Group health plans, their plan administrators and fiduciaries, employer or other sponsors, administrative services providers and insurers should act quickly to distribute required notices using the regulatory guidance just released today (April 7, 2021) and take other actions needed to comply with the Consolidated Omnibus Reconciliation Act of 1985 (“COBRA”) coverage and premium subsidy notification, enrollment and coverage continuation requirements created by Section 9501 (the “COBRA Premium Assistance Rules”) of the American Rescue Plan Act of 2021 (“ARP”) enacted last month.

The guidance package released today by the Employee Benefit Security Administration includes model notices and other preliminary guidance on the COBRA Premium Assistance Rules, which among other things require group health plans to notify “assistance eligible individuals” no later than May 31, 2021 of right under ARP Section 9501 to enroll in free COBRA Coverage during the ARP Premium Subsidy Period that began April 1, 2021. As notifications are due no later than May 31, 2021 and the 60 day period for enrolling in COBRA coverage under the ARP COBRA Subsidy Rules does not begin until proper notification is provided, group health plan should move quickly to prepare and distribute the notifications and make other necessary plan arrangements.

ARP COBRA Subsidy Rules Overview

Section 9501 of the ARP seeks to help “assistance eligible individuals” continue their health benefits by providing assistance to maintain enrollment in covered group health plans by allowing them to enroll and maintain COBRA coverage under those plans without paying their COBRA continuation coverage premiums. No later than May 31, 2021, the ARP requires covered group health plans to notify certain former covered employees or dependents that qualify to enroll in COBRA coverage as “assistance eligible individuals” of their right within 60 days of notification to enroll in COBRA Coverage under the group health plan at no cost from April 1, 2021 through September 30, 2021 or, if earlier, the date their COBRA eligibility otherwise end (the “Premium Subsidy Period”). Assistance eligible individuals generally are qualified beneficiaries who lost coverage under the group health plan due to an involuntary reduction in hours or termination of employment enrolled in COBRA Coverage between April 1, 2021 and September 31, 2021 including those qualifying event was an involuntary employment loss occurring during the 18-month period (29-months for individuals qualifying for extended COBRA eligibility due to disability) prior to April 1, 2021 not enrolled in COBRA as of April 1, 2021.

Group health plans cannot require an assistance eligible individual to pay any premiums for COBRA Coverage during his Premium Subsidy Period. Instead, ARP allows sponsoring employers or other plan sponsors to claim an employment tax credit for COBRA premiums paid on behalf of assistance eligible individuals.
ARP Covered Group Health Plans

Like the COBRA coverage continuation rules generally, the COBRA Premium Assistance Rules generally apply to all group health plans sponsored by private-sector employers or employee organizations (unions) subject to the COBRA rules under the Employee Retirement Income Security Act of 1974 (ERISA). This generally includes all private-sector group health plans maintained by employers that had at least 20 employees on more than 50 percent of its typical business days in the previous calendar year other than church plans and.

Additionally, the Rules also apply to group health plans sponsored by State or local governments subject to the continuation provisions under the Public Health Service Act.

Finally, the COBRA Premium Assistance Rules also is available for group health insurance required under state mini-COBRA laws.

Premium Subsidy Limited To “Assistance Eligible Individuals”

Only “assistance eligible individuals” within the meaning of ARP Section 9501(c) qualify for the COBRA Premium Assistance Rules and other rights. The generally applicable provisions of COBRA continue to govern the rights of individuals who do not qualify as “assistance eligible individuals.”

An Assistance Eligible Individual is a COBRA qualified beneficiary who meets the following requirements during the period from April 1, 2021 through September 30, 2021:

ARP Section 9501(c) generally defines an “assistance eligible individual” as an individual who:

- Is a “qualified beneficiary” under COBRA\(^1\) by reason of an reduction of hours or termination of employment by a covered employee other than on account of the employee’s gross misconduct or voluntary termination of such individual’s employment by such individual; and
- Elects such COBRA coverage either within the 60-day election period usually applicable under COBRA or, for a qualified beneficiary not enrolled in coverage as of April 1, 2021 who otherwise would be an assistance eligible individual, who timely elects COBRA in accordance with the ARP.

Pending further guidance, group health plans, their sponsors and administrators should use care to avoid applying the definition of “assistance eligible individual” too narrowly. Because ARP disregards a qualified beneficiary’s previous failure to timely elect or subsequent failure to maintain COBRA coverage for purposes of determining status as an assistance eligible individual, qualified beneficiaries potentially eligible to qualify as assistance eligible individuals could include any individuals that lost coverage due to voluntary reductions in hours or terminations of employment who have not exhausted their original maximum period of COBRA eligibility and whose eligibility for COBRA coverage otherwise ended for a reason other than failure to elect to pay premiums.

The existing guidance seems to support this interpretation. Along with recognizing that ARP disregards the failure of an individual to elect or maintain COBRA Coverage for purposes of determining status as an assistance eligible individual, COBRA Premium Assistance under the American Rescue Plan Act of 2021 FAQs (the “FAQ”) states that an individual who otherwise would be an assistance eligible individual is ineligible for COBRA Premium Assistance if eligible for Medicare or other group health coverage, such as through a new employer’s plan or a spouse’s plan (not including excepted benefits, a qualified small employer health reimbursement arrangement (QSEHRA), or a health flexible spending arrangement (FSA)). The FAQ also clarifies that individuals that have individual health insurance coverage, like a plan through the Health Insurance Marketplace® or Medicaid may be eligible for ARP premium assistance, but electing to enroll COBRA continuation coverage with ARP premium assistance will disqualify the individual for premium tax credit, advance payments of the premium tax credit, or the health insurance tax credit for the individual’s health coverage during that period. The FAQ also confirms that if the employee’s termination of employment was for gross misconduct, the employee and any dependents would not qualify for COBRA continuation coverage or the

\(^1\) For purposes of COBRA, the term “qualified beneficiary” generally means an employee who was covered by a group health plan on the day before a qualifying event occurred or that employee's spouse, former spouse, or dependent child. In addition, any child born to or placed for adoption with a covered employee during a period of continuation coverage is automatically considered a qualified beneficiary. An employer's agents, independent contractors, and directors who participate in the group health plan may also be qualified beneficiaries. See
premium assistance. As the FAQ does not otherwise further narrow the maximum period an individual can be a qualified beneficiary due to a reduction in hours or termination of employment, the class of persons eligible for the COBRA Premium Subsidy rights presumably includes individuals that have experienced a subsequent event that otherwise would terminate their COBRA eligibility before the end of the 18 month maximum COBRA eligibility period (or 29-month period for individuals disabled on the date of the original qualifying event who qualify for the disability extension to their maximum COBRA eligibility Period.)

**Plans Must Offer Additional Election Period For Assistance Eligible Individuals Not Enrolled On 4/1/2021**

By May 31, 2021, covered group health plans must notify qualified beneficiaries not already enrolled in COBRA as of April 1, 2021 of their opportunity to apply within 60 days of the notification for enrollment as an assistance eligible individual in COBRA coverage retroactive to April 1, 2021.

Qualified beneficiaries eligible to receive COBRA coverage with premium assistance must apply for enrollment as assistance eligible individuals within 60 days of the provision of this notification. The FAQ clarifies that these deadlines for group health plans to provide notification and for qualified beneficiaries to apply for enrollment as assistance eligible is not affected by the special relief for the 60-day initial election period for COBRA continuation coverage provided by the Notice of Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID–19 Outbreak (“Joint Notice”) issued on May 4, 2020 by the DOL, the Department of the Treasury, and the IRS and discussed in EBSA Disaster Relief Notice 2021-01.

ARP provides that COBRA Coverage with premium assistance for an assistance eligible individual who timely enrolls during the ARP Special Enrollment Period begins on April 1, 2021 ends on the date that that individual’s COBRA eligibility otherwise would end had the individual been enrolled in and maintained COBRA enrollment (the “Premium Assistance Period”). The FAQ states that assistance eligible individuals timely making this election can begin their subsidized COBRA Coverage prospectively from the date of their election, or, an assistance eligible individual with a qualifying event on or before April 1st, may choose to start coverage as of April 1st, even if the individual receives an election notice and makes such election at a later date. In either case, the premium assistance is only available for periods of coverage from April 1, 2021 through September 30, 2021.

**Assistance Eligible Individuals Gets Free COBRA Thru September**

The ARP COBRA Subsidy provisions effectively prohibit group health plans from charging assistance eligible individuals for COBRA coverage during the period beginning on the first day of the month that the individual qualifies for COBRA that begins on or after April 1, 2021 until the earliest of the following dates (the “Premium Subsidy Period”):2

- The date the qualified beneficiary is eligible3 for coverage under any other group health plan (other than coverage consisting of only excepted benefits,4 coverage under a health flexible spending arrangement under Code Section 106(c)(2), coverage under a qualified small employer health reimbursement arrangement under Code Section 9831(d)(2) or eligible for benefits under the Medicare program under title XVIII of the Social Security Act;
- The date of the expiration of the otherwise applicable maximum period of COBRA continuation coverage under Code Section 4980B (other than due to a failure to elect or discontinuation of coverage for nonpayment of COBRA premium that occurred before April 1, 2021).

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2 Act Section 9501(a)(1) “In the case of any premium for a period of coverage during the period beginning on the first day of the first month beginning after the date of the enactment of this Act, and ending on September 30, 2021, for COBRA continuation coverage with respect to any assistance eligible individual described in paragraph (3), such individual shall be treated for purposes of any COBRA continuation provision as having paid in full the amount of such premium.”
3 Presumably the term “eligible” is intentionally used to end the subsidy where the qualified beneficiary has the option to enroll in other ACA-covered group medical plan coverage” whether or not the individual elects to enroll.
4 Excepted benefits refers to plans excluded from ACA and HIPAA group health plan coverage under Internal Revenue Code Section 9832(c), ERISA Section 733(c) and Public Health Service Act Section 2791(c).
Assistance eligible individuals must notify the group health plan if that individual ceases to qualify for premium assistance due the individual becoming eligible for other group health plan coverage.

Qualified beneficiaries eligible for COBRA after their Premium Assistance Period ends may continue to qualify for COBRA subject to their timely payment of all required COBRA premiums and fulfillment of otherwise applicable COBRA requirements.

**Group Health Plans May Allow Change To Lower Coverage**

ARP permits, but does not require, group health plans to offer assistance eligibility individuals the option to change their group health plan coverage election to a coverage option offered to all similarly situated active employees when the election is made. However, this option is only allowed if:

- The plan sponsor timely elects to offer the option to change plans within the time required by ARP;
- The different coverage also is offered to similarly situated active employees at the time such election is made;
- The COBRA premium for the different coverage does not exceed the premium for coverage in which such individual was enrolled at the time such qualifying event occurred; and
- The different coverage in which the individual elects to enroll is not:
  - Coverage that provides only excepted benefits as defined in section 9832(c) of the Internal Revenue Code of 1986, section 733(c) of the Employee Retirement Income Security Act of 1974, and section 2791(c) of the Public Health Service Act;
  - A qualified small employer health reimbursement arrangement (as defined in section 9831(d)(2) of the Internal Revenue Code of 1986); or
  - A flexible spending arrangement (as defined in section 106(c)(2) of the Internal Revenue Code of 1986); and
- All notifications required by ARP timely are provided.

Plan sponsors wishing to offer this option should act quickly to amend their plan documents, contracts and communications to implement this choice in addition to providing the requisite notifications and elections to assistance eligible individuals.

**Group Health Plan Notification Of Assistance Eligible Individuals**

ARP requires group health plans to provide certain notifications to qualified beneficiaries entitled to qualify to enroll in COBRA coverage with premium assistance.

*Initial Notification By March 31, 2021.* Group health plans must provide notification by May 31, 2021 of the availability of premium assistance for COBRA coverage for assistance eligible individuals and if the employer chooses to allow assistance eligible individuals to change their coverage election as allowed by ARP, the option to enroll in different coverage. Failure to provide the required notification is a failure to meet the notice requirements under the applicable COBRA continuation provision. To fulfill this notification requirement, ARP requires that the notifications include—

- The forms necessary for establishing eligibility for premium assistance under this subsection;
- The name, address, and telephone number necessary to contact the plan administrator and any other person maintaining relevant information in connection with such premium assistance;
- A description of the extended election period for applying for enrollment in COBRA Coverage with premium assistance;
- A description of the obligation of the qualified beneficiary to notify the group health plan of events terminating the assistance eligible individual’s eligibility for premium assistance and the penalty provided under Internal Revenue Code Section 6720C for failure to carry out the obligation;
- A description, displayed in a prominent manner, of the qualified beneficiary’s right to a subsidized premium and any conditions on entitlement to the subsidized premium; and
- A description of the option of the qualified beneficiary (if any) to enroll in different coverage if the employer permits such beneficiary to elect to enroll in such different coverage as allowed under ARP.
While ARP allows plan administrators the option of designing their own notices and forms to fulfill this requirement, it also directed the Department of Labor in consultation with the Secretary of the Treasury and the Secretary of Health and Human Services to develop model notices for plans to use for this purpose. In response to this directive, the Department of Labor EBSA on April 7, 2021 published the following model notices and forms for group health plans to use for this purpose:

- General Notice and Election Notice
- Notice in Connection with Extended Election Period
- Alternative Notice; and
- Summary of the COBRA Premium Assistance Provisions

**Notice of Expiration of Premium Assistance.** ARP also generally requires that group health plans send written notice to assistance eligible individual whose eligibility for enrollment in COBRA coverage with premium assistance is about to end the period of the impending termination of their eligibility for premium assistance during the period beginning 45 days before the date of such expiration and ending on the day 15 days before the date of such expiration. This notification must inform the assistance eligible individual:

- That the premium assistance for such individual will expire soon and the prominent identification of the date of such expiration; and
- That such individual may be eligible for coverage without any premium assistance through COBRA continuation coverage or coverage under a group health plan.

The obligation to provide this notification does not apply where eligibility for premium assistance ends because the individual becomes eligible for coverage under any other group health plan or Medicare.

ARP directed the Secretary of Labor, in consultation with the Secretary of the Treasury and the Secretary of Health and Human Services, to prescribe model notifications for group health plans to use to provide this notification. The EBSA published its model [Notice of Expiration of Premium Assistance](#) as part of the guidance package it released on April 7, 2021.

**ARP Tax Credit For Employers And Other Plan Sponsors**

ARP creates tax credits for employers or other plan sponsors to mitigate the financial hardship of complying with ARPs COBRA Premium Subsidy rules. An employer maintaining a group health plan under which some or all of the coverage is self-insured generally is entitled to the credit. For insured coverage, the insurer will claim the tax credit. Where a multiemployer group health plan provides the subsidized COBRA coverage, the multiemployer plan will claim the credit. The credit will be refundable and may be advanced quarterly. Before the government issues a check, however, the credit will be applied against payroll taxes – specifically, the Medicare Hospital Insurance (HI) taxes and Railroad Retirement Tax Act (RRTA) Tier 1 taxes attributable to the HI tax rate. As of publication, Internal Revenue Service implementing guidance of these tax credit rules was still pending. Stay tuned for more details as they become available.

**More Information**

The ARP COBRA Premium Subsidy Rules are only one of a plethora of COVID health care emergency driven regulatory and enforcement changes impacting employers and their employee benefit plans. If you need assistance or would like additional information about these or other legal, management or public policy developments, please contact the author Cynthia Marcotte Stamer via e-mail or via telephone at (214) 452-8297.

If you or someone you know would like to receive future updates about developments on these and other concerns, register [here](#), connect with us on Facebook, on LinkedIn or Twitter or both.
Recognized by her peers as a Martindale-Hubble “AV-Preeminent” (Top 1%) and “Top Rated Lawyer” with special recognition LexisNexis® Martindale-Hubbell® as “LEGAL LEADER™ Texas Top Rated Lawyer” in Health Care Law and Labor and Employment Law; as among the “Best Lawyers In Dallas” for her work in the fields of “Labor & Employment,” “Tax: ERISA & Employee Benefits,” “Health Care” and “Business and Commercial Law” by D Magazine, Cynthia Marcotte Stamer is a practicing attorney board certified in labor and employment law by the Texas Board of Legal Specialization and management consultant, author, public policy advocate and lecturer widely known for 30+ years working as an on demand, special project, consulting, general counsel or other basis with domestic and international business, charitable, community and government organizations of all types, sizes and industries and their leaders on labor and employment and other workforce compliance, performance management, internal controls and governance, compensation and benefits, regulatory compliance, investigations and audits, change management and restructuring, disaster preparedness and response and other operational, risk management and tactical concerns.

Most widely recognized for her work with health care, life sciences, insurance and data and technology organizations, she also has worked extensively with health plan and insurance, employee benefits, financial, transportation, manufacturing, energy, real estate, accounting and other services, public and private academic and other education, hospitality, charitable, civic and other business, government and community organizations. and their leaders.

Ms. Stamer has extensive experience advising, representing, defending and training domestic and international public and private health care and life sciences, charitable, community and governmental, and other business organizations and their leaders, employee benefit plans, their fiduciaries and service providers, insurers, and others. A widely published author and popular speaker, Ms. Stamer also has published and spoken extensively on wage and other and other health care, human resources, employee benefits and other workforce and services; insurance; workers’ compensation and occupational disease; business reengineering, disaster and distress; and many other compliance, governance, risk management, operational and public and regulatory affairs concerns.

A former lead advisor to the Government of Bolivia on its pension project, Ms. Stamer also has worked internationally and domestically as an advisor to health, managed care, insurance, and other business, community and government leaders on these and other legislative, regulatory and other legislative and regulatory design, drafting, interpretation and enforcement, as well as regularly advises and represents organizations on the design, administration and defense of workforce, employee benefit and compensation, safety, discipline, reengineering, regulatory and operational compliance and other management practices and actions.

Ms. Stamer also serves in leadership of a broad range of professional and civic organizations and provides insights and thought leadership through her extensive publications, public speaking and volunteer service with a diverse range of organizations including as Chair of the American Bar Association (“ABA”) Intellectual Property Section Law Practice Management Committee, Vice Chair of the International Section Life Sciences and Health Committee, Past ABA RPTE Employee Benefits & Other Compensation Group Chair and Council Representative and current Welfare Benefit Committee Co-Chair, Past Chair of the ABA Managed Care & Insurance Interest Group, past Region IV Chair and national Society of Human Resources Management Consultant Forum Board Member, past Texas Association of Business BACPAC Chair, Regional Chair and Dallas Chapter Chair, former Vice President and Executive Director of the North Texas Health Care Compliance Professionals Association, past Board President of Richardson Development Center (now Warren Center) for Children Early Childhood Intervention Agency, past North Texas United Way Long Range Planning Committee Member, past Board Member and Compliance Chair of the National Kidney Foundation of North Texas, a Fellow in the American College of Employee Benefit Counsel, the American Bar Foundation and the Texas Bar Foundation and many others.

For more information about these concerns or Ms. Stamer’s work, experience, involvements, other publications, or programs, see www.cynthiastamer.com or contact Ms. Stamer via e-mail here. ©2021 Cynthia Marcotte Stamer. All rights reserved.