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2021 Employee Benefit Compliance Updates

Today's Presenter

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Today's Agenda

- 2021 Indexed Benefit Figures
- COVID-19 Benefit Extensions & "Outbreak Period" Guidance
- American Rescue Plan Act (ARPA)
  - COBRA Subsidy
  - ERC Extension
  - Other Employee Benefit Provisions

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2021 ACA Updates – Indexed Figures

- Employer Mandate
  - Affordability percentage: **9.83%** for plan years beginning in 2021 (up slightly from 9.78% for 2020)
  - Penalties under 4980H(a) “no offer” and 4980H(b) “defective offer” increased to $2,700 and $4,060, respectively
- Plan Design
  - Health HSA Contribution Limit: Self-only: $3,600 and Family: $7,200, with $1,000 catch up allowed for those 55 & over
  - Health FSA Limit: The amount of annual elective contributions limited to no more than $2,750 *(no change from 2020)*

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2021 PCORI Fee Update

Employers who sponsor self-insured coverage—including HRAs and certain FSAs—are responsible for filing and paying the Patient-Centered Outcomes Research Institute (PCORI) by July 31st of the calendar year following the end of the applicable plan year.

For plan years that ended in 2020, PCORI fees are due by Aug. 2, 2021.

- For plans ending January 1, 2020 through September 30, 2020, the fee is **$2.54** per covered life
- For plans ending October 1, 2020 through December 31, 2020, the fee is **$2.66** per covered life

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State ACA Reporting Requirements

- As of the 2020 reporting year, New Jersey, Washington DC, California, and Rhode Island have implemented individual mandates for health coverage that require every state resident to have health insurance, obtain an exemption, or pay a penalty (shared responsibility payment) with their state income tax return.

- In addition to the federal mandate that requires electronic submission of forms to the IRS, employers and providers of health coverage to NJ, DC, CA, and RI residents must file 1095 forms to the state(s).

- Connecticut, Hawaii, Maryland, Minnesota, Vermont and Washington are considering ACA employer reporting requirements.

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Executive Order to Strengthen ACA

- On Jan. 28, 2021, President Joe Biden issued an executive order intended to strengthen the ACA and Medicaid. The executive order directed the Department of Health and Human Services (HHS) to establish a special enrollment period through Federally Facilitated Exchanges due to the COVID-19 pandemic.

- The order also directs IRS, DOL and HHS to review existing policies to determine whether they undermine the ACA and consider whether to suspend, revisit or rescind those actions.

An executive orders directs federal agencies to consider new regulations or guidance to implement the order's policies, but the order itself does not make any changes to existing regulations.

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Consolidated Appropriations Act

Former President Trump signed the Consolidated Appropriations Act of 2021 (the Act) into law on Dec. 27, 2020. The Act contains multiple provisions impacting employee benefits, including the following:

1. New rules regarding surprise medical billing;
2. New patient choice provisions;
3. A new fee dispute resolution process;
4. New rules providing transparency in health care;
5. New continuity of care rules;
6. New rules regarding parity in mental health and substance use disorder benefits;
7. New reporting requirements regarding pharmacy benefits and drug costs

Most of the above provisions become effective for plan years beginning on or after Jan. 1, 2022 and the onus of responsibility is generally on the carrier for fully insured plans.

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Outbreak Period Overview

On April 28, 2020, the DOL & IRS published a joint notice providing deadline relief to help employee benefit plans, plan participants and plan service providers impacted by the COVID-19 crisis. Under the final rule, plans subject to ERISA or the Internal Revenue Code, must disregard the "Outbreak Period" for purposes of determining certain deadlines including:

- The 30-day period (or 60-day period, if applicable) to request special enrollment;
- The 60-day election period for COBRA continuation coverage;
- The date for making COBRA premium payments;
- The date for individuals to notify the plan of a qualifying event or determination of disability;
- The date within which individuals may file a benefit claim under the plan's claims procedure; and
- The dates within which claimants may file an appeal of benefits determinations or external reviews

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Recent Guidance on "Outbreak Period" Relief

- Under federal law, the Outbreak Period for deadline extension relief cannot exceed one year. Because the Outbreak Period began on March 1, 2020, the relief was expected to expire on Feb. 28, 2021. However, under EBSA Disaster Relief Notice 2021-01, the agencies clarified that the one-year maximum in ERISA 518 applies to each individual time period affected by the outbreak period. When determining the limit, it runs from the date an action would otherwise have been required in a given situation.

- Specifically, individuals and plans will have the applicable periods disregarded until the earlier of:
  - One year from the date they were first eligible for relief; or
  - 60 days after the announced end of the National Emergency *(the end of the Outbreak Period)*

This is an event-to-event, person-by-person determination!

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Outbreak Period Extension Examples

- **Example 1:** If a qualified beneficiary would have been required to make a COBRA election by March 1, 2020, that requirement is delayed until February 28, 2021, which is the earlier of 1 year from March 1, 2020 or the end of the Outbreak Period (*which remains ongoing*).

- **Example 2:** A COBRA premium payment for March 2020 was due March 1, 2020, subject to a grace period ending March 31, 2020. The premium was not paid. The 1-year period ends February 28, 2021 and payment can be required by March 31, 2021.

- **Example 3:** An employee had a new baby on September 1, 2020. Per the plan, the employee must enroll their child within 60 days, or by October 31, 2020. The entire one-year period is tolled, from September 1, 2020 to August 31, 2021. The employee has 60 days from the end of the one-year tolling period to make this SEP election, or by October 31, 2021 *(assuming the Outbreak Period has not ended at an earlier date).*

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American Rescue Plan Act Overview

On March 11, 2021, President Joe Biden signed into law the American Rescue Plan Act (ARPA), a $1.9 trillion legislative package including a significant range of policies to provide additional pandemic relief. The act contains both mandatory and discretionary provisions relating to employee benefits.

- 100% subsidy for COBRA premiums
- Extension and expansion of employee retention tax credit (ERC)
- Extension of pandemic-related unemployment benefits
- Expansion of subsidy for premiums through the ACA Exchanges
- Increase in DCAP contribution limits

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COBRA Subsidy Overview

- “Subsidy period” is April 1, 2021 through Sept. 30, 2021
- Subsidy only available for coverage lost due to involuntary termination or reduction in hours
- 100% subsidy. Qualified beneficiaries will pay nothing. The entity that individuals would have normally paid COBRA premiums to will essentially advance the amounts due
- Employers recover lost premium through a payroll tax credit
- Previously eligible individuals not currently enrolled in COBRA will have a second chance to enroll
- Significant new notice requirements

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COBRA Subsidy - Eligible Plans

- Any group health plan covered by federal COBRA continuation coverage or state continuation coverage, **except for flexible spending accounts (FSA).**

- The COBRA premium includes medical, dental, vision, HRAs, and the standard 2% COBRA administration fee.

- These rules are <u>not optional</u> for employer sponsored group health plans. All group health plans subject to COBRA, except FSAs, must provide this subsidized coverage.

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COBRA Subsidy - Eligible Individuals

- Assistance eligible individuals (AEIs) are qualified beneficiaries who trigger COBRA continuation coverage because of an involuntary termination of employment or a reduction in hours **and** whose current COBRA continuation coverage period would cover some or all of the subsidy period.

- Individuals who qualify for COBRA because of voluntary termination, retirement, or death would not be considered AEI.

- An AEI is no longer eligible for a subsidy upon the earliest of: becoming eligible for other group health plan coverage *(that is not an excepted benefit);* becoming eligible for Medicare; or the expiration of their maximum COBRA period.

- AEIs are required to notify their group health plan if they become eligible for other ACA-compliant coverage during the subsidy period (even if they do not enroll) and will be subject to penalties if they fail to do so.

- **Coverage is not automatic.** AEIs not yet enrolled in COBRA will need to elect COBRA coverage in order to take advantage of the subsidy.

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COBRA Subsidy Special Enrollment Period

- Under the ARPA, an individual who is eligible for assistance and who hasn't elected COBRA coverage by April 1, or who elected COBRA coverage but then discontinued it, may elect COBRA coverage during a special enrollment period starting April 1 and ending 60 days after the date on which the COBRA subsidy notification was delivered.

- These individuals may receive the subsidy on a prospective basis, without having to elect and pay for COBRA retroactively for months prior to the subsidy becoming available.

- Employers may, but are not required, to permit individuals to change coverage. If this option is provided, the premium subsidy cannot exceed the cost of the coverage option the individual was in at the time of the qualifying event.

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COBRA Special Election Examples

- Gary was laid off due to company downsizing in December 2019. He became eligible for COBRA on Jan. 1, 2020. Gary never elected COBRA. He may be eligible for subsidized COBRA between April 1, 2021 through June 30, 2021. If he had elected COBRA beginning Jan. 1, 2020, he would reach the 18 months maximum coverage at the end of June. However, if Gary already found another job and was eligible for health insurance through his new employer, he would not qualify for subsidized COBRA.

- Jan lost eligibility for health insurance through her job after her hours were reduced due to COVID-19. She became eligible for COBRA on July 1, 2020. Jan never elected COBRA and is still working part-time. Jan may be eligible for subsidized COBRA between April 1, 2021 through Sept. 30, 2021. If she had elected COBRA beginning July 1, 2020, she would reach the 18 months maximum coverage on Dec. 31, 2021. Note the DOL's one-year COBRA election extension also applies to Jan, so she also has the option elect COBRA back to July 1, 2020 if she pays the premiums owed for retroactive coverage prior to the subsidy period.

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COBRA Subsidy - Notice Requirements

In addition to the COBRA general notice and election notice already required, employers will have additional notice requirements to AEIs and new language to include as part of the COBRA election notice for newly eligible participants. The DOL is directed to provide model language for most new notices within 30 days of enactment of the ARPA, then providers will have 60 days to provide the notices.

- **Premium assistance notice:** Individuals who are AEIs who are active on COBRA continuation coverage
- **Election notice:** Individuals who qualify for the new 60-day special election period or those who have yet to elect COBRA but remain eligible to do so under usual rules
- **Subsidy termination notice:** Individuals who are receiving the subsidy, to let them know when the subsidy will end

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COBRA Subsidy Tax Credit

- The cost of the COBRA premium is claimed as a refundable tax credit by the entity covering the cost of the subsidized coverage.
- The payroll tax credit will equal the full amount of COBRA premiums not paid by assistance eligible individuals. If the amount of the credit exceeds the payroll taxes owed, any excess will be refunded to the eligible entity.
- The credit may be advanced under rules set out by the IRS. The IRS will be forthcoming with necessary regulations, guidance, forms, or instructions to carry out these payroll tax credits, including any reporting required to verify the amount of reimbursement.
- Employers cannot claim a tax credit for COBRA subsidies on amounts they plan to receive a tax credit through the ERC or through the FFCRA *(i.e. no double dipping)*
- Plan administrators and sponsors' tax departments should coordinate now to establish a plan for determining AEIs and tracking the amount of subsidies provided between April 1 and Sept. 30, 2021.

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Employee Retention Credit (ERC)

The CARES Act contains a provision known as the Employee Retention Credit (ERC), a refundable payroll tax credit designed to encourage eligible employers to keep employees on their payroll, despite experiencing economic hardship related to COVID-19.

- The ERC provides a refundable credit of up to $5,000 for each full-time equivalent employee retained between March 13 and Dec. 31, 2020, and up to $7,000 per quarter for each retained employee between Jan. 1 and Dec. 31, 2021. Meaning eligible employers can potentially take an ERC of up to $33,000 per employee.

- Eligible employers are those who were ordered to fully or partially shut down or whose gross receipts fell below 50% for the same quarter in 2019 (for 2020) and below 80% (for 2021). For employers not in business in 2019, corresponding quarters from 2020 can be used to determine eligibility.

- “Qualified wages" includes wages (as defined in Section 3121(a) of the Code) and compensation (as defined in Section 3231(e) of the Code), as well as amounts paid by the employer for the employee's group health plan coverage, provided those amounts are excluded from income under Section 106(a) of the Code.

- Employers may claim their credit immediately by reducing payroll taxes sent to the IRS. Where credits exceed payroll taxes, a direct refund can be requested from the IRS.

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ARPA's Expansion & Extension of ERC

- Extends the credit to the last two quarters of 2021 *(in conjunction with Consolidated Appropriations Act extension, the credit is now available for all of 2021).*

- Expands ERC eligibility to "recovery startup businesses" established after February 15, 2020, with annual gross receipts of up to $1 million. A recovery startup business meets the ERC eligibility test even if it does not otherwise meet the general eligible employer ERC requirements. The startup ERC is capped at $50,000 per quarter, per employer.

- Increases the amount of the ERC available to "severely financially distressed employers," or those that experienced a gross receipts reduction of more than 90 percent as compared to the same quarter in 2019. The ERC is uncapped for these employers, and they may treat all wages paid to employees as qualified wages, regardless of the size of the employer and number of employees.

Note: The IRS recently issued guidance on the credit, but such guidance **does not** apply to ERC qualified wages paid after December 31, 2020. It is expected that IRS guidance regarding 2021 ERC updates will be forthcoming.

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Other EE Benefit Provisions in ARPA

- **Extension of pandemic-related unemployment benefits:** The $300 weekly benefits provided under pandemic-related unemployment programs are extended through Sept. 6, 2021. In addition, the first $10,200 of unemployment benefits are exempted from federal income tax for each spouse in households with under $150,000 in adjusted gross income.

- **Expansion of subsidy for ACA premiums through the ACA Exchanges:** The bill increases the dollar amount of, and expands eligibility for, subsidies for health insurance coverage purchased through the Marketplace/Exchange. These and other ACA affordability changes made by the bill will expire after two years.

- **Increase in DCAP contribution limits.** For **calendar year** 2021, the bill increases the annual contribution limit for a dependent care assistance program (DCAP) from $5,000 to $10,500 *(and from $2,500 to $5,250 for married individuals filing taxes separately).* Employers with DCAPs ***may*** retroactively amend their plans to incorporate this increase.

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Questions?

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