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COMPLIANCE SOLUTIONS

American Rescue Plan Act of 2021:

What We Know Now & What's Coming Next

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Today's Agenda:
✓ Families First Coronavirus Relief Act (FFCRA) Tax Credits Extended
✓ COBRA Subsidy
✓ Dependent Care FSA

We're Waiting…

Where are the Regulations?

ARPA signed on March 11, 2021

FFCRA Eligibility

- Employers with less than 500 employees
- Mandatory through December 31, 2020; optional since January 1, 2021
- Original deadline to obtain tax credits was March 31, 2021
- ARPA extended the tax credit deadline from April 1, 2021 through September 30, 2021
- FFCRA statute was not extended, only the access to the tax credits
- This has created some confusion regarding application for employers
- Some state law statutes have created mandatory leave that runs contemporaneously with the voluntary FFCRA (SB95 in CA)

Emergency Paid Sick Leave (EPSL)

- Required employers to provide paid sick leave to employees who met certain triggers (discussed on next slide)
- Set required rates of pay (discussed on next slide)
- Set maximum pay amounts (discussed on next slide)
- Provided employees with up to 80 hours of paid sick leave; once used could not be replenished
- Allowed for employers to obtain federal tax credits to offset the cost of the paid leave

Original Triggers for Eligibility under EPSL

- Employee is subject to quarantine for COVID-19 (full pay; $511/day or $5,110 total)
- Employee is advised by HCP to self-quarantine due to concerns related to COVID-19 (full pay; $511/day or $5,110 total)
- Employee has symptoms related to COVID-19 and is seeking a diagnosis (full pay; $511/day or $5,110 total)
- Employee is caring for an individual subject to quarantine or advised to quarantine by HCP (2/3 pay; $200/day or $2,000 total)
- Employee is caring for a child if the school or place of care is closed due to COVID-19 precautions (2/3 pay; $200/day or $2,000 total)

Added Triggers Under ARPA

- Employee obtaining a COVID-19 vaccination
- Employee is recovering from an injury, disability, illness or condition related to a COVID-19 vaccination; or
- Employee is seeking or awaiting the results of a COVID-19 test or diagnosis because either the employee has been exposed to COVID-19 or the employer requested the test or diagnosis
- All new reasons qualify the employer for a $511 full pay tax credit whereas all the other caps remain the same as on the previous slide

EPSL Allotment

- Originally provided 10 days/80 hours of EPSL to be used through March 31, 2021
- ARPA resets available leave to 10 days/80 hours as of April 1, 2021, and is available through September 30, 2021
- Employees are allowed no carryover of previously unused leave

Emergency Family and Medical Leave (EFMLA)

- Required employers to provide paid family and medical leave to employees who met one specific trigger (discussed on next slide)
- Set required rates of pay (discussed on next slide)
- Set maximum pay amounts (discussed on next slide)
- Provided employees with up to 12 weeks of paid sick leave (first two weeks were unpaid)
- Allowed for employers to obtain federal tax credits to offset the cost of the paid leave

Triggers for Eligibility Under EFMLA

- Original Trigger
  - Employee is caring for a child if the school or place of care is closed due to COVID-19 precautions ($200/day or $10,000 total)
- As a result of ARPA, EFMLA now allows for all EPSL triggers to also trigger EFMLA eligibility
- Still caps the available tax credit per employee at $200/day but increases the maximum total to $12,000
- ARPA allows the first two weeks of EFMLA to now be paid so it is arguable that an employee can now get 2 weeks of EPSL and 12 weeks of EFMLA for 14 total paid weeks

EFMLA Replenished?

- ARPA is silent about whether EFMLA is replenished
- The consensus is:
  - Employees may take up to 12 weeks between April 1, 2021 and September 30, 2021
  - Employees are still limited to 12 total weeks of FMLA within a 12-month period for all reasons
  - Employees who have already used up their allotment for the year are not entitled to more FMLA, either traditional or emergency
  - If the FMLA year has reset then the employee is entitled to the new 12 weeks, including both traditional and emergency

Non-Discrimination Provision

- FFCRA tax credit extension comes with a catch
- An employer may not discriminate in terms of employee eligibility for paid leave
- If the program discriminates in favor of:
  - Certain highly compensated employees (section 414(q) of the IRC)
  - FT employees; or
  - Employees on the basis of employment tenure
- If you have an existing paid sick leave program that you want to try and align with FFCRA for tax credits, you must make sure the foregoing discrimination does not occur or the tax credits won’t be available

FFCRA Extension Decision

- FFCRA is voluntary so employers need to decide if they are going to extend the program or not
- If an employer wants to extend the FFCRA for tax credits then they should immediately notify employees and change any existing policies to conform to the new rules
- Update any leave forms or documentation requirements to encompass the new rules
- Rules must be followed properly or the tax credits will not be available; no hybrid approaches allowed
- If they are not going to extend the program then employers should remove/cancel any FFCRA policies from the handbook or policy manual

FFCRA Extension Decision Alternatives

- Employer creates their own paid sick leave program with their own parameters; won’t qualify for tax credits
- Meet requisite state paid sick leave mandates and match FFCRA leave to be able to get the federal tax credits
- Analyze growing vaccination rates within your organization to decide whether to implement because it is an incentive for employees to stay home if sick
- Employee morale if implemented or not

ARPA/FFCRA Takeaways

- Intermittent leave under the EFMLA must still be agreed to by the employer and the employee
- Regular rate includes commissions, tips or piece rates
- Leave times for vaccinations vary
- Follow FFCRA or no tax credits
- Follow regular FMLA counting principles
- Compare with state paid leave laws to maximize benefit
- Continue to meet all documentation requirements

General Overview

- The American Rescue Plan Act of 2021 (ARPA) created a 6-month subsidy period (**April 1, 2021 to September 30, 2021**) during which certain "Assistance Eligible Individuals" (AEIs) may qualify for a 100% subsidy for COBRA coverage.
- The subsidy must be offered by group health plans providing:
  - Federal COBRA continuation coverage under the Code, ERISA, or PHSA; or
  - Continuation coverage under state "mini-COBRA" laws
- Includes all group health plan subject to COBRA (e.g., medical, dental, vision, EAP) except health flexible spending accounts (FSA)

DOL issued guidance and model notices on April 7th, 2021 clarifying some key questions left unanswered by ARPA. However, additional guidance is expected which may impact information contained in these slides.

Payroll Tax Credit

How Does this Work?

- The premium is advanced by the employer, plan, or insurer, and then reimbursed by the federal government through a refundable credit against Medicare payroll taxes.
  - For self-insured plans and insured plans subject to federal COBRA, the employer receives the tax credit
  - For insured plans not subject to COBRA, the insurer receives the credit
  - For multiemployer plans, the plan receives the credit
  - Credit amounts exceeding Medicare taxes will be treated as a refund of a Medicare tax overpayment
- Amount of subsidy includes 2% administrative fees associated with the COBRA premium
- Amounts employers may offer to some employees after termination of employment to subsidize COBRA (e.g. under a severance agreement or plan) will not be eligible for reimbursement from the government via the payroll tax credit.

DOL issued guidance and model notices on April 7th, 2021 clarifying some key questions left unanswered by ARPA. However, additional guidance is expected which may impact information contained in these slides.

Who Is Eligible for the Subsidy?

- **Assistance Eligible Individuals (AEIs)**
  - Must have lost group health coverage due to an **involuntary termination of employment** (other than for gross misconduct) or a **reduction of hours**
    - Includes employees, former employees, covered spouses and dependents
  - COBRA qualified beneficiaries are <u>ineligible</u> for the subsidy if they experience another COBRA qualifying event (e.g., divorce or legal separation, death of the covered employee, dependent child ceasing to be a dependent or entitlement to Medicare)

Who Is Eligible for the Subsidy? (continued)

- **Involuntary Termination??**
  - DOL guidance does not define "involuntary" termination
  - Can look to the American Recovery and Reinvestment Act of 2009
  - **Common questions:**
    - Does this subsidy apply to an involuntary termination even if the termination was for "cause" for a poor performance issue?
    - Is an employee who loses coverage after a period of time on disability or leave of absence, or due to termination after a period of disability or leave, eligible for the subsidy?
    - Retirement?
- **Reduction in Hours**-*can be voluntary or involuntary*
    - Change in business's hours of operations
    - Change from full-time to part-time status
    - Taking a temporary leave of absence
    - Lawful labor strike

American Recovery and Reinvestment Act (ARRA) of 2009: https://www.irs.gov/pub/irs-drop/n-09-27.pdf

Subsidy Duration

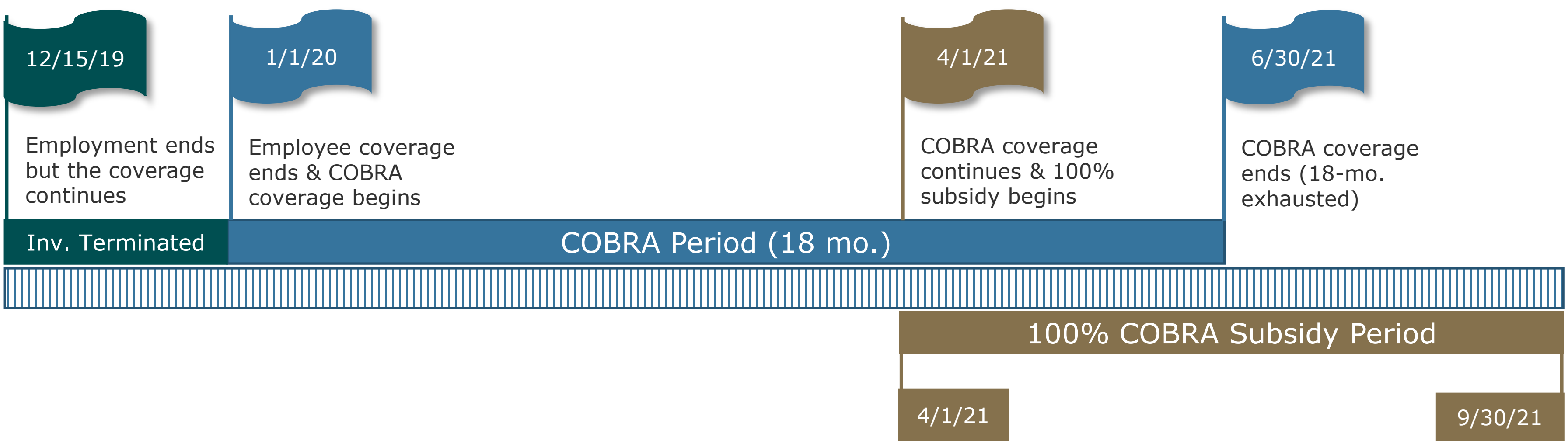
- The subsidy period will be shortened for AEIs who, before September 30, 2021:
  - Reach the end of their original 18-month COBRA maximum period of coverage; or
  - Are eligible or become eligible for other group health plan coverage, including a new employer's group health plan or the spouse's employer group health plan
  - Group health plan coverage **does not** include:
    - Coverage that is only excepted benefits (such as dental or vision coverage), a QSEHRA, FSA, Medicaid, or Marketplace coverage
- If a QB is in a waiting period for other group health plan coverage, they are not considered "eligible" for other group health plan coverage
- AEIs must notify the group health plan if they become eligible for Medicare or another group health plan
- Penalties for failure to notify include:
  - $250 for inadvertent failure
  - $250 or 110% of premium subsidy amount for intentional failure

Extended Election Period

- ARPA also extends another opportunity to elect COBRA for certain individuals who would be eligible for a subsidy if they had elected COBRA.
  - Only applies to federal COBRA, does not apply to plans subject to state continuation coverage
  - Includes individuals who do not have COBRA coverage in effect as of April 1, 2021 because they never elected COBRA, or
  - The individual elected COBRA but discontinued COBRA before April 1, 2021 (for another reason besides exhausting their maximum coverage period)
  - These individuals may elect COBRA 60 days after they are provided required notification of the extended election period
    - Extended COBRA deadlines under Outbreak Period Deadline Extensions do not apply
  - They may start subsidized coverage: (1) prospectively, (2) retroactive back to April 1, 2021, or (3) retroactively to their original loss of coverage (required to pay premiums for coverage before April 1, 2021) if individual is within one year of their original 60-day deadline to elect COBRA

Extended Election Period (continued)

- **Example:** Ann was involuntarily terminated from her job at ABC Company on December 15, 2019. She did not elect COBRA continuation coverage, but purchased individual health insurance through the Exchange. She is not eligible for any group health plan coverage. If she had elected COBRA, it would have been effective from January 1, 2020, to June 30, 2021. Anne may now elect COBRA, at no cost due to the ARPA COBRA subsidy, effective beginning April 1, 2021, and ending June 30, 2021.

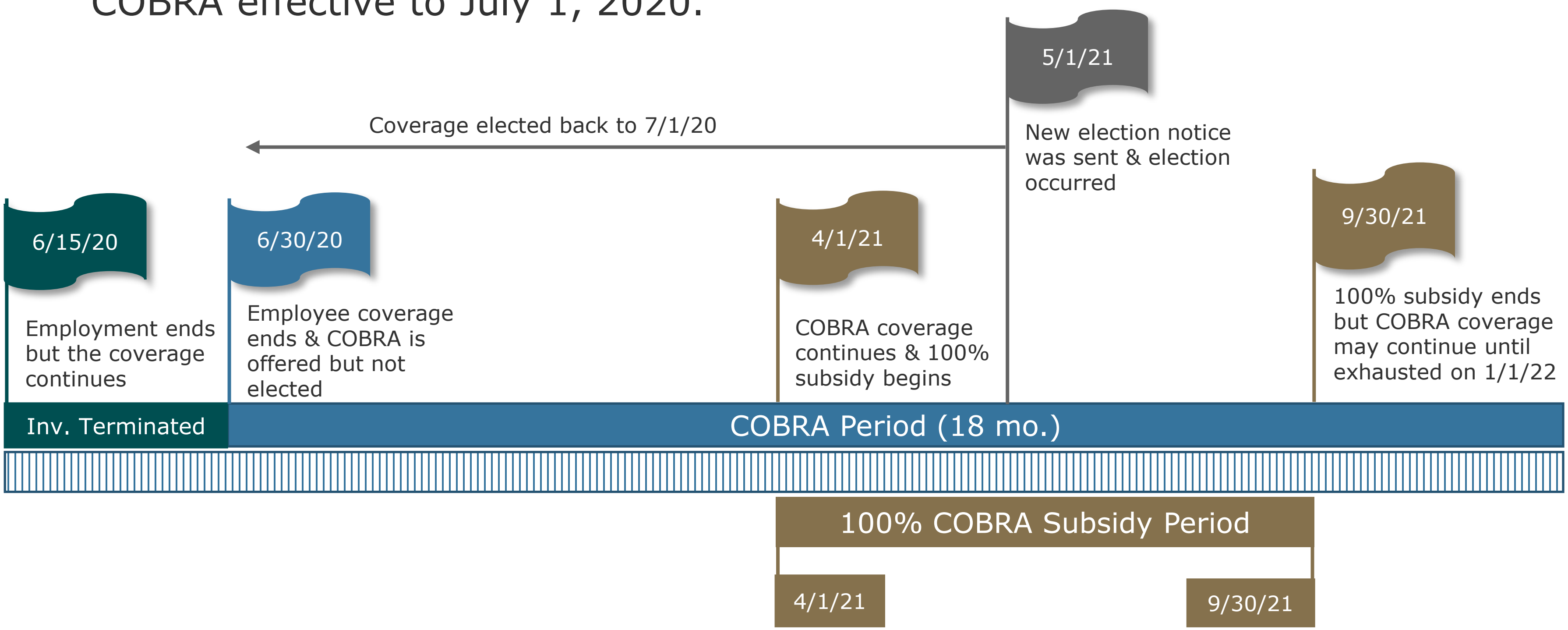


Interaction with Outbreak Period Deadline Extensions

- **Background**: In April 2020, the DOL/IRS provided COVID-related relief for deadlines related to COBRA, HIPAA Special Enrollment Rights and claims procedures.
- Deadlines for certain COBRA timeframes (e.g., deadlines for COBRA elections and premium payments) will be tolled until the earlier of (i) one year from the date the deadline would have begun running for that individual, or (ii) 60 days after the announced end of the Outbreak Period (ongoing).
- The Outbreak period deadline extension does not apply to the 60-day notice or election periods related to the full COBRA premium subsidies
- However, the premium subsidy election period does not cut off an individual's pre-existing right to elect COBRA continuation coverage under the extended time frame of up to one year provided for under previous DOL guidance. Individuals in an Extended Election period may elect COBRA
  - (1) prospectively, or (2) retroactive back to April 1, 2021, or (3) retroactively to their original loss of coverage (required to pay premiums for coverage before April 1, 2021)

Interaction with Outbreak Period Deadline Extensions (continued)

- **Example:** Jen was involuntarily terminated on June 15, 2020 and lost health plan coverage on June 30, 2020. Jen did not elect COBRA. Jen is not eligible for other group health coverage or Medicare. Her ARPA extended election notice was sent to her on May 1, 2021. Jen elected COBRA effective to July 1, 2020.



Plan Enrollment Option

- ARPA also creates a plan enrollment option under which a plan may permit AEIs to elect a different plan coverage option that has the same or lower cost premium
- Optional requirement
- An AEI would have 90 days after notice of the enrollment option is provided to make the election
- The different coverage option must also be offered to similarly situated active employees (i.e., the group of employees the AEI would belong to if still employed)
- Cannot be a health FSA, a QSEHRA, or coverage that offers only excepted benefits

DOL Guidance

- On April 7, 2021, the DOL released guidance and issued model notices which included:
  - FAQs
  - Summary of the COBRA Premium Assistance Provisions
  - Model General Notice and COBRA Continuation Coverage Election Notice
  - Model Notice in Connection with Extended Election Period
  - Model Alternative Notice
  - Model Notice of Expiration of Premium Assistance

https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy

DOL Guidance (continued)

- **Model General Notice and COBRA Continuation Coverage Election Notice** (Federal COBRA)
  - **Who?** This notice may be used for ***any*** individual who loses coverage due to a qualifying event that occurs on or after April 1, 2021 but no later than September 30, 2021
  - **When?** Must be provided by the normal deadlines for COBRA election notices
  - Must include the **Summary of the COBRA Premium Assistance Provisions** with forms
- **Model Notice in Connection with Extended Election Period** (Federal COBRA)
  - **Who?** This notice if for individuals currently enrolled in COBRA due to a reduction in hours or involuntary termination as well as those who would currently be AEIs if they had elected and/or maintained COBRA coverage
  - **When?** Must be provided by May 31, 2021
  - Must include the **Summary of COBRA Premium Assistance Provisions** with forms

https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy

DOL Guidance (continued)

- **Model Alternative Notice**
  - Group health plans subject to state "mini-COBRA" continuation coverage may send this notice
  - **Who?** This notice should be used for all qualified beneficiaries with a qualifying event occurring from April 1, 2021 to September 30, 2021
  - **When?** Must be provided by the normal deadlines for state COBRA election notices
  - Must include the **Summary of the COBRA Premium Assistance Provisions** with forms
- **Model Notice of Expiration of Premium Assistance**
  - This notice must be provided to inform assistance eligible individuals of when their premium subsidy will expire
  - Must be done no more than 45 days before and no fewer than 15 days before: (1) the premium assistance expires, or (2) the maximum period of continuation coverage ends
  - This notice does not need to be sent if the individual is losing the premium subsidy due to becoming eligible for other group health plan coverage or Medicare

https://www.dol.gov/agencies/ebsa/laws-and-regulations/laws/cobra/premium-subsidy

Next Steps

- Identify former employees who lost health coverage due to an involuntary termination of employment or reduction in hours (must look back as far as November 2019)
- Provide or make sure your COBRA administrator is providing the new required notices to individuals using the DOL's model notices
- Decide whether AEIs will be allowed to elect a different plan coverage option that has the same or lower cost premium.
- Track how many AEIs took advantage of the subsidy and for how long so that they are prepared to file for a tax credit for that cost via payroll tax filings.
- Stay tuned for additional guidance

Dependent Care FSA Increase

- ARPA provides for a one-year increase to the dependent care FSA limit (optional)
- For year 2021, the dependent care FSA limit increased to $10,500 ($5,250 for married individuals filing separately)
- Non-calendar plan considerations
- Employer may amend their Section 125 retroactively if:
  - The employer adopts the amendment no later than the last day of the plan year in which the amendment is effective (e.g., not later than December 31, 2021)
  - The plan is operated consistent with the terms of such amendment for the full retroactive period

Thank You for Attending

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