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Benefit Plans: American Rescue Plan of 2021 (ARPA) Update

Legal Update
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The American Rescue Plan Act of 2021 (ARPA) passed by Congress and signed into law by President Biden on March 11, 2021, included the following employee benefits updates and changes:

Dependent Care FSA Increase

For calendar year 2021 only, the dependent care Flexible Spending Account (FSA) limit has been increased from $5,000 ($2,500 for married individuals that file separately) to $10,500 ($5,250 for married individuals that file separately). The law change is temporary, and if Congress does not act, the limit will return to the $5,000 ($2,500) limit in 2022. The increase in the limit does not change nondiscrimination testing for dependent care FSAs. It is likely that employers who have had trouble passing average benefit testing/55 percent utilization testing in the past will have difficulty taking advantage of this increase.

As we discussed in an earlier advisory, the Consolidated Appropriations Act of 2021 (CAA) allows employers to amend their health and dependent care FSAs to permit participants to prospectively change their elections without experiencing a permitted election change event. Therefore, if the employer amends its dependent care FSA, employees would have the flexibility to increase their dependent care FSA election amount without a permitted election change event. However, even if the employer did not amend the dependent care FSA to permit the prospective election change, it is likely that the mid-year increase to the dependent care FSA contribution limit qualifies as a significant improvement of a benefit package option under the existing permitted election change rules. Under this type of event, employees could enroll or increase an existing election within the cafeteria plan's specified time period (generally 30 days).

Applying the law change to non-calendar year plans may become complex, since the increased limits only apply to the 2021 calendar year. Fortunately, due to the CAA and existing election change events discussed above, employers should be able to coordinate elections to meet the rules. If you have questions on how to accomplish this, please contact us.

100 Percent COBRA Subsidies from April 2021 through September 2021

Eligible COBRA enrollees will be able to receive a 100 percent subsidy for their COBRA premiums from April 1, 2021, to September 30, 2021. In general, employers pay for the subsidies and then receive refundable tax credits (or reduced payroll tax withholdings) equal to the subsidized premiums, which require complying with tax reporting requirements.

To be eligible for the subsidy, the individual must be an employee or an employee's family member who loses coverage due to an involuntary termination (for reasons other than gross misconduct) or due to a reduction in hours. Employees that voluntarily terminate are not eligible for the subsidy. In addition to individuals who become eligible during the April 1, 2021, to September 30, 2021, period, the subsidy also covers former employees (and family members) who (1) are currently on COBRA coverage, (2) have never elected COBRA, or (3) have elected and discontinued COBRA prior to the subsidy period, but whose COBRA period includes part of the subsidy period.

The subsidy is also available for continuation coverage required by state "mini-COBRA" laws if that coverage is similar to federally-mandated COBRA coverage. Eligible individuals who are not currently enrolled in COBRA must be provided with a second opportunity to elect COBRA coverage, and the second enrollment period runs from 60 days following the date the eligible individual receives the revised COBRA notice discussed below.

For eligible individuals, the subsidy will last a maximum of six months but will end on the earlier of (1) the individual's maximum period of COBRA coverage or (2) September 30, 2021. The subsidy will also end if the individual becomes eligible for another group health plan or Medicare. ARPA charges individuals a $250 penalty for any failure to notify the employer of new coverage. Additionally, if the eligible individual intentionally fails to notify, the penalty is the greater of $250 or 110 percent of the subsidy amount.

ARPA permits (but does not require) an employer to give the eligible individuals the option to choose another group health plan option. The premium for the new plan cannot be more than the premium for the previous plan. If allowed by the employer, the eligible individual would have 90 days from the date of their COBRA notice to make a new group plan election.

ARPA also requires new notice requirements. First, employers must send a new COBRA election notice with specific detailed information about the subsidy within 60 days of April 1, 2021, i.e. by May 31, 2021, to all individuals who (1) previously failed to elect COBRA, (2) discontinued COBRA coverage, or (3) have yet to elect COBRA coverage but still remain eligible to do so under the usual COBRA rules. Next, employers will need to amend their COBRA notice and election forms for individuals that become eligible during the subsidy period to include ARPA rights. Finally, employers must send a notice to eligible individuals if their subsidy will expire no less than 15 days or more than 45 days prior to the end of the subsidy. The expiration notice will not be required if the eligible individual has obtained other group health coverage. The Department of Labor is expected to release model language to assist employers with these revised notice requirements.

Outbreak Period Extension

As we described in our client advisory dated May 5, 2020, the DOL had provided a tolling period for COBRA and other health plan deadlines. The DOL recently extended and clarified this tolling period in EBSA Disaster Relief Notice 2021-01. Individuals and plans with timeframes that are subject to the relief under the prior DOL and IRS guidance will have the applicable deadlines disregarded until the earlier of (1) one year from the date they were first eligible for relief, or (2) 60 days after the announced end of the National Emergency (the end of the Outbreak Period). At that time, the timeframes for individuals and plans with periods that were previously disregarded under the previous guidance will resume. In no case will a disregarded period exceed one year.

Emergency Sick and Family Leave Changes

ARPA extends and increases the employer tax credits for emergency paid sick and family leave that was enacted under the Families First Coronavirus Response Act (FFCRA) and extended to March 31, 2021, under the CAA. ARPA increases the limits on tax credits to offset leave costs for employers with fewer than 500 employees and extends the availability for tax credits to September 30, 2021. The tax credits also are available to offset employer costs for paid leave taken for COVID-19 vaccinations and related health issues. While ARPA extended the availability for tax credits, it did not extend the FFCRA mandate to provide paid leave for employees.

Expanded Employee Retention Credit

ARPA extends the employee retention credit from June 30, 2021, to December 31, 2021. Additionally, the credit is restructured as a refundable payroll tax credit against the employer's share of Medicare taxes instead of Social Security taxes. The credit continues to equal 70 percent of qualified wages, including allocable qualified health plan expenses, paid to employees by eligible employers. The scope of the credit varies by the size of the employer.