

## Employee Benefits and Executive Compensation Compensation and Benefits Considerations in the American Rescue Plan Act of 2021



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The American Rescue Plan Act of 2021<sup>[1]</sup> (the ARPA or the Act) was signed into law on March 11, 2021. Among myriad other topics, the Act builds upon, modifies, or otherwise addresses the relief promulgated in the Coronavirus Aid, Relief, and Economic Security (CARES) Act and Consolidated Appropriations Act (CAA).<sup>[2]</sup> In addition, the Act includes several new provisions in light of the ongoing COVID-19 pandemic that impact employee benefits and executive compensation.

Of particular import to employers is the Act's new COBRA subsidy. The Act provides that for certain individuals, COBRA will be 100% subsidized during a limited window. In addition, the Act gives employers the option to temporarily increase the dependent care flexible spending account limits, makes available long-awaited pension plan relief, and, starting in 2027, expands the "covered employee" group for Code Section 162(m) to include the next five highest paid officers after the existing group.

This alert provides a high-level overview of the above-mentioned components of the Act, as they are most pertinent to companies' day-to-day compensation and benefits concerns. Please note that further guidance from government agencies is expected in the near future, and will shed more light on certain aspects of the Act.

### COBRA Subsidies

#### ***So what exactly is the provided COBRA subsidy?***

The Act provides temporary COBRA premium assistance to certain "assistance eligible individuals" (as defined below) and their beneficiaries. Commencing on April 1, 2021, such individuals can receive up to six months of free COBRA coverage (i.e. a 100% subsidy until September 30, 2021). The subsidy coverage is only available from April 1, 2021 through September 30, 2021.

#### ***Do employers have to offer eligible individuals the free COBRA coverage during the subsidy period?***

Yes. This is a mandatory provision for employers.

#### ***Do all participants get the COBRA subsidy?***

No. The coverage is only offered to "assistance eligible individuals," meaning:

- those whose qualifying event was an *involuntarily* termination from employment or a reduction in hours;
- those who are not otherwise eligible for Medicare or other group health plan coverage; and
- those who elect such COBRA coverage.

This means that individuals entitled to COBRA as a result of a voluntary termination are not eligible for

the COBRA subsidy.

***What if an individual would have been eligible for COBRA during the subsidy period but did not elect COBRA or opted out of coverage early?***

The Act includes prospective COBRA coverage options as of April 1, 2021 for those individuals who experienced an involuntary termination or reduction in hours and who did not elect COBRA or dropped COBRA (but had they timely elected it or maintained it, the coverage would have continued through the subsidy period).

For these individuals, a new election period must be offered that runs from April 1, 2021 through a 60-day period following receipt of a “notice of extended election period.” The period of coverage for such individuals would be for the period beginning April 1, 2021 and ending September 30, 2021 (subject to earlier termination as described below).

This further increases administrative burdens on employers, as employers will be required to look back at least to 2019 to see who might be eligible individuals and give them the proverbial “second bite at the apple.”

***Which plans are covered by the COBRA subsidy?***

The subsidy applies to plans subject to COBRA (e.g., medical, dental, vision) except health flexible spending accounts.

***Are employers required to eat the entire cost of this COBRA subsidy?***

The entire amount of the COBRA subsidies (inclusive of the 2% administrative fee) will be “advanced” by the employer (or insurance company), after which the government will provide a tax credit to these parties. The tax credit is a refundable credit or offset against the employer’s Medicare hospital insurance payroll taxes.

***Is the subsidy includable in an eligible individual’s gross income?***

No. The subsidy will not be treated as income for the eligible individual.

***Is an eligible individual guaranteed to receive free COBRA coverage for the entire subsidy period?***

No. If an individual’s maximum COBRA coverage period (e.g., 18 months) would normally end within the period or the individual becomes eligible for another group health plan or Medicare, then the subsidy would end sooner than September 30, 2021.

***What happens if an eligible individual pays premiums during the COBRA subsidy period?***

If an employer received a COBRA premium payment from an eligible individual for a month during which the subsidy would apply, the employer is required to refund the premium payment back to the individual within 60 days of receipt.

***Do employers have to notify employees of the COBRA subsidy?***

Yes. If an employer does not furnish the three new notices described below, then they will fail their notice obligations.

***What are the three new notices?***

As it has in the past, the Department of Labor (DOL) is expected to create model notices that employers may (but are not required to) rely on as a template. The three notices are as follows:

*General Notice.* For people who first become eligible to elect COBRA during the subsidy period beginning April 1, 2021, additional information must be provided in their COBRA notices, including details regarding the availability of the premium subsidy and, if adopted by the employer, any option to enroll in different coverage. The DOL will develop the model notice within 30 days of enactment.

*Notice of Extended Election Periods.* For individuals who get a second election period, as described above, a new notice with specific information must be provided. These individuals are entitled to an extended election period, and employers must notify the individuals of the opportunity to elect COBRA prospectively for the subsidy. The DOL will develop the model notice within 30 days of enactment and the required information must be provided to this group of individuals within 60 days of April 1, 2021.

*Notice of Expiration of Subsidy Period.* Employers must send a notice to the individuals who are receiving the subsidized coverage with the date that the subsidy period is expiring. This notice must be provided no more than 45 days and no less than 15 days from the expiration of the subsidy period, and should explain that the subsidy is ending and advise that additional COBRA continuation coverage or other group health plan coverage may be available. This notice will also need to be provided to individuals whose subsidy is ending because their COBRA period is ending within the subsidy period, and also to those who have remaining unsubsidized COBRA months after September 30, 2021. This notice *does not* need to be sent to a person who self-reported eligibility for other group health coverage and is therefore disqualified from further subsidized COBRA coverage. The DOL will provide a model notice within 45 days of enactment.

### ***Is there anything optional with respect to these COBRA provisions in the Act?***

Yes. The Act provides that if an employer wishes, it may permit eligible individuals to change their elections within 90 days of their qualifying event to other coverage options; however, this is not required, and the Act provides that certain conditions must be satisfied for an employer to allow it. The following conditions must be met:

- the employer made a voluntary decision to permit such enrollment change;
- the premium for the new coverage does not exceed the premium for the previous coverage (i.e. is the same price or cheaper);
- the new coverage the individual elects to enroll in is offered to similarly situated active employees at the time the election is made; and
- the new coverage does not consist of coverage that provides only excepted benefits, a qualified small employer health reimbursement arrangement, or a flexible spending arrangement.

### **Dependent Care FSA Limits**

#### ***What is the change to the existing law?***

Dependent care flexible spending account (Dependent Care FSA) limits have been increased temporarily. For any taxable year commencing after December 31, 2020 and before January 1, 2022 (i.e. for 2021 only for calendar-year plans), the limit for exclusion from gross income is increased from \$5,000 to \$10,500 for Dependent Care FSAs.

#### ***Do employers have to offer this increase?***

No. This is optional and not mandatory. Employers do not have to incorporate this increased limit into their plans; however, if they do, then the plans must be amended no later than the last day of the plan year in which the amendment is effective. For calendar-year plans, this date is December 31, 2021. Accordingly, such an amendment may have a retroactive effect to the beginning of the plan year.

## Single Employer Pension Plan Relief

The Act implements several new provisions related to pension plan funding. One such provision is the allowance of plan sponsors of single-employer defined benefit pension plans to calculate minimum funding requirements by amortizing the entire unfunded liability of a plan over 15 years. Functionally, this means that plan sponsors may now pay off a pension plan's underfunding liability over 15 years instead of 7 years, which was the period that was previously in place. Plan sponsors may apply this change for the 2019, 2020, or 2021 plan years, and on a go-forward basis from the 2022 plan year. Another provision in the Act is that, due to historically low interest rates, discount rate stabilization used to calculate the liability for minimum funding purposes has been revised to apply through 2030. Employers should consult with their actuaries for the impact this would have on their defined benefit pension plans.

## Internal Revenue Code Section 162(m) Expansion

### ***What has changed?***

Code Section 162(m) provides a \$1 million annual limitation on the deduction that public companies may take with respect to compensation paid to "covered employees." The existing law's "covered employee" group includes a company's Chief Executive Officer (CEO), Chief Financial Officer (CFO), and the next three highest paid executive officers in any given year, as well as any individual who had previously been a "covered employee" for any tax year since January 1, 2017 – often referred to as the "once in, always in" concept.

The Act expands the covered group to include the next five highest paid officers after the existing group. This additional group of five, however, is not required to be included in the "once in, always in" category.

### ***When does the change become effective?***

The expansion of covered employees will not take effect until January 1, 2027.

### ***How can an employer prepare for this change?***

Employers may want to look into implementing a method of tracking their highest paid officers, making sure to distinguish between the CEO/CFO/three highest paid officers who will always be in the covered group once they have been included in any year, and the next five top paid officers, whose inclusion will vary on a year-to-year basis.

If your company has questions about the employee benefits and executive compensation provisions of the Act addressed herein, or any other questions about the Act, reach out to your Jenner & Block contact for assistance. The Employee Benefits and Executive Compensation Practice is monitoring for the regulatory and legislative guidance that is expected to be released in the coming weeks and months, and is prepared to work through the nuances of this ever-adapting body of law.

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[1] H.R.1319, Pub. Law 117-2

[2] For more information on these acts, please see <https://jenner.com/practices/447/library>

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