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Benefits & Compensation Update

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What Plan Sponsors Should Know about ARP COBRA Premium Assistance and Election Extensions

On March 11, 2021, President Biden signed the American Rescue Plan Act of 2021 (the "ARP"), a stimulus package to aid in the response to the COVID-19 pandemic. The ARP includes noteworthy provisions relevant to employer-provided benefits, including COBRA premium assistance and COBRA election extensions.

The Department of Labor recently published FAQs implementing COBRA premium assistance and COBRA election extensions provided under the ARP. Below is a summary of the relevant provisions as applicable to benefit plan sponsors and administrators.

COBRA Premium Assistance

Plan sponsors of group health plans are required to provide participants and beneficiaries with the right to continuation coverage under COBRA. Ordinarily, such individuals bear the entire cost of the premium payment associated with COBRA continuation coverage and must elect COBRA based on strict election period timelines.

The ARP allows "Assistance Eligible Individuals" (as defined below) the right to continue their

employer provided health insurance at no additional premium cost ("COBRA Premium Assistance"). COBRA Premium Assistance applies to continuation health benefits between April 1, 2021 and September 30, 2021 (the "Coverage Period"). During the Coverage Period, an employer or plan that provides COBRA Premium Assistance to any Assistance Eligible Individuals will be entitled to a tax credit equal to the amount paid for the related health coverage. COBRA Premium Assistance is available under federal COBRA provisions and corollary state provisions, so long as the individual properly elected COBRA under state regulations.

Assistance Eligible Individuals

"Assistance Eligible Individual" is defined under the ARP as a COBRA qualified beneficiary during the Coverage Period that:

- Is COBRA eligible because of either a reduction in hours or an involuntary termination of employment; and
- Elects COBRA coverage.

For purposes of the ARP, COBRA qualified beneficiary means, in addition to the participant, those beneficiaries that qualify under federal law (i.e., spouses and child dependents) but not additional beneficiaries that may be covered under state regulations (i.e., domestic partners and their

child dependents). If an individual is eligible for a different group health plan (i.e., a plan through a spouse's employer) they will not be an Assistance Eligible Individual; however, eligibility for a qualified small employer health reimbursement arrangements, FSAs or Medicare would not exclude an individual from being an Assistance Eligible Individual. In addition, an employee and their dependents would not qualify as an Assistance Eligible Individual if the employee is terminated for gross misconduct. Further, those individuals who elect COBRA Premium Assistance and who later become eligible for coverage under a different group health plan during the Coverage Period must inform the plan as to their change in status and they will no longer be an Assistance Eligible Individual.

New Election Opportunity

Under the ARP, plan sponsors may need to provide Assistance Eligible Individuals with another opportunity to elect COBRA. If an individual was offered Federal COBRA prior to April 1, 2021 and declined coverage or discontinued coverage and the maximum period of eligibility for COBRA coverage has not yet expired, they may be entitled to a new election opportunity under the ARP. This additional election period is not intended to lengthen an individual's COBRA coverage beyond the maximum allowed period, typically 18 months from the qualifying event. As discussed in more detail below, plan sponsors must provide these individuals with an additional COBRA notice outlining their new eligibility. State continuation programs, also known as "mini-COBRA", programs are not required to offer this new election opportunity, but may provide an additional election period in line with the federal change.

It is important that Plan sponsors review their termination records to determine who must receive a notice regarding their new election opportunity.

Notice Requirements

Plan sponsors have new COBRA notice requirements and should coordinate with any third

party administrators to produce and distribute such notices. Model notices can be found on the DOL's website. Plan sponsors must coordinate the following notices immediately:

1. ***COBRA Premium Assistance Notice:*** Must be provided to qualified beneficiaries that incur a qualifying event during the Coverage Period and to other eligible individuals who have already elected COBRA. This notice can be combined with the normal COBRA notices plans are required to provide such individuals. Individuals must affirmatively elect eligibility to receive the premium assistance.
2. ***Extended COBRA Election Period Notice:*** Must be provided to individuals whose COBRA period has not run out and never elected COBRA or who dropped COBRA before reaching the maximum allowable period. This notice must be provided within 60 days of the first day of the first month beginning after the date of the enactment of the ARP (May 31, 2021). After receipt of the notice, such individuals would be allowed 60 days to make an election.

Note that these deadlines override the relief provided by the government for benefit plans as a result of the COVID-19 outbreak. Employers may be subject to an excise tax under the Code if they fail to satisfy their COBRA obligations, including appropriate notice obligations.

Finally, for any individuals that partake in the premium assistance, plan sponsors will be required to send an additional notice 15 to 45 days prior to the expiration of the premium assistance informing such individuals that COBRA Premium Assistance will expire soon, the date of expiration and that they may be eligible to continue COBRA without assistance.

Relief for Dependent Care Assistance Programs

In addition to the special COBRA provisions discussed above, the ARP temporarily increases the maximum amount that can be contributed to dependent care assistance programs ("DCAPs") on a pre-tax basis. This increase and other recent legislation pertinent to employers offering DCAPs are discussed below.

DCAP Limit Increase

The ARP increases the limits that can be contributed to DCAPs, also referred to as dependent care flexible spending accounts ("FSAs"). This increase supplements pandemic relief legislation passed last year that provided additional flexibility to make changes to dependent care FSA elections and carry over unused FSA amounts.

DCAPs are employer-provided benefit plans that help employees care for qualifying dependents, including children under 13 years old or a physically or mentally disabled spouse or dependent who is incapable of self-care. Employees and/or employers can make contributions to a DCAP depending on the type of plan established. Under the IRS "use-it-or-lose-it" rule, contributions made during a plan year that are not used by the end of the plan year are forfeited, subject to a 2½ month grace period during which a prior year's contributions can be used.

The employer establishes the minimum and maximum amount that can be contributed to its DCAP, but, under IRS limits, DCAP assistance above \$5,000 (\$2,500 per parent if married and filing separately) is taxable income to the employee. The ARP temporarily increased the limit for 2021 from \$5,000 to \$10,500 (or from \$2,500 to \$5,250 for married individuals filing separately). Employers can voluntarily take advantage of the rule by adopting a plan amendment retroactive to the start of the 2021 plan year by no later than the end of such plan year (e.g., by December 31, 2021 for calendar year plans).

Additional Temporary DCAP Relief

ARP's increase to the annual contribution limit supplements other temporary relief provided by the Consolidated Appropriations Act enacted into law at the end of 2020 ("CAA"). This relief:

- permitted employers (on an optional basis) to allow participants to carry over amounts unused in the 2020 plan year to the 2021 plan year and, similarly, from the 2021 plan year to the 2022 plan year;
- extended the permitted grace period under the use-it-or-lose-it rule for plan years ending in 2020 and 2021 from 2½ months to 12 months following the end of the plan year; and
- allowed employers to provide employees with the opportunity to make prospective mid-year changes to their contribution elections in 2021 without a qualifying status change.

DCAP Considerations for Employers

There are important action items for employers to consider in connection with the temporary increase to the DCAP contribution limit, including the following:

- If an employer decides to increase the annual contribution limit, it should also consider allowing all employees to make prospective mid-year changes, or else the increased contribution limit would be available only to those employees who have a qualifying status change.
- If an employer does not wish to increase the annual contribution limit, it should review its plan document to see if the plan provides a fixed dollar limit or cross-references the IRS limit. The plan may need to be amended in order to avoid an automatic increase in the limit.

Because of these and other important considerations, as well as the potential complexity involved in adopting and administering these special rules,

employers should consult with their benefits advisors.

Important IRS Update: The IRS recently issued a notice concerning the tax treatment of unused DCAP benefits made available in the 2021 or 2022 plan year under either the CAA's carryover or extended grace period provisions. The notice clarifies that these benefits will not be considered taxable income for the participant as long as such amounts would have been excluded from gross income (if used) in 2020 or 2021, as applicable.

DOL Missing Participant Guidance

The Department of Labor recently released guidance for plan fiduciaries, administrators, and service providers concerning their obligations under ERISA to locate "missing" or "lost" participants; i.e., participants who are non-responsive to plan communications, have not commenced receipt of their benefits despite having reached retirement age, or have not cashed or deposited checks sent to them by the plan (the "Missing Participant Guidance").

The DOL has subjected retirement plans with missing participants to increased scrutiny under its Terminated Vested Participant Project ("TVPP"). As part of these TVPP audits, the DOL (i) reviews plan records to ensure that the plan maintains up to date census data for all participants and (ii) assesses plan procedures for identifying and re-establishing contact with lost participants. While to date enforcement activity under the TVPP has focused on defined benefit plans, the best practices discussed in the Missing Participant Guidance apply to both defined benefit and defined contribution plans.

Best Practices Discussed in the Missing Participant Guidance

Although none of the practices outlined in the Missing Participant Guidance are mandatory, plan fiduciaries are encouraged to identify those practices and procedures which, in light of each plan's unique circumstances, "will yield the best results in a cost

effective manner." The Missing Participant Guidance is broader in scope than prior DOL guidance on this subject, and some of the best practices it mentions include the following:

- Maintain accurate census information for the participant population, which may entail (i) regularly requesting updated contact information from participants and beneficiaries, (ii) flagging undeliverable mail and uncashed benefit checks for further follow-up and (iii) using prompts in online platforms to encourage participants to verify and update their contact information.
- Implement effective communication strategies such as (i) encouraging contact with the plan or plan sponsor through websites and toll-free telephone numbers, (ii) using plain English in plan communications and offering non-English language assistance when necessary and (iii) clearly and prominently identifying the purpose of a given plan communication.
- Improve missing participant search procedures, which, in addition to utilizing commercial locator services and internet search tools, may entail (i) attempting contact via email, telephone, text and social media, (ii) consulting with known former colleagues of the missing participant and (iii) checking with designated plan beneficiaries (e.g., spouse, children) and the employee's emergency contacts (in the employer's records) for updated contact information.
- Document plan policies and procedures for identifying missing participants and locating them, including the decision-making behind the formulation and implementation of such policies and procedures.

Further Considerations for Fiduciaries

While the Missing Participant Guidance offers insight into the practices that DOL considers commensurate with a fiduciary's responsibilities under ERISA, several of these best practices raise

privacy and security concerns that fiduciaries must carefully assess and navigate. For example, when using an address obtained from a third-party, it may be prudent to send a mailing to that address requesting that the participant contact the plan first before sending any sensitive participant information to that address. Similarly, while the Missing Participant Guidance (and prior DOL guidance) mention consulting the records of other plans sponsored by the participant's employer to see if they contain updated contact information, access to such information may be restricted under HIPAA if that other plan is a health plan. Therefore, plan sponsors may want to include voluntary information sharing consent processes in their plan enrollment

forms in order to facilitate information sharing regarding missing participants.

In light of this new and important DOL guidance and enhanced plan audit activity, plan sponsors should consider contacting their benefits advisors to discuss enhanced operational processes and written protocols concerning missing participants.

This update is not intended to provide legal advice with respect to any particular situation, and no legal or business decision should be based solely on its content.

If you have any questions about this update, please contact:

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