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The Return of COBRA Subsidies: Flashbacks of 2009

The \$1.9 trillion American Rescue Plan Act of 2021 (“Act”) was signed into law by President Joe Biden on March 11, 2021. Similar to the COBRA premium subsidies that were part of the American Recovery and Reinvestment Act of 2009, the Act requires payment of 100% of the Consolidated Omnibus Budget Reconciliation Act of 1985 (COBRA) premiums for individuals who lost group health plan coverage due to involuntary termination or a reduction in hours. This new premium subsidy applies to premiums for coverage from April 1, 2021 through September 30, 2021 for qualified beneficiaries who elect continuation of group health plan coverage under (COBRA). The Act requires a special COBRA enrollment period for individuals who had a COBRA qualifying event prior to April 1, 2021 and did not elect COBRA or have since let COBRA lapse. Either the employer, the insurer, or the plan itself (depending on the type of plan and whether federal COBRA applies) provides the subsidy. That entity can recoup the COBRA premiums by reducing Medicare taxes they would otherwise remit to the U.S. Treasury. This new subsidy comes with a host of compliance obligations, including new notices that employers must quickly give to qualified beneficiaries who lost or lose coverage due to employment termination or reduction in hours, as further described below.

Premium Assistance Period and Subsidy Amount

The Act provides for a 100% COBRA premium subsidy for the period beginning April 1 and ending September 30, 2021. The 100% subsidy is based on the COBRA premium plus the 2% administrative fee that plans are permitted to charge. This effectively provides six free months of free COBRA coverage to “assistance eligible individuals” as defined in the next section. The subsidy period ends earlier than September 30, 2021 if the individual becomes eligible for other group health coverage or Medicare, or if their COBRA period (generally 18 months) ends before September 30. The subsidy period does not extend the normal COBRA period. If a qualified

beneficiary eligible for the subsidy pays a COBRA premium for coverage during the subsidy period, that premium must be reimbursed to the qualified beneficiary within 60 days.

Assistance Eligible Individuals

Assistance eligible individuals qualify to receive the subsidy. This is someone who (1) lost medical coverage under a group health plan due to their or their family member's involuntary termination of employment for reasons other than gross misconduct or a reduction of hours, (2) has a portion of their COBRA coverage period during the subsidy period of April 1, 2021 through September 30, 2021, and (3) elects COBRA (including under the special COBRA enrollment rule described below). For example, an individual who experienced an involuntary termination of employment November 1, 2019 would be an assistance eligible individual because the last month of their 18-month COBRA period would be April 2021. The Act does not define what qualifies as an involuntary termination, so there is some uncertainty here. We hope additional guidance will be issued soon addressing the issue. Note that the subsidy is not available to individuals who voluntarily terminate.

Special COBRA Enrollment

For individuals who are not enrolled in COBRA on April 1 but who meet the definition of assistance eligible individuals, the Act provides for a special COBRA enrollment period. This special enrollment period will apply to individuals who already experienced a qualifying event and did not elect COBRA or who elected COBRA but discontinued the coverage prior to April 1. These individuals can now elect COBRA with subsidized coverage starting on April 1 and lasting until September 30, 2021, or, if earlier, any remaining period of their original COBRA coverage period. If an individual's COBRA coverage period lasts beyond September, they may continue COBRA but are required to pay the full premium. Employers are required to provide notice to individuals eligible for the special enrollment by May 31, 2021 and the period to elect runs from 60 days of receipt of the notice.

For example, if someone's qualifying event occurred on November 1, 2019 and that individual did not elect COBRA, they must get an updated COBRA notice from the plan sponsor by May 31, 2021. The updated notice allows them to elect COBRA with coverage starting April 1, 2021, and only for that month since it is the last month of the individual's 18-month COBRA coverage period. Employers should start reviewing records now to determine whether prior qualifying events resulted in someone being considered an assistance eligible individual so that new COBRA notices can be sent to those individuals. This requires looking at qualifying events that occurred as far back as October 2019, and possibly longer if we get clarification on whether the subsidy would apply to someone who was able to extend COBRA for up to 36 months.

In addition to the special enrollment period, an employer is permitted (but not required) to offer assistance eligible individuals 90 days from the date of notification of the right to enroll in a different type of coverage than they had previously elected prior to their qualifying event, if the coverage is available to similarly situated active employees and the premium is equal to or less than the coverage the individual had at the time of the qualifying event.

Notice Requirements

The Act requires employers and plans to provide individuals who become entitled to COBRA during the subsidy period with COBRA notices to that include information about the subsidy. These COBRA notices must include the following information:

- The forms necessary for establishing eligibility for the premium assistance.
- A description of the special second 60-day election period.
- A description of the qualified beneficiary's obligation to notify the plan of eligibility for other group health plans or Medicare coverage that disqualify the person from receiving the subsidy, and the penalty for failure to so notify the plan.
- A prominently displayed description of the qualified beneficiary's right to subsidized COBRA coverage and any entitlement conditions to the subsidy.

- A description of the qualified beneficiary's option to enroll in different coverage if the employer allows this option.
- The name, address and telephone number necessary to contact the plan administrator and any other person maintaining relevant information in connection with the premium subsidy.

Assistance eligible individuals who were eligible for COBRA prior to April 1, 2021 must receive an updated notice with the information described above, by May 31, 2021. The government agencies will be providing model notices within 30 days of the enactment of the Act.

A second notice is required to inform assistance eligible individuals of when their subsidy will expire. The notice must be provided no more than 45 days but no less than 15 days prior to the subsidy expiration. The notice must inform assistance eligible individuals of the date the subsidy expires and that they are eligible for unsubsidized coverage through COBRA for any remaining COBRA period. This notice is not required if the subsidy is ending due to the individual's becoming eligible for other group health coverage or Medicare. The government agencies will be providing a model notice within 45 days of the enactment of the Act.

Subsidy Credit

The "person to whom premiums are payable" will claim a tax credit for the COBRA premium that an assistance eligible individual did not pay during the subsidy period. The "person to whom premiums are payable" depends on what type of plan is involved, as follows:

- Single employer self-insured plans and fully-insured plans subject to federal COBRA – the employer/plan sponsor
- Single employer fully-insured plans not subject to federal COBRA – the insurer
- Multiemployer plans – the plan

The credit applies against the entity's liability for the Medicare Hospital Insurance Tax (the 1.45% of FICA taxes) and advance credits may be requested to fund the subsidy.

The new COBRA subsidy will require substantial time and resources to implement and administer. Taking into account the fact that litigation over COBRA notices is a hot topic, now would be a good time to review your COBRA notices and procedures to avoid any issues. We will be addressing this topic in the near future, so stay tuned. Additional guidance from government agencies is expected, including model notices.

In the meantime, [Carl Lammers](#) and other members of Frost Brown Todd's [Employee Benefits & ERISA](#) practice group are available for assistance in construing and implementing these rules.

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