

March 19, 2021

## Key Employee Benefit Provisions of the American Rescue Plan Act of 2021

The [American Rescue Plan Act of 2021 \(“ARPA”\)](#), the landmark \$1.9 trillion legislative package that President Biden signed into law on March 11, 2021, contains a number of significant employee benefit plan changes that should provide much-needed relief for plan sponsors and participants impacted by the COVID-19 pandemic. The key benefits and compensation provisions of ARPA are summarized in this Alert, and include (i) a six-month 100% subsidy for COBRA premiums for certain former employees, (ii) an increase in dependent care assistance plan (DCAP) exclusion limits for 2021, (iii) extended amortization for single employer pension plans, (iv) actions to address the insolvency concerns of multiemployer pension plans facing critical or declining financial status and the Pension Benefit Guaranty Corporation (PBGC) and (v) an expansion of the “covered employee” definition under section 162(m) of the Internal Revenue Code of 1986 (the “Code”). Plan sponsors and service providers should become familiar with these changes as certain plan amendments and participant notices will have to be drafted in 2021 in order to comply.

### I. COBRA Changes

- **Six Months of COBRA Premium Subsidies at 100%** – ARPA creates a 100% premium subsidy for COBRA coverage for any period of coverage during the period starting April 1, 2021 through September 30, 2021. The premium subsidy, which also covers any administrative fees, is available for “assistance eligible individuals,” which include any employee or dependent who (i) loses group health plan coverage due to an involuntary termination of employment or because of a reduction of hours and (ii) elects COBRA coverage. Employers will be responsible for paying the premiums and they will recoup the expenditures through credits on their quarterly payroll tax returns (and if the subsidy is higher than the payroll taxes, they will receive a refund). Since ARPA does not extend the maximum duration of COBRA coverage (e.g., 18 months), the COBRA premium subsidy would end earlier if the assistance eligible individual’s maximum period of COBRA coverage ceases prior to September 30, 2021. Separately, the subsidy ends if the individual becomes eligible for coverage under another group health plan (excluding excepted benefits such as dental, vision, or a health FSA) or Medicare. Individuals would be required to notify their group health plan administrator if they become eligible for such coverage and could be subject to penalty if they fail to do so.
- **Lookback Period to November 2019** – The legislation provides an 18-month lookback to November 1, 2019 by creating a special election period for any individual who either (i) did not elect COBRA continuation coverage between November 1, 2019 and April 1, 2021 but who would be an assistance eligible individual if such election had been made or (ii) elected COBRA continuation coverage and discontinued such coverage prior to April 1, 2021 (perhaps, because of an inability to make monthly premium payments). These individuals are entitled to elect COBRA coverage within 60 days of receiving the required extended election notice from the employer, plan administrator or COBRA administrator. Please note that this election is prospective, meaning that it can only be made for periods beginning on or after April 1, 2021, and that the maximum coverage period is not extended. It is still determined based on the date of the qualifying event.
- **Plan Enrollment Option** – ARPA also permits a plan to provide an assistance eligible individual the opportunity to change coverage options in conjunction with electing COBRA continuation coverage. Under this plan enrollment option, the assistance eligible individual may elect to enroll in a different group health plan within 90 days of the date of notice of the enrollment option that the employer is required to furnish. The individual must only be offered the option to change to coverage offered to similarly situated active employees, and the premium for such option must not exceed the premium for the individual’s group health plan coverage as of the date of the qualifying event. The alternative coverage cannot consist of excepted benefits or coverage under a qualified

small employer health reimbursement arrangement or a flexible spending arrangement. This plan enrollment option only allows a group health plan to offer additional coverage options to assistance eligible individuals and does not change the basic requirement that a group health plan must allow an individual to continue enrollment with the coverage in which the individual is enrolled as of the qualifying event. Furthermore, if alternative coverage is elected, under the COBRA rules it must generally be permitted to be continued for the applicable required period (e.g., the 18 months—absent an event that permits coverage to be otherwise terminated) even though the premium subsidy may only apply until September 30, 2021 (or earlier).

- **Additional Notice Requirements** – As indicated above, the legislation imposes additional notice requirements for individuals who become eligible to elect COBRA from April 1, 2021 until September 30, 2021. In particular, ARPA requires employers to provide assistance eligible individuals written notice of the following:
  - information about the qualified beneficiary's right to premium assistance and any conditions on entitlement to that assistance;
  - a description of the option to enroll in different coverage if permitted; and
  - a description of the obligation of the qualified beneficiary to notify the group health plan of eligibility under another group health plan or eligibility for Medicare, and the penalty for failure to provide this notification.

ARPA also provides that notice must be furnished to an assistance eligible individual if such individual became entitled to elect COBRA continuation coverage on or after November 1, 2019 and prior to April 1, 2021. In such case, the notice must provide the additional information that is required to be added to the notice described above and must be provided by June 1, 2021. Failure to do so would be treated as a failure to satisfy the notice rules under the COBRA continuation coverage requirements.

ARPA tasks the DOL with preparing model language for these additional notification requirements within 30 days of the legislation's enactment. In the meantime, for employers that outsource COBRA administration, they should start having conversations with their third-party service providers about updating their policies, procedures and qualified beneficiary communications in accordance with these new requirements.

## II. Temporary Increase for Dependent Care Assistance Plan Contribution Limits

- ARPA includes a temporary increase in DCAP exclusion limits for the 2021 tax year in order to provide increased support to working families and a further incentive for employers to offer such a benefit. The legislation increases the limit from \$5,000 to \$10,500 (and \$5,250—up from \$2,500—in the case of a separate return filed by a married individual). Similar to the carryover and grace period relief provided by the Consolidated Appropriations Act and implementing IRS guidance (see our prior Alert [here](#)), this is a permissive change and employers are not obligated to increase the election amounts for DCAPs that they sponsor. For an employer that chooses to increase participant election amounts, the legislation provides that a plan that otherwise satisfies the requirements of a dependent care assistance program and cafeteria plan shall not fail to meet those requirements if the plan is amended as follows:
  - the amendment is adopted no later than the last day of the plan year in which the amendment is effective, and
  - the plan is operated consistently with the amendment terms beginning on the effective date of the amendment and ending on the date the amendment is adopted.

Employers considering adopting this temporary increase in permitted DCAP benefits should also consider the impact of such increase on any nondiscrimination testing required under Code Sec. 129(d)(2).

### III. Extended Amortization for Single Employer Plans

- ERISA contains funding rules, such as contribution requirements, for single employer pension plans, which allow these plans to amortize funding shortfalls over seven years. As a result of the ongoing pattern of interest rate and market volatility due to the COVID-19 public health emergency, ARPA addresses the concern that seven years does not provide enough stability and sufficient time over which to pay for long-term liabilities, by providing that for all plan years beginning after December 31, 2021 (or, at the election of the plan sponsor, plan years beginning after December 31, 2018, December 31, 2019, or December 31, 2020), all shortfalls will be amortized over 15 years instead. Moreover, the shortfall amortization bases for plan years preceding the first plan year beginning after December 31, 2021 (or after whichever earlier date is elected as indicated above) and all shortfall amortization installments determined with respect to such bases, shall be reduced to zero. In addition, ARPA modifies existing funding relief with respect to interest rates used to determine cash funding requirements by adjusting the existing interest rate corridor (extending the phase-out of relief) and implementing a 5% floor on all interest rates for funding purposes.

### IV. Actions to Address the Insolvency Concerns of Underfunded Multiemployer Plans and the PBGC

- **Special Financial Assistance Program** – ARPA includes provisions to improve funding for multiemployer pension plans, including financial assistance provided through the PBGC to qualifying underfunded plans to secure pension benefits for plan participants. When a multiemployer pension plan becomes insolvent, the PBGC provides financial assistance to the plan (in the form of loans that are not expected to be repaid) to pay participants' benefits up to a statutory maximum. According to the PBGC, its multiemployer insurance program will likely become insolvent in 2026, which means that participants in insolvent plans would face substantial benefit reductions, likely receiving less than the PBGC guaranteed benefit for multiemployer plans.

Under the legislation, the PBGC will provide eligible multiemployer plans with grants, which the legislation calls “special financial assistance” from the U.S. Treasury’s general fund (rather than from the PBGC’s existing multiemployer revolving fund). The PBGC is required to publish requirements for the grant applications within 120 days of the date of ARPA’s enactment, and applications will have to be submitted by December 31, 2025. To qualify for a grant, a plan will have to meet one of the following four criteria:

- in any plan year beginning in 2020 through 2022, be in critical and declining status;
- in any plan year beginning in 2020 through 2022, be in critical status, be funded at less than 40%, based on current liability measures, and have a ratio of active to inactive participants of less than 2 to 3;
- have become insolvent after December 16, 2014, but not yet be terminated; or
- have had a suspension of benefits approved as of the date of enactment.

Grants are projected to be sufficient to pay benefits through 2051 and plans will not be required to repay the grants. In general, projections are based on assumptions used in a plan’s most recent status determination filing from before January 1, 2021, unless the PBGC determined that an assumption was “clearly erroneous.”

- **Increase in PBGC Premiums** – ARPA also increases PBGC premiums for all multiemployer plans to \$52 per participant beginning in 2031, which will be adjusted for inflation thereafter. In 2021, multiemployer premiums are \$31 and are adjusted for inflation annually.

## V. Expanded Class of “Covered Employees” under Code Sec. 162(m)

- Code Sec. 162(m) limits a publicly held corporation’s deduction to \$1 million per year for compensation paid to “covered employees.” The term “covered employee” generally includes the corporation’s principal executive officer (PEO), principal financial officer (PFO), and three highest compensated officers for the taxable year other than the PEO or PFO. ARPA expands the definition for tax years beginning after December 31, 2026 by providing that “covered employee” shall also include the five highest compensated employees in addition to the individuals whose compensation is currently subject to the limitation on deductibility under Code Sec. 162(m). Note, these five additional employees do not have to be officers of the publicly held corporation.
- Code Sec. 162(m) provides that once an individual is a covered employee for a taxable year they remain one for all future taxable years; however, this requirement will not apply to the five additional employees whose compensation is subject to Code Sec. 162(m)’s limitation on deductibility as a result of ARPA’s expansion of this Code section. In other words, someone who is classified as being among the five highest compensated employees in one year (perhaps, because of a large sign-on bonus or some other unusually large compensatory payment) may not necessarily get picked up in the following year.

If you have any questions about any of the changes that ARPA makes or need assistance with any employee communications or plan amendments in connection with these changes, please contact your Ropes & Gray advisor.

A separate Ropes & Gray client alert ([American Rescue Plan Act \(ARPA\) Phase 5 Stimulus Package—Highlights of Certain Key Tax-Related Provisions in ARPA](#)) provides a summary of the key tax-related provisions outlined in the ARPA.