# Alerts & Publications

## American Rescue Plan Act Includes New COBRA Subsidy & Tax Credits for Employers

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## I. INTRODUCTION

On March 11, 2021, President Biden signed the American Rescue Plan Act of 2021, H.R. 1319 (the "ARPA"), a $1.9 trillion COVID-19 relief package that provides stimulus payments, expands and modifies certain tax credits, and extends unemployment benefits for individuals. In addition to these developments, the ARPA contains a number of provisions that affect employers, including a new COBRA subsidy and payroll tax credits for paid leave and employee retention.

## II. BACKGROUND

H.R. 1319 passed on a 219-212 vote in the House of Representatives on February 27 and was thereafter sent to the Senate. On March 6, the Senate passed the Act on a 50-49 vote. President Biden signed the bill into law on March 11.

## III. ARPA'S COBRA SUBSIDY

The ARPA creates a new COBRA subsidy for certain eligible individuals (and their covered dependents) who lost or will lose group health plan coverage due to an involuntary termination of employment or reduction in hours. Employers are required to pay or advance 100% of COBRA premiums for such individuals (and their covered dependents) for up to six months, from April 1, 2021 to September 30, 2021. Employers are also required to provide certain notices of this COBRA subsidy to eligible individuals as discussed in greater detail below.

### A. Eligibility and Subsidy Period

Under the ARPA, individuals eligible for this new COBRA subsidy are referred to as "assistance eligible individuals." An assistance eligible individual is any employee (and his or her covered dependents) who is eligible for COBRA continuation coverage due to the employee's involuntary termination of employment (other than for gross misconduct) or a reduction in hours, and who elects COBRA continuation coverage. Individuals who qualify for COBRA because of voluntary resignation are not considered assistance eligible individuals under ARPA. An assistance eligible individual is entitled to a 100% COBRA premium subsidy from April 1, 2021 through the earlier of (1) September 30, 2021, (2) the end of their COBRA coverage period, or (3) the date on which such individual obtains other group healthcare coverage or Medicare, whichever occurs first (the "Subsidy Period"). The subsidy does not extend the original COBRA coverage period (or any longer applicable state law mini-COBRA coverage period).

Assistance eligible individuals may include those who elected COBRA coverage prior to April 1 as well as individuals who become COBRA-eligible (and elect COBRA coverage) after April 1. For example, if an employee was involuntarily terminated by her employer and elected COBRA coverage effective January 1, 2020, and her maximum COBRA period is 18 months, she is eligible for the subsidy from April 1, 2021 to June 30, 2021 (the date her 18-month COBRA period ends).

All group health plans subject to COBRA, except flexible spending accounts, must provide this subsidized coverage. While COBRA only applies to employers with 20 or more employees, this subsidy is also available for continuation coverage required by State "mini-COBRA" laws if that coverage is similar to federally mandated COBRA coverage.

Individuals who become eligible for other group health plan coverage or Medicare are required to notify their group health plans. The timing and format for that notification will be provided in upcoming regulations. Individuals who fail to comply with this notice obligation may be penalized at $250 for each failure, except if the failure is intentional, the penalty is the greater of $250 or 110% of the amount of the subsidy. Penalties will not be assessed if the failure to notify was due to reasonable cause and not willful neglect.

### B. The Extended COBRA Election Period

The ARPA also includes an extended COBRA election period that permits otherwise assistance eligible individuals who previously declined COBRA coverage or let their coverage lapse to elect COBRA coverage beginning April 1, 2021 and receive the subsidy during the Subsidy Period. Such individuals must elect COBRA coverage within 60 days of receiving an Extended Election Notice (as described below).

### C. Alternative Enrollment Options

Under the ARPA, employers may allow an assistance eligible individual to enroll in COBRA continuation coverage under a group health plan that differs from the COBRA continuation coverage in effect prior to the individual becoming eligible for COBRA coverage. The assistance eligible individual must elect the different coverage within 90 days of receiving notice of the alternative enrollment option. The following additional requirements must also be met:

1. The premium for the different coverage does not exceed the premium for the coverage in which the individual was enrolled at the time of the qualifying event;
2. The employer offers the different coverage to similarly situated active employees at the time the individual makes the election; and

3. The different coverage is not (a) coverage that provides only excepted (i.e., non-traditional) benefits, (b) a qualified small employer health reimbursement arrangement, or (c) a flexible spending arrangement.

### D. Payroll Tax Credits

As explained above, under the ARPA, the employer (and not the assistance eligible individual) must pay or advance the COBRA premiums for assistance eligible individuals. Employers will generally be entitled to reimbursement (on a dollar-for-dollar basis) through a refundable payroll tax credit against employer-paid Medicare taxes. Such tax credit will be applied on a quarterly basis, with any credits above Medicare taxes for such quarter to generally be treated as an overpayment that may be refundable. The IRS may issue further guidance on how such credits will work.

### E. Notices

The notice requirements of the ARPA mandate that employers send general election notices to employees who first become eligible for subsidized coverage during the Subsidy Period. This notice must inform assistance eligible individuals of the availability of a premium subsidy and other specific details about the administration of the subsidized coverage. Employers must also send notices to individuals who are eligible for the extended election period discussed above ("Extended Election Notices") during the Subsidy Period. Extended Election Notices must be distributed by May 31, 2021. Lastly, if an assistance eligible individual's COBRA subsidy will expire prior to September 30, 2021 (other than due to the individual obtaining new group healthcare coverage or Medicare coverage), employers must send the individual another notice between 15 days to 45 days before the subsidy expires that identifies the expiration date and state that coverage may remain available through unsubsidized COBRA coverage or other coverage, if applicable. The Department of Labor has announced that it will post model notices for these purposes in April 2021.

## IV. EMPLOYER TAX CREDITS

### A. Compliance with COBRA

As explained above, employers who comply with the ARPA's COBRA provisions will be reimbursed through tax credits against their quarterly payroll taxes for the costs of the subsidized coverage during the Subsidy Period. If the tax credit exceeds the payroll taxes owed, it will be treated as an overpayment and refunded to the employer.

### B. Voluntarily Providing Paid Sick & Family Leave

Similar to the tax credits provided in the Families First Coronavirus Response Act ("FFCRA"), under the ARPA, employers with no more than 500 employees who voluntarily provide qualifying paid leave consistent with the FFCRA may receive a refundable quarterly tax credit through September 30, 2021 for an amount equal to 100% of qualified sick and family leave wages paid by the employer. Any excess tax credits that exceed the payroll taxes owed will be refunded to the employer. Additionally, the amount of refundable tax credits will be increased by the employer's qualified health plan expenses as properly allocable to the qualified leave wages.

ARPA broadens the qualifying reasons for paid sick leave to include: (1) seeking or awaiting the results of a COVID-19 test or diagnosis if the employee has been exposed to COVID-19 or the employer requested the test or diagnosis; (2) receiving a COVID-19 vaccine; or (3) recovering from an injury, illness, disability, or medical condition associated with the vaccine. These qualifying reasons also allow employees to receive paid leave under the Emergency Family and Medical Leave Expansion Act.

Beginning April 1 and through September 30, employers may voluntarily offer 10 new days (up to 80 new hours) of paid sick leave to employees, and will be eligible to receive the tax credit for such leave. The tax credit an employer can receive for such paid sick leave is based on an employee's regular rate of pay if the need is for one new reasons related to immunization or testing (as described above) or because of the employee's own symptoms, quarantine or isolation up to $511 per day. For any other paid sick leave reason, the amount of tax credit an employer can receive is limited to 2/3 the regular rate of pay capped at $200 per day.

Employers can also receive a tax credit for up to 12 weeks of paid family leave. The total cap for paid family leave has been increased from $10,000 to $12,000. The available credit is still limited to 2/3 the regular rate of pay capped at $200 per day for all paid family leave reasons, including the new leave reasons described above that qualify for a $511 per day cap when the wages are paid under the paid sick leave provisions. Unlike the FFCRA, ARPA does not require the first ten days of paid family medical leave to be unpaid.

ARPA disqualifies employers from receiving a tax credit if they violate the anti-retaliation provisions of the FFCRA or administer FFCRA paid leave benefits in a discriminatory manner in favor of highly compensated employees, full-time employees, or employees with greater seniority.

### C. Employee Retention

Subject to certain limitations, eligible employers, including recovery startup businesses and severely financially distressed employers, who retain employees may receive a refundable quarterly tax credit for an amount equal to 70% of the qualified wages with respect to each of their employees. Similar to the credit under the Coronavirus Aid, Relief, and Economic Security ("CARES") Act, this tax credit incentivizes employers to keep employees on the payroll.

The ARPA extends the employee retention credit through the end of 2021. The amount of qualified wages with respect to any employee that may be taken into account will not exceed $10,000. If the employer is a recovery startup business, the amount of the credit for any quarter will not exceed $50,000.

## V. NEXT STEPS

With respect to the new COBRA subsidy, employers should begin reviewing their records to identify assistance eligible individuals (including those who may qualify under the extended COBRA election period) and coordinate with their COBRA administrator to ensure compliance with the applicable requirements under the ARPA, including the various notice requirements.

In addition, employers should continue to look for published guidance and/or updated FAQs from the Department of Labor and the Internal Revenue Service. If you have any questions regarding the ARPA or how it may impact your company's policies or practices, please contact the authors of this alert or your O'Melveny advisor.

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