



Q&A – CONSIDERATIONS FOR COUNTIES UNDER THE AMERICAN RESCUE PLAN ACT OF 2021

March 31, 2021

President Biden signed the American Rescue Plan Act of 2021 (“ARPA”) into law on March 11, 2021. In simple terms, the ARPA is a \$1.9 trillion federal spending package intended to provide economic and other relief related to the Covid-19 pandemic. In addition to the subsidy payments made to local governments, the ARPA contains many provisions impacting employment practices within counties.

The Wisconsin Counties Association and its general counsel, von Briesen & Roper, s.c., have received many questions surrounding ARPA, interpretation of its terms, and its impact on counties.

Our general counsel has prepared the Q&A below, which focuses on COBRA subsidies and the voluntary extension to state and local governments of those federal paid sick and family medical leave benefits previously made available to private employers under the Families First Coronavirus Response Act (FFCRA). *County officials are encouraged to review this guidance carefully with corporation counsel to ensure appropriate interpretation and otherwise assess the impact of any local rules, policies and regulations.*

COBRA Subsidies

1. What is COBRA continuation coverage?

The Consolidated Omnibus Budget Reconciliation Act of 1986 (COBRA) amended the Public Health Service Act, the Internal Revenue Code and the Employee Retirement Income Security Act (ERISA) to require employers with 20 or more employees to provide temporary continuation of group health coverage in certain situations where coverage would otherwise be terminated.

2. What is public sector COBRA?

Title XXII of the Public Health Service (PHS) Act, 42 U.S.C. §§ 300bb-1 through 300bb-8, applies COBRA requirements to group health plans that are sponsored by state or local government employers. It is sometimes referred to as “public sector” COBRA to distinguish it from the ERISA and Internal Revenue Code requirements that apply to private employers.

3. How does the COBRA subsidy work under the ARPA and how long does it last?

The COBRA subsidy in the ARPA requires employer plan sponsors to allow terminated employees and family members to continue healthcare coverage at no cost, subject to a

timely COBRA election. The employer will be required to cover the monthly premium expense but can then recoup the expense through a quarterly credit against payroll taxes. In summary, ARPA provides a tax-free 100% subsidy of COBRA premiums for assistance eligible individuals from April 1, 2021 through September 30, 2021 (the “Subsidy Period”).

More guidance from the IRS is expected regarding the mechanics of applying for and receiving reimbursement for the subsidized coverage.

4. Who is an “assistance eligible individual” eligible to receive subsidized or “free” COBRA?

Subsidized COBRA will be available for any previously covered employee or family member who:

- Lost healthcare coverage due to involuntary termination of employment (other than for gross misconduct) or reduction of hours, and is still in his or her 18-month COBRA eligibility period during the six-month Subsidy Period (April 1 - September 30).
- Did not elect COBRA when originally eligible, or who elected and subsequently allowed coverage to lapse.

In practical terms, any employee who lost health coverage for qualifying reasons between November 1, 2019 and September 30, 2021 could take advantage of these provisions. It is important to note that the termination of employment or reduction in hours must be *involuntary* for the individual to qualify.

It is also important to note COBRA’s definition of a “qualified beneficiary” includes only a covered employee and his or her spouse and dependent children who were covered under the plan on the day before the COBRA qualifying event, as well as children born to or adopted by the employee during a period of COBRA coverage. This definition does not include a new spouse because the spouse was not covered by the plan on the day before the employee’s qualifying event. It is expected that forthcoming IRS guidance will address any allocation of the ARPA premium subsidy when the employee elects coverage for a family member that is not a “qualified beneficiary.”

5. When does subsidized coverage end?

An individual loses subsidy eligibility on the earliest to occur of the following:

- September 30, 2021 (the end of the Subsidy Period);
- The individual gains eligibility for other group health coverage (excluding coverage consisting only of excepted benefits) or Medicare; or
- The individual exhausts their 18-month COBRA eligibility period.

A covered individual is required to notify the group health plan when he or she is no longer eligible for a subsidy due to becoming eligible for another group health plan or Medicare. The individual could be liable for 110% of any ineligible subsidy paid due to their failure to notify the plan administrator of alternative coverage.

6. What are the notice requirements for plan administrators?

Plan administrators are required to provide the following notices: (1) Notice of Extended Election Period, (2) Notice of Availability of Premium Assistance, and (3) Notice of Expiration of Subsidy.

7. What information must be included in the Notice of Extended Election Period?

The plan administrator must provide notice on or before May 31, 2021, to assistance eligible individuals who were previously eligible for COBRA and declined coverage or elected COBRA coverage and let it lapse. This notification must include:

- Forms needed to establish eligibility for premium assistance;
- The name, address, and telephone number of the plan administrator and any other entity maintaining relevant information in connection with the subsidy (e.g., COBRA administrator);
- A description of the additional 60-day election period;
- A description of the individual's responsibility to notify the plan of eligibility for other group health plan coverage or Medicare, including information about the penalty for failure to do so;
- A prominently displayed description of the individual's right to the COBRA subsidy; and
- If the employer has decided to permit medical plan option changes, a description of the available option(s).

Plans are permitted to modify existing notices to include the additional language or, alternatively, to provide the additional information in a separate notice. ARPA instructs the Secretary of Labor (Secretary), in consultation with the Secretary of Health and Human Services and the Secretary of the Treasury, to provide a model notice within 30 days after enactment of ARPA. Employers may use the new model, or as in the past, use their own notices as long as the content requirements are satisfied.

8. What information must be included in the Notice of Availability of Premium Assistance?

This applies to eligible individuals who are already COBRA participants when the subsidy period begins and eligible individuals whose COBRA qualifying events occur during the Subsidy Period. The content requirements are the same as the COBRA Notice of Extended Election Period. Plan administrators may provide this information in a revised COBRA election notice or as a separate addendum to it. Since the subsidy is temporary, plan administrators may prefer using an addendum.

9. What information must be included in the Subsidy Termination Notice?

Plan administrators must provide a notice to COBRA participants receiving subsidies including the following information:

- The individual’s subsidy expiration date;
- The right to continue COBRA without a subsidy if the maximum COBRA continuation coverage period has not been exhausted; and
- Other coverage options that may be available.

The notice requirement does not apply when the loss of subsidy is due to the individual gaining eligibility for other group health coverage or Medicare. This notice has a delivery window beginning 45 days before the subsidy expires and ending 15 days before the subsidy expires. In other words, since the subsidy expires on September 30, 2021, the plan administrator must provide this notice sometime between August 16, 2021 – September 15, 2021.

10. Is an individual allowed to switch his or her coverage to a different plan using the COBRA subsidy?

Generally, the coverage made available to eligible individuals should be the same coverage in effect prior to their COBRA qualifying events. However, solely for purposes of ARPA, employers may – but are not required to – permit eligible individuals to select coverage under other options (other than a health FSA, an excepted benefit, or a QSEHRA) offered by the employer. Enrollment in different coverage may be permitted only if:

- The premium is not greater than the premium for the coverage in which the individual was enrolled at the time of the qualifying event;
- The other coverage is also offered to similarly situated active employees at the time of the election; and
- The other coverage is not coverage that provides only excepted benefits (e.g., a separate dental or vision benefit), a QSEHRA, or a health FSA.

11. How are subsidized COBRA premiums funded?

Quarterly payroll tax credits will ultimately be available to employers or administrators (as applicable) to refund the subsidies. If the credit exceeds the amount of payroll taxes due, it

will be treated as an overpayment and refunded to the employer. The credit can also be advanced under rules to be issued in the future. Further guidance from the IRS is expected on this issue.

12. What if an individual feels they are eligible for the subsidy but the employer disagrees?

Many employees resigned during 2020 due to health concerns or the inability to find child care. While these resignations were voluntary, some employees may feel they were forced to resign because they had no other option. As a result, the employee may feel that he or she involuntarily separated. There may also be other fact specific scenarios where an employee stops coming to work but never formally resigns. Each of these situations will need to be closely evaluated when deciding who is eligible for the COBRA subsidy.

If an employer determines that an individual is not eligible for the subsidy, but the individual disagrees, an expedited appeal process will be available. Under the expedited appeals process, the Secretary of Labor (or the Secretary of Health and Human Services for coverage required under the Public Health Services Act) in consultation with the Secretary of the Treasury (Secretaries) will decide within 15 business days after receipt of the appeal request.

13. What legal issues are still unresolved?

ARPA provisions regarding the COBRA subsidy do not make clear whether the subsidy covers dental and vision coverage along with medical coverage. Similarly, ARPA does not indicate what penalties may attach for an employer's failure to provide the subsidy notices. It is anticipated that this information and more will be covered in forthcoming guidance from the Department of Labor or IRS.

14. What should employers be doing now to prepare?

Employers and plan administrators should take the following steps:

- If the plan is fully insured, coordinate with your health plan provider regarding who will meet the responsibilities for updating and giving the notices set out below.
- Most immediately identify former employees who are in the potentially eligible group – those who lost group health plan coverage due to involuntary termination or reduction in hours in the period beginning November 1, 2019.
- On or before May 31, 2021, provide those eligible employees with the amended Notice of Extended Election Period.
- Update COBRA election notices for any individual who becomes eligible for COBRA during the six-month Subsidy Period.
- Decide as a matter of policy whether to permit individuals to enroll in a different plan option than the one in which they were enrolled when coverage was lost.

- Update internal processes and policies such as those related to termination of COBRA coverage for nonpayment of premiums.

Penalties apply if the required notices are not timely provided, so employers and plan administrators should be diligent in ensuring the notices are timely provided and include the requisite information.

Payroll Tax Credits for Paid Sick Leave and Family Leave

15. Are the federal paid sick leave and family medical leave benefits previously available under FFCRA mandatory under ARPA?

No. ARPA gives covered employers the right to continue to provide qualified leave as an extension of the Emergency Paid Sick Leave Act (“EPSLA”) and the emergency FMLA Expansion Act (“EFMLEA”). However, ARPA does not mandate extension of these paid benefits. Instead, ARPA allows eligible employers to claim tax credits if they voluntarily provide such leave.

16. Are state and local government employers eligible for these extended tax credits under ARPA?

The FFCRA specifically exempted state and local government employers from eligibility for the tax credits described above. However, ARPA removes the exemption. Removal of the exemption has been widely interpreted to mean that state and local govt are eligible for the tax credits. However, due to the budget reconciliation rules, the tax credits will not be retroactive for state and local governments. Tax credits can be taken for such leave granted during the period of March 31, 2021, until September 30, 2021.

17. How can state and local government employers become eligible for the tax credits?

State and local government employers can choose to extend the EPSLA or the EFMLEA in order to qualify for the tax credits provided by ARPA.

18. Are EPSL and EFMLEA leave the same under ARPA extensions as they were under the FFCRA?

No. ARPA expands the types of leave available under both the EPSL and the EFMLEA, and makes the reasons for qualifying leave identical under both laws. Additional qualifying leave now includes time off for: (1) when an employee is obtaining a COVID-19 vaccination; (2) when an employee is suffering or recovering from side effects related to the COVID-19 vaccination; and (3) when an employee is seeking or waiting the results of a COVID-19 test if the employee has either been exposed to COVID-19 or the employer has requested the

COVID-19 test. These reasons are in addition to the six reasons for leave originally set forth in the FFCRA.

Moreover, ARPA also increases the amount of EFMLEA leave that may be paid. Previously, the first two weeks of EFMLEA leave were unpaid. Under ARPA, employers may choose to make all 12 weeks of EFMLEA leave paid, and may qualify for tax credits for the entire 12 weeks. In addition, the caps for tax credits for voluntarily providing EFMLEA have increased from \$10,000 to \$12,000. Other than these two changes, employees are still entitled to be compensated at 2/3 of regular rate with a \$200 daily cap. An employer can always agree to provide additional compensation in excess of the 2/3 regular rate but will not be entitled to a tax credit for any monies above 2/3 of the regular rate.

19. Are employers required to extend both the EPSL and the EFMLEA in order to qualify for the tax credits?

No. ARPA provides that the employer may choose to voluntarily extend either component of FFCRA. An employer who chooses to extend EPSL, but not EFMLEA, or vice versa, would still be eligible for the relevant tax credits.

20. If a county chooses to extend either the EPSL or the EFMLEA, can it select from among the qualifying reasons for leave?

While employers are free to craft their own versions of the EPSL or the EFMLEA, employers should note that in order to qualify for the tax credits discussed above, employers must maintain the EPSL or the EFMLEA as set forth in ARPA. This means that the employer must allow the leave amounts, allotments, benefits, and qualifying reasons as discussed above. If the employer modifies any component, it risks being disqualified for the tax credits.

21. How does ARPA reset any leave component eligibility for employers who previously extended FFCRA?

ARPA “resets the clock” with respect to the 10 days of emergency paid sick leave under the FFCRA. In other words, employers may voluntarily provide employees up to 80 hours of EPSL in the period from April 1, 2021 through September 2021, in addition to any EPSL provided earlier, and be eligible for the corresponding tax credits. Any days an employee took before April 1, 2021 will not count toward the cap on the tax credits. It is not clear whether ARPA also resets the EFMLEA clock. It is expected that will be clarified in forthcoming IRS Guidance.

22. How else does ARPA modify FFCRA?

ARPA adds a non-discrimination provision which disallows the tax credits for any employer who discriminates with respect to leave under both the EPSL and the EFMLEA: (1) in favor of highly compensated employees earning \$130,000 or more; (2) in favor of full-time employees; or (3) on the basis of employment tenure.

Employee Retention Credit

22. What is the Employee Retention Credit?

The Employee Retention Credit (ERC) was originally enacted under the CARES Act and provided a refundable tax credit against certain employment taxes equal to 50% of the qualified wages an eligible employer pays to employees after March 12, 2020. The ERC was set to expire on December 31, 2020, but was expanded and extended under the Consolidated Appropriations Act of 2020 (CAA) to provide a refundable tax credit equal to 70% of the qualified wages paid by an eligible employer from January 1, 2021 until June 30, 2021. ARPA again extends the credit for qualified wages paid between July 1, 2021, and December 31, 2021.

23. Is the Employee Retention Credit available for state and local governments?

Not generally. For 2020, the ERC was not available to federal, state, and local governments and their political subdivisions, agencies, and instrumentalities. For 2021, the following public entities are eligible for the ERC if they otherwise qualify: (a) colleges and universities; (b) entities whose principle purpose or function is providing medical or hospital care; and (c) certain tax-exempt corporations organized under an act of Congress as an instrumentality of the United States.