

2021

Regulatory & Legislative Update

Presented by Benefit Comply



Regan Debban J.D., Principal

Ms. Debban has more than 10 years' experience in employee benefits as both an attorney and an advisor. She provides guidance related to regulatory compliance matters to employers and insurance industry professionals. Ms. Debban's work has included helping employers navigate and find practical solutions to complicated Affordable Care Act requirements and with other employee benefit compliance issues arising under ERISA, COBRA, Section 125, and HIPAA. Ms. Debban has been a featured speaker at events nationwide and has been a principal presenter in compliance webinars attended by thousands of employers and insurance professionals. She is also the author of a leading guide to ACA employer reporting requirements. Prior to joining Benefit Comply, Ms. Debban worked as in-house counsel assisting in HR, benefit, and data security compliance, including for a major Fortune 500 company. She also worked as a legal researcher and as an employee benefits consultant before entering law school. Ms. Debban received her law degree from William Mitchell College of Law and her MBA from The University of St. Thomas.



Bob Radecki, Principal

Mr. Radecki has over 30 years of experience in the HR and employee benefits industry helping employers deal with difficult benefit and compliance matters. Bob founded and served as President of A.E. Roberts Company, a nationally recognized compliance consulting and training firm. Bob is recognized as a leading expert on a variety of benefit compliance issues including COBRA, FMLA, ERISA and Health Reform. Bob has been the featured speaker at many industry events and conferences and has published several articles concerning employee benefits compliance issues.

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Agenda

- §125 and §129 Optional Changes
- Outbreak Period Guidance
- ARPA COBRA Subsidy

§125 and §129 Optional Changes

§125 and §129 Optional Changes

Consolidated Appropriations Act of 2021

- Expanded carryovers or grace periods
- Health FSA post termination reimbursements
- DCAP increased age of qualifying individuals
- Election change flexibility

American Rescue Plan Act of 2021

- Increase in DCAP contribution limit

Consolidated Appropriations Act of 2021

- Expanded Carryover or Grace Period
 - Allowed for **plan years ending during 2020 or 2021**

Health FSA (General-Purpose or Limited-Purpose)

Generally allows up to a \$550 carryover or 2 ½-month grace period

- May now offer a carryover of all unused amounts OR up to a 12-month grace period

Dependent Care Assistance Plan (DCAP)

Generally allows up to a 2 ½-month grace period (no carryover)

- May now offer a carryover of all unused amounts OR up to a 12-month grace period

Consolidated Appropriations Act of 2021

- Health FSA Post Termination Reimbursements
 - Following a reduction in hours or termination of employment during calendar year 2020 or 2021, plan may reimburse qualifying medical expenses incurred through the end of the plan year
- DCAP Increased Age of Qualifying Individuals
 - Allows reimbursement for dependents who have not attained age 14 (rather than 13) under the following circumstances:
 - Employee elected to participate in a DCAP plan that had a regular enrollment period on or before Jan. 31, 2020; and
 - Dependent reached age 13 during that plan year, or the next plan year if there are unused expenses that are carried over

Consolidated Appropriations Act of 2021

- Election Change Flexibility
 - Allowed for **plan years ending in 2021**
 - Prospective changes only (no refunds)

Health FSA and DCAP

Employees may begin, end, increase, or decrease elections

Group Health Plan

Employees may:

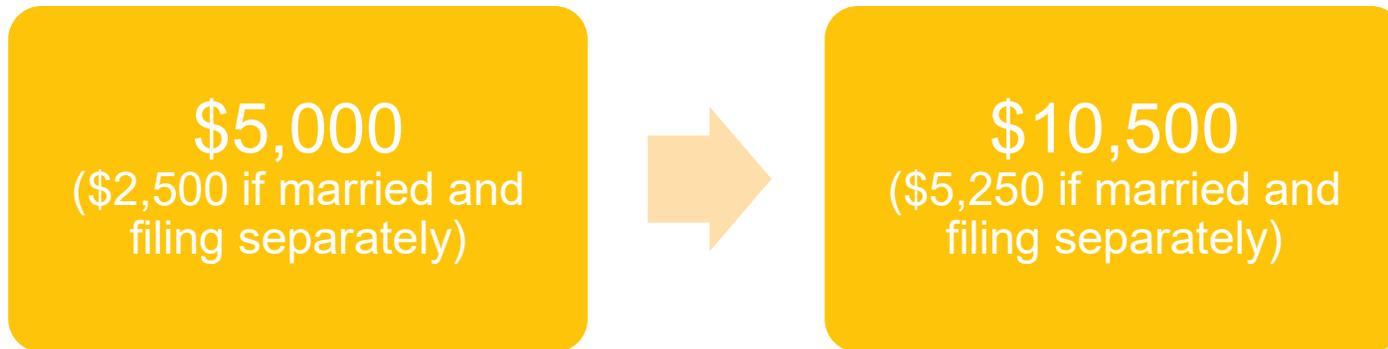
- Enroll,
- Move from single to family, or
- Revoke election if enrolled or enrolling in another plan

Consolidated Appropriations Act of 2021

- Flexibility is Optional, Not Required
 - Employers may choose what provisions, if any, to make available
 - Employers may place limits on number of changes, time frames for changes, and which plans may be changed
 - Employers may offer an expanded carryover or grace period with additional restrictions (e.g., cap carryover, lesser grace period, for only one plan year)
- Plan Amendments
 - May retroactively implement any provisions so long as the employer informs all eligible employees of changes
 - Formal plan amendments must be made by last day of the first calendar year after plan year in which change is effective

American Rescue Plan Act (ARPA)

- Increase in DCAP Contribution Limit
 - Effective for **2021 calendar year** only



- Unclear whether amounts carried over or available via an expanded grace period from 2020 is included in this maximum amount
- Amendment must be made by the last day of the 2021 plan year

Outbreak Period Guidance

Outbreak Period

National Emergency

Declared by President Trump in March 2020

Remains in force until it is announced that it has come to an end

Impact on Benefit Plans

- DOL and IRS Joint Rule requiring suspension of time frames under COBRA, HIPAA and ERISA until the end of the “Outbreak Period”

Outbreak Period = National Emergency + 60 days

• Disregarded Period

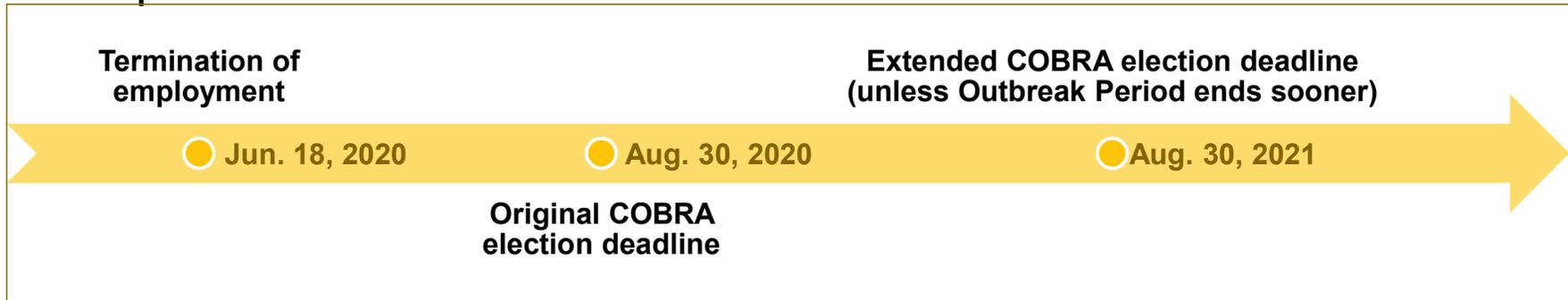
- Outbreak Period (National Emergency + 60 days) or 1 year from the individual’s triggering event (whichever expires first)

– Applies to the following deadlines:

- Notice for requesting HIPAA special enrollment rights
- ERISA claims (including health FSA and HRA run-out periods)
- COBRA elections and payments

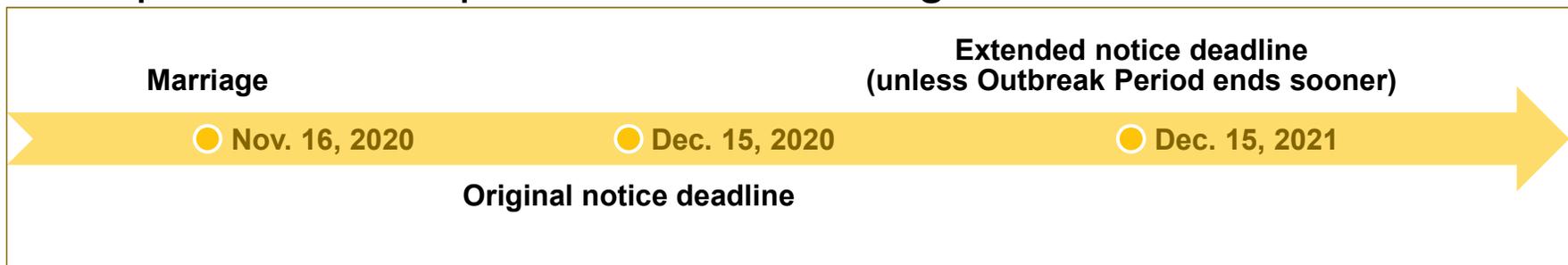
Outbreak Period

- Example – COBRA Election



Must pay COBRA premiums retroactively back to Jul. 1, 2020 to enroll

- Example – HIPAA Special Enrollment Right



Effective date would be 1st of the month following notice

ARPA COBRA SUBSIDY

COBRA Subsidy

- American Rescue Plan Act (ARPA) → 100% COBRA Subsidy

Provides a COBRA subsidy for certain qualified beneficiaries (QBs)

Subsidy is available Apr. 1 – Sept. 30, 2021

Subsidy covers all group health plan coverage, but not health FSAs

Employer must pay premium to carrier or cover on self-insured plan

Significant new notice requirements

COBRA Subsidy

COBRA Subsidy
Eligibility



Federal COBRA or state continuation right
triggered by **involuntary termination of
employment or reduction in hours**

- Not available for loss of coverage due to voluntary termination of employment, divorce, death, or loss of dependent status
- **The termination does not need to be related to COVID-19**
- Employers should consider how voluntary vs. involuntary termination of employment is determined for other purposes

COBRA Subsidy

2 Categories of Eligible Individuals

Involuntary termination of employment or a reduction in hours triggering federal COBRA or state continuation during Apr. – Sept. 2021

Involuntary termination of employment or a reduction in hours triggered federal COBRA or state continuation prior to Apr. 2021, but still in maximum coverage period

Subsidy will be available to employees (former employees) and their spouses and dependents

COBRA Subsidy

QBs in the middle of their maximum coverage period

If already enrolled in COBRA or state continuation coverage, coverage continues, but no premium is due (premium is paid by the employer for up to 6 months)

If not enrolled in COBRA - “Second Bite at the Apple”

- Individuals who did not elect, or elected and subsequently dropped, must be given a second chance to enroll and take advantage of the subsidy
- Must still be within their maximum coverage period from the original qualifying event date
- Coverage must be elected within 60 days of being notified of the COBRA subsidy
- Coverage is prospective (i.e., Apr. 1), not retroactive to the original qualifying event date

COBRA Subsidy

• EXAMPLES

EXAMPLE 1:

- Employee experiences a reduction in hours May 12, 2021
- Employee (and any family members enrolled) must be offered the COBRA subsidy for Jun. 1 – Sept. 30, 2021

EXAMPLE 2:

- Employee's position was eliminated Jul. 23, 2020. Employee and family elected COBRA and have paid monthly COBRA premiums since Aug. 2020
- Family may continue coverage and not pay the COBRA premiums for Apr. 1 – Sept. 30, 2021

EXAMPLE 3:

- Employee was involuntarily terminated Nov. 3, 2019. Employee did not elect COBRA when first offered
- Employee must be offered the COBRA subsidy for Apr. 1 – May 31, 2021

COBRA Subsidy

- COBRA Subsidy Period (Apr. – Sept. 2021)
 - COBRA subsidy ends the earliest of:

Individual becomes eligible for group health plan coverage or Medicare

Federal COBRA or state continuation maximum coverage period (from the original qualifying event date) expires

Sept. 30, 2021

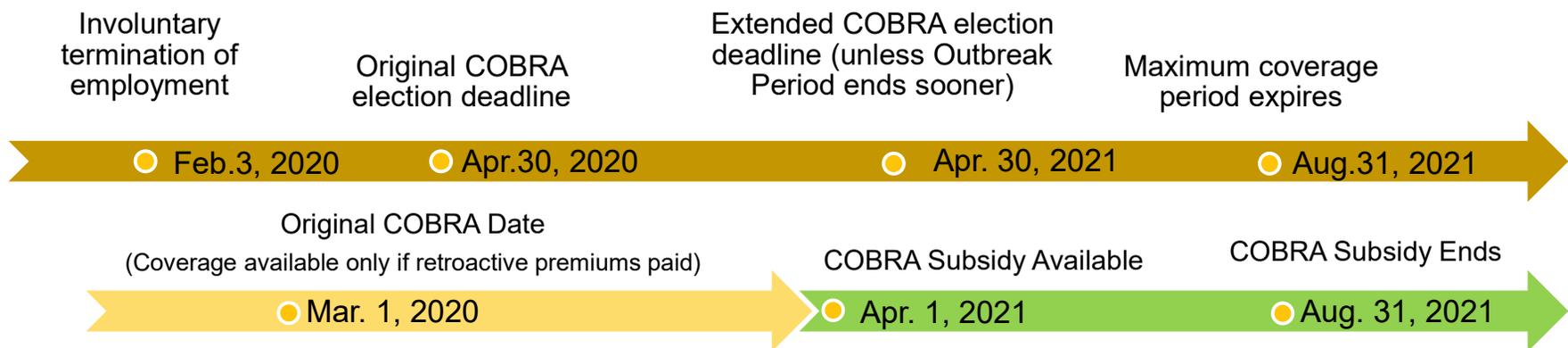
- QBs are required to notify employer of eligibility for group health plan coverage or Medicare
 - Fine of \$250 for failure to notify
 - Increased to repayment of the premium if failure to notify was intentional
 - Penalty may be forgiven for reasonable cause

COBRA Subsidy

- Interaction with the Outbreak Period

- Individuals who triggered a COBRA continuation right prior to Apr. 2021 might be able to take advantage of Outbreak Period extension and COBRA subsidy

- Individuals who elect the COBRA subsidy Apr. – Sept. 2021 cannot be required to elect or pay for COBRA retroactively (but could choose to do so if still in their extended window)



COBRA Subsidy

Subsidy Coverage = 100%

- Full cost of COBRA (single or family), including administrative fee (generally 2%)
- Applies to all group health plan coverage (e.g., medical, dental, vision), but not health FSAs
- Subsidy covers federal COBRA and state continuation coverage
 - Employer should pay the carrier for a fully-insured plan
 - Employer should provide coverage at no cost on self-insured plan

Employer Payroll Tax Credit

- Employers will recover premiums not paid by QBs through a payroll tax credit
 - Similar to how employers recover paid leave costs under the FFCRA
- If tax credit exceeds payroll taxes due for a particular period, employer can apply for a refundable tax credit
 - In most cases employer payroll taxes due will exceed recoverable COBRA premiums

COBRA Subsidy

- Notice Requirements – DOL instructed to issue model notices

COBRA Election Notice

- Must be updated with language describing the COBRA subsidy for those who trigger a continuation right during Apr. – Sept. 2021
- May amend existing notice or include a separate document

Notice to Existing QBs

- Inform covered QBs that premiums do not need to be paid Apr. – Sept. 2021
- “Second Bite at the Apple” – inform QBs within their maximum coverage period, but not currently covered, of the COBRA subsidy Apr. – Sept. 2021
- Notice must be provided by May 31, 2021 (within 60 days of Apr. 1)

Subsidy Ending Notice

- Must be sent to anyone receiving the COBRA subsidy informing them of the subsidy coming to an end unless the subsidy is terminating following notification of eligibility for group health plan coverage or Medicare
- Must be sent between 15 - 45 days prior to end of subsidy

COBRA Subsidy

Timeline



COBRA Subsidy

Coordination with COBRA Administrators

- Will administrator distribute an updated election notice to individuals with a continuation right following an involuntary termination of employment or reduction in hours Apr. 1 – Sept. 30, 2021?
- Does administrator have records to determine which individuals experienced an involuntary termination of employment or reduction in hours and are still in their maximum coverage period? Will administrator distribute the required notice to such individuals?
- Will administrator distribute notices within 15-45 days prior to the subsidized coverage terminating for those who elect it?
- Will administrator provide reports showing who elected subsidized COBRA Apr. 1 – Sept. 30, 2021 to assist employer with collecting payroll tax credits?

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