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BENEFITS REPORT

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American Rescue Plan Act: COBRA Subsidy Relief and Dependent Care FSA Limit Increase

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On March 11, 2021, President Biden signed into law the American Rescue Plan Act (the "Act"). This $1.9 trillion legislative package provides significant pandemic relief. This article focuses on the COBRA continuation coverage subsidy relief, as well as increased Dependent Care Flexible Spending Account ("Dependent Care FSA") relief provided under the Act.

COBRA Subsidy Relief Available

Under existing COBRA rules, an individual who loses employer group health plan coverage as a result of a COBRA qualifying event is eligible to elect continued group health plan coverage. However, the COBRA qualified beneficiary is typically obligated to pay up to 102% of the COBRA cost of coverage. To provide relief to terminating employees and their eligible dependents, the Act provides for temporary COBRA subsidies.

COBRA Subsidy Is Temporary

The Act provides that if an "Assistance Eligible Individual" incurs any premiums between April 1, 2021 and September 30, 2021, such premiums must

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be 100% subsidized (i.e., the Assistance Eligible Individual does not have to pay any amount to receive COBRA coverage).

> **Note**: Under existing COBRA rules, the group health plan may require a COBRA qualified beneficiary to pay an amount up to 102% of the applicable premium for group health plan coverage. In calculating premiums for COBRA coverage, the group health plan can include the costs paid by both the employee and the employer, plus an additional 2% for administrative costs. The COBRA subsidy provided for under the Act will cover both employer and employee costs, plus the 2% administrative fee (if any).

Who Is Eligible for COBRA Subsidy?

The COBRA subsidy is available to "Assistance Eligible Individuals." Assistance Eligible Individuals include individuals (such as employees and their eligible dependents) who (i) have lost group health plan coverage as a result of an involuntary termination of employment or reduction in hours, (ii) have elected COBRA coverage, and (iii) have COBRA coverage during the period of April 1, 2021 through September 30, 2021. It's important to note that the COBRA subsidy is not broadly available to all COBRA qualified beneficiaries (i.e, it is not available to individuals who have lost group health plan coverage due to a voluntary termination of employment, death, divorce, loss of dependent status, etc.) — it is only available to those who have lost coverage due to an involuntary termination of employment or a reduction in hours. Note that it is not clear from the Act whether subsidies are available to those who have lost coverage due to a voluntary reduction in hours. We will watch for further guidance from the government on this issue.

COBRA Election Extension Available Under the Act

The Act allows a "second bite at the apple" for those individuals who might benefit from the COBRA subsidy, but who did not previously elect COBRA coverage, or who may have dropped COBRA coverage (e.g., stopped paying COBRA premiums). If a COBRA qualified beneficiary became eligible for COBRA coverage prior to April 1, 2021 and some period of their COBRA coverage falls between April 1, 2021 through September 30, 2021, but the individual did not previously elect COBRA (or they dropped COBRA coverage), such individual will have another opportunity to elect COBRA coverage and take advantage of the COBRA subsidy. Upon receiving an "Extended Election Period Notice" from the group health plan, the individual will have 60 days to elect COBRA coverage. The individual's COBRA coverage will be retroactive back to April 1, 2021 and may run up to the individual's 18-month maximum COBRA coverage period (measured back to the date of the individual's involuntary termination of employment or reduction of hours).

> **Example:** On January 1, 2021, an employee loses group health plan coverage due to an involuntary termination from employment. The employee was offered COBRA coverage but chose not to elect such coverage. If the employee had elected COBRA coverage, their maximum COBRA coverage period would have run from January 1, 2021 through June 30, 2022. Under the Act, this individual is considered an Assistance Eligible Individual because they lost group health plan coverage due to an involuntary termination of employment, and a portion of their 18-month COBRA coverage period falls between April 1, 2021 and September 30, 2021. To provide this individual with the opportunity to take advantage of the COBRA subsidy, the group health plan must provide the individual with a Notice explaining their extended COBRA election period, and the opportunity to elect COBRA coverage. Note that although the Act provides the individual with another opportunity to *elect* COBRA coverage, it does not extend the individual's maximum COBRA coverage period. In this example, if the individual now elects COBRA coverage due to the COBRA subsidy, the individual's COBRA coverage period would run from April 1, 2021 through June 30, 2022 (i.e., the date their maximum COBRA coverage period would end, measured from the date of their involuntary termination of employment). The individual is eligible for a COBRA subsidy for the period April 1, 2021 through September 30, 2021, and then the individual will owe the full amount of COBRA premiums for the rest of their COBRA coverage period (i.e., from October 1, 2021 through June 30, 2022).

> **Note:** In 2020, the Department of Labor, Department of Treasury and the Internal Revenue Service issued a joint notice (the "Joint Notice") requiring ERISA plans to disregard the period beginning March 1, 2020 and ending 60 days after the National Emergency Period terminates (the "Outbreak Period") when determining various deadlines, including COBRA election deadlines, and COBRA premium payment deadlines. However, it is not clear how the extended deadline provisions found in the Joint Notice interact with the timeframes set out in the COBRA subsidy provisions of the Act. For example, it is unclear whether the Joint Notice extension for electing COBRA applies to elections for subsidized COBRA under the Act. We will watch for more guidance from the government on this issue.

Additional COBRA Rights Available Under the Act

Under the existing COBRA rules, a COBRA qualified beneficiary must elect the same group health plan coverage that the individual had on the day before their COBRA qualifying event. However, under the Act, an employer may permit an Assistance Eligible Individual the opportunity to elect continuation coverage under a different major medical plan than the one the individual was enrolled in at the time of their COBRA qualifying event triggered by an involuntary termination of employment (or reduction in hours). The new medical plan's premiums may not exceed the premiums for the medical plan under which the Assistance Eligible Individual was enrolled as an active employee. Further, the new medical plan must be a plan that is available to similarly situated active employees of the employer; and such new medical plan cannot be an excepted benefit, a qualified small employer health reimbursement arrangement, or a Health Flexible Spending Account. If the Assistance Eligible Individual wants to elect a different medical plan option, they must make that election within 90 days of receiving notice from the plan administrator of the individual's opportunity to make a change in their medical plan options.

> **Note:** Whether to offer Assistance Eligible Individuals the opportunity to elect a different medical plan option is an employer plan design decision — the Act does not require that the employer offer a different medical plan option.

COBRA Subsidy Period May Be Cut Short

The length of an individual's COBRA subsidy may be cut short (i.e., end before September 30, 2021) if the individual becomes eligible for other group health plan coverage or Medicare. The COBRA subsidy also may end earlier if the individual's maximum COBRA coverage period ends before September 30, 2021.

> **Note:** If an individual becomes eligible for other group health plan coverage or Medicare, they must notify the plan. If the individual fails to notify the plan, the penalty is generally $250 for each such failure. If the individual *intentionally* fails to notify the plan, they may be subject to penalties equal to the greater of $250 or 110% of the COBRA premium subsidy amount for each such failure. However, no penalties will be imposed if the individual had "reasonable cause" for failing to provide the required notice. The Department of Labor will be issuing additional guidance regarding this notice requirement (e.g., the timing and manner of this notice).

Refund of COBRA Premiums Required

If an Assistance Eligible Individual makes any COBRA premium payments during the period April 1, 2021 through September 30, 2021, then the entity that receives such COBRA premium payment is required to reimburse the Assistance Eligible Individual for these premium payments. This repayment must be made no later than 60 days after the date on which the Assistance Eligible Individual made payment.

Employers Must Provide Notice Regarding COBRA Subsidy

The Act places new COBRA notice obligations on plan administrators.

- ***COBRA Election Notice Must Be Updated***
  COBRA Election Notices must be updated to include the following:
  - Forms that must be completed to establish eligibility for the premium subsidy;
  - Contact information (i.e., name, address, telephone number) of the plan administrator or other entity

(e.g., COBRA administrator) that will be responsible for answering questions regarding the subsidy;

- A description of the extended COBRA election period;
- A description of the COBRA qualified beneficiary's obligation to notify the plan if they cease to be eligible for the subsidy (and the associated penalties if this notification is not provided);
- A description, displayed in a prominent manner, of the COBRA qualified beneficiary's right to the COBRA subsidy; and
- A description of the COBRA qualified beneficiary's right to change group health plan options (if applicable).

- ***Extended Election Notice***
  The plan administrator must send an "Extended Election Notice" to any Assistance Eligible Individuals who now have a second opportunity to elect COBRA coverage (as described earlier in this article). The plan administrator must send this Notice to impacted Assistance Eligible Individuals no later than May 31, 2021.

- ***Notice of Expiration of the COBRA Subsidy Period***
  When the period of the COBRA subsidy draws to a close, plan administrators will be required to send notices to Assistance Eligible Individuals explaining that their COBRA subsidy will end. This notice must be sent during the period August 16, 2021 through September 15, 2021. The Notice must explain that:
  - The premium subsidy will be ending, and include a "prominent" identification of the ending date of the subsidy; and
  - The individual may be eligible for continued COBRA coverage (or other group health plan coverage) without the subsidy.

Note: The Department of Labor will issue model notices that group health plans may use to meet these additional COBRA notice obligations.

Employers to Receive Tax Credit

Employers and plans will receive tax credits equal to the premiums that the Assistance Eligible Individuals otherwise would have owed. The credit will be provided by the Treasury Department through a reduction of Medicare payroll taxes.

Dependent Care FSA Limit Increased

Under current rules, the maximum annual benefit that a Dependent Care FSA participant may elect to receive for qualifying dependent care expenses for any taxable year beginning after December 31, 2020 and before January 1, 2022 is $5,000 (for employees that are married and filing jointly); and $2,500 (for employees who are married but filing separately). The Act increases these limits to $10,500 (for employees married and filing jointly); and $5,250 (for employees who are married and filing separately). If an employer wants to adopt this increased limit, it will need to amend its Dependent Care FSA plan by the last day of the plan year in which the amendment is effective (i.e., for a calendar year plan, by December 31, 2021). The amendment will have retroactive effect (e.g., will be effective retroactively back to January 1, 2021 for calendar year plans).

> **Note:** If an employer has adopted the Flexible Spending Account (FSA) relief provisions provided in IRS Notice 2021-15 which allow Dependent Care FSA elections to be changed mid-year for any reason, then individuals will have the opportunity to make mid-year election changes to increase their Dependent Care FSA amounts. Alternatively, if the employer's cafeteria plan has not adopted this FSA relief, but allows individuals to make mid-year election changes based on existing Treas. Reg. Section 1.125-4 "permitted life events" (e.g., such as the "addition or improvement of a benefit option"), then the individual could make a mid-year election change to increase their Dependent Care FSA election amounts based on an applicable Treas. Reg. Section 1.125-4 "permitted life event."

Suggested Action Items — COBRA Subsidy

- Plan Administrators will need to identify the individuals who will be impacted by the COBRA subsidy. These individuals will include the following:
  - Individuals who are eligible for the COBRA subsidy, but did not previously elect COBRA coverage, or who dropped COBRA coverage;
  - Individuals who have elected COBRA and some part of their COBRA coverage period will run from April 1, 2021 through September 30, 2021; and
  - Individuals who will elect COBRA coverage on or after April 1, 2021.
- Coordinate administration of the COBRA subsidy with the group health plan's COBRA Administrator,
- Identify those individuals who should receive notice of the new COBRA subsidy and timely provide the required notices to these individuals,
- If the employer chooses to allow Assistance Eligible Individuals to change major medical plans, confirm that the insurance carriers and third party administrators will allow such enrollment changes,
- If the employer offers an involuntary severance plan which provides for employer-paid COBRA coverage, the employer should clearly communicate whether the employer-paid COBRA coverage will run concurrently with the COBRA subsidy provided under the Act. For example, let's assume an employer provides an involuntary severance plan that provides for four months of employer-paid COBRA, and an employee is involuntarily terminated on April 1, 2021. Here, the employer should communicate whether the former employee will receive up to six months of COBRA subsidy under the Act (i.e., April 1, 2021–September 30, 2021), plus an additional four months of employer-paid COBRA subsidy (i.e., October 1, 2021–January 31, 2022) — or if the four months of employer-paid COBRA subsidy will run concurrently with the COBRA subsidy provided under the Act.

Suggested Action Items — Dependent Care FSA Limit

- Coordinate administration of the increased Dependent Care FSA limits with the cafeteria plan's Flexible Spending Account vendor;
- Communicate the new Dependent Care FSA limit to participants and clearly communicate when individuals will have the opportunity to make a mid-year election to increase their Dependent Care FSA limits (e.g., will the employer have a special enrollment period to allow mid-year Dependent Care FSA election changes, or can individuals make an election change to increase their Dependent Care FSA amounts at any time during 2021);
- Amend plans for the increased Dependent Care FSA limits.

If you have any questions regarding this article, please contact the author.

FIRM NEWS

On February 5, **Angel Garrett** and **Tiffany Santos** presented at the American Bar Association Section of Labor and Employment Law "2021 Employee Benefits Committee Midwinter Meeting."

- **Angel** participated on two panels: *Pension Regulatory Overview* covered major regulatory actions undertaken this year that impact retirement plans, their administration and their stakeholders. *Retaining Diverse Talent* discussed some of the barriers facing attorneys of color, women and others when it comes to career advancement, and organizational interventions that firms can implement to prevent attrition.
- **Tiffany** participated in the *Healthcare Regulatory Update* which explored the recent spate of regulatory action taken by HHS, Treasury and Labor related to health plan compliance (including the price transparency rule and what plans must do to comply), as well as the health plan provisions enacted by the federal government and other relief issued by the IRS and DOL to address the COVID-19 pandemic.

On March 3, **Marc Fosse** spoke on *Structuring Deferred Compensation: Plan Options and Key Considerations for Employee Benefits Counsel* at a Strafford Webinar. This CLE webinar provided employee benefits counsel and advisers with a detailed review of the ERISA, IRS, and DOL regulations which must be considered in structuring deferred compensation plans.

On March 30, **Clarissa Kang** and **Angel Garrett** will be presenters for a Western Pension & Benefits Council online webinar, ERISA Litigation Update: *Recent ERISA Lawsuits and Their Impact on Plan Fiduciaries and Service Providers*. The cases discussed will include claims involving actively managed target date funds, retail share class funds, managed accounts, participant data, and cyberbreaches. They will also cover updates on litigation over plan provisions requiring arbitration of ERISA claims and setting a deadline to bring ERISA claims.

> Tuesday, March 30, 10:00 am – 11:45 am PDT
> To register: https://westernpension.org/event-4172818

On April 7, **Joe Faucher** will join a Strafford Live Webinar panel on *ERISA Litigation and Employee Stock Ownership Plans: The Evolving Landscape of Claims Against Fiduciaries.* This CLE webinar will guide counsel on procedures and fiduciary responsibilities in employee stock ownership plan (ESOP) transactions and cover recent court rulings. The panel will discuss best practices in satisfying fiduciary duties in ESOP transactions, legal issues that arise, and lessons learned from recent cases to defend against and minimize litigation.

On April 13, **Sarah Kanter** and **Freeman Levinrad** will present a webinar sponsored by the Northern California Chapter of the International Society of Certified Employee Benefits Specialists (ISCEBS) on *Legislative and Regulatory Updates — Health & Welfare and Retirement*.

- **Sarah** will address recent legislation, regulation and other federal guidance impacting group health plans.
- **Freeman** will address recent regulatory and legislative changes impacting retirement plans, and provide a summary of proposed legislation.

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