



INSIGHTS



2021 Employee Benefits Regulatory Update Q&A

By Jennifer Chung, Esq.

The first year of a new White House Administration is usually an eventful one for lawmakers and, incidentally, for employee benefits professionals. This year is proving to be no exception to the rule with the passage of the American Rescue Plan Act (ARPA) and many more regulations on the docket to be finalized this year. Join us for an informative seminar featuring Jen Chung, Vice President, Senior Compliance Officer at Woodruff Sawyer recently hosted an informative seminar where she discussed the recent and upcoming changes to benefits compliance legislation.

You can watch the [on-demand webinar](#) here. We were only able to answer a few live questions during the webinar, so here are the responses to the slew of good questions that were raised in the Q&A box.

Q: We had layoffs that were called "voluntary," but the deal was if we didn't get enough volunteers, the company would choose employees to lay off. As far as ARPA is concerned, would that be considered voluntary or involuntary?

The DOL is likely going to be aggressive about (i.e., in favor of) allowing the subsidy. Until they issue further guidance, these "voluntary" layoffs should be considered involuntary because employees would have been laid off if they had not taken the deal.

Q: How do we know if employees/qualified beneficiaries (QBs) are eligible for other coverage? Is this an honor system? What do we ask for?

There are some formalities and penalties imposed on individuals that provide a little more "teeth" than a mere honor system. Individuals must submit the Request for Treatment as an Assistance Eligible Individual (AEI) form, which requires them to affirmatively check a box stating that they are NOT eligible for other group coverage.

Q: For the ARPA COBRA Subsidy, does "not eligible for GHP other coverage" include Medicaid (in the same manner as Medicare)?

ARPA and the DOL guidance specifically reference only Medicare, not Medicaid. Those who qualify for Medicaid will not need (or necessarily want) COBRA coverage.

Q: For the "second bite of the apple" notice, is it all COBRA-eligible terminations or just those you think that would be eligible for the subsidy?

The Extended Election Notice (which we referred to as a "second bite of the apple" notice during our legislative compliance webinar) should be sent to all employees or former employees (and their QBs) who lost GHP from October 1, 2019 through March 31, 2021 due to (1) involuntary terminations, or (2) hours reduction. The most conservative approach is to send this Notice to every COBRA-eligible person and leave it up to them to submit the request form attesting to their eligibility as an AEI.

Q: If a terminated employee enrolled in COBRA in 2019, are they eligible for the subsidy?

Yes, this is possible but only if it was the last TWO months of 2019. If the first effective date of the COBRA coverage was November 1, 2019, then yes, they are eligible for a subsidy for the April 2021 coverage month. If the effective date began on December 1, 2019, then they would be eligible for a subsidy for both the April 2021 and May 2021 coverage months. (This presumes that the other conditions to be an AEI have been satisfied.)

Q: What is an example of when someone on a disability would qualify for the subsidy? Does this apply to someone who loses active coverage when FMLA is exhausted?

To qualify for the extra 11-month disability COBRA extension, an individual must be deemed as permanently disabled by the Social Security Administration. Within 60 days of receiving the SSA disability determination, that person must notify the employer plan sponsor (or COBRA vendor) about the SSA determination and make a request for the extended COBRA window. Because it takes more than a mere doctor's note, the usual FMLA exhaustion for a temporary disability is not a trigger for the COBRA disability extension.

Q: We are going to be paying a fee to our Cobra vendor for mailing of all these new notices. Considering we have over 800 employees who will be receiving a notice, it will be quite expensive for those COBRA vendor mailing fees. Is this also something we can seek reimbursement for?

Although a physical mailing of the new notices could add up to a sizeable expense, the DOL will not permit passing on any of these ARPA-related admin fees to COBRA enrollees and has not clarified if employers can be reimbursed for these expenses via the payroll tax credit. Hopefully more guidance will be coming soon, but the employer is going to bear the cost for now.

Q: How is it possible for an employee to have market-place coverage, drop it, and then take advantage of the COBRA subsidy for six months and then go back to marketplace?

The recent DOL guidance suggests that this is possible/permitted. Marketplace coverage is individual coverage, so it is not considered "other group health coverage." Therefore, if an employee (or their QBs) falls within the COBRA subsidy eligibility provisions and are within their COBRA duration window, nonsubsidized Marketplace coverage will not interfere with their ability to qualify for the COBRA subsidy.

In essence, this means that AEIs can drop their Marketplace coverage, enroll in COBRA coverage to take advantage of the ARPA subsidy, then drop COBRA coverage when the subsidy ends, and enroll in Marketplace coverage.

Q: How does the COBRA extension impact former EEs whose termination was involuntary and are currently on COBRA?

There is no impact at all for employees who truly terminated their employment voluntarily. There are no extensions and no subsidies for those EEs.

Q: Does the Initial Rights Notice need to be modified to address ARPA subsidy? Should all COBRA eligible and actively enrolled participants be sent this notice, or should the revised notice only be sent to those potentially eligible AEIs?

There is some discretion on how to handle the notices. To eliminate the risk of not sending the right notice to someone who should get it, we suggest (1) completely replacing the Initial/General Notice with the ARPA version of the New Model General and Election Notice for all newly eligible employees as of April 1, 2021, and (2) sending the Extended Election Notice (second bite of the apple notice) to all persons who had a COBRA event between October 1, 2019 through March 31, 2021.

Q: Would an aging out dependent be considered eligible for subsidy?

No, the COBRA subsidy is only for work-related loss of coverage events due to involuntary terminations, layoffs, or reduction of hours, etc.

Q: Is it true that you can allow an employee to switch plans, but they are not allowed the COBRA subsidy if the plan they switch to is more expensive?

No, not quite. An employer can only allow a COBRA QB to newly enroll in a different coverage plan (than what they had while employed) if the plan on April 1, 2021, is not more expensive. Meaning the employer cannot even allow a switch at all if the plan is more expensive. If more expensive, the normal COBRA rules kick in and the QB can only continue with whatever coverage they had at the time of the COBRA event.

Q: Please clarify COBRA subsidy eligibility. Involuntary terminations only (except gross misconduct), furloughs, layoffs, reduction in hours. For reduction in hours, this could be voluntary (e.g., employee chooses to reduce their schedule) or involuntary (e.g., employer is reducing schedule due to lack of work)? If benefits end for an employee on an approved leave of absence (regardless of the reason), they would be eligible for subsidy? What about military leave?

Yes, correct that the reduction of hours can be voluntary or involuntary. If benefits end for an employee who is on an approved LOA, that person will be eligible for the COBRA subsidy if they do not become ELIGIBLE for other group health coverage or Medicare. Yes, the COBRA subsidy should work as well for someone on military leave unless they are eligible for other group health coverage through the military.

Q: Cobra Subsidy: Are active employees who lost coverage because they didn't meet the ACA required hours and lose employer coverage, eligible for the ARPA subsidy?

Yes, this should fall within the hours reduction category for the COBRA subsidy. In other words, a variable hour employee will qualify for the COBRA subsidy if they previously had coverage but lost eligibility because they could not work enough hours during the 2020 measurement period.

Q: If an employee can only get a vaccine during work hours, can they use the Supplemental Sick Leave for their time away from work? What if the employee gets sick after getting vaccine, can they use the FFCRA Sick Leave?

A company's compliance with these FFCRA provisions is no longer mandatory after 2020. Therefore, if the company wants to voluntarily comply with the FFCRA in 2021, they can allow up to 10 days of FFCRA sick leave to cover an illness that arises due to taking the vaccine.

The paid sick time will cover either (1) time off to take the vaccine or (2) to recover from illness due to taking the vaccine.

Q: The employee cost for employee-only health care coverage is \$175 per month, and we provide a \$60 per month "wellbeing" incentive to all employees whether they have our insurance coverage or not. Are we in trouble with the new EEOC rules?

If the incentive is provided only to employees who are eligible to participate in the company's health plan (even if they choose to get coverage elsewhere), then the standard is 30% of the total cost of the coverage level (including both the employer and the employee's share of the premiums).

If the \$60/month incentive is available to all employees (even those who are not eligible to participate in the group health plan), then this amount will likely run afoul of the EEOC's new "de minimis" standard for a wellness plan to be considered voluntary. It will depend on what employees are required to do (or to provide) to get that \$60/month incentive. If there is no disability related inquiry (i.e., no health risk assessment or biometric screening), it might not be an issue.

Q: For DCAP, we allowed the \$5,000 carryover but didn't implement the \$10,500 increased limit. Can employees get reimbursed for the full \$10,000 tax-free (2020 \$5,000 carryover + 2021 \$5,000 election)? Or do we have to adopt the \$10,500 increase for employees to use/be reimbursed for the full \$10,000 tax-free in 2021?

Employers will only need to amend the plan document to enact the \$5,000 carryover provision and do NOT need to adopt a plan amendment to address the increased tax-free limit for 2021. Employees with carryover amounts from 2020 will be able to submit up to \$10,000 in tax-free DCAP reimbursements for the 2021 calendar year.

Note that many (most) employers are choosing to not amend the DCAP plan to permit a \$10,500 election for the 2021 plan year.

For more insight into benefits compliance as we adjust to a new administration, reach out to Jen Chung or your Woodruff Sawyer Benefits contact.



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