

## First COBRA Deadline Extensions and Now COBRA Subsidy Payments, How Is an Employer to Keep Track?

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The COVID-19 pandemic has affected nearly every corner of our lives for well over a year - and employer provided group benefits have not been immune! Indeed, as last year the Department of Labor, Treasury Department and Internal Revenue Service published Disaster Relief Notice 2020-01 (the "2020 Notice") which extended the COBRA notice and election periods until the 60<sup>th</sup> day after the announcement of the end of the national emergency (the "Outbreak Period").

In recognition that the Outbreak Period has continued, and to clarify/update the COBRA deadline extension issue for employers, the Department of Labor, in coordination with the Treasury Department and Internal Revenue Service, issued Disaster Relief Notice 2021-01 (the "2021 Notice"). The 2021 Notice recognizes that, under ERISA, the Departments of Labor and Treasury may only prescribe a period of up to one year that may be disregarded in determining the date by which any action under ERISA is required or permitted to be completed. In other words, the extension provided in the 2020 Notice was only applicable until February 28, 2021. As a result of this deadline, the 2021 Notice clarifies the 2020 Notice by providing that applicable COBRA deadlines will be disregarded until the *earlier* of (i) one year from the date the individual was first eligible for relief under the 2020 Notice (i.e. March 1, 2020), or (ii) end of the Outbreak Period. Upon expiration of the extended deadlines, the previously disregarded notice and election timeframes for individuals and plans will resume. For

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example, if a qualified beneficiary would have been required to make a COBRA election by March 1, 2020, the 2021 Notice delays that election requirement until the earlier of one year from that date (February 28, 2021), or the end of the Outbreak Period (which remains ongoing).

Moreover, under the 2021 Notice, plan administrators and fiduciaries who know, or should know, that a COBRA deadline extension period is about to expire, should send a notice regarding the end of the extension period to the qualified beneficiary and provide him or her with the new election deadline.

But wait, there's more! On March 11, 2021, President Biden signed into law the American Rescue Plan Act (the "ARPA"). Section 9501 of the ARPA provides for a six (6) month COBRA premium subsidy for certain qualified beneficiaries. For the period of April 1, 2021 to September 30, 2021, an Assistance Eligible Individual, i.e. a qualified beneficiary who is eligible for COBRA coverage due to a reduction in hours or an involuntary termination of employment, may elect to receive the COBRA premium subsidy. The key question is what constitutes an "involuntary termination" of employment. If an employee voluntarily terminates his or her employment, he or she is not eligible to receive the premium subsidy. In order to clarify what constitutes "involuntary termination" and other questions relating to the ARPA, the IRS issued Notice 2021-31. This Notice contains Q&A's on premium subsidy eligibility, what constitutes an "involuntary termination" and other situations involving the reduction in hours. For example, Notice 2021-31 clarifies that, generally, an employer's decision not to renew an employee's contract will be considered an involuntary termination of employment if the employee was otherwise willing and able to continue the employment relationship and was willing to execute a contract with similar terms to that of the contract that was terminating.. In addition, Notice 2021-31 clarifies what documentation an employer needs to retain in order to be able to establish entitlement to recoupment of the COBRA premium subsidies paid on behalf of employees.

In addition to employees who suffer from a reduction in hours or an involuntary termination, the term Assistance Eligible Individual includes eligible employees who (i) are already enrolled in COBRA, (ii) did not elect COBRA coverage when it initially became available to them, or (iii) elected COBRA coverage initially, but let the coverage lapse. This means that employers could have former employees and qualified beneficiaries who were eligible for COBRA coverage in November 2019 or later that are able to receive a premium subsidy.

If the individual elects to receive the COBRA premium subsidy, the employer must pay 100% of the premium on behalf of the individual and will then be entitled to a dollar-for-dollar tax credit on its quarterly payroll filings. Once the premium subsidy period ends, i.e. September 30, 2021, the Assistance Eligible Individual can continue coverage by paying the premiums in full themselves.

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So what is an employer to do? The answer depends on whether an individual recently experienced a reduction in hours / was involuntarily terminated from employment, or was terminated after November 2019 and is in the extension period under the 2021 Notice discussed above.

If the individual is an Assistance Eligible Individual because of a current reduction in hours or involuntary termination, he or she must be provided the the “Summary of the COBRA Premium Assistance Provisions under the American Rescue Plan of 2021” with the COBRA notice and election information from the employer so that he or she can elect to receive the COBRA premium subsidy. It is important to note that the deadline extensions provided in the 2021 Notice described above do not apply to elections related to COBRA premium assistance under the ARPA. Therefore, potential Assistance Eligible Individuals must elect COBRA coverage within 60 days of receiving the COBRA notice from the employer in order to be eligible to receive the COBRA premium subsidy.

If the individual is in his or her extension period under the 2021 Notice, then an employer will need to notify the individual that he or she may be eligible for an additional COBRA election opportunity under the ARPA. This additional election opportunity specifically applies to individuals who currently have COBRA coverage, those who did not elect COBRA continuation coverage when it was first offered, or those who elected coverage, but are no longer enrolled (i. e. an individual who dropped coverage because it was unaffordable). Employers must provide these individuals a notice regarding the additional election opportunity by **May 31, 2021**. Individuals will then have 60 days to elect COBRA coverage and request the premium subsidy. Please note that this additional election opportunity does not extend COBRA’s 18 month coverage period, it only permits individuals who are still within this period with another opportunity to make the election.

Finally, under either scenario described above, and at least 15 days before September 30, 2021, the Employer must provide each Assistance Eligible Individual with notice that the COBRA premium subsidy period is about to expire, and he or she may continue COBRA coverage by paying the premiums in full or he or she may take advantage of the special enrollment period to enroll in coverage through a Health Insurance Marketplace or individual health insurance coverage outside of the Marketplace.

All of the model notices discussed above and FAQs are available on the DOL’s website.

The Employment, Labor, and Benefits Department at Koley Jessen is closely monitoring the COVID-19 pandemic and its effect on the workforce. Employers with questions are encouraged to contact a member of our team.