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## Did You Know? The American Rescue Plan Act Includes a Mandatory COBRA Subsidy Provision that Imposes New Obligations on Employers

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by George J. Kasper and Zachary T. Zeid

The recently enacted American Rescue Plan Act (“ARPA”) includes several provisions intended to assist individuals impacted by the COVID-19 pandemic. Among them, ARPA provides for a health insurance premium subsidy for employees (or former employees) who are eligible or become eligible for continuation coverage under the Consolidated Omnibus Budget Reconciliation Act (“COBRA”), or under a State program that provides similar continuation coverage. ARPA also creates a new temporary COBRA enrollment right.

**The Premium Subsidy.** The subsidy covers 100% of the applicable COBRA premium for all “assistance eligible individuals” (or “AEI”) with respect to coverage periods beginning April 1, 2021 and ending September 30, 2021. During that time, the employer (or in some cases the insurer or plan) must pay the full amount (100%) of the COBRA premium cost for each eligible individual. If an AEI pays the continuation coverage premium for any month for which the subsidy requirements apply, the employer must reimburse the AEI for the premium paid (i.e., April premiums already paid by an AEI). From a tax reporting and withholding perspective, the premium subsidy for an AEI is neither taxable income to the employee, nor a deductible expense for the employer. As explained below, an employer may recover the full premium subsidy amount through a federal tax credit.

**Affected Health Plans.** The subsidy applies to major medical, dental and vision plans. This includes group health plans of large and small private employers, as well as state and local government employers. Health flexible spending accounts (FSAs) and qualified small employer health reimbursement arrangements

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(QSEHRAs) are exempt from the subsidy requirement.

**Eligible Individuals.** The COBRA premium subsidy is available to all AEIs, which generally includes all individuals who lose health insurance coverage as a result of either (i) a reduction in hours or (ii) an involuntary termination of employment; who elect continuation coverage; and whose maximum COBRA continuation coverage period has not expired by April 1, 2021. ARPA also creates a second COBRA election right for individuals who (i) previously declined COBRA coverage, or (ii) discontinued coverage (including for nonpayment of premiums), and who would otherwise be AEIs. Such individuals may elect to enroll in continuation coverage and are eligible for the subsidy.

Importantly, ARPA does *not* extend the maximum coverage period under COBRA. Therefore, the subsidy is not available for any period following expiration of the maximum continuation coverage period required under COBRA, even if that occurs prior to September 1, 2021. Similarly, an AEI will no longer be eligible for the subsidy if the individual becomes *eligible* for coverage under another group health plan (excluding coverage consisting of only excepted benefits, health FSAs, and qualified small employer HRAs (QSEHRAs)) or Medicare. A penalty applies to AEIs who fail to notify their health plan(s) that they are no longer eligible for the subsidy.

**Notice Requirements.** ARPA imposes new notice requirements which employers must comply with immediately. These include a written notification explaining the availability of the subsidy and a notice informing an AEI of the date when the premium subsidy will end. The Department of Labor has published a web page that includes FAQs and model notices that comply with these requirements, while the IRS and Department of the Treasury are expected to issue additional guidance providing more information about the subsidy-related tax credits.

**Payroll Tax Credit.** The employer (or insurer, as applicable) is reimbursed by means of a refundable credit against the employer's share of Medicare hospital insurance tax. The credit is a dollar-for-dollar reimbursement of the subsidy paid on behalf of AEIs. For self-insured plans and insured plans subject to federal COBRA, the employer receives the tax credit. For insured plans not subject to federal COBRA (i.e., small plans subject to state continuation coverage laws), the insurer receives the credit. Any credit amounts that exceed Medicare taxes will be treated as a refund of a Medicare tax overpayment.

### **Immediate Action Items for Employers/Plan Sponsors:**

- Identify COBRA-qualified beneficiaries (and other continuation coverage eligible individuals) who are potential AEIs.
- Contact your COBRA administrator, third-party administrator, and insurers to coordinate compliance efforts, particularly with respect to the applicable notices, *which must be provided promptly to all AEIs*.

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- Work with payroll personnel or providers to claim the tax credit.

Failing to comply with COBRA's requirements, including those under ARPA, even accidentally, could result in significant liability for your organization. The lawyers at Pullman & Comley are dedicated to assisting employers in ensuring compliance with these and other COVID-19 related requirements, and we have model notices and other useful resources available that can be customized to reflect the specific needs of your business. If you have questions about your organization's obligations under COBRA and/or ARPA, or for compliance assistance, please contact any of our Labor, Employment Law, and Employee Benefits attorneys

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