

April 29, 2021

CLIENT ALERT – CORONAVIRUS (COVID-19)
LABOR, EMPLOYMENT AND EMPLOYEE BENEFIT UPDATES - COBRA SUBSIDY

Dear Clients and Friends:

In our [prior Client Alert](#) dated March 24, 2021, we advised you that President Biden signed The American Rescue Plan, a \$1.9 Trillion coronavirus relief bill, into law that contained, among other things, a COBRA subsidy. Recent guidance from the United States Department of Labor has clarified that the definition of an “assistance eligible individual” for the COBRA subsidy includes those employees who voluntarily reduced their hours of employment and lost their group health coverage. **Therefore, this group of employees must be provided with the notice written in “clear and understandable language” describing the COBRA subsidy and the other items specified by the statute no later than May 31, 2021.**

This Client Alert provides a general summary of the COBRA subsidy provisions of The American Rescue Plan with the updated information. This information is not legal advice and may not be suitable for all client situations. As always, if you would like specific legal assistance with respect to these programs or any other matters, please do not hesitate to contact your HH&K attorney.

COBRA Changes

COBRA Premium Subsidies

In 2009 the American Recovery and Reinvestment Act of 2009 created a federal subsidy of the premiums payable by certain terminated employees for continuation coverage provided under employer-sponsored group health plans pursuant to the requirements of the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended (also known as “COBRA”). The American Rescue Plan creates a similar COBRA premium subsidy.

The COBRA premium subsidy is available to “assistance eligible individuals” which generally includes any employee or dependent who loses coverage due to an involuntary termination of employment or due to an involuntary reduction in hours. Subsidies are not available to employees or dependents who voluntarily terminated employment and lost their group health plan coverage.

The employer must provide assistance eligible employees who became entitled to COBRA before April 1, 2021 with a notice written in “clear and understandable language” describing the COBRA subsidy and the other items specified by the statute no later than May 31, 2021. (The American Rescue Plan directs the Treasury Department, the Department of Labor (DOL) and the Department of Health and Human Services to issue a model notice for those group health plans not subject to federal COBRA) by Monday, April 26, 2021.)

The subsidy (which seems to include the 2% administrative fee) that is available to “assistance eligible individuals” is available only for the period beginning April 1, 2021 and ending September 30, 2021. An assistance eligible individual loses the subsidy when her or she (a) becomes eligible for (not enrolled in) another group health plan (such as becoming eligible for a new employer’s plan or becoming eligible for coverage under a spouse’s plan); (b) becomes eligible for (not enrolled in) Medicare; or (c) exhausts their maximum period of COBRA coverage. Under the new law, assistance eligible individuals are required to notify the group health plan providing their COBRA coverage if they become (a) eligible for (not enrolled in) another group health plan or (b) eligible for (not enrolled in) Medicare. Assistance eligible individuals who fail to provide such notice to the plan are

subject to a \$250 penalty; a penalty of 110% of the COBRA subsidy applies if the failure was intentional. No penalty applies if the failure to notify is due to reasonable cause.

During the period of the subsidy, the assistance eligible individual does not pay any COBRA premiums. The manner in which the COBRA subsidies are paid will depend on the employer's group health plan. For group health plans subject to federal COBRA (those group health plans sponsored by employers with more than twenty (20) employees) and for all self-inured group health plans, the employer pays the COBRA premiums for these individuals and is reimbursed by the federal government through a refundable tax credit against the employer's Medicare tax deposits. For fully insured group health plans not subject to deferral COBRA (those sponsored by employers with less than twenty (20) employees), the insurer receives the tax credit. For multiemployer plans (typically a union plan), the multiemployer plan is eligible for the credit.

The American Rescue Plan also requires that assistance eligible individuals receive a notice at least fifteen (15) and no more than forty-five (45) days before the end of their COBRA subsidy period notifying them that the subsidy is ending soon, a "prominent identification" of the date the subsidy ends, and a statement that the individual may be eligible for coverage without the subsidy through COBRA or another group health plan. The American Rescue Plan directs the Treasury Department, DOL and the Department of Health and Human Services to issue a model notice by Monday, April 26, 2021. The termination notice is not required to be issued to an assistance eligible individual who (a) becomes eligible for (not enrolled in) another group health plan or (b) becomes eligible for (not enrolled in) Medicare.

Optional COBRA Election Change

An employer is permitted (but not required) to allow assistance eligible individuals to change COBRA coverage to a lower-cost option (assuming one exists). The lower cost option cannot be an "excepted benefit" under the terms of the Affordable Care Act (such as dental only or vision only coverage), a medical FSA or a qualified small employer health reimbursement arrangement (QSERA).

The employer must provide assistance eligible employees who became entitled to COBRA before April 1, 2021 with a notice written in "clear and understandable language" describing the COBRA subsidy and the ability to elect the lower cost option, together with the other items specified by the statute, no later than May 31, 2021.

The assistance eligible individual then has 90 days after receiving this notice to make the election to change coverage.

Additional COBRA Election

The American Rescue Plan allows an assistance eligible individuals who did not elect COBRA continuation coverage but who would otherwise be eligible for the COBRA subsidy a second chance to elect COBRA coverage. In addition, it provides a special election period for any individual who elected COBRA continuation coverage and discontinued such coverage before April 1, 2021.

The employer must provide these assistance eligible employees with a notice written in "clear and understandable language" describing the COBRA subsidy and the ability to elect the lower cost option, together with the other items specified by the statute, no later than May 31, 2021.

These individuals may elect COBRA continuation coverage within 60 days of receiving this notice of the opportunity. This COBRA coverage will be effective with the first period of coverage beginning on or after April 1, 2021 and will terminate as of the end of the original COBRA continuation period (calculated as if the individual elected COBRA during the individual's initial 60-day election window or if the individual had not terminated COBRA early).

It is unclear how this election period will apply to those who haven't yet elected COBRA due to the tolling of COBRA election periods as described in a [previous Client Alert \(available here\)](#). It is hoped that the Internal Revenue Service and DOL will issue guidance on this point.

Contact Your HH&K Attorney for Legal Guidance

This information is not legal advice and may not be suitable for all client situations. This Client Alert provides general information regarding the COBRA subsidy provisions of The American Rescue Plan and does not outline all of the important considerations related thereto. We anticipate that the terms of each of these programs may continue to evolve as applicable authorities release guidance.

This Client Alert is not a substitute for legal guidance regarding program details and how those may be applicable to your business. As always, if we can be of assistance with these programs or any other matters, please do not hesitate to contact your HH&K attorney.



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