

March 19, 2021

Carol Weiser
Benefits Tax Counsel
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Rachel Leiser Levy
Associate Chief Counsel (EEE)
Internal Revenue Service Office of Chief
Counsel
1111 Constitution Avenue, NW
Washington, DC 20224

Ali Khawar
Principal Deputy Assistant Secretary -
Employee Benefits Security Administration
U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

Amber Rivers
Acting Director - Office of Health Plan
Standards and Compliance Assistance
U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

Jeffrey Wu
Acting Principal Deputy Administrator & Deputy Director for Policy
Center for Consumer Information and Insurance Oversight
Centers for Medicare and Medicaid Services
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Re: Request for COBRA Subsidy Guidance

Dear Ms. Weiser, Ms. Levy, Mr. Khawar, Ms. Rivers and Mr. Wu;

Thank you for giving us the opportunity to request additional guidance from the Departments of the Treasury, Labor, and Health and Human Services (the “Departments”) regarding how the new COBRA subsidy under the American Rescue Plan Act of 2021 (“ARPA”) should be administered.

HealthEquity, Inc. and its subsidiaries administer HSAs and other consumer-directed benefits for our more than 12 million accounts in partnership with employers, benefits advisors, and health and retirement plan providers who share our mission to connect health and wealth and value our culture of remarkable “Purple” service. Our subsidiary, WageWorks, Inc., is a licensed third-party administrator (“TPA”) and one of the largest providers of services for COBRA, direct bill, and state continuation coverage programs.

We are members of the American Benefits Council (“ABC”) and have worked with ABC to provide comments to the Departments in a separate comment letter (attached). We are writing independently to express our support for the points in the ABC comment letter. We particularly stress the need for additional guidance regarding how the COBRA subsidy interacts with the DOL/IRS extension notice, as detailed in the ABC Comment Letter.

In addition, we would like to provide more information, from the perspective of a COBRA administrator, about some of the specific issues raised in the ABC Comment Letter, as follows.

1. Defining “Involuntary” - Through a Pandemic Lens

ARPA defines an “assistance eligible individual” as a qualified beneficiary who loses eligibility for health coverage due to an involuntary termination of employment or a reduction in hours. The statute does not define “involuntary.”

We understand that the Departments are considering looking to COBRA subsidy guidance under the American Recovery and Reinvestment Act of 2009 (“ARRA”) to fill in the blanks under ARPA. We support looking to ARRA as a baseline in that the ARRA guidance does address a number of questions that would be helpful for administering the COBRA subsidy under ARPA. **However, the intent of ARPA is to provide relief to Americans who have terminated employment during a pandemic – a far different circumstance from the economic downturn that prompted ARRA.**

While ARRA looked to the employer to make the determination as to who was involuntarily terminated at the employer’s behest based on economic circumstances, this question is not as clear during a pandemic when there are many more reasons why someone may have left employment involuntarily, particularly to care for children or family members. These are circumstances that disproportionately fall on women, with studies showing that 2.3 million women leaving the workforce since the pandemic began, as compared to 1.8 men.¹ Further, the magnitude of the loss of coverage during the pandemic is much greater than during the economic downturn of 2008-2009, based on unemployment numbers: 23 million in April 2020 compared to 14 million in April 2009.² Further, the Kaiser Family Foundation estimated that - as of May 2, 2020 - nearly 27 million people potentially lost employer-sponsored insurance and became uninsured following job loss.³

The CARES Act recognized this reality by extending Pandemic Unemployment Assistance) to individuals who self-certified that they were unable or unavailable to work for a number of pandemic-related reasons, including:

- Caring for a family member diagnosed with COVID-19;

¹ Studies show that as of January 2021, 2.3 million women have left the workforce, compared to 1.8 million men. <https://nwlc.org/wp-content/uploads/2021/02/January-Jobs-Day-FS.pdf>. A study by McKenzie found that, during the pandemic, mothers are 1.5 times more likely than fathers to be spending an extra three or more hours a day on housework and childcare—equivalent to 20 hours a week, or half a full-time job. https://wiw-report.s3.amazonaws.com/Women_in_the_Workplace_2020.pdf.

² <https://fred.stlouisfed.org/series/UNEMPLOY>

³ <https://www.kff.org/coronavirus-covid-19/issue-brief/eligibility-for-aca-health-coverage-following-job-loss/>

- Providing primary caregiving responsibility to a child or household member unable to attend school or another facility that is closed as a direct result of the COVID–19 public health emergency and such school or facility care is required in order for the individual to be able to work;
- Being unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID–19 public health emergency or upon advice of a health care provider;
- Where an individual has to quit his or her job as a direct result of COVID–19; and
- Where an individual’s place of employment is closed as a direct result of the COVID–19 public health emergency.⁴

We encourage the Departments to build on ARRA taking into account additional pandemic-related circumstances in line with the CARES Act and Pandemic Employment Assistance guidance to consider individuals whose termination of employment was involuntary for pandemic-related reasons, as well as economic reasons. Even ARRA recognized that facts and circumstances may indicate that what appears to be a voluntary termination really may be involuntary: “[I]f a termination is designated as voluntary or as a resignation, but the facts and circumstances indicate that, absent such voluntary termination, the employer would have terminated the employee’s services, and that the employee had knowledge that the employee would be terminated, the termination is involuntary.”⁵

Thus, we encourage the Departments to align COBRA subsidy relief to similar employment-related relief under the CARES Act and consider the perspective of the employee as well as the employer in determining whether a termination was involuntary. This can be easily accomplished by having the employee attest to whether their termination from employment was involuntary due to either an employer’s determination or the pandemic-related parameters adopted by the Departments.

2. Facilitating Access to the Subsidy Through Employee Self-Certification

The Departments can help facilitate the COBRA subsidy by allowing employees to self-certify that they qualify for this relief, particularly given the urgent roll-out. Employers already are struggling to administer remote workforces, vaccine, and other COVID-related benefits. Many employers do not track the reasons why an individual terminates employment and only send a non-descript code of termination to the COBRA administrator (which generally will include both termination and reduction of hours). So, employers and COBRA administrators will not be able to determine from existing records which qualified beneficiaries were involuntarily terminated and thus, qualify for the subsidy. In addition, most records do not distinguish when the qualifying event is a reduction in hours, where the involuntary requirement does not apply. So, there is the potential that if the employer or COBRA administrator makes this determination based on current records, a qualified beneficiary could be inadequately noticed and left out. The issue can be fixed if employers send a notice to all qualified

⁴ 4 15 USC §9201(a)(3) (definition of “covered individual” for Pandemic Unemployment Assistance) (Pub. L. 116-136 (CARES Act)); see also DOL Unemployment Insurance Program Letter No. 16-20, Change 3 (https://wdr.doleta.gov/directives/attach/UIPL/UIPL_16-20_Change_3_acc.pdf).

⁵ IRS Notice 2009-27.

beneficiaries who had either a termination of employment or reduction of hours and allow these qualified beneficiaries to self-certify eligibility when they elect the COBRA subsidy.

The model COBRA election notice developed by DOL can include eligibility requirements, along with an attestation from the qualified beneficiary that he or she meets these requirements. This approach would be similar to the self-certification that was permitted under the ARRA Notice 2009-27 for insurers and multiemployer plans and is currently how benefits are determined under the CARES Act Unemployment Insurance Program. This method, if applied across all who lost coverage during the pandemic, would ensure that no employee is overlooked by their employer.

If qualifying beneficiaries are able to self-certify eligibility for the COBRA subsidy, the Departments should adopt a safe harbor that, as long as the employer provides the model election notice to all potential assistance eligible individuals (that is, all qualified beneficiaries whose qualifying event was termination of employment or reduction of hours who are still within their COBRA period), the employer will be deemed to meet the requirement to provide an election to all assistance eligible individuals. In addition, the employer should be able to rely on this employee attestation for purposes of applying for the corresponding tax credit.

3. Urgent Need for Guidance

The priority for employers – and for assistance eligible individuals – is to have clear guidance that is easy-to-understand and is timely. The applicability date for the COBRA subsidy is April 1, 2021. Therefore, employers, health plans, and COBRA administrators need clear guidance as soon as possible to answer the above questions - along with model notices - to be able to enroll eligible individuals and provide them with the relief they have been promised.

Thank you for your hard work on these important issues. We are happy to answer any questions or set up a call if you would like more information. I can be reached by email at jdietel@thehealthequity.com or by phone at 650.577.6372.

Sincerely,



Jody L. Dietel, ACFCI, CAS, HSAe
Senior Vice President, Advocacy and Government Affairs
HealthEquity, Inc.

cc: Nicky Brown, Vice President, Advocacy & Government Affairs, HealthEquity, Inc.
Christy Tinnes, Groom Law Group
Katy Johnson, American Benefits Council

Attachment: American Benefits Council letter dated March 18, 2021



AMERICAN BENEFITS COUNCIL

March 18, 2021

Carol Weiser
Benefits Tax Counsel
U.S. Department of the Treasury
1500 Pennsylvania Avenue, NW
Washington, DC 20220

Rachel Leiser Levy
Associate Chief Counsel (EEE)
Internal Revenue Service Office of Chief
Counsel
1111 Constitution Avenue, NW
Washington, DC 20224

Ali Khawar
Principal Deputy Assistant Secretary -
Employee Benefits Security
Administration
U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

Amber Rivers
Acting Director - Office of Health Plan
Standards and Compliance Assistance
U.S. Department of Labor
200 Constitution Ave, NW
Washington, DC 20210

Jeffrey Wu
Acting Principal Deputy Administrator & Deputy Director for Policy
Center for Consumer Information and Insurance Oversight
Centers for Medicare and Medicaid Services
Department of Health and Human Services
200 Independence Avenue, SW
Washington, DC 20201

Re: Request for COBRA Subsidy Guidance and Clarification on EBSA Disaster Relief Notice 2021-01

Dear Ms. Weiser, Ms. Levy, Mr. Khawar, Ms. Rivers and Mr. Wu,

I write on behalf of the American Benefits Council (“the Council”) to request that the Departments of the Treasury, Labor, and Health and Human Services (“the Departments”) issue guidance related to the COBRA subsidy provisions in the

American Rescue Plan Act of 2021 (ARPA), including how the ARPA provisions interact with EBSA Disaster Relief Notice 2021-01 (the “Outbreak Period Notice”). We also request that the Departments clarify several open questions regarding the Outbreak Period Notice. We are sincerely grateful for the significant efforts that the Departments have taken in response to the pandemic and related economic crisis. To that end, we understand that the Departments are working to address many urgent priorities, but we raise the issues in this letter now due to the urgent need for guidance.

The Council is dedicated to protecting employer-sponsored benefit plans. The Council represents more major employers – over 220 of the world’s largest corporations – than any other association that exclusively advocates on the full range of employee benefit issues. Members also include organizations supporting employers of all sizes. Collectively, Council members directly sponsor or support health and retirement plans covering virtually all Americans participating in employer-sponsored programs.

In that regard, our members play a vital role both in providing health care coverage during this unprecedented public health crisis and in mitigating the economic consequences of the pandemic for millions of Americans. We have long expressed concern about the financial and administrative burdens imposed on plan sponsors by COBRA. Notably, that the adverse selection of those electing COBRA means that true costs to employers typically far exceed the 102% of premiums that they may charge. The increase of the ARPA COBRA subsidy to 100% from earlier versions, addresses at least one of the Council’s concerns that an insufficient subsidy would exacerbate adverse selection because primarily people with high health costs elect COBRA coverage. However, due to the lack of technical corrections or guidance in the statute – and the expected administrative burdens prompted by the Outbreak Period Notice giving plan participants significant extra time to make COBRA elections and payments – employers need clear guidance regarding how the subsidies work and how the ARPA requirements interact with the Outbreak Period Notice.

Understanding that the Departments face many priorities currently, we have identified the top priority issues where guidance is most urgently needed in order for employers to implement the COBRA subsidy provisions by April 1, 2021. As plan sponsors continue to work to implement these provisions, and as additional questions and issues arise, we will follow up as needed. Guidance is most urgently needed regarding:

- The interaction and application of the Outbreak Period Notice to the time frames set out in the ARPA COBRA subsidy provisions.
- The definition of “voluntary” termination of employment under the ARPA COBRA subsidy provisions.
- Processes for determining which individuals are assistance-eligible under the ARPA COBRA subsidy provisions.

- The time periods for plans to provide the required ARPA notices to participants.
- The extent to which employers can claim the tax credit for COBRA coverage they have agreed to subsidize, including in severance agreements.
- The scope of the requirement to provide a special COBRA election period and related notice.
- The operation of the requirement that individuals notify plans/employers if they are eligible for other coverage.
- The interaction of the special COBRA election rights/notices and potential COBRA extensions for disability and second qualifying events.
- The process for advancing the COBRA subsidy tax credit to employers and insurers.
- The extent to which guidance provided for the COBRA subsidy provisions under the American Recovery and Reinvestment Act (“ARRA”) is considered to apply under the ARPA.
- The application of the COBRA subsidy provisions in the ARPA to state continuation coverage extensions.
- A number of issues that need clarification under the Outbreak Period Notice, including the application of the one-year tolling period to certain “stacked” deadlines (e.g., COBRA election/premium payments; claims/appeals), commencement of timeframes once the outbreak period ends, and the application of the guidance to health FSAs.

COBRA SUBSIDIES

Interaction with Outbreak Period Notice

There is much uncertainty regarding how the ARPA COBRA subsidy provisions interact with the Outbreak Period Notice, and employers need clear guidance and examples urgently of how these provisions interact.

In addition to the general COBRA election right for newly COBRA eligible individuals, the ARPA gives a new COBRA election right to qualified beneficiaries who already had an involuntary termination of employment or reduction in hours and who are still in their COBRA period and either (1) did not timely elect COBRA or (2) elected

but then dropped COBRA.¹ We request that the Departments confirm that the Outbreak Period Notice extension on COBRA elections does not apply to elections for subsidized COBRA under the ARPA or the ARPA required notices.

The same concerns that appear to form the basis for providing additional time to a qualified beneficiary under the Outbreak Period Notice are not present when the qualified beneficiary can receive 100% subsidized coverage. In addition, a one-year extension would be administratively difficult for both employers and the IRS because employers would not be able to claim the tax credit until the qualified beneficiary elects COBRA, which could be up to a year later. In addition, delays in electing COBRA also would delay access to health care for participants, which seems contrary to the purpose of the ARPA provision. Therefore, assistance eligible individuals should not be given up to an extra year to elect the subsidized COBRA coverage. Instead, the timeframes set out in the ARPA should apply. Moreover, the ARPA has a specific timeframe set out in the statute for certain individuals to elect COBRA coverage (i.e., 60 days after the notice advising the individual of the opportunity) and was passed after the Outbreak Period Notice was published. Thus, it reasons that the actual statutory language should override any prior administrative guidance.

Questions have also arisen regarding the timing of COBRA elections and premium payments, and the interaction with the Outbreak Period Notice, for the period before the COBRA subsidy window (i.e., before April 1, 2021) and after the COBRA subsidy window (i.e., after September 30, 2021). So that stakeholders have clarity, we request clear guidance and examples that explain how COBRA elections apply in these contexts as well. For instance, we ask that you address the following:

- Can a qualified beneficiary who has not yet elected COBRA due to the Outbreak Period Notice extension choose to elect only subsidized COBRA coverage effective April 1 without electing retroactive coverage?
- If the qualified beneficiary is required to elect retroactive coverage to qualify for subsidized COBRA, may the employer require the employee to pay the past COBRA premiums before current subsidized coverage is effective?
- If the employee is not required to elect and pay for retroactive coverage that would otherwise have been required (under “normal” COBRA procedures) to qualify for the later period of subsidized coverage, does the qualified beneficiary continue to have a right to go back and elect the retroactive unsubsidized coverage until the one-year deadline expires or may the employer consider an election for the subsidy period (starting 4/1/21) as extinguishing any right to unpaid prior months of coverage?

¹ We note that later in this letter we seek confirmation and clarification on certain aspects of this special election right.

- If the coverage period prior to April 1, 2021, must remain available, once the subsidized coverage ends and the qualified beneficiary first makes a premium payment, may the employer apply that premium payment to the premiums owed for the retroactive period or must the employer apply the amounts prospectively to the October 2021 premium?

Clarity is needed on what is permissible, including regarding a plan/employer providing an independent election for the subsidy period or requiring the qualified beneficiary to make an election for the retroactive pre-subsidy period when he/she makes his/her subsidized COBRA election.

Below are examples of the open questions with respect to these scenarios. In each example, assume the qualified beneficiary is an “assistance eligible individual” under the ARPA, that he was not eligible for Medicare or another group health plan from April 1, 2021, through September 30, 2021, and that the National Emergency is still ongoing.

- **Example 1** – A qualified beneficiary had a COBRA qualifying event on May 1, 2020. His regular deadline to elect COBRA coverage was June 30, 2020, but that was extended under the Outbreak Period Notice until June 30, 2021. On May 31, 2021, he elects subsidized COBRA coverage retroactive to April 1, 2021.
 - Can the employer require that the May 31, 2021, election include a decision to waive or elect the retroactive period from May 1, 2020 – March 31, 2021? Or is that a separate election that is still extended until June 30, 2021?
 - Once the subsidized COBRA coverage ends on September 30, 2021, does the qualified beneficiary automatically continue on with unsubsidized COBRA for October 2021 (i.e., the last month of the COBRA period)?
 - If the employer is not permitted to “close,” or otherwise have the qualified beneficiary waive, the unpaid months of coverage prior to the subsidy period when electing coverage starting April 1, 2021, and the qualified beneficiary continues coverage into October 2021, can the employer credit any payment received during or after the subsidy period to the unpaid months of coverage between May 2020 and March 2021 until such payments are current to the then applicable coverage month?
 - Can the employer claim the tax credit in July 2021 (or later) for the April – June 2021 coverage months?
- **Example 2** – A qualified beneficiary had a COBRA qualifying event on April 1, 2021. His regular deadline to elect COBRA coverage is May 31, 2021, but according to the Outbreak Period Notice, this election deadline is extended until

May 31, 2022. On May 31, 2022, he elects COBRA coverage retroactive to April 1, 2021.

- Is the qualified beneficiary eligible for subsidized coverage for April 1, 2021, through September 30, 2021, or is the election too late for subsidy purposes, coverage purposes, both, or neither?
- If the qualified beneficiary can elect subsidized coverage, can the employer claim the tax credit in June 2022 (or later) for the April – September 2021 coverage months?

As illustrated by the examples above, if the Departments apply the Outbreak Period Notice extensions in any way to the subsidized COBRA under ARPA, which we do not suggest they do, it is vital that the Departments provide clear guidance that the employer’s deadline to claim the tax credit corresponds to the extended time period for qualified beneficiaries to elect COBRA coverage, and that the employer can claim the tax credit in the quarter in which the employee makes the delayed election without the requirement to file a Form 941-X for the quarter in which the COBRA coverage falls.² If the Departments determine that the Outbreak Period Notice extensions apply with respect to the election for subsidized COBRA coverage, we request that the Departments also make clear whether the Outbreak Period Notice extensions apply to the administrator’s requirement to send the ARPA COBRA notices.

Definition of “Involuntary Termination”

To be an “assistance eligible individual” under the ARPA, the qualified beneficiary must lose eligibility for health coverage due to termination of employment or a reduction in hours, except for the “voluntary termination of such individual’s employment by the individual.” The statute does not define what “voluntary” or “involuntary” means for this purpose.

The COBRA subsidy in the American Recovery and Reinvestment Act of 2009 (ARRA) was similarly only available with respect to “involuntary” terminations of employment. We request that the Departments adopt a definition of voluntary/involuntary termination consistent with the definition of involuntary termination in Notice 2009-27, Q&As 1-9, rather than a broader definition.³ (If the

² Compare with ARRA Q&As, Q&A-FP-16: “if the employer has not claimed the credit on the original Form 941 for the quarter during which the COBRA subsidy was provided, the employer can file Form 941-X for that quarter.”

³ For example, under the CARES Act, unemployment assistance, which typically is for involuntary terminations, is generally available to an individual who self-certifies that he/she is unemployed or unable to work because a child is unable to attend school or another facility that is closed due to COVID-19, in addition to more traditional involuntary terminations.

Departments adopt a broader definition, it is important that employers be able to rely on attestations by the employee when claiming the tax credit, as described below.) If there is not a clear standard of involuntary termination, some employers may interpret this definition more narrowly than other employers, which could result in inconsistent subsidy eligibility across the country and attendant costly and unnecessary litigation because qualified beneficiaries who were unable to receive the subsidy could challenge the employer's interpretation in court. For these reasons, we ask the Departments to adopt the ARRA definition.

Whatever definition of "involuntary" the Departments implement, employers, insurers, and health plans will be required to make judgement calls, in a short time frame, and in the context of the ongoing public health crisis. We request the Departments recognize this reality and adopt a similar "facts and circumstances" standard as in the ARRA guidance, along with a focus on compliance assistance, rather than strict enforcement, as long as employers, insurers, and health plans are acting in good faith in order to comply with the requirements.

We also ask that the Departments clarify whether the "voluntary" carve-out applies to a qualifying event that is a reduction in hours.

Determining Who Is Assistance-Eligible

Regardless of the definition of "involuntary" that the Departments adopt, it is imperative that the Departments give employers the ability to rely on either their own corporate records or on an employee's attestation to determine whether an employee's termination was involuntary when claiming the tax credit. Employers may not have historically tracked whether an employee's termination was involuntary, and due to the new COBRA election right for qualified beneficiaries who had a qualifying event as far back as 18 months ago⁴, it may be extremely difficult for an employer to determine whether every termination during this time period was involuntary. Due to the urgent nature of the subsidy, employers should be able to identify assistance-eligible individuals either based on their own records or an employee attestation. The method that may work for one employer may not be as feasible for another, based on size, type of employer, past recordkeeping practices, and circumstances during the pandemic.

ARRA guidance provided similar flexibility in some circumstances. More specifically, in claiming the tax credit, prior ARRA FAQs provided that multiemployer plans and insurers could rely on the employer's reporting or the employee's

⁴ As discussed later in this letter, depending on how the Departments clarify the issue, this period may extend back even longer, to 29 months, where an employee was involuntarily terminated followed by a disability extension (or possibly 36 months if there was a second qualifying event).

certification that his/her termination was involuntary.⁵ And, although the employer claiming the credit had to make its own determination under “unilateral authority,” ARRA only required employers to retroactively go back at most 5.5 months. Since the time period here is so much longer, and the election period is so urgent, employers should have more flexibility in how they determine who qualifies as an assistance-eligible individual.

Accordingly, we request that the Departments permit employers to either make the involuntary determination themselves or to rely on an employee’s attestation that his/her termination was involuntary.

- **Employer Determination** - The ARRA Q&As provided that the IRS would not challenge an employer’s determination that the termination was involuntary as long as the determination was consistent with a reasonable interpretation of the applicable statutory provisions and IRS guidance. The Q&As required the employer to maintain supporting documentation of its determination.
- **Employee Attestation** - Where the credit was claimed by the insurer or multiemployer plan instead of the employer, the Q&As required that the insurer/multiemployer plan obtain a statement from the employee or the employee’s former employer that the employee was involuntarily terminated. The statement had to include a certification that, to the best of the employee’s or the employer’s, as applicable, knowledge and belief, all of the information provided was true and correct and be signed by the employee or employer, as applicable.

We request that the Departments permit employers to use either option under ARPA, including a similar employee certification, using the Department of Labor’s (DOL) model COBRA election notice as the mechanism to obtain the employee’s attestation. If an employer chooses to use the employee attestation method, it could send the model election notice to all required recipients and ask them to self-certify if they meet the definition of assistance-eligible individual.

Relatedly, we note that the Congress struck the 15-day accelerated DOL appeal process from the final enacted version of ARPA. We request confirmation that no special appeals processes or rules apply to an employer’s determination of whether a qualified beneficiary is an assistance eligible individual and that existing law governs.

⁵ <https://web.archive.org/web/20090801080223/http://www.irs.gov/newsroom/article/0,,id=205364,00.html>.

Notice Requirements

The ARPA requires administrators to send notices to assistance eligible individuals that describe the availability of the subsidies. The administrator must send the notice to assistance eligible individuals who became entitled to elect COBRA coverage before April 1, 2021, within 60 days after April 1, 2021, (and possibly sooner than that for other assistance eligible individuals). Not later than 30 days from March 11, 2021, the Secretary of Labor, in consultation with the Secretary of the Treasury and the Secretary of Health and Human Services, must issue model notices. This means that the DOL could issue the model notice with only a little over a month before the deadline for administrators to send their required notices.

Given the uncertainty with the meaning of “involuntary” and thus who should even receive the notice, along with the questions regarding the interaction with the Outbreak Period Notice, we request that the Departments provide relief from these notice requirements so that the 60-day period runs from the later of (1) the date DOL issues the model notice or (2) April 1, 2021, so that employers have time to incorporate the model language in their notices. We also request that DOL incorporate any relevant interaction of the Outbreak Period Notice, to the extent applicable, in all model language provided.

In addition, due to the speed of implementation and the current complicated circumstances for many employers due to the ongoing crisis, we request the Departments adopt a standard where plans must provide the notice as soon as practicable as long as the plan is acting in good faith, similar to the relief provided in EBSA Disaster Relief Notice 2020-01.

We also note that clarifying guidance would be helpful regarding when the election notice, with the additional content required by ARPA, must be provided for individuals who first become entitled to COBRA after April 1, 2021. ARPA provides plans 60 days from April 1, 2021, to provide notice for assistance eligible individuals, and those with special election rights, “who first became entitled to elect COBRA continuation coverage” before April 1, 2021. Questions have arisen regarding the notice timing for those who become entitled to COBRA after April 1, 2021, especially where the plan administrator is utilizing the Outbreak Period relief and has yet to distribute the “base” COBRA election notice. In addition, clarification of what it means to “first become entitled to COBRA” would be helpful – does that mean the qualifying event occurred before April 1, 2021, or that the original election notice was sent prior to April 1, 2021, or something else?

Tax Credit Amount Regarding Employer Subsidies including Severance Agreements

In the normal course, and in some cases even more so during the current crisis, many employers subsidize some or all of COBRA for their former employees, including as part of severance agreements with employees. A major question that has arisen since

the ARPA was enacted is whether employers may take the tax credit for the full amount of the COBRA premium, even if they had agreed to subsidize COBRA continuation coverage, including as part of severance agreements. We understand that under ARRA, based on FAQs issued at the time, the extent of the employer subsidy did impact the amount the employer could claim under the tax credit. However, key language in the ARPA differs from that in ARRA, as ARPA provides that individuals are treated as having paid the full amount of the premium, whereas under ARRA individuals were required to pay 35 percent of the amount of the premium. As such, the prior guidance was focused on the amount of the premium employees were required to pay, which isn't relevant under the ARPA.

This significant difference between the statutes has led to questions on this issue. As such, we ask that the Departments clarify the issue and provide that under ARPA, employers may claim the full tax credit even if they voluntarily agreed to provide a COBRA subsidy, including as part of their severance policies or by practice. This confirmation would not affect the ability of employees to get the relief intended under ARPA (i.e., a full COBRA subsidy) and would reduce the burden for employers, by minimizing the need to make plan or severance agreement changes to COBRA subsidies on a very short timeframe. In addition, guidance along these lines would provide support for employers during this health and economic crisis, many of whom have taken extra steps to support employees and former employees during the crisis, including by providing subsidized COBRA.

Examples of how this would work would also be helpful. It would also be helpful if responsive guidance addressed lump sum severance payments (e.g., the employer provides the employee \$5,000 for COBRA premiums for January 2021 through June 2021).

Scope of Requirement to Provide Special Election Period and Related Notice

The ARPA provides a special COBRA election period to individuals who would be assistance eligible individuals had they elected COBRA and to those “who elected COBRA continuation coverage and discontinued from such coverage before the first day of the first month beginning after the date of enactment” of the ARPA.⁶ The statute also requires a special notice be provided to these individuals, including about the availability of premium assistance, within 60 days of enactment of the ARPA.⁷

Given how these statutory provisions are worded, a technical question has arisen regarding the group of qualified beneficiaries who qualify for the special COBRA election. As such, we are seeking confirmation that the special election period for those

⁶ See ARPA section 9501(a)(4)(A).

⁷ See ARPA section 9501(a)(5)(C).

who previously dropped COBRA but are still in their COBRA coverage period applies only to qualified beneficiaries whose qualifying event was involuntary termination of employment or a reduction in hours (rather than to any qualified beneficiary still in their COBRA period, regardless of the qualifying event). It seems clear that the purpose of the special election period, and the related notice, is to give individuals who would be eligible for the COBRA subsidy if they were enrolled in COBRA as of April 1, 2021, the chance to enroll in COBRA and obtain the subsidy. Therefore, we see no reason why individuals who are clearly not eligible for the subsidy (i.e., those with qualifying events other than involuntary termination of employment or reduction in hours) should be given a special COBRA election right. But confirmation of this fundamental issue would be very helpful and would provide employers clarity on the universe of qualified beneficiaries to whom the special election needs to be provided and communicated. Related confirmation that employers need not provide information about the COBRA subsidy to qualified beneficiaries who experience qualifying events other than involuntary termination of employment or reduction in hours would also be very helpful.

Eligibility for Other Coverage

Under the ARPA, the COBRA subsidy is not available to an assistance eligible individual for any months beginning after the first date the individual is eligible for coverage under another group health plan (other than excepted benefits, a health FSA, or a qualified small employer health reimbursement arrangement) or Medicare. The statute requires individuals to notify the plan to which the COBRA subsidy applies in the event the individual becomes eligible for other coverage (DOL will specify the time and manner) and also provides that DOL may impose penalties on individuals for failing to provide the required notice of cessation of eligibility for the COBRA subsidy.

We emphasize that employers are generally not in the position to be aware of an individual's eligibility for other coverage and that the statute clearly puts the onus on the individual to notify the plan to the extent they become eligible for other coverage, and we expect this will be a well-explained element in the model notice language. Relatedly, it would be helpful if the Departments would confirm in guidance that employers may, but are not required to, require individuals to self-certify or attest as to their eligibility status under other disqualifying group health plan coverage or Medicare. Consistent with the statute, employers should be relieved of any responsibility for requiring affirmative statements about such other coverage. In many cases, employers' administrative COBRA election mechanisms are not set up to process and confirm these types of additional responses and therefore would prefer not to use them. In some cases, however, employers may wish to request or require such an attestation regarding other coverage, which should be permitted. And if an employer chooses to seek an attestation, they should be permitted to fully rely on the attestation.

Along these same lines, to the extent that a qualified beneficiary misrepresents their eligibility for other coverage, or fails to timely notify the employer of the other coverage, we ask that the Departments confirm that employers not be required to refund the tax credit relating to the period during which the individual was eligible for other coverage (including not amending its tax filings) or seek repayment of COBRA premiums from the individual. This position is consistent with guidance provided under the similar provision under the ARRA, which provided that if an employer had claimed the credit, they were not required to refund the premium reduction to the IRS merely because the individual failed to provide notice of other coverage unless the employer otherwise knew of the eligibility for the coverage.⁸ Instead, the ARRA guidance noted that the consequence would be that the individual who failed to provide proper notice to the plan may be subject to penalties.

Disability Extensions and Second Qualifying Events

Under COBRA, certain individuals may qualify for an extended COBRA coverage period added to the typical 18-month window, up to 29 months total, due to a disability, and a dependent or spouse may qualify for an extra 18 months of COBRA due to a second qualifying event following the initial involuntary termination or reduction of hours. The ARPA gives a special election right, and requires related notices to be sent, for individuals who had an involuntary termination of employment or reduction in hours qualifying event and had not elected COBRA (or who elected and dropped COBRA) and who are still in their COBRA period.

Questions have arisen regarding whether a new election right, and the related notice, must be provided to qualified beneficiaries where the employee was involuntarily terminated or experienced a reduction in hours more than 18 months ago but who are still in their COBRA period due to a disability extension or a second qualifying event. For example, an employee may have been involuntarily terminated 24 months ago, but then qualified for a disability extension allowing COBRA for a total of 29 months. A spouse may have been eligible for COBRA due to the employee's involuntary termination 24 months ago and then permitted to extend the COBRA period to 36 months due to a second qualifying event of a divorce or death of the employee. We ask for clarifying guidance on this issue and we also ask for clarity as to whether the COBRA subsidy is available to individuals who have elected and remained on COBRA for an extended period due to a disability determination or second qualifying event, if those extra months fall between April 2021 and September 2021.

⁸ See IRS Notice 2009-27, Q&A-42.

ARRA Q&As

As part of implementing the ARRA COBRA subsidy, the IRS issued comprehensive Q&As under the ARRA in Notice 2009-27 and on its website, as did DOL (ARRA Q&As).⁹ Questions have arisen regarding the extent to which the Departments will take the position this prior guidance applies under the ARPA and we request clarification on that point. To the extent that prior guidance is deemed to apply under the ARPA, we ask that it be made clear which aspects of the guidance are applicable. More generally, we ask that all applicable guidance (new and old) regarding the ARPA COBRA subsidy be made available in a centralized, easily accessible location.

We also note that, to the extent the prior guidance is considered to apply, we will continue our review of that prior guidance and will follow up to the extent we identify issues or questions. Although the ARRA subsidy is substantially similar to the ARPA subsidy, we note that the statutes differ in key respects (e.g., the amount of the subsidy and the eligibility of those who have a reduction in hours for the subsidy) and that the current public health crisis and economic crisis presents a different set of facts and challenges than faced in 2009.

Advanceable Nature of the Credit

Under the ARPA, the tax credit for the COBRA subsidy may be advanced to the employer or insurer, as applicable, “according to forms and instructions provided by the Secretary.” We believe that the ability to seek advanced tax credits to cover the cost of COBRA coverage will prove crucial for many employers, and we encourage the Treasury Department to work as quickly as possible to provide the forms and instructions that will be needed to implement this provision.

State Continuation Coverage

Under some states’ continuation coverage provisions (e.g., New York and California), certain qualified beneficiaries covered under insured group health plans have a right to an additional 18 months of coverage once their initial 18-month period under federal COBRA coverage ends. While the ARPA permits individuals to receive the subsidy for state continuation coverage (including for months 19-36 after federal COBRA coverage ends), it does not appear that the special election right applies to state continuation coverage. More specifically, the ARPA provides a special election right for qualified beneficiaries who had a qualifying event and are still in their COBRA period and either (1) did not timely elect COBRA or (2) dropped COBRA. However, that

⁹ IRS, COBRA Questions and Answers: Administration and Eligibility (found here: <https://web.archive.org/web/20090801080223/http://www.irs.gov/newsroom/article/0,,id=205364,00.html>)

provision just references COBRA under ERISA, the Internal Revenue Code, and the Public Health Service Act. Thus, it does not appear that the special election right applies with respect to state continuation coverage.

The ARRA contained similar language and Notice 2009-27¹⁰ confirmed that the ARRA does not give such individuals the right to elect coverage under state COBRA-like provisions (but that the state program may provide for an extended election right). We request that the Departments provide a similar clarification under the ARPA, where it is even more necessary so that employers are not required to potentially go back 36 months in time to determine whether the employee's termination of employment was involuntary (unless the state adopts a special election right similar to the one under the ARPA).

Additional Issues for Clarification Re COBRA Subsidy

In addition to the key issues identified above, we have received a great many number of questions from our employer members regarding implementation of the COBRA subsidy provisions and below we list some of the most frequent questions/issues for you to consider as you work to develop guidance:

- *Exchange access after end of COBRA subsidy:* When the COBRA subsidy expires at the end of September 2021, does that give rise to a special enrollment period in the Exchange? It would be helpful to clarify the options assistance eligible individuals will have for coverage on October 1, 2021.
- *Online processes:* Many employers have asked for confirmation that the procedures for enrolling individuals in COBRA, providing notices, seeking employee attestations, etc. can all be done electronically. Confirmation on this topic would be very helpful.
- *Application to all group health plans:* Although the statute is clear that the COBRA subsidy is available for COBRA continuation coverage under all group health plans, including excepted benefits, such as vision and dental plans and employee assistance programs (but excluding coverage under a health flexible spending arrangement), we have heard that many would find explicit confirmation by the Departments helpful.
- *Refunding premiums:* ARPA provides that if an individual has already paid premiums for the period during which the COBRA subsidy applies, the person to whom the payment is payable must reimburse the individual for the amount paid, not later than 60 days from when the individual made the payment. If a

¹⁰ Notice 2009-27, Q&A-51.

third party paid the premiums, should the plan refund the third party or the assistance eligible individual? And what should the plan do if it has already been 60 days since the premium was paid?

- *Options under the plan:* As in the normal course, plan options offered by an employer change over time, some are added and some are dropped. When an individual elects COBRA, he/she can only elect the plan option that he/she was in prior to the qualifying event (but can generally change options at open enrollment). In the event the employer drops a plan option and someone who had been enrolled in that option later elects COBRA, employers provide the individual the most equivalent plan option. Due to the long election periods under the Outbreak Period Notice, the likelihood that for many employers plan options have changed since the qualifying event, and that the qualified beneficiary may not have elected COBRA when open enrollment occurred, guidance confirming that employers may put qualified beneficiaries in the plan most equivalent to their prior plan would be helpful.
- *Claiming the credit:* For employers who are eligible for the COBRA subsidy tax credit but are exempt from Social Security and Medicare taxes, how is the credit claimed?
- *Notice re subsidy expiration:* ARPA requires a notice to be provided regarding expiration of the COBRA subsidy no more than 45 days before the date of expiration but no less than 15 days prior to expiration. Due to the fact that individuals will be receiving notices about the subsidy at the beginning of the subsidy period, and the end of the subsidy period will be at most 6 months from then, we ask the Departments to consider ways to reduce the burden imposed by the expiration notice, for example, by allowing plans to comply by including the expiration date in the election notice (i.e., noting that the subsidy will expire on September 30 or, if earlier, when the COBRA period ends) to avoid having to then send another notice not long after regarding expiration of the subsidy.

OUTBREAK PERIOD NOTICE

Notwithstanding that the Outbreak Period Notice significantly increases burdens and complexity for plan sponsors and causes confusion for participants, employers are doing their best to digest the new guidance and apply it consistently. However, in addition to the questions above regarding how the Outbreak Period Notice and the ARPA COBRA subsidy interact, there are significant open questions with respect to the Outbreak Period Notice standing on its own. This confusion has exacerbated the questions about the interaction with the COBRA subsidies and, as such, we ask that the following issues also be clarified as soon as possible.

Deadlines Related to the Outbreak Period

In the Notice of Extension of Certain Timeframes for Employee Benefit Plans, Participants, and Beneficiaries Affected by the COVID-19 Outbreak (“Joint Notice”) and the text of the Outbreak Period Notice, once the outbreak period ends (60 days after the end of the COVID-19 National Emergency), the deadline that was tolled resumes. For example, assume a COBRA election period that would have run beginning March 1, 2021, (and generally ending April 30, 2021) would be immediately suspended. Now assume that the outbreak period ends on September 30, 2021. Under the Joint Notice and text of the Outbreak Period Notice, the individual’s 60-day COBRA election period would commence October 1, 2021.

However, Example 2 in the Outbreak Period Notice states “if a qualified beneficiary would have been required to make a COBRA election by March 1, 2021, the Joint Notice delays that election requirement until the earlier of 1 year from that date (i.e., March 1, 2022) or the end of the Outbreak Period.” (emphasis added). This appears to indicate that the individual would not get another 60 days after the outbreak period ends, but rather the new COBRA election deadline would be October 1, 2021, (in our example above).

This example has caused confusion, and employers are unsure how to calculate the deadline in the context of the outbreak period (rather than the one-year limit). Additional clarification is needed so that employers can proceed with certainty and consistency.

One-Year Tolling Period

There is also confusion with respect to how the one-year tolling period described in the Outbreak Period Notice applies to separate, but related, deadlines (sometimes called “stacked” deadlines). For example, where the claims deadline was tolled one year and the claim is denied, is the appeal deadline now extended for another year entirely? Similarly, in instances where the COBRA election deadline was tolled one year, once the qualified beneficiary makes the election, is the premium payment deadline now extended for another year entirely? This is another area where there is significant confusion.

We request that the Departments clarify that related deadlines are only tolled one year from the *first* deadline due date, rather than *each* deadline being subject to its own new one-year tolling period. We also strongly urge the Departments to provide detailed examples to address the confusion. To apply a one-year tolling period to each individual deadline would extend these periods out multiple years based on each claim for benefits or each COBRA election and subsequent payment(s) – these multiple stacked extensions could be detrimental to both individuals and employers, as

illustrated in the examples below (all examples assume the COVID-19 National Emergency is ongoing).

- **Claims/Appeals Example** – Under the terms of the plan, a participant has one year from an incurred claim to file a claim for benefits and 180 days to file an appeal of a denied claim. A participant incurred a claim on May 1, 2019. The May 1, 2020, regular claim deadline was extended until May 1, 2021. The participant files the claim on May 1, 2021, and the plan denies the claim on June 1, 2021. Under our recommendation above, the 180-day deadline to file the appeal would be November 28, 2021, (i.e., 180 days from the day the claim is denied). If the one-year tolling period applies to the appeal deadline, also, then this appeal deadline would be extended until November 28, 2022, (i.e., over 3.5 years from the date the claim was incurred – to say nothing of the additional time that could be stacked on as a result of external review). By that point, it may be difficult for the participant and the plan to obtain information necessary to submit/process the appeal and providers will wait years for payment of claims. Changes in plan providers and stop loss carriers (for self-funded plans) would make the claim difficult to track and process and may leave employers without necessary coverage for claims that are not processed until such a late date.
- **COBRA Example** – A qualified beneficiary has a COBRA qualifying event on July 1, 2020; the 60-day COBRA election deadline would generally have been August 30, 2020. The deadline was extended until August 30, 2021; the qualified beneficiary makes his election on that date. Under our recommendation above, the 45-day deadline for the initial COBRA premium is October 14, 2021, (i.e., 45 days from the August 30, 2021, election date). However, if the one-year tolling period is also applied to the initial premium payment deadline, it would be extended until October 14, 2022. This is a significant period after the maximum COBRA coverage eligibility period ends on December 31, 2021. The likelihood that the individual would be willing and/or able to pay 18 months of COBRA coverage over 2 years following the beginning of such coverage and 8 months after the maximum COBRA coverage eligibility period ends is unlikely, confusing for participants, and inconsistent with sound public policy of ensuring individuals have medical coverage when needed (i.e., over the two year extended deadline period), as COBRA coverage generally will not be effective until the participant elects and pays for the coverage.

Compounding this confusion is what premium months the employer can collect with the COBRA initial payment. Typically, the initial COBRA payment includes all months of coverage through the end of the month prior to the payment date.¹¹ Thus, in the example above, if the initial payment is made on October 14, 2021, the employer can

¹¹ Treas. Reg. § 54.4980B-8, Q&A-5(b). The examples in the Joint Extension Notice are consistent with this approach.

require that it include payment for July 2020 through September 2021. We request that the Departments confirm that this is correct and that the employer is not required to apply a one-year tolling period to each subsequent premium payment (e.g., the initial premium payment only includes July 2020 and each subsequent month has its own one-year tolling, so the August 2020 payment is due August 30, 2021; the September 2020 payment is due September 30, 2021). To reiterate, clear examples would be extremely helpful to address the current confusion.

Similarly, it is unclear when a COBRA qualified beneficiary's monthly COBRA premiums (i.e., following the initial premium payment) are due with respect to this one-year tolling period. For example, if the individual has not paid premiums beginning with the March 2020 payment (originally due March 31, 2020), is the qualified beneficiary required to pay all premiums due for the March 2020 through February 2021 coverage periods by March 30, 2021; or, alternatively, is each monthly premium payment deadline subject to its own one-year tolling period (e.g., April 2020 by April 30, 2021; May 2020 by May 31, 2021)?

Health FSA Claims

Unlike major medical plans, the deadline to submit claims for health FSAs is not based on the date the claim is incurred but rather is a set date for all participants – either a set number of days after the end of the plan year (and grace period, if there is one) (e.g., 60 days after the end of the plan year) or a set date (e.g., March 31). There has been some confusion about how to determine the extended due date for health FSA claims in the context of the outbreak period (i.e., the COVID-19 National Emergency period end date plus 60 days). We request that the Departments confirm, including with a clear example, the extended deadline is the same for all participants and is determined based on the claims deadline under the plan rather than the date on which the expense was incurred. For example, the claims deadline under the plan for 2020 claims is normally March 31, 2021 (90 days from the end of the plan year), which is extended under the Outbreak Period Notice. The outbreak period ends on September 30, 2021. The 90-day deadline (January 1, 2021 – March 31, 2021, is 90 days) for all participants would begin October 1, 2021, and ends December 30, 2021.

Reasonable Accommodation

The Outbreak Period Notice states that “[t]he guiding principle for administering employee benefit plans is to act reasonably, prudently, and in the interest of the workers and their families who rely on their health, retirement, and other employee benefit plans for their physical and economic well-being. This means that plan fiduciaries should make reasonable accommodations to prevent the loss of or undue delay in payment of benefits in such cases and should take steps to minimize the possibility of individuals losing benefits because of a failure to comply with pre-

established time frames.” The illustrative examples in the Outbreak Period Notice all involve notifications/reminders to participants rather than further extending any deadlines longer than one year (or, if earlier, the end of the outbreak period).

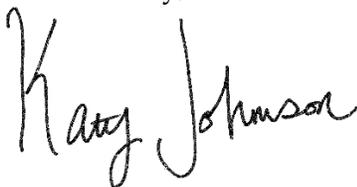
This language has caused some confusion, and we request that the Departments clarify that this language regarding a “reasonable accommodation” does not impose any requirement on employers to extend deadlines longer than otherwise required under the Outbreak Period Notice. The Outbreak Period Notice already provides for upwards of a one-year extension, and, as explained earlier, we are of the view that additional time can be detrimental to employees and employers in many cases. Moreover, to require employers and administrators to make discretionary accommodations on a per-participant basis could raise fiduciary concerns, as well as nondiscrimination concerns. ERISA-covered plans generally must be administered according to their terms and treat similarly situated individuals consistently. Providing a reasonable accommodation individual-by-individual may not be consistent with the plan terms. As such, we also request that, in this context, the Departments confirm that employers and plan fiduciaries will not be considered in violation of the plan’s terms if they do provide a reasonable accommodation that is inconsistent with the terms of the plan.

* * * * *

We greatly appreciate your attention to these requests among the many other essential matters before you and are cognizant of your need to prioritize. The requests in this letter reflect some of the top concerns we are hearing from our employer members and our hope is that the Departments can issue clarifying guidance with clear examples as soon as possible.

If you have any questions or would like to discuss, please do not hesitate to reach out. Thank you again.

Sincerely,



Katy Johnson
Senior Counsel, Health Policy