll in a different coverage option other than the coverage the qualified beneficiary is currently enrolled in, subject to some limitations. Enrollment in the different coverage may only be permitted for the following reasons: (1) the premium does not exceed the premium for the coverage in which the individual was enrolled at the time of the qualifying event;

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(2) the different coverage is also offered to similarly situated active employees at the time of election; and (3) the different coverage is not coverage that provides only excepted benefits, or is a qualified small employer health reimbursement arrangement (QSEHRA) or health flexible spending arrangement (FSA).

- **Notices:** Employers must timely notify individuals who become entitled to elect COBRA during the subsidy period of the subsidy's availability and the option to enroll in different coverage (if permitted by the plan) by May 30, 2021. In addition, employers must notify individuals of their subsidy's expiration between 45 and 15 days before the expiration date. ARPA has directed the DOL to issue model notices for the initial subsidy notification and the model expiration notice.

Dependent Care FSAs

ARPA increased the dependent care FSA limit for calendar year 2021. Employees can now contribute $10,500, which is an increase from a $5,000 limit (the limit has also increased from $2,500 to $5,250 for married taxpayers who file separately). Employers who choose to adopt this new limit can amend their Section 125 plan retroactively so long as the amendment is adopted by the last day of the plan year in which the amendment is effective. For example, an amendment made to a calendar year plan has to be adopted by December 31, 2021.

ACA Premium Tax Credit

The ACA provides premium tax credits for individuals who purchase health insurance through an Exchange and whose household incomes are between 100% and 400% of the federal poverty line (FPL). ARPA has increased the eligibility for individuals who are eligible for the ACA premium tax credit by eliminating the upper income limit for eligibility in the 2021 and 2022 tax years. ARPA also increases the amount of the premium tax credit by decreasing, in all income bands, the percentage of household income that individuals must contribute for Exchange coverage. Individuals with income above 400% of the FPL will have their premiums capped at 8.5% of their income.

FFCRA Tax Credit Extension

ARPA extends the FFCRA tax credit provisions through September 30, 2021 but allows employers to continue to voluntarily determine whether they want to extend FFCRA paid leave to their employees. Should an employer determine that they want to continue to offer paid leave to their employees, there are other applicable modifications to the FFCRA as a result of ARPA that will become effective on April 1, 2021.

The modifications include an expansion of the covered reasons for emergency paid sick leave and emergency FMLA. They are being expanded to employees who are (i) obtaining an immunization related to COVID-19 or recovering from any injury, disability, illness or condition related to such immunization; or (ii) seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID-19, when such employee has been exposed to COVID-19 or the employer has requested such test or diagnosis. Importantly, the original emergency FMLA provisions of the FFCRA were limited in regard to the covered reasons it could be utilized by employees (school closing/loss of child care). In ARPA, those reasons have been expanded to include all the reasons utilized for emergency paid sick leave, including the two new reasons noted above. It also removes the two-week waiting period on emergency FMLA leave and raises the aggregate cap on emergency FMLA leave from $10,000 to $12,000. Further, employees who previously took 10 days of emergency paid sick leave under the FFCRA will now be permitted to obtain another 10 days of paid leave.

ARPA also includes new non-discrimination rules for employers that opt to voluntarily provide FFCRA leave and obtain the tax credits. Specifically, ARPA disallows the tax credits for any employer who discriminates with respect to leave: (1) in favor of highly compensated employees; (2) in favor of full-time employees; or (3) on the basis of employment tenure.

Employee Retention Credit

ARPA encourages businesses to retain their employees despite the challenges posed by COVID-19 by extending the Employee Retention Tax Credit, previously set to expire in June 2021, until December 31, 2021. Eligible employers who experience a full or partial shutdown due to COVID-19 or a qualifying decline in their receipts in 2021 may qualify for the Employee Retention Tax Credit. The credit is also expanded to include certain start-up businesses (with a credit capped at $50,000 per quarter) even if they do not experience an eligible decline in gross receipts, or a full or partial suspension.

Though ARPA is now law, federal agencies will be tasked with issuing more detailed guidance to address practical elements of the ARPA's various provisions. Employers should anticipate the release of this information over the coming weeks.

ADDITIONAL RESOURCE

American Rescue Plan Act of 2021 (H.R. 1319)