

CLIENT ALERT: Federal Relief Act Includes Six Months of Fully-Subsidized Cobra Payments for Eligible Employees

The newly enacted American Rescue Plan Act of 2021 (“ARPA”) creates a window in which employers must subsidize certain terminated employees’ health coverage under COBRA. This change in the law will have a significant impact on employers, particularly those who include some form of COBRA payments in their standard severance agreements.

Section 9501 of ARPA provides that for the period of April 1, 2021 to September 30, 2021, employers must subsidize 100% of the employee’s full health care costs for continued group health coverage under COBRA where an employee has lost coverage due to a reduction in hours or involuntary termination from employment (except for gross misconduct). Many states have “mini-COBRA” laws that apply to employers who have fewer than 20 employees or who otherwise are not covered by COBRA. The subsidy applies to these smaller employers, as well.

ARPA requires that an employer must notify any employee or eligible dependent who is or would have been eligible for COBRA during the six-month April 1 to September 30 window that they can select and receive COBRA coverage, so long as they lost coverage due an hours’ reduction or involuntary separation from employment. The employee must be informed that the employer will provide 100% payment for premiums for the number of eligible months during the window period that they would otherwise would have been or are eligible for COBRA. ARPA further provides that employers will be reimbursed by the Federal government through a FICA tax credit. The subsidy in the law is currently scheduled to end on September 30, 2021, so any COBRA eligibility after that date would revert to being the financial responsibility of the employee or beneficiary. Indeed, the employer is required to provide both the general election notice, as well as a subsequent notice of the expiration of the subsidy. The election notice must be sent within 60 days of April 1, 2021, and the Department of Labor is expected to issue a model notice for use during that period. (As of the date of this alert, one has not yet been released). Affected employees and eligible beneficiaries (called “assistance eligible individuals” or “AEIs”) must select to participate in coverage within 60 days.

Because the ARPA COBRA subsidy is based on the window of eligibility for COBRA, employees and beneficiaries who were eligible for COBRA at any time in the last 17 months may need to be notified, regardless of whether they selected COBRA at the time, since they may have one or more months of potential COBRA eligibility during the subsidy window period. However, the subsidies are only allowed COBRA coverage through the end of their COBRA maximum duration period. For instance, if an employee became COBRA eligible when the employee was laid off in December 2019 (losing health coverage starting in January 2020), their potential COBRA eligibility period would be 18 months from then (or through June 2021). Hence, if the employee or eligible dependent elected to select COBRA coverage during this open window, the subsidy would only cover the three-month period between April 2021 and June 2021. These same rules apply for individuals who selected and continue to

receive COBRA coverage during the window period. Additionally, individuals who selected, but then discontinued COBRA participation, are eligible to select the subsidized COBRA coverage, as long as the individual still has remaining potential months of eligibility during the April 1, 2021 to September 1, 2021 window.

If an employee or eligible beneficiary is already on COBRA and pays for the premiums for any period between April 1 and September 30, 2021, the employer must reimburse them (and then receive the subsidy for the reimbursement through the FICA tax credit).

Employees are required to notify the employer (and have their subsidy ended) if they become eligible for (even if they have chosen not to participate in) other group health coverage or Medicare during the six-month window.

All employers should coordinate carefully with health care providers and/or COBRA vendors to ensure that appropriate notices are distributed to employees who may have recently been subject to a reduction in hours or involuntary termination from employment. Employers should also coordinate with their accountants and tax advisers concerning obtaining the credits.

Going forward, employers should also consult with their employment counsel concerning separation packages. Historically, many employers have offered to pay all or part of an employee's COBRA as part of the severance benefits offered to a departing employee. Section 9501 of ARPA grants certain employees a right to a full COBRA subsidy during the six-month window, which could eliminate the value of an employer's offer and lead to confusion. It is also an open question whether an employer may claim a tax credit for paying an employee's COBRA premium when the employer has a contractual obligation to do so, and how to define involuntary termination under APRA. These are but a few of many unanswered questions in the law's text that are expected to be clarified when the Federal Department of Labor and/or the Internal Revenue Service issues guidance or regulations concerning this significant benefit.

As always, employers should consult with their M&J attorney with questions about this COBRA subsidy.

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