



**Lowenstein Sandler's Employee Benefits & Executive Compensation Podcast:
Just Compensation**

**Episode 2 -
Navigating the Nuances of the COBRA Subsidy Under
the American Rescue Plan Act**

By [Andrew Graw](#) and [Megan Monson](#)
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Andrew Graw: Welcome to our Just Compensation podcast. Today, we'll be talking about navigating the nuances of the Cobra subsidy under the American Rescue Plan Act. I'm Andrew Graw. I chair Lowenstein Sandler's Employee Benefits & Executive Compensation practice group. I'm joined by Megan Monson, counsel in the practice group as well. With that, Megan, please take us away.

Megan Monson: Thanks, Andy. As you may be aware, on March 11th, President Biden signed into law, the American Rescue Plan Act of 2021, or ARPA for short. This was signed into law as part of the new third COVID-19 stimulus relief bill. The ARPA assists qualifying individuals who lose coverage under an employer's group health plan due to an involuntary termination of employment or a reduction in hours by allowing them to opt for Cobra coverage, at no cost, from April 1st through September 30th. The federal government pays the tab by providing employers with an offsetting tax credit against their federal Medicare taxes for the cost of Cobra coverage. The IRS has issued guidance on this topic to aid in distilling many of the questions that have been raised and to try and address ambiguity in the law. Initially, this guidance was in the form of 86 frequently asked questions, spanning a variety of topics. Most recently, the IRS issued notice 2021-46 with other tips and practical guidance. Today, we wanted to focus on some of these topics that we've seen to be the focal point for many employers.

Andrew Graw: We've had a number of clients across a variety of industries raise questions in trying to navigate the new premium assistance and the guidance that's been issued by the IRS. And to understand how it applies to them as well as their former employees, we'll share some of the more frequently asked questions we've been asked by clients, as you may have encountered the same things or may encounter those things in the future.

Megan Monson: First and foremost, many of the questions we've seen focus on whether an individual is eligible for Cobra assistance, as a threshold matter. As previously mentioned, individuals are generally eligible for the Cobra subsidy if they have a termination of employment or a reduction in hours. A number of

clients have asked us whether a reduction in hours must be involuntary in order to take advantage of this benefit. IRS guidance makes clear that the answer is no. Even if the reduction in hours is voluntary, by the employee's choice, they would still be eligible for the Cobra subsidy. A question that commonly comes up is, what about situations where an employee's termination is framed as a resignation? Does that allow for them to take advantage of the Cobra subsidy?

Andrew Graw:

This is a question that we've gotten quite a bit and some of the situations involved have been very interesting. The answer to the question is that an individual is considered to be involuntary termination based on facts and circumstances. Well, what does that mean in practice?

It can mean that if someone is constructively discharged, for example, if they're asked to move to a geographic location that is materially different from where their current location is, and they decline, they can be considered to be constructively discharged for purposes of the Cobra premium assistance and qualify for it based on an involuntary termination. Other situations that could give rise to an involuntary termination that are not simply the employer giving the person a pink slip is an election by the employee to participate in a reduction-in-force. Sometimes companies will establish a window program or other reduction-in-force program where employees can elect to be included. In that situation, the IRS guidance indicates that the individual would be considered to have involuntarily terminated by accepting the program.

So clients and companies have to be mindful of situations where an employee terminates employment under circumstances that could give rise to an involuntary termination, even if they're not being involuntarily terminated in the normal sense. Another question that we often get is whether assistance, the premium assistance, applies to dental and vision coverage as well as health coverage?

Megan Monson:

The short answer is yes. In general, the Cobra premium assistance is available under a group health plan. Definition of group health plan covers medical benefits. It also covers vision and dental-only plans. This is true regardless of whether or not the employer pays for a portion of the cost. In general, group health plans also include health reimbursement arrangements, but it's important to note that group health plans do not include a health flexible spending account or a group life insurance plan. One item that can come up related to if you're taking advantage of this benefit for dental and vision-only benefits is if you subsequently become eligible for a group health plan that may or may not include dental and vision benefits, that's a scenario where you would cease to be eligible for the Cobra subsidy. So in effect, you may not still be getting those benefits, but you're now no longer eligible for the Cobra subsidy as well. So, we've talked about the fact that this Cobra coverage is available at no cost, but does that really mean no cost? Does the Cobra subsidy actually cover the 2% administrative fee?

Andrew Graw:

It actually means no cost. Premium subsidy assistance does cover 102% of the Cobra premium cost, which is intended to include the 2% administrative fee. Prior Cobra subsidy situations that Congress has put in place did not

include coverage for 100% of the Cobra premium cost. The ARPA, however, does cover 100%. There's really no reason for someone who is eligible for the Cobra assistance to reject it because it's free. So what happens if a participant has paid for Cobra premiums after April 1st, because oftentimes, they're paid in advance, but are otherwise eligible for the premium assistance and should have gotten it for free?

Megan Monson: So we've seen this come up fairly frequently and while employers tend to handle it in a couple of different ways, the most common is to offset any advanced payments against future Cobra premiums. This would apply if you have an individual who's eligible and continuing Cobra beyond September 30th, anything they previously paid will simply be applied and offset against their future premiums. If however, you have somebody who ceases Cobra coverage before the subsidy expires, or for whatever reason, chooses no longer to have Cobra coverage beyond September 30th, you would simply issue them a refund with respect to any amounts that have already been paid. Obviously, that creates some more administration of the plan, which is why many employers tend to take the offset approach, initially, to the extent they can.

Andrew Graw: I think it's worth mentioning, though, that if an individual wants to receive a refund of the Cobra premiums that they've paid, it appears that the company would be required to pay it to them rather than carry it forward to be applied to periods of time after the Cobra premium ends.

Megan Monson: Great point, Andy. So another question that's frequently come up is, does the Cobra subsidy actually extend the period of time that somebody's eligible for Cobra?

Andrew Graw: And here, the answer is clear, that the answer is no. If someone has Cobra coverage for 18 months and accepts the Cobra premium subsidy for say three months, they don't extend their overall Cobra period for a period of 21 months. It remains at 18 months from the time of the qualifying event. Another question that we often get is how an employer can protect itself, to be certain that former employees are actually eligible for the assistance so that when the employer applies for the credit, it's not rejected, or on subsequent audit, won't be recovered by the IRS?

Megan Monson: So one thing that we've been recommending to clients, which is supported by IRS guidance, is requiring the individuals to self-certify or attest, that they're actually eligible for this coverage and the benefit. Employers who are relying upon any sort of self-certification or attestation must keep a copy in their records to protect themselves in the event of an IRS audit or challenge down the road. Employers who are relying upon individual self-certification or attestations can also require this to be provided on a more frequent basis. So for example, you can have employees and former employees provide this on a monthly basis to continue being certain that they're actually eligible for the coverage. Continuing on the topic of former employees, employers have asked how far back do I have to go in order to determine who might be eligible for this benefit?

Andrew Graw: And the answer is that employers have to go back and determine who is eligible for Cobra in any of the 18-month period going back prior to April 1st, 2021. All of those individuals, even if they declined Cobra coverage or stopped paying for Cobra are eligible for the Cobra premium assistance. And that can be a daunting task, to go back and review those records, but it must be done. Those employees, or former employees, I should say, have a right to the Cobra premium assistance and the law requires that employees provide them with notice of the opportunity to elect Cobra, the Cobra premium assistance. They don't need to go back and accept Cobra coverage for the period prior to April 1, in order to take advantage of the Cobra premium subsidy, effective April 1. Which leads to another question that we've gotten from a number of clients. Does the participant have the option or is he required to pay back premiums for Cobra coverage in order to get in for the April 1st subsidy?

Megan Monson: So since we've been covering the topic of former employees, another question that frequently comes up is how far back do employers have to go in order to determine who may be eligible for this benefit?

Andrew Graw: An employer has to go back and determine whether anyone who was eligible for Cobra during the period prior to April 1st is eligible for the premium assistance. That requires going back and looking at all Cobra terminations over the prior 18-month period, which can be a daunting task in a review of all records. And, hopefully, for those companies that have third-party Cobra service firms assisting them, they will have those records. Which raises another question that we often get, which is whether or not a participant who was eligible for Cobra during the 18-month period prior to April 1, has the ability to elect the premium Cobra assistance without also electing Cobra for the period prior to April 1? Megan.

Megan Monson: So this is a scenario where the individual has a few options. The individual can either choose to pay back premiums, essentially, back to the date that they were initially eligible for coverage and then would subsequently have retroactive Cobra coverage through that point in time. They can also choose to have Cobra coverage retroactive to April 1st because as Andy mentioned earlier, there's really no negative for them doing so if they're otherwise eligible because they're not paying any costs. Alternatively, they can elect on a go-forward basis to simply have Cobra election apply after the date they've made their election. Another interesting point to note is an individual who was eligible for but previously declined Cobra coverage prior to April 1st, can also retroactively elect Cobra coverage prior to April 1st, provided that they pay for any Cobra premiums for that earlier point in time. So we've been focusing on who's eligible for coverage? When does coverage cease? But an important item that we haven't yet focused on is, how do employers claim the premium assistance credit for this benefit that they're providing to employees?

Andrew Graw: Right. And probably the most critical question for employers because they want to be paid by the federal government back for providing the Cobra premium assistance. So the way that employers claim the credit is on their quarterly form 941. That's the employer's quarterly federal tax return for employment taxes. This can be a little bit more complicated than it may sound. And the IRS has provided a number of helpful examples in their

frequently asked questions. So if there are circumstances that could be a bit out of the ordinary, it's best to refer to those examples in the IRS guidance to make sure that the credit is properly being applied for. Which brings us to a broader question of whether there are any other practical impacts of the premium assistance credit that employers should be aware of? Megan.

Megan Monson: Whether or not you have an outside third-party Cobra administrator or not, taking advantage of the Cobra subsidy and monitoring employees is going to require additional administration. So that's going to require additional time and effort, presumably from folks in your HR roles.

Thanks, everybody, so much for joining us today. This is a really terrific discussion and gave our listeners a strong baseline understanding of some of the nuances that relate to the Cobra subsidy. We hope that by hearing some practical questions that have been raised by our clients, it will provide you with some clarity on these topics. As mentioned, this is still an emerging area of the law, which we will continue you to monitor and provide any new and updated guidance. As the Cobra subsidies are intended to expire on September 30th, be alert for additional updates. We appreciate you staying tuned in and hope you will join us for future podcasts.

Andrew Graw: And if you have a subject that you would like us to address in future podcasts, please send us an email and we'll be happy to consider it. We look forward to being able to bring you future podcasts. Thanks so much.

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