

---

# The 2021 COBRA Subsidy: Is Your Plan in Compliance?

**Presentation for:**  
Employee Benefits Academy  
June 24, 2021

**Presentation by:**  
Scott Austin, Partner  
Jessica Agostinho, Partner

# Housekeeping: Questions

- Questions during this presentation
  - We encourage questions (even though your audio lines are muted)
  - To submit a question, simply type the question in the blank field on the right-hand side of the menu bar and press return
  - If time permits, your questions will be answered at the end of this presentation. And if there is insufficient time, the speaker will respond to you via e-mail after this presentation

# Housekeeping: Recording, CE Credits and Disclaimer

- Recording
  - This presentation is being recorded for internal purposes only
- Continuing education credits
  - A purpose of the webinar series is to provide FREE CE credits
    - Hunton Andrews Kurth LLP will seek CLE credit for this program in CA, FL, GA, NC, NY, TX and VA. Credit hours are not guaranteed and are subject to each state's approval rules. Please be aware that due to various state bar closures, CLE accreditation will be delayed for the foreseeable future.
  - If you have any questions relating to CE credits, please contact Anna Carpenter at [acarpenter2@huntonak.com](mailto:acarpenter2@huntonak.com).
- Disclaimer
  - This presentation is intended for informational and educational purposes only, and cannot be relied upon as legal advice
  - Any assumptions used in this presentation are for illustrative purposes only
  - No attorney-client relationship is created due to your attending this presentation or due to your receipt of program materials



**Partner**

Email: [saustin@HuntonAK.com](mailto:saustin@HuntonAK.com)

Phone: 214-979-3002

1445 Ross Avenue, Suite 3700  
Dallas, TX 75202

Scott's practice focuses on assisting businesses implement and maintain valuable executive compensation arrangements and employee benefits.

Scott is a member of the firm's Employee Benefits group, and has offices in Dallas and Atlanta. Scott works on all legal aspects of executive compensation and employee benefits, as well as ERISA litigation matters. His practice includes working with businesses to put in place and maintain executive employment agreements and deferred compensation arrangements, qualified retirement plans and health and welfare plans. He helps lead the firm's Health Care Reform initiative. Scott regularly advises clients on issues involving deferred compensation (including Internal Revenue Code Sections 409A, 162(m) and 280G). He has also worked with a number of companies in designing and implementing cash balance plans and other qualified retirement plans, including 401(k) plans. Scott works closely with the fiduciary administrative committees of clients' benefit plans and helps them through the murky waters of ERISA's fiduciary requirements. He also advises on the employee benefit aspects of corporate transactions and financings.

Scott has significant experience in agency inquiries concerning employee benefit plans, including inquiries and audits by the Internal Revenue Service, Department of Labor and Pension Benefit Guaranty Corporation. He also regularly provides substantive support to ERISA litigation matters, including Enron-like fiduciary breach litigation and retiree medical claims. Scott is also experienced in general governance matters and the securities aspects of employee benefits.



**Partner**

Email: [jagostinho@HuntonAK.com](mailto:jagostinho@HuntonAK.com)  
Phone: 202-419-2110

2200 Pennsylvania Avenue NW  
Washington, DC 20037

Jessica helps clients navigate the complex and evolving area of employee benefits law, including health care reform, tax-qualified retirement plans and executive compensation. She also frequently handles employee benefits issues arising in corporate transactions, employment agreements, and vendor contract negotiations.

Jessica works with clients on a broad array of employee benefits matters, advising on compliance with ERISA, the Internal Revenue Code, the Affordable Care Act, HIPAA and COBRA. She regularly advises on compensation and benefits aspects of employment agreements and severance arrangements. She also frequently works with clients on negotiating employee benefit vendor contracts and HIPAA business associate agreements for employee benefit plans.

In corporate transactions, Jessica negotiates employee benefits representations and covenants, conducts due diligence review of employee benefit plan documentation, and advises clients on executive compensation issues arising under Section 409A and Section 280G.

# Upcoming 2021 Webinars

- **2021 webinars:**
  - **July 22:** Employment and Benefits Issues in M&A Transactions
  - **August 26:** Basics and Update on IRS and DOL Correction Programs
  - **September 23:** Self-Directed IRAs and investments relating to the same
  - **October 28:** Navigating controlled group and affiliated service group rules
  - **November 18:** Year-End Benefit Plan Requirements/End of Year Benefits "To Do" List
  - **December 16:** Benefits Year in Review and a Look Ahead to the Upcoming Year
  
- Sign up here: [Employee Benefits Academy Webinar Series - Subscribe](#)

# Overview – COBRA Premium Assistance Under American Rescue Plan Act of 2021 (ARPA)

- ARPA enacted March 4, 2021
- Section 9501 of ARPA provides a temporary 100% reduction in COBRA premiums for “Assistance Eligible Individuals” and qualifying dependents
- COBRA subsidy period – April 1, 2021 – September 30, 2021
- Group Health plans and insurance carriers must treat Assistance Eligible Individuals as having fully paid their COBRA premiums during the COBRA subsidy period; group health plans and insurance carriers are entitled to recoup the subsidy through an employment tax credit
- Guidance
  - DOL FAQs – (April 7, 2021)
  - DOL Model Notice/Election Forms – (April 7, 2021)
  - IRS FAQs – Notice 2021-31 (May 18, 2021)

# Overview – Topics in Webinar

- Covered Plans
- Assistance Eligible Individuals
- Key Issues Relating to Subsidy Period
- Notice and Election Requirements and Issues
- Procedures for Claiming the Tax Credit



- The COBRA subsidy applies to group health coverage that is subject to COBRA under ERISA, the IRC and the PHSA, as well as under State programs that provide comparable continuation coverage (“mini-COBRA” programs). The COBRA subsidy does not apply to Exchange coverage, or to coverage not subject to COBRA (e.g., church plans)
- The COBRA subsidy is available for all COBRA coverage available under a group health plan except for a health FSA
  - Example: Dental and vision coverage is subject to the COBRA subsidy, but not group life insurance coverage
- Retiree health coverage is subject to the COBRA subsidy if offered under the same plan made available for employees. If offered under a standalone retiree health plan, the coverage is not eligible for the subsidy

- COBRA coverage under an HRA is subject to the COBRA subsidy. Also, becoming eligible for HRA coverage will end the COBRA subsidy period like any other group health plan eligibility
- The COBRA subsidy does not apply to a coverage option in which the individual was not enrolled at the time of the qualifying event if the different option has a higher premium
  - Example: Assistance Eligible Individual is enrolled in COBRA with a \$800 per month premium. The Plan allows COBRA participants to change options, and the Plan offers two other options with monthly premiums of \$700 and \$1,000, respectively. The individual may change to the \$700 option and continue to receive a COBRA subsidy. However, if the individual changes to the \$1,000 option, the individual would not be eligible for the COBRA subsidy
  - Exceptions:
    - If the original option ceases to be available
    - A change made during open enrollment under the plan

# Assistance Eligible Individuals

- An Assistance Eligible Individual is an individual who:
  - Is a COBRA qualified beneficiary as a result of a reduction in hours, or an involuntary termination of employment
  - Is eligible for COBRA coverage for some or all of the period April 1, 2021 – September 30, 2021, or would have been eligible during such period had he/she elected COBRA or continued COBRA coverage during the subsidy period
  - Is not eligible for other disqualifying coverage (e.g., another group health plan) or Medicare during the period of subsidized coverage (Note: Exchange coverage is not disqualifying coverage)
  - Elects the COBRA coverage either in the normal course or during a special election window allowed under ARPA for the subsidized coverage

# Assistance Eligible Individuals

- A termination for “cause” does not make a former employee ineligible
  - However, under existing COBRA rules, employers may treat former employees as ineligible for COBRA, generally, if terminated for “gross misconduct”
- An Employer may rely on an individual’s certification of eligibility for the subsidy
  - The employer should retain the certification to verify the employer’s eligibility for the tax credit
- Assistance Eligible Individuals also include a spouse or dependent child of the employee who is covered at the time of the employee’s reduction in hours or involuntary termination resulting in the loss of coverage. Children born to or adopted by the employee during the subsidy period are also eligible for the subsidy

- The COBRA subsidy applies to qualified beneficiaries who previously lost coverage due to a reduction in hours or involuntary termination of employment and are still within their COBRA coverage period (18 months in most cases)
  - This means that an employee who was involuntarily terminated or had a reduction in hours as far back as November 2019 could be eligible for a subsidy
- Health plans are required to offer a “second chance” election to qualifying individuals who experienced an eligible COBRA qualifying event but declined COBRA, or who previously elected COBRA and let it lapse before April 1, 2021
- The extended election window only applies to Federal COBRA, not state-mandated continuation coverage

- Any reduction in hours that results in a loss of coverage qualifies:
  - Voluntary or involuntary
  - Furlough (temporary loss of employment with ultimate expectation of return)
  - Work stoppage as a result of a strike

- Involuntary termination means a severance from employment due to the independent exercise of the unilateral authority of the employer, other than due to the employee's implicit or explicit request, where the employee is willing and able to continue performing services
  - Based on facts and circumstances
  - Includes:
    - Resignation for good reason (material negative change in employment relationships analogous to constructive discharge)
    - Employee initiated termination in response to an involuntary reduction in hours (even if reduction in hours would not result in loss of coverage)
    - Employer's decision not to renew an employment agreement (unless facts demonstrate that the parties understood that the agreement was not going to be extended)
    - Termination during period of illness or disability if there is an expectation that the employee would ultimately return
  - Does not include:
    - Death
    - Retirement (unless facts and circumstances show that the employee would have terminated the employee but for the retirement and the employee was aware of that)
    - Voluntary resignation

# COBRA Premium Assistance Period - General

- The beginning of the COBRA subsidy period is the first applicable period of coverage (monthly or shorter period) beginning on or after April 1, 2021, for which COBRA premiums are generally charged
  - Example: A plan charges COBRA premiums for bi-weekly coverage periods. For March 2021, the last bi-weekly coverage period is March 28 – April 10, followed by a coverage period from April 11 – April 24. The first COBRA subsidy period would be April 11
- The end of COBRA subsidy period is the earliest of:
  - The first date the Assistance Eligible Individual becomes eligible for other group health coverage or Medicare
  - The date the Assistance Eligible Individual ceases to be eligible for COBRA
  - The end of the last coverage period beginning on or before September 30, 2021



# COBRA Premium Assistance Period – Special Rules

- Special Rules Relating to the Subsidy Period
  - An individual can become an Assistance Eligible Individual more than once
    - Example: Involuntary termination on April 1, 2020; becomes eligible under spouse's employer's plan on June 1; spouse is involuntarily terminated and loses coverage on July 1
  - If an Assistance Eligible Individual continues to be eligible for COBRA coverage after September 30, 2021, COBRA automatically continues and premiums are due under the terms of the plan
  - An Assistance Eligible Individual who fails to give the employer notice that the individual has become eligible for another group health plan or for Medicare is subject to a tax penalty of \$250 per failure (higher if fraudulent)
  - Death of an Assistance Eligible Individual does not end the COBRA subsidy period for any other qualified beneficiary

# COBRA Premium Assistance Period – Special Rules

- ARPA also permits (but does not require) group health plans to allow eligible individuals to change to a different health benefit option and retain eligibility for the COBRA subsidy, so long as the following requirements are met:
  - The different coverage is no more expensive than the coverage in which they were enrolled at the time of their COBRA qualifying event
  - The different coverage is also available to similarly-situated active employees
  - The different coverage is not limited to excepted benefits, a QSEHRA, or a health FSA
- If a plan permits changes to coverage options, the individuals must be provided a notice of the right to do so

- Notice of the ARPA subsidy and new election rights was required to be provided to Assistance Eligible Individuals by May 31, 2021
  - The notice must include forms needed to establish eligibility, information on the subsidy generally, conditions to receive it, any extended election period, and the individual's obligation to notify the plan of any other coverage for which they are eligible
- Notices should be provided on an ongoing basis to newly-eligible Assistance Eligible Individuals
- Assistance eligible individuals must also receive a separate notice 15-45 days before their subsidy ends (unless it is due to eligibility for other coverage)
- The DOL has issued model notices

- In May 2020, the government suspended certain time limits under ERISA, including the time period to elect COBRA coverage, up to one year from the date of the suspension (on a case-by-case basis)
  - Allowed COBRA qualified beneficiaries to elect retroactive COBRA coverage back to their original COBRA eligibility date, provided that they pay for COBRA back to that date
- As a result of the COBRA subsidy, some Assistance Eligible Individuals may have the option to elect COBRA beginning on one of three dates:
  - Retroactive to original loss of coverage date (under the 2020 relief)
  - As of April 1, 2021 (under ARPA)
  - Prospective as of the date the election is made (under ARPA)
- If the Assistance Eligible Individual does not elect retroactive coverage at the time they elect COBRA coverage with the subsidy, they do not get another opportunity to elect retroactively
- Note that the 2020 relief does not apply to the COBRA subsidy election
  - An Assistance Eligible Individual must elect COBRA coverage within 60 days after the notice is provided in order to obtain the subsidy

- The “premium payee” is entitled to the tax credit. The “premium payee” is the person to whom the premiums are payable, and can be any of the following:
  - The common law employer maintaining the plan, in the case of either of the following:
    - A plan that is fully or partially self-funded
    - A plan that is subject to federal COBRA
  - The insurer, for a plan that is fully insured and subject to state continuation coverage
  - A multiemployer plan
- In certain circumstances, a third-party payor may be eligible to receive the credit

# Calculating the Amount of the Credit

- The amount of the premium assistance credit is equal to the premiums not paid by the Assistance Eligible Individual due to the application of the COBRA subsidy
- For employers that normally subsidize COBRA under severance arrangements, the amount of the credit is generally equal to the amount that would have been charged to the qualified beneficiary in the absence of the ARPA subsidy
  - If the employer pays a portion of COBRA premiums for similarly-situated qualified beneficiaries, then the credit is the amount of the COBRA premiums, *minus* the amount the employer would normally have paid
- If an employer historically subsidized COBRA premiums but increases the premium for all similarly-situated qualified beneficiaries effective April 1, then the credit applies to the full amount of the ARPA subsidy
- If the plan charges all similarly-situated qualified beneficiaries the full COBRA cost but makes a separate taxable payment to an Assistance Eligible Individual, the credit applies to the amount of the COBRA subsidy

# Calculating the Amount of the Credit

- If an employer treats any portion of post-termination coverage as non-COBRA coverage, then the subsidy does not apply to that period
  - Example: If an employer generally charges \$1,000/month for COBRA coverage but offers 3 months of subsidized coverage at \$200/month post-termination, the amount of the COBRA subsidy credit depends on how the 3-month period is characterized:
    - If the 3-month subsidized period is treated as part of COBRA coverage, then the employer is eligible for a \$200 credit for each of the first three months, and \$1,000 for each month thereafter
    - If the employer treats the employee as having a COBRA qualifying event AFTER the end of the 3-month severance period, then the employer is not eligible for a credit for the first 3 months (because it is not offering COBRA). If the employee elects COBRA after the subsidy period, then the employer would be eligible for the \$1,000 credit for each applicable month
- The credit for an individual coverage HRA (ICHRA) is limited to 102% of the amount actually reimbursed with respect to the Assistance Eligible Individual

- The premium assistance credit does not apply to portions of the COBRA premiums attributable to individuals who would not be qualified beneficiaries under federal COBRA
  - Domestic partner
  - Spouse added after the employee was on COBRA
- Small employers subject to state continuation coverage rather than federal COBRA should consider how eligibility rules may differ under state laws, which could affect credit eligibility



# Applying for the Credit

- Report on Form 941
  - The IRS recently issued a draft Form 941 and draft instructions which include the COBRA premium assistance credit
- The employer becomes entitled to the credit as of the date on which they receive the individual's election of COBRA coverage
- For example (assuming a monthly coverage period):
  - Participant makes an election on 6/17 for coverage back to 4/1/21. As of 6/17 the employer is entitled to a credit for April, May, and June, and should report on Form 941 for Q2
  - Participant makes an election on 7/17/21 for coverage back to 6/1. As of 7/17 the employer becomes entitled to a credit for June and July, and should report on Form 941 for Q3
- No credit permitted with respect to amounts for a which a credit was received under the CARES Act or the Families First Coronavirus Relief Act

- The premium payee may reduce deposits of federal employment taxes up to the amount of the anticipated credit
  - The reduction can be made at the time the employer becomes entitled to the credit, but not for a period of coverage that has not yet begun
- The premium payee may request an advance of the amount of anticipated credit in excess of the federal employment tax deposits by filing Form 7200
  - This is the same form used for other advances of employment tax credits related to earlier COVID-19 guidance
  - Any request for advance can't be made until the end of the payroll period in which entitlement occurs

# Next Month's Webinar

## **Executive Compensation Academy**

- Title: Training Course on Stock Option Awards and Stock Appreciation Rights (Part 2 of 3)
- When: July 8, 2021
- Time: 10:00 am – 11:00 am CT  
11:00 am – 12:00 pm ET

## **Employee Benefits Academy**

- Title: Employment and Benefits Issues in M&A Transactions
- When: July 22, 2021
- Time: 10:00 am – 11:00 am CT  
11:00 am – 12:00 pm ET

© 2020 Hunton Andrews Kurth LLP. Attorney advertising materials. These materials have been prepared for informational purposes only and are not legal advice. This presentation may not be reproduced without prior written consent from Hunton Andrews Kurth LLP. Hunton Andrews Kurth, the Hunton Andrews Kurth logo, HuntonAK and the HuntonAK logo are service marks of Hunton Andrews Kurth LLP. Contact: Walfrido J. Martinez, Managing Partner, Hunton Andrews Kurth LLP, 2200 Pennsylvania Avenue, NW, Washington, DC, 202.955.1500. Receipt of these materials does not constitute an attorney-client relationship. Prior results do not guarantee a similar outcome.