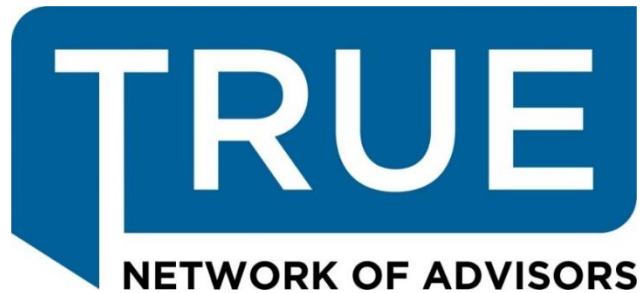


ARPA 2021: What Employers Need to Know



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AGENDA

- ▼ **FFCRA Updates in the American Rescue Plan Act**
- ▼ **Additional Flexibility for FSA, DCAP & Section 125 Cafeteria Plans**
- ▼ **ARPA COBRA Subsidies**
- ▼ **Outbreak Period Extensions Update**

FFCRA Update

- ▼ The **requirement** for employers with fewer than 500 employees to provide **FFCRA leave and benefits ended on 12/31/20**
- ▼ **Effect of 2020 Year-End Stimulus Bill**
 - ▼ No extension of mandate
 - ▼ Employers who wish to voluntarily comply with original FFCRA can receive the **same payroll tax credits through 3/31/21**
- ▼ **Effect of ARPA**
 - ▼ Still **no mandate** to offer FFCRA, but lots of new **components for employers who wish to voluntarily comply and receive payroll tax credits through 9/30/21**

FFCRA Update cont'd

▼ What Must Employers Do to Continue to Receive FFCRA Tax Credits for Leaves Between 4/1/21 and 9/30/21?

- ▼ 80 hours of Emergency Paid Sick Leave (“EPSL”) re-loads (whole new extension of benefit) effective 4/1/21
- ▼ In addition to the original six categories of EPSL, employees are eligible for a 100% paid benefit if
 - ▼ an employee is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID-19, when the employee has been exposed to COVID-19 or the employer has requested a test or diagnosis; or
 - ▼ an employee needs leave to obtain a COVID-19 immunization or recover from an injury, disability, illness, or condition resulting from immunization

FFCRA Update cont'd

▼ What Must Employers Do to Continue to Receive FFCRA Tax Credits for Leaves Between 4/1/21 and 9/30/21?

- ▼ In addition to the new categories of EPSL, employees now qualify for up to 12 weeks of EFMLA for the same original reasons (loss of child care/school closure) plus each of the EPSL reasons for leave
- ▼ The first ten days of EFMLA are no longer unpaid. The daily paid EFMLA benefit remains capped at \$200/day, but with a new maximum limit of \$12,000 for the duration of the leave
- ▼ Although EFMLA does not explicitly re-set (new 12 weeks) on 4/1/21, we think it does for employers not subject to traditional FMLA or employees not eligible for traditional FMLA, and for all others, adds a new category of leave for 4/1 to 9/30/21

FFCRA Update cont'd

▼ Effect of Expiration of FFCRA

- ▼ Employers who wish to stick to the old FFCRA framework or do something short of the new FFCRA may do so, provided they understand there is no tax credit for anything less than 100% compliance with the FFCRA, as amended
- ▼ Employers choosing to implement the new FFCRA terms likely need to communicate with employees regarding the additional leave options for 4/1 to 9/30/2021, but DOL has not issued a model notice (and may not do so at all)
- ▼ Any employer decision to continue providing FFCRA benefits beyond 4/1/21 should be (1) in writing, (2) specify it is temporary, and (3) explain that it terminates upon the implementation of any new law requiring a similar benefit

CAA & ARPA Flex Plan Flexibility

- ▼ Unlimited Carryover or Extended Grace Period
- ▼ Health FSA Reimbursements for Terminated Participants
- ▼ Special Dependent Care FSA Carry Forward Rule for Dependents who Aged Out During the Pandemic
- ▼ Midyear Election Changes for FSAs during the 2021 Plan Year
- ▼ Increased Dependent Care FSA Max Contribution

CAA & ARPA Flex Plan Flexibility

- ▼ **Optional Unlimited Carryover OR Extended Grace Period**
 - ▼ Expansion of relief provided in IRS Notices 2020-29 and 2020-33
- ▼ **Both options effectively give employees up to an extra 12 months to utilize unused health and dependent care FSA amounts from 2020 and 2021**
- ▼ **Plans may not have both carryover and grace period**

CAA & ARPA Flex Plan Flexibility

Increased Carryover:

- Normally, carryovers are available to health FSAs only, and the maximum is \$550 (now indexed for cost of living changes under IRS Notice 2020-33)
- CAA expands carryovers to dependent care FSAs
- Both may allow an unlimited amount to be carried over into 2021 and 2022 plan years

Extended Grace Period:

- Normally, the maximum allowable grace period for an FSA is 2 ½ months
- This option increases the maximum grace period from 2 ½ months to 12 months for plan years ending in 2020 and 2021

▼ Employer Flexibility:

- ▼ May set a deadline for use of carryover funds
- ▼ May require (new) employee contributions to have access to carryover amounts

CAA & ARPA Flex Plan Flexibility

▼ Health FSA spend-down for terminated participants

- ▼ Employees who cease participation in HFSA during 2020 or 2021 (e.g., due to termination) may continue to receive reimbursements from unused amounts through the end of the plan year for expenses incurred after termination

▼ Special dependent care FSA carry forward for dependents who aged out during the pandemic

- ▼ Temporary increases of maximum age of qualifying dependent for DCAP from under 13 to under 14 for the last plan year for which the annual open enrollment period was on or before 1/31/20 (and if the DCAP is amended to allow carryover, the age increase will also apply to the next plan year)

▼ Midyear election changes for FSAs during the 2021 plan year

- ▼ Employees may prospectively change existing HFSA and DCAP elections during the 2021 plan year, without “change in status” event
- ▼ Dropping health plan coverage requires employee written attestation of other coverage

CAA & ARPA Flex Plan Flexibility

- ▼ **Increased Dependent Care FSA Max Contribution**
 - ▼ ARPA allows increased DCAP maximum annual contribution amount from \$5,000 (\$2,500 for married individual filing separately) to \$10,500 (\$5,250 for a married individual filing separately)
 - ▼ This is the first time in 35 years that the dependent care FSA maximum has been increased
 - ▼ Currently, only applies to the 2021 plan year

CAA & ARPA Flex Plan Flexibility

- ▼ All changes optional
- ▼ All changes require plan amendments
- ▼ Deadline for Plan Amendments
 - ▼ Employers that want to implement any of the CAA cafeteria plan changes must amend their plan documents by no later than December 31, 2021 (for changes applicable to the 2020 plan year) or no later than December 31, 2022 (for changes applicable to the 2021 plan year)
 - ▼ An amendment increasing the dependent care FSA maximum must be adopted by December 31, 2021

ARPA COBRA Premium Subsidies

- ▼ ARPA provides AEIs with 100% subsidy for COBRA premiums if qualifying reason is *involuntary* termination of employment or reduction in hours
 - ▼ Same “gross misconduct” exclusion applies
- ▼ **Subsidy Period:** April 1, 2021 to September 30, 2021
- ▼ **Assistance Eligible Individuals (“AEIs”)** – qualified beneficiary who is eligible for and elects COBRA for a period of coverage within the Subsidy Period due to a qualifying event of involuntary termination of employment or reduction of hours
 - ▼ Includes individuals already on COBRA, newly-eligible for COBRA, AND certain individuals that previously declined or dropped coverage within the last 18 months
- ▼ Employer reimbursed via credit against certain payroll taxes (or refund of overpayment for credit amounts exceeding payroll taxes)

ARPA COBRA Premium Subsidies

▼ Extended (*Reinstated*) Election Period

- ▼ In addition to “new” AEIs with qualifying event during Subsidy Period, ARPA also provides new election period for individuals who *would be* an AEI if they had a COBRA election in place during the Subsidy Period
- ▼ Effectively, this provides a new election period to individuals who already had an involuntary termination of employment or reduction in hours within the last 18 months and did not timely elect COBRA or dropped COBRA
- ▼ New election period of 60 days from date of notice of ARPA special election period
- ▼ Elected coverage is not retroactive to date of original qualifying event
 - ▼ Instead, coverage would begin with first period of coverage after ARPA (generally, April 1, 2021)
- ▼ Same maximum coverage period applies with respect to date of original qualifying event

ARPA COBRA Premium Subsidies

▼ Alternative Plan Enrollment Option

- ▼ Under ARPA, employer may allow AEs to elect to enroll in a different coverage option offered by the employer
- ▼ 90 days from notice of enrollment option
- ▼ Different coverage option may not have a premium that exceeds the premium for the individual's existing coverage and must also be offered to active employees
- ▼ Optional – employers are not required to make the alternative plan enrollment option available

ARPA COBRA Premium Subsidies

▼ Notice Requirements

- ▼ Notice of Subsidy Availability (May 31, 2021)
- ▼ Notice of Extended Election Period (May 31, 2021)
- ▼ Notice of Plan Enrollment Option (if applicable)
- ▼ Notice of Subsidy Expiration (between 45 and 15 days before the expiration date)
 - ▼ Unless the subsidy is expiring because the AEI has become eligible for coverage under another group health plan or Medicare

▼ Notice must be provided to AEIs who become eligible to elect COBRA during the Subsidy Period

- ▼ Any individuals eligible to elect COBRA under the extended election period described above (i.e., any individuals who experienced a loss of coverage due to an involuntary termination or reduction in hours and who are still within their 18-month CCOBRA maximum coverage period)

ARPA COBRA Premium Subsidies

- ▼ ARPA directs the DOL to issue model notices by mid-April
 - ▼ Employers may also create their own notices
 - ▼ May amend existing notices or provide required notices in separate document(s)
- ▼ Notices must contain the following:
 - ▼ The availability of the COBRA premium subsidy and the conditions for receiving it
 - ▼ The forms necessary for establishing eligibility for the COBRA premium subsidy
 - ▼ The name, address, and telephone number necessary to contact the plan administrator and any other person maintaining relevant information in connection with the COBRA premium subsidy
 - ▼ A description of the extended election period
 - ▼ A description of the option to enroll in different coverage, if adopted by the employer

Outbreak Period Extensions Update

- ▼ Statutory authority to extend certain deadlines for up to one year
- ▼ DOL issued guidance to clarify and explain (necessary) end to Outbreak Period Extensions
 - ▼ *Individuals and plans with timeframes that are subject to the relief under the Notices will have the applicable periods under the Notices disregarded **until the earlier of (a) 1 year from the date they were first eligible for relief, or (b) 60 days after the announced end of the National Emergency (the end of the Outbreak Period)**. On the applicable date, the timeframes for individuals and plans with periods that were previously disregarded under the Notices will resume. In no case will a disregarded period exceed 1 year.*

Outbreak Period Extensions Update

- ▼ **HIPAA Special Enrollment Period**
- ▼ **COBRA**
 - ▼ **COBRA Election Period**
 - ▼ **COBRA Premium Payment Period**
 - ▼ **COBRA Notices from Employees regarding Divorce/Legal Separation, Dependent Child's Eligibility Ceases, and Disability**
- ▼ **Claims Procedures**
 - ▼ **Plan's Benefit Claim Filing Deadline**
 - ▼ **ERISA Adverse Benefit Determination Appeal Deadline**
 - ▼ **ERISA External Review Request Deadline**
 - ▼ **Deadline to Submit Additional Information Related to External Review Request**
- ▼ **Certain Notice and Disclosure Requirements**

Outbreak Period Extensions Update

- ▼ 2020 Guidance extended deadlines/timeframes by disregarding the “***Outbreak Period***”
 - ▼ The period from March 1, 2020 until **60 days after** the announced end of the National Emergency period (or a later date announced in subsequent guidance)
 - ▼ Applies retroactively to March 1, 2020
- ▼ ***Examples used April 30, 2020 as the assumed end-date of the National Emergency*** 🤔🤔🤔🤔
 - ▼ The assumed April 30 end-date resulted in an Outbreak Period running from March 1, 2020 through June 29, 2020 (the 60th day after the assumed end of the National Emergency)
- ▼ Departments *intend* to issue additional guidance if there are different Outbreak Periods for different parts of the country

Outbreak Period Extensions Update

- ▼ Authority to extend deadlines is capped at one year
- ▼ Two scenarios for end of extensions:
 - ▼ Case-by-case Basis
 - ▼ Universal End
 - ▼ In no case will a disregarded period exceed 1 year Authority to extend deadlines is capped at one year
- ▼ Case-by-case Basis
 - ▼ DOL takes position that the extensions apply on a case-by-case basis
 - ▼ One-year extension runs from the date the individual's deadline first extended
- ▼ Universal End
 - ▼ If earlier, the extensions end for everyone on date that is 60 days after the announced end of the National Emergency (the end of the Outbreak Period)

Outbreak Period Extensions Update

- ▼ **What happens at the end of the extension?**
 - ▼ **On the applicable date, the timeframes for individuals and plans with periods that were previously disregarded under the Notices will resume**
 - ▼ **Deadline/timeline picks back up from there**
 - ▼ **The end of the extension is not (necessarily) the same as the end of the deadline – the applicable timeline still runs from the end of the extension**

Outbreak Period Extensions Update

▼ ***Encouraged Relief***

- ▼ *The Department of Labor recognizes that affected plan participants and beneficiaries may continue to encounter an array of problems due to the ongoing nature of the COVID-19 pandemic in circumstances under which relief under the Notices is no longer available due to the statutory one-year limit on the Agencies' authority to grant relief. The guiding principle for administering employee benefit plans is to act reasonably, prudently, and in the interest of the workers and their families who rely on their health, retirement, and other employee benefit plans for their physical and economic well-being. This means that plan fiduciaries should make reasonable accommodations to prevent the loss of or undue delay in payment of benefits in such cases and should take steps to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established time frames.*

Outbreak Period Extensions Update

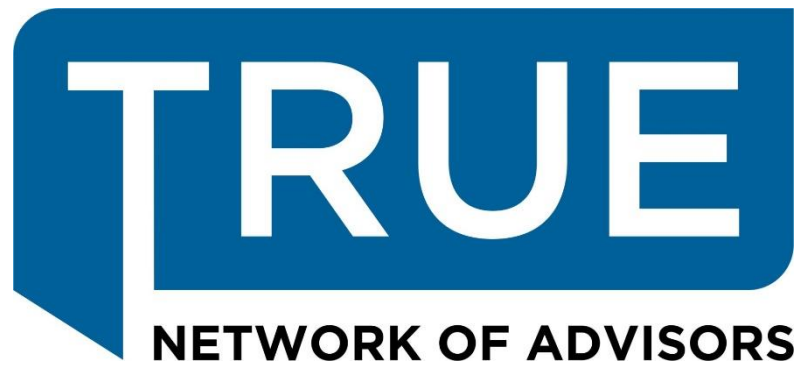
▼ Fiduciary principles

- ▼ Reasonable accommodations to prevent the loss of or undue delay in payment of benefits
- ▼ Take steps to minimize the possibility of individuals losing benefits because of a failure to comply with pre-established time frames
- ▼ Where the plan administrator or other responsible plan fiduciary knows, or should reasonably know, that the end of the relief period for an individual action is exposing a participant or beneficiary to a risk of losing protections, benefits, or rights under the plan, the administrator or other fiduciary should consider affirmatively sending a notice regarding the end of the relief period

▼ Amend/re-issue notices and disclosures

▼ Provide notice of other options for participants who may lose coverage

- ▼ E.g., exchange/marketplace coverage – ***Special*** Special Enrollment Period on Federal Marketplace February 15 and continuing through May 15



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