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NEWS ALERT

EMPLOYEE BENEFITS

A Summary of Key Employee Benefits and Executive Compensation Provisions in the American Rescue Plan Act

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On March 11, 2021, President Biden signed into law the American Rescue Plan Act of 2021 ("ARPA"), a $1.9 trillion COVID-19 economic stimulus bill. ARPA contains provisions affecting employee benefits and executive compensation, including temporary fully subsidized COBRA premiums, a temporary increase in dependent care assistance dollar limits, relief for single employer and multiemployer defined benefit pension plans, and the expansion of the pool of covered employees subject to the compensation limitations under Internal Revenue Code Section 162(m).

<u>**Temporary Fully Subsidized COBRA Premiums**</u>. ARPA fully subsidizes COBRA premiums for "assistance eligible individuals", defined as any qualified beneficiaries (that is, covered employees and their covered spouses and dependent children) who are eligible for, and who elect, federal or state COBRA coverage for any coverage period during the 6-month subsidy period beginning April 1, 2021 and ending September 30, 2021, by reason of the covered employee's involuntary termination of employment or reduction of hours. The subsidy is not available if the covered employee voluntarily terminates employment. Assistance eligible individuals pay nothing for their fully subsidized COBRA coverage, and the premium subsidy is excluded from their federal gross income. The persons to whom the fully subsidized COBRA premiums otherwise would have been paid (that is, insurers, employers or plans) pay the full COBRA premiums and then recover their outlays through payroll tax credits. The COBRA premium subsidy applies to all COBRA-subject group health plans (for example, medical, dental and vision plans), except for health flexible spending arrangements (health FSAs) offered under Internal Revenue Code Section 125 cafeteria plans.

- *Individuals Who Are Eligible for the Temporary COBRA Premium Subsidy.* The temporary COBRA premium subsidy is available to any assistance eligible individual (described above) who:

    1. First becomes eligible for COBRA coverage during the 6-month subsidy period (April 1, 2021 to September 30, 2021) and elects COBRA coverage;

    2. On April 1, 2021, had already elected and is enrolled in COBRA coverage; or

    3. On April 1, 2021, could have been enrolled in COBRA coverage but was not, either because the individual did not elect COBRA coverage or did elect COBRA coverage but discontinued the coverage before April 1, 2021. To be able to take advantage of the COBRA premium subsidy, any assistance eligible individual in this third category must elect (or reelect) COBRA coverage during a special "second-chance" election period beginning April 1, 2021 and ending 60 days after he or she is provided with a supplemental "second-chance" COBRA election notice (described below).

    If any assistance eligible individual pays a COBRA premium that is eligible for the subsidy, the person to whom the premium was paid (that is, the insurer, employer or plan) must reimburse the individual within 60 days after he or she elects subsidized COBRA coverage.

The 6-month COBRA premium subsidy period begins April 1, 2021 and ends September 30, 2021. The subsidy will expire before September 30, 2021 if, before that date, an assistance eligible individual's maximum COBRA coverage period ends or if the individual becomes eligible for coverage under another employer's group health plan or Medicare. An assistance eligible individual must notify the group health plan under which he or she is receiving the COBRA premium subsidy when he or she becomes eligible for another employer's group health plan or Medicare, and may be subject to a monetary penalty if he or she fails to do so.

The 6-month COBRA premium subsidy period (April 1, 2021 to September 30, 2021) does not lengthen an assistance eligible individual's COBRA coverage period. So, for example, if the individual's COBRA coverage period will end on June 30, 2021, the individual will get the COBRA premium subsidy for April, May and June 2021 only.

- *Amount of the COBRA Premium Subsidy.* The COBRA premium subsidy is the entire COBRA premium, plus any administrative fee.

- *Plan Enrollment Option.* ARPA permits (but does not require) an employer to offer a special plan enrollment option under its group health plan that allows an assistance eligible individual to change, within 90 days of receiving notice of the plan enrollment option, to a different coverage option under the plan in conjunction with electing COBRA coverage, provided that:

    1. The employer has determined that it will permit such change;
    2. The premium for the different coverage option does not exceed the premium for the coverage option the individual was enrolled in when the COBRA qualifying event occurred;
    3. The different coverage option is also offered to similarly-situated active employees; and
    4. The different coverage option is not coverage providing only excepted benefits, a qualified small employer health reimbursement arrangement (HRA), or a health FSA.

- *Notice Requirements.* ARPA imposes the following new COBRA notice requirements:

    - *Election Notice.* The COBRA election notice that is provided to any assistance eligible individual who becomes entitled to elect COBRA coverage during the 6-month COBRA premium subsidy period (April 1, 2021 to September 30, 2021) must provide an additional written notification, in "clear and understandable language", that includes the following information:

        1. The forms necessary for establishing eligibility for the COBRA premium subsidy;
        2. The name, address and telephone number necessary to contact the plan administrator and any other person maintaining relevant information about the COBRA premium subsidy;
        3. A description of the "second-chance" extended election period (described above);
        4. A description of the individual's obligation to notify the group health plan when he or she ceases to be eligible for the COBRA premium subsidy because he or she has become eligible for coverage under another employer's group health plan or Medicare, and the monetary penalty for failure to provide such notice;
        5. A description, displayed in a prominent manner, of the individual's right to a subsidized COBRA premium and any conditions on entitlement to the subsidized premium; and
        6. If the group health plan sponsor provides a plan enrollment option (described above), a description of the individual's option to enroll in a different coverage option offered by such plan sponsor.

The additional information listed in 1 through 6 above may be provided either in the COBRA election notice itself or in a separate document provided along with that notice. ARPA requires the U.S. Department of Labor (DOL) to prescribe a model COBRA election notice meeting these additional notification requirements not later than April 10, 2021 (that is, not later than 30 days after ARPA's March 11, 2021 enactment date).

- *"Second-Chance" Election Notice*. Assistance eligible individuals who became entitled to elect COBRA coverage before April 1, 2021 must be provided with a new COBRA election notice (a "second-chance" COBRA election notice), not later than May 31, 2021 (that is, within 60 days after April 1, 2021) that contains all of the additional information about the COBRA premium subsidy (described above). The DOL is required to prescribe a model "second-chance" COBRA election notice not later than April 10, 2021.

- *Notice of Expiration of the Period of COBRA Premium Subsidy.* Between 45 days and 15 days before an assistance eligible individual's COBRA premium subsidy period expires, the group health plan's plan administrator must provide to such individual a written notice, in "clear and understandable language", stating:

    1. That the individual's COBRA premium subsidy will expire soon, and prominently identifying the expiration date; and
    2. That the individual may be eligible for coverage, without any premium subsidy, through COBRA coverage or coverage under a group health plan.

The requirement to provide the notice of expiration of the period of COBRA premium subsidy is waived if the subsidy expires prior to its otherwise-applicable expiration date because the assistance eligible individual becomes eligible for coverage under another employer's group health plan or Medicare.

The DOL is required to prescribe a model notice of expiration not later than April 25, 2021 (that is, within 45 days after ARPA's March 11, 2021 enactment date).

- *Notice of Ineligibility for COBRA Premium Subsidy.* An assistance eligible individual who ceases to be eligible for the COBRA premium subsidy because he or she becomes eligible for coverage under another employer's group health plan or Medicare must notify the group health plan that is providing the subsidized coverage of his or her ineligibility for the subsidy. The notice must be provided in such time and manner as may be specified by the DOL. Any individual who fails to provide the notice of ineligibility may be required to pay a $250 penalty for each such failure. If the individual's failure to provide the notice of ineligibility is fraudulent, the penalty amount would be the greater of $250 or 110% of any COBRA premium subsidy provided to the individual after he or she ceased to be eligible for the subsidy. No penalty would be imposed upon any individual who fails to provide the notice of ineligibility if the failure is due to reasonable cause and not to willful neglect.

- *How the COBRA Premium Subsidies Are Provided.* Assistance eligible individuals do not receive any COBRA premium subsidy payments directly. Instead, ARPA requires group health plans to treat these individuals as having paid in full the amount of the subsidized premium. As noted above, if an assistance eligible individual nevertheless pays his or her COBRA premium, his or her premium payments must be timely refunded. The persons to whom COBRA premiums are payable (described below) must pay the full COBRA premiums, and then recover their premium payments by taking a credit for each calendar quarter against the Hospital Insurance (HI) component of their FICA taxes or the equivalent amount of Railroad Retirement Tax Act (RRTA) taxes. If the credit exceeds the taxes owed, the excess is treated as a refundable overpayment. For these purposes, the "person to whom COBRA premiums are payable" is treated as being:

    1. For a multiemployer group health plan, the plan itself;

    2. For a group health plan not described in 1 above that is subject to federal COBRA or that is partly or completely self-insured, the employer maintaining the plan; and

    3. For any group health plan not described in 1 or 2 above, the insurer providing the coverage under the plan.

- *Next Steps for Employers.* Employers whose group health plans are subject to federal or state COBRA continuation coverage requirements should take time now to familiarize themselves with ARPA's COBRA premium subsidy rules. Employers should reach out now to their COBRA administrators to plan for timely complying with ARPA's COBRA premium subsidy requirements, including identifying assistance eligible individuals who will be eligible for the subsidy, and preparing required notices (which should include deciding whether to wait for the DOL's model notices or to create their own notices now).

Temporary Increase in Dependent Care Assistance Dollar Limits. ARPA permits (but does not require) employers to increase qualified dependent care assistance program flexible spending account (DCAP FSA) annual spending limits, but only for the 2021 taxable year. Employers who wish to make this change to their DCAP FSAs will need to act quickly. The normal DCAP FSA annual spending limits are $5,000 for unmarried individuals and for married individuals filing jointly and $2,500 for married individuals filing separately. For taxable year 2021 only, ARPA boosts those spending limits to $10,500 for unmarried individuals and for married individuals filing jointly, and to $5,250 for married individuals filing separately.

Employers who decide to implement ARPA's higher DCAP FSA spending limits for 2021 may allow participants in their Section 125 cafeteria plans to prospectively change their DCAP FSA elections to take advantage of the higher limits for the remainder of this year. Such employers must amend their plan documents, by the last day of the plan year in which the change is effective, to reflect the higher limits, and such plan amendment can be retroactively effective as long as the employer operates its plan consistently with the terms of the amendment beginning on its effective date and ending on the date the employer adopts the amendment.

Executive Compensation Changes. For taxable years beginning after December 31, 2026, ARPA expands the number of employees covered by the $1 million deduction limit applicable to publicly held corporations under Code Section 162(m). Under current rules, the group of "covered employees" whose compensation is subject to Section 162(m) generally consists of those employees who have served as the chief executive officer, chief financial officer, or one of the three highest-compensated other officers. For taxable years beginning after December 31, 2026, ARPA expands the group of "covered employees" to include the next five highest compensated employees, regardless of whether they served as officers at any time during the taxable year. Unlike other covered employees, these additional five covered employees will not be permanently treated as covered employees and will be re-determined each taxable year beginning after December 31, 2026, based on compensation levels.

Single Employer Defined Benefit Pension Plan Relief. ARPA contains two provisions that grant some funding relief to single employer defined benefit pension plans.

- *Extended Amortization.* ARPA provides a "fresh start" (that is, a reset) on the amortization of a single employer defined benefit pension plan's underfunding. For plan years beginning after December 31, 2021 (or, at the election of the plan sponsor, for plan years beginning after December 31, 2018, December 31, 2019 or December 31, 2020), all of the plan's shortfall amortization bases, and all shortfall amortization installments determined with respect to such bases, are reduced to zero. In addition, beginning with the applicable plan year, the plan's new shortfall amortization base and any future shortfalls will be amortized over 15 years, instead of seven years. This relief will reduce annual minimum required contributions to single employer defined benefit pension plans.

- *Extension of Pension Funding Stabilization Percentages*. ARPA also extends the funding stabilization changes that have been enacted since 2012 (beginning with MAP-21) but that were scheduled to start phasing out in 2021. Under these funding stabilization rules, the interest rates used to determine the present value of plan liabilities are subject to minimum and maximum percentages (known as the interest rate corridor) and the spread between those two percentages gradually increases (that is, phases out) over time. ARPA shrinks the spread between the minimum and maximum percentages and extends the time period before the spread begins to phase out, which further stabilizes funding calculations. ARPA also sets a permanent interest rate floor of 5% on the 25-year average on which the interest rate corridor is based. These changes apply to plan years beginning after December 31, 2019, but a plan sponsor may elect not to have these changes apply to any plan year beginning before January 1, 2022 either (as specified in the election) for all purposes for which the changes apply or solely for purposes of determining the adjusted funding target attainment percentage (AFTAP) under Code Section 436, which is used to determine whether a plan may be subject to certain restrictions based on its level of underfunding.

Multiemployer Defined Benefit Pension Plan Relief. ARPA also contains several provisions that are intended to address the country's financially-troubled multiemployer defined benefit pension plan system. One such provision creates a "special financial assistance fund" under the Treasury Department from which the Pension Benefit Guaranty Corporation (PBGC) would be able to make grants to severely underfunded multiemployer plans, which those plans would not have to repay. Under another provision, for plan years beginning after December 31, 2030, the multiemployer PBGC premium rate will increase from $31 to $52 per participant, and the premium amount will be subject to indexed increases for plan years beginning after December 31, 2031. ARPA does not change PBGC premium rates for single employer defined benefit pension plans.

If you have any questions about the American Rescue Plan Act or how it might affect your business, please contact Melanie N. Aska, Counsel, at 617-457-4131 or maska@murthalaw.com or Erek M. Sharp, Partner, at 203-772-7772 or esharp@murthalaw.com.