



The American Rescue Plan Act of 2021 Brings Big Changes to COBRA (and a Temporary One to DCFSAAs)

The following general summary is intended to educate employers and plan sponsors on the potential effects of recent government guidance on employee benefit plans. This summary is not and should not be construed as legal or tax advice. The implications of this legislation are complex and very fact specific. As always, we strongly encourage employers and plan sponsors to consult competent legal or benefits counsel for all guidance on how the actions apply in their specific circumstances.

Overview

On March 11, 2021, President Biden signed into law the American Rescue Plan Act of 2021 (the “Act”). This \$1.9 trillion bill is designed to provide additional relief with respect to the ongoing COVID-19 pandemic and includes several important changes to COBRA coverage as well as a temporary – but noteworthy – change to Dependent Care Flexible Spending Accounts (DCFSAAs).

COBRA

In General

The Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) amends sections of the Employee Retirement Income Security Act of 1974 (ERISA), the Internal Revenue Code of 1986 (the “Code”) and the Public Health Service Act (PHSA). COBRA requires group health plans to offer certain individuals, who would otherwise lose group health plan coverage as a result of a specific qualifying event (such as termination of employment or certain changes in family status), the opportunity to continue their group health plan coverage for a specified period of time at applicable group rates (generally 102 percent of the cost to the plan).

How the Act Impacts COBRA

The Act provides for a federal subsidy of 100 percent of the COBRA continuation coverage premiums (the “Subsidy”) for qualified beneficiaries whose COBRA qualifying event was the covered employee’s involuntary termination of employment¹ or reduction of hours between April 1, 2021 and September 30, 2021. These individuals are referred to as “Assistance Eligible Individuals” (“AEIs”).

IMPORTANT: The Act’s definition of an Assistance Eligible Individual, in part, is a qualified beneficiary who has experienced a termination of employment (excepting a voluntary termination of employment or a termination of employment due to gross misconduct) or a reduction of hours. Employers should begin to review their records to identify the facts and circumstances of those terminated employees in line with this distinction to help ensure commensurate application of subsidy

¹ Other than by reason of such employee's gross misconduct

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eligibility. Although model notices will be forthcoming (as described below), it is important to identify these individuals as soon as possible so the necessary actions can be taken when ready.

The definition of a qualified beneficiary includes the covered employee, the covered employee's federally recognized spouse, and the covered employee's dependent child(ren) (as defined by the terms of the group health plan). Qualified beneficiaries have separate election rights under COBRA. Therefore, even if the covered employee does not elect COBRA, a covered spouse or covered child of the involuntarily terminated covered employee will qualify as an AEI.

The Subsidy applies to all COBRA-eligible group health plans sponsored by an employer (e.g., medical, dental, and vision) except for healthcare flexible spending accounts under a cafeteria plan.

The Act also allows – but does not require – employers to offer AEIs the option to change their health insurance coverage to another coverage option offered by the employer provided the associated premium does not exceed the premium for that AEI's existing coverage and also offered to similarly situated active employees.

Looking to the Past to Predict the Future

What's an involuntary termination of employment? What amount is used to determine the 100 percent share that must be paid by the AEI (e.g., what if they're already receiving an employer-provided subsidy)? While there are several ambiguities and opportunities for clarification with respect to the Act, perhaps we can consider past guidance to give us a better understanding.

The provisions of the Act contain a number of procedural similarities to the COBRA changes introduced by the American Recovery and Reinvestment Act of 2009 ("ARRA"), including ARRA's provision of a federal subsidy for qualified beneficiaries receiving COBRA due to an "involuntary termination of employment." Looking back, the IRS published 59 questions and answers² to help clarify the finer points of ARRA, including the definition of involuntary termination.

IRS Notice 2009-27 states that an involuntary termination of employment "means a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee's implicit or explicit request, where the employee was willing and able to continue performing services."

The notice also specifies:

[T]he determination of whether a termination is involuntary is based on all the facts and circumstances. For example, if a termination is designated as voluntary or as a resignation, but the facts and circumstances indicate that, absent such voluntary termination, the employer would have terminated the employee's services, and that the employee had knowledge that the employee would be terminated, the termination is involuntary.

² <https://www.irs.gov/pub/irs-drop/n-09-27.pdf>

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The Act does not define “involuntary termination,” so barring any forthcoming guidance to the contrary, the commentary proffered in Notice 2009-27 may be a reasonable indicator of the circumstances that would give rise to a qualified beneficiary’s treatment as an AEI.

The ARRA guidance appears to take a narrower view of what is an “involuntary” termination or reduction in hours. More recent relief during the pandemic suggests that “involuntary” could be interpreted more broadly. For example, pandemic unemployment assistance (which is generally available when an employee’s termination of employment is involuntary) has been defined to include a separation as a result of the primary child caregiver having to terminate employment because of the closure of their child’s school due to COVID-19 or for someone who is providing care for a member of that individual’s household who has been diagnosed with COVID-19.³ Given these two widely different interpretations on what is an “involuntary” termination, further guidance on the potentially expanded or redefined circumstances for involuntary termination will be welcome.

Subsidy Eligibility

Qualified beneficiaries that experienced an involuntary termination of employment or reduction of hours and subsequently elected COBRA continuation coverage are eligible to receive the Subsidy on a go-forward basis for periods of COBRA coverage beginning April 1, 2021 and ending September 30, 2021 (the “Subsidy Period”).

Special Second Election Period

The Act also provides a second 60-day election period to certain qualified beneficiaries that experienced an involuntary termination of employment or reduction of hours prior to the start of the Subsidy Period but **did not** elect COBRA during their initial 60-day election period, as well as those who elected coverage but then subsequently **lost** that coverage prior to the start of the Subsidy Period (e.g., due to non-payment of premiums).

If these AEIs elect COBRA continuation coverage during the second 60-day period, their Subsidy will begin as of April 1, 2021. If these AEIs elect COBRA continuation coverage through this second election period, their COBRA coverage will begin as of April 1, 2021. However, the maximum COBRA eligibility period is measured from the original qualifying event date (i.e., the date of the involuntary termination of employment or reduction of hours).

Example

Amanda is involuntarily terminated on July 15, 2020 and loses her active employee coverage as of July 31, 2020. She was mailed a COBRA election notice but does not elect. Within 60 days of April 1, 2021, Amanda must be notified of the availability of the Subsidy and offered a new opportunity to elect COBRA effective April 1, 2021. Amanda makes this election on May 15, 2021. Since her plan offers coverage month-to-month, her COBRA coverage will begin on April 1, 2021. However, her maximum COBRA eligibility period will still begin on August 1, 2020 (the day after her last date of active employee coverage) and run through January 31, 2022.

IMPORTANT: Under the guidance provided by the Department of Labor (DOL) Employee Benefits Security Administration (EBSA) Disaster Relief Notice 2020-01 and the Notice of Extension of Certain Timeframes for Employee Benefit Plans,

³ https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20_Change_3_acc.pdf

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Participants, and Beneficiaries Affected by the COVID-19 Outbreak (“Joint Notices”), many qualified beneficiaries who have **not yet** elected COBRA coverage also will have the option to elect COBRA *without* the subsidy back to their original qualifying event date - and then *with* the subsidy beginning April 1, 2021.⁴

Example – Suspension of Original Election Period AND Special Second Election Period

Brian is involuntarily terminated and loses his active employee coverage on June 30, 2020. He is mailed a COBRA election notice but has yet to elect. Ordinarily, he would have had 60 days from July 1, 2020 to elect COBRA (or August 30, 2020). Due to the relief described in the Joint Notices, Brian’s one-year maximum tolling period would end June 30, 2021; he would have 60 days to elect COBRA coverage from that date (with his COBRA period going back to July 1, 2020, when he lost coverage). Under the Act, within 60 days of April 1, 2021, Brian must also be notified of the availability of the Subsidy and offered another new opportunity to elect COBRA coverage effective April 1, 2021. Because of the tolling period, Brian now has the option to (a) elect COBRA *without* the Subsidy retroactive to July 1, 2020 with his Subsidy beginning April 1, 2021; **or** (b) choose only to elect COBRA continuation coverage under the second election period from April 1, 2021 going forward until the end of his otherwise applicable COBRA period counted from July 1, 2020 (in this case, both his COBRA coverage and his Subsidy begin effective April 1, 2021).

The extension of deadlines offered by the Joint Notices adds additional complexity regarding how it may interact with the COBRA Subsidy. Guidance on the potential interaction between the Act’s COBRA provisions and the relief described in the Joint Notices will be welcome.

Duration of the Subsidy

As stated above, the Subsidy Period begins April 1, 2021 and ends September 30, 2021. However, if an AEI becomes *eligible* for other group health coverage or Medicare or reaches the end of her/his maximum COBRA coverage period, her/his entitlement to the Subsidy ends. Any AEI who becomes eligible for other group health coverage⁵ or Medicare must provide timely written notice that (s)he no longer qualifies for the Subsidy.

A Subsidy recipient’s failure to provide timely notice to the plan of loss of eligibility for the Subsidy is subject to a penalty of \$250 for each failure.⁶

How the Subsidy Works

As noted above, the federally-provided Subsidy is 100 percent of the amount owed by the AEI (this includes the generally applicable 2 percent administrative fee, meaning an AEI effectively would owe no premium payment for the duration of eligibility for the Subsidy). Instead, for any plan (insured or self-funded) that offers COBRA pursuant to ERISA, the PHSAs, or the Code, it would be the employer that will pay 100 percent of an AEI’s COBRA premium during the AEI’s Subsidy Period. For multiemployer plans, the plan will pay the COBRA premium, and for fully

⁴ The full Compliance Alert addressing EBSA Disaster Relief Notice 2021-01 is available [here](#).

⁵ Not including excepted benefits such as standalone dental or vision plans, employee assistance programs, health FSAs, Health Reimbursement Arrangements (HRAs), Qualified Small Employer HRAs)

⁶ The penalty can increase to 110 percent of the amount of the subsidy received after the loss of eligibility if the failure to provide notification is due to fraud. However, an exception – in which a penalty may not apply – is available for failures due to reasonable cause and not to willful neglect.

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insured arrangements not subject to ERISA, the PHSAs, or the Code (e.g., plans subject to state COBRA laws), the insurer will pay the COBRA premium. These groups will be subsequently reimbursed through payroll tax credits (or, for amounts exceeding payroll taxes, as a refund of an overpayment).

Electing Other Coverage

The Act allows – but does not require – employers to offer AEIs the option to change their group health insurance coverage when making a COBRA election under the employer’s plan. This new coverage option must have the same or lower premiums and must be available to similarly situated non-COBRA employees under the plan. If the employer chooses to offer this option to AEIs, the AEI must elect to change her/his coverage within 90 days of receipt of the COBRA election notice.

IMPORTANT: This provision is optional, and an employer is not required to make this option available to comply with the Act.

New Notice Requirements

The Act requires the modification of COBRA election notices – or to provide supplemental notices – to all individuals who become entitled to elect COBRA continuation coverage during the Subsidy Period. These notices must include the following:

- The forms to establish eligibility for the Subsidy;
- The name, address, and phone number to contact the plan administrator (or the COBRA administrator) and any other person who can provide assistance and further information;
- A description of the qualified beneficiary’s obligation to notify the plan if (s)he becomes eligible for coverage under another group health plan or Medicare, and a description of the penalty for failure to notify the plan;
- A description of the qualified beneficiary’s right to the Subsidy and any conditions on entitlement to the reduced premium; and
- A description of the election of a different coverage option described above (if the employer chooses to offer this option to AEIs).

Qualified beneficiaries that experienced an involuntary termination of employment or reduction of hours prior to the start of the Subsidy Period but **did not** elect COBRA during their initial 60-day election period, as well as those who elected coverage but then subsequently **lost** that coverage prior to the start of the Subsidy Period (e.g., due to non-payment of premiums) must be issued a revised election notice including the information outlined above within 60 days of April 1, 2021 (that is, May 31, 2021).

The Act requires the DOL (in coordination with the Treasury and the Department of Health and Human Services; collectively, the “Agencies”) to provide model notices no later than 30 days after March 11, 2021. Because employers have a 60-day period in which to provide these special second election notices, some employers may choose to wait until these model notices have been issued before revising and reissuing applicable notices.

Subsidy Expiration Notices

No more than 45 days and no less than 15 days prior to the expiration of the Subsidy Period, AEIs receiving the COBRA subsidy must be furnished a notice advising of the expiration of the Subsidy

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Period, the date on which the Subsidy is to expire, and a statement that the individual may be eligible for coverage without premium assistance through either COBRA continuation coverage or under a group health plan. This notice is not required for instances in which the loss of the Subsidy is due to the AEI becoming eligible for other group health plan coverage or the maximum COBRA eligibility period ends prior to September 30, 2021.

The Agencies are directed to create a model expiration notice no later than 45 days after March 11, 2021.

DCFSA

In General

A DCFSA (or a “dependent care assistance program,” as referenced in Internal Revenue Code § 129(d)(1)) is a tax-advantaged account that helps employees use pre-tax dollars to pay for eligible expenses related to the care of a qualifying dependent. Generally, the maximum amount a taxpayer is permitted to exclude from gross income per year is \$5,000 (or \$2,500 if married and filing separately).

Temporary Increase of Maximum Exclusion Amount

For taxable years beginning in 2021, the maximum amount of DCFSA benefits permitted for income exclusion is temporarily increased to \$10,500 (or \$5,250 for married taxpayers filing separately). Plans can be amended retroactively to incorporate this change provided the amendment is adopted no later than the end of the plan year in which the amendment is to be effective and the plan is operated consistently with the terms of the amendment as of the date the amendment is effective.

Conclusion

While the Act is now law – and with many similarities to the previous subsidy provisions introduced in ARRA – there is still important clarifying guidance in the offing. HealthEquity will continue to stay abreast of this topic and – as additional guidance is available – we will advise accordingly.