



Insurance Brokers &  
Consultants

# Dependent Care Assistance Plans and COBRA Subsidy Update

May 13, 2021

# PRESENTERS



## **Liz Mann, J.D.**

Liz Mann is EPIC's internal compliance director. Liz and her team are responsible for disseminating information to clients about changing requirements and regulations and reviewing all plan designs and programs for compliance with Federal and State regulations. Liz is embedded into our account management team to provide timely support and guidance as ERISA-related regulations or concerns emerge in the marketplace. As a client, you have the option of directly accessing Liz or accessing her traditionally through your account team. Liz graduated Magna Cum Laude from Saint Mary's College in Notre Dame, IN with Bachelor of Arts degrees in History and French. She graduated with her law degree from University of Toledo, College of Law in Toledo Ohio in 2007. She has accumulated over 12 years of experience working in employee benefits and offers expertise in ERISA, IRS, COBRA, FMLA and ACA compliance.



## **Bob Radecki, Senior Regulatory and Public Policy Analyst**

Bob Radecki has over 30 years of experience in the HR and employee benefits industry helping employers deal with difficult benefit and compliance matters. Previously Mr. Radecki 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.

# Agenda

- Dependent Care Assistance Plans
- COBRA Subsidy Update



# DEPENDENT CARE ASSISTANCE PLANS (DCAP)

# Contributions

- Tax-Free Reimbursement Limit
  - Lesser of \$5,000 for single individuals or married individuals filing jointly (Temporary Covid-19 related increase to \$10,500 covered later)
    - \$2,500 for married individuals filing separately
    - Employer and Employee Contributions
    - Calendar year basis
    - Report in Box 10 Form W-2
- Timing
  - Not subject to uniform availability
  - Use-it or Lose-it applies
    - 2-½ month grace period (COVID-19 related changes covered later)
    - No carryover allowed (COVID-19 related changes covered later)
    - Spend-down provision if in plan document

# Election Changes

- Permitted Changes
  - Change in cost or coverage of childcare provider
  - Other Section 125 permitted election changes that affect the employee's eligible DCAP expenses (COVID-19 related changes covered later)
    - change in employee's legal marital status (gain or lose a spouse);
    - change in number of dependents;
    - change in employment status for employee, spouse or dependent that affects eligibility;
    - dependent satisfies (or ceases to satisfy) eligibility requirements;
    - change in residence; and
    - commencement or termination of adoption proceedings

# Election Changes

- **Example 1:** Ross elected \$5,000 through his employer's DCAP in January. In April, Ross and his wife Anita get divorced. Anita and Ross's child move out of Ross's house. May Ross make a midyear pre-tax election change to terminate his DCAP contributions?  
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- **Yes.** Since Ross's child will no longer be living with him, Ross will no longer have any eligible DCAP expenses. Therefore, Ross may make a midyear pre-tax election change to terminate his DCAP contributions.
- **Example 2:** Tara elected to contribute \$4,000 to her DCAP in January through her employer. In March, Tara got word that a spot opened for her son in a daycare much closer to her house. However, the new daycare is more expensive than Tara's current daycare. May Tara make a midyear pre-tax election change to increase her DCAP contributions?  
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- **Yes.** Tara is able to increase her DCAP contributions due to the increased cost of the new daycare.

# Nondiscrimination

## §129 Discrimination Testing

- Prohibits from discriminating in favor of highly compensated or key employees
  - Offering more generous eligibility rules, benefits or contributions
- Recommended that employers run §129 discrimination testing annually
- Eligibility and utilization tested
  - 55% average benefits test
  - Most common plan that fails nondiscrimination testing
- Discriminatory plans trigger taxable income for the highly compensated and key employees



# Eligible Expenses

- Overview
  - Not eligible if the expense also claimed under Dependent Care Tax Credit
  - Must have been incurred during the period of coverage, and adequate claims substantiation must be provided by the participant and by an independent third party for each reimbursement
- Qualifying Individual
  - Dependent who has not attained age 13; (COVID-19 relief discussed later)
  - Dependent who is physically or mentally incapable of caring for self; or
  - Spouse who is physically or mentally incapable of caring for self
- Gainfully Employed
  - Full-time or part-time
  - If part-time - eligible expenses only for working days
    - Unless required to pay for a period that includes non-working days

# Examples

- **Example 1:** June is gainfully employed and has her 18-month old daughter in daycare. June has prepaid for care in March that will not be provided until April. May she submit this expense for reimbursement from her employer's DCAP?
- **No.** Expenses must have been incurred in order to be reimbursed. Employees may not submit expenses for reimbursement until they've been received – even if they've paid for them.
- **Example 2:** Alberto and his spouse are both gainfully employed and have their son in daycare during the workweek. Occasionally, Alberto is asked to work in the evenings and his spouse cannot provide childcare due to other personal commitments. Can Alberto submit daycare expenses for his son for those evenings?
- **No.** Because the expense doesn't allow Alberto and his spouse to be gainfully employed, it is not eligible for reimbursement.

# Eligible Expenses

- Eligible Care Arrangement
  - Primary purpose is to ensure the individual's well-being and protection
  - Educational programs (tutoring, music lessons, etc.) not reimbursable
    - Even if the employee would have had to procure other care had it not been for the educational program
    - Limited exception for certain summer day camps
  - Not eligible if provided by...
    - Tax dependent of the employee
    - Employee's child under the age of 19
    - Employee's spouse or other parent who is not the employee's spouse
  - Examples
    - Day-care centers
    - In-home care (such as a nanny or au pair)
    - Custodial care



# DEPENDENT CARE ASSISTANCE PLANS (DCAP) COVID-19 RELATED FLEXIBILITY & CHANGES

# COVID-19 Relief Legislation – All Changes Optional

- Unlimited Carryover Allowed
  - Previously not permitted for DCAPs at all
  - Participants may be allowed to carry over their entire unused balance for plan years ending in 2020 or 2021
  - Recent Guidance
    - DCAP tax exclusions available for reimbursements over \$10,500 if additional amount is due to carryover
- Extended Grace Periods
  - Current rules allow a DCAP grace period of only up to 2 ½ months
  - Grace period of up to 12 months for plan years ending in 2020 or 2021
- Amendments
  - Required by last day of plan year following the plan year during which the change is permitted

# COVID-19 Relief Legislation – All Changes Optional

- Election Changes
  - Prospective changes to HFSA and DCAPs only
  - For any plan years ending in 2021, even without a recognized election change event
  - This would include prospectively reducing an existing election to \$0
  - Employers may want to consider permitting election changes especially considering potential confusion regarding how carryovers and grace periods affect annual maximums
  - Amendment required by 12/31/2022

# COVID-19 Relief Legislation – All Changes Optional

- Special Rule for Dependents Who Age Out
  - DCAP typically only reimburses expenses related to dependents under 13
  - Temporary rule permits expenses for under 14 under the following circumstances:
    - The employee elected to participate in a DCAP plan that had a regular enrollment period on or before January 31, 2020 (e.g., plan years that began 1/1/2020); and
    - A dependent child reached the age 13 during that plan year or the next plan year if there are unused expenses that are carried over



# COBRA SUBSIDY UPDATE



# COBRA Subsidy Highlights

## AEIs

### 100% COBRA Subsidy for Assistance Eligible Individuals

- COBRA or State Continuation due to reduction in hours or involuntary termination of employment
  - Employers (fully-insured and self-insured) responsible for federal COBRA eligible AEIs
  - Carriers responsible for state continuation AEIs
- AEIs include spouses and dependent qualified beneficiaries only if triggering event is the employee's reduction in hours or involuntary termination of employment
- Individuals not eligible for subsidy if they are eligible for another group health plan or Medicare

# COBRA Subsidy Highlights

## Timing of Subsidy

April 1 – September 30

- Available for new subsidy eligible qualifying events, AEIs on COBRA now, and for those who previously had a subsidy eligible qualifying event and are still in their maximum coverage period (e.g., 18 months after involuntary termination of employment for a COBRA AEI)
- Subsidy ends if AEI reaches maximum coverage period or becomes eligible for other group health plan coverage or Medicare

## Plans

All Plans Subject to COBRA Except Health FSA

- Statutory language only excludes Health FSA
- 2009 ARRA COBRA subsidy also included all COBRA plans except Health FSA

# COBRA Subsidy Highlights

## Involuntary Termination

### Interpret “Involuntary” Broadly

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- No guidance yet, but there was significant guidance during the 2009 ARRA COBRA subsidy

## Second Chance

### AEIs with Prior Event Get a Second Chance to Enroll

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- Applies to AEIs who had a subsidy qualifying event and did not elect the first time, as well as those who elected but have since dropped coverage
- AEI must still be in maximum coverage period
- Employer must notify by May 31<sup>st</sup>
- AEI has 60 days from notice to elect

# COBRA Subsidy Highlights

## The Notices

### DOL Has Issued Model Notices

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- Model Election Notice with Updated Subsidy Language
- Model Notice in Connection with Extended Election Period
- Summary of COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021
  - Includes AEI certification of eligibility forms
- Notice of Expiration of Premium Assistance

## Payroll Tax Credit

### Recover COBRA Payments Through Payroll Tax Credit

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- Employer withholds amount of lost COBRA premium payments from Medicare payroll tax deposits
- Reported on quarterly payroll tax filing
- Government entities are eligible for payroll tax credit



# Frequently Asked Questions (FAQs)

# Involuntary Termination of Employment

- What is Considered an Involuntary Termination of Employment?
  - 2009 ARRA Guidance for involuntary termination was interpreted broadly
    - An involuntary termination means a severance from employment due to the independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee's implicit or explicit request, where the employee was willing and able to continue performing services.
    - Layoffs and reductions in force
    - Failure to renew a contract
    - Termination for cause
    - Employer's action to end an employment when employee cannot work due to illness or disability
    - Employee resignation as the result of employer-initiated change in work location
  - Termination does not need to be related to COVID
  - Termination for gross misconduct ineligible for COBRA or the subsidy

# Payroll Tax Credit

- How does the employer recover lost COBRA premium payments?

*Note: The IRS has not issued any guidance to-date. We assume the process will work similar to the 2009 ARRA COBRA subsidy. This process is subject to change if IRS releases new and differing guidance.*

- Employer takes a credit against Medicare portion of payroll taxes
  - A credit equal to missed COBRA payments can be taken for each deposit - then the total credits will be reported on the employer's quarterly (941) or annual (943 or 944) payroll tax report
- Government entities are eligible for the payroll tax credit
- TBD - IRS will release process for employers to use when Medicare payroll tax liability is less than missed COBRA premiums

# COBRA Subsidy Notices

- Notice Requirements
  - DOL Model Notices Released <https://www.dol.gov/COBRA-subsidy>
    - Model General Notice and COBRA Continuation Coverage Election Notice with updated subsidy language
      - To use for new AEIs
    - Model Notice in Connection with Extended Election Period
      - To use for second chance AEIs
    - Summary of COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021
      - Includes AEI certification (attestation) of eligibility form
      - Should be provided with election notices
    - Model Notice of Expiration of Premium Assistance



# COBRA Subsidy 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 AEs no premiums due Apr. – Sept. 2021
- “Second Bite at the Apple” – inform QBs in maximum coverage period, but not currently covered of the COBRA subsidy
- Notice must be provided by May 31, 2021
- AEI must elect coverage within 60 days of receipt of notice

## Subsidy Ending Notice

- Must be sent to anyone receiving the COBRA subsidy informing them of the subsidy coming to an end
- Must be sent between Aug. 16 – Sept. 15, 2021

# COBRA Subsidy Notices

- Attestation or AEI Certification
  - Do we have to collect the certification that is part of the Summary of COBRA Premium Assistance Provisions?
  - Not required, but recommended
    - Ensure carrier/stop-loss carrier will provide coverage
    - Proof of the employer's right to collect payroll tax credits
  - Model DOL Notices contain a “certification” form for employers to use


# Existing Qualifying Beneficiaries

- How far are we required to “look back” to determine who must receive a second chance notice?
  - In most cases it will be 18 months (i.e., qualifying events that occurred in Oct 2019 or later)
  - However it could be longer in some circumstances – waiting for guidance from DOL or IRS
    - State continuation (up to 36 months)
    - Possible COBRA extensions:
      - Due to 2nd qualifying event after the original reduction in hours or involuntary termination of employment 18-month event for spouses and dependents (up to 36 months)
      - Disability determination (29 months)



**QUESTIONS?**

**THANK YOU FOR ATTENDING!**



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