Benefits Law Deep Dive: New COBRA and Mental Health Parity Rules

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Agenda

- COBRA overview
- Changes per American Rescue Plan Act of 2021 ("ARPA")
- Mental Health Parity and Addiction Equity Act ("MHPAEA") overview
- Changes per Consolidated Appropriations Act ("CAA")

COBRA Overview

- Federal law which says that employers with 20+ employees generally must provide health plan continuation coverage to certain "qualified beneficiaries" ("QBs")
- Applies when there is a "triggering event" (e.g., reduction in hours; divorce; child attaining age 26) and an actual loss of coverage
- QB generally elects within 60 days to take the COBRA and makes first payment within 45 days
  - DOL rules extend these periods, in general, for about 1 year
- 18 months is typical length of coverage, but could be 29 months or 36 months in some situations

COBRA Overview

- ARPA passed for various reasons, including to assist economy and workers impacted by COVID-19
- ARPA's method of doing this is to provide: (1) 100% federal subsidy (i.e., "free" COBRA) for certain assistance eligible individuals ("AEIs"); (2) additional election opportunity to obtain COBRA; and (3) new notices to tell AEIs (and possible AEIs, it seems) about this
- Subsidy available for 6 months (4/1/2021 – 9/30/2021), unless Congress chooses to extend
- AEIs are not eligible for premium assistance as of the earliest of:
  - The "first date" that the AEI "is eligible for coverage under any other group health plan" or Medicare
    - But, not true if the other coverage is an "excepted benefit" (e.g., stand-alone dental or vision), a health FSA or a qualified small employer health reimbursement arrangement ("QSEHRA")
    - Note that it seems to be based on "eligibility" for Medicare, not actual enrollment
  - The date that the typical 18 months of COBRA would have expired

COBRA Overview

- AEI seems to lose subsidy only for "newly-acquired" eligibility under a health plan
- Suppose Robert is involuntarily terminated from Good Co. in February 2021. He is married to Sally. Sally is employed elsewhere. Both Robert and Sally elected family coverage (i.e., double coverage)
- Robert elects Good Co.'s offer of COBRA, effective March 1, 2021. In March, Robert obtains a new job. He takes the offer of health plan coverage and will enroll on May 1
- Is Robert eligible for "free" COBRA in April, even though he has coverage through Sally's plan? Likely yes, because that is not "newly-acquired" coverage. Nor does the waiting period cause a loss of the subsidy
- Is Robert eligible for "free" COBRA in May, when he joins the new plan? Probably not

Only Certain COBRA Events Receive Subsidy

- Only reduction in hours and non-gross-misconduct terminations of employment will create ARPA COBRA rights

Event	Must COBRA Be Provided?	Is ARPA Subsidy Available?
"Involuntary" termination of employment	Yes	Yes
"Voluntary" termination of employment	Yes	No
Termination due to gross misconduct	No	No (if COBRA not offered)
"Voluntary" reduction in hours	Yes	Yes
"Involuntary" reduction in hours	Yes	Yes
All other COBRA events (e.g., divorce; child aging out of plan)	Yes	No

Involuntary Terminations

- IRS has not yet defined key term of "involuntary" or "voluntary" termination
- Certain situations seem "easy"
  - Voluntary: Employee wins the lottery and the next day quits all work and retires
  - Involuntary: Employer surprises employee with notice of permanent downsizing; employee is shocked and disappointed
- But will be lots of situations which are more difficult
  - Employee is unhappy with not receiving a promotion. Employer is unhappy with employee's job performance. HR manager and employee talk, mutually agree employee should "move on"
- If employee entered into severance agreement and it says that termination was "voluntary", does that control?
- If employer tracks "voluntary" / "involuntary" termination for other purposes (e.g., state unemployment) does that state definition control?

Involuntary Terminations

- ARRA guidance from 2009 may help – presumably IRS will look to it in defining key terms
- IRS Notice 2009-27 has 9 Q&As on what "involuntary termination" means
- "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" (Q&A 1)
- Can be "involuntary", in some situations, even when it is "employee-initiated" if employee had "good reason due to employer action that causes a material negative change in the employment relationship for the employee"
- Does not include death of employee or absence from work due to illness or disability
  - But, that could lead to a reduction in hours, which IS eligible for a premium subsidy

Involuntary Terminations

- Lay-off period with a right of recall; or a temporary furlough period can be an involuntary termination
- But a reduction in hours to zero is not involuntary
  - However, if employee quits because those reduction in hours are a "material negative change in the employment relationship", that could be "involuntary"
- Retirement can be "involuntary" if, based on "facts and circumstances", employer would have terminated employee, but for retirement happening first
- Strike initiated by employee is not an involuntary termination, but a "lockout initiated by the employer" is involuntary
- Severance package / buy-out where employee agrees to quit, with knowledge that employer will terminate "a certain number of remaining employees" is "involuntary"
- Very tough for employers because: (1) can be based on facts and circumstances; and (2) employer may not have tracked this for past 18 months

"Free" Coverage

- Mechanics of how it will work are a bit unclear, but ARPA will provide it through employers not paying certain employment taxes
- IRS has yet to issue guidance on it
- In ARRA (2009 stimulus bill) Congress provided a similar 65% subsidy, funded through a tax credit
  - Form 941 (then and now) used to report payment of quarterly employment taxes
  - In 2009, lines 12a – 15 of Form 941 were completed to report the amount of the COBRA premium not paid by individuals for the quarter (e.g., $100,000). That amount was subtracted from employment taxes owed by employer (e.g., $250,000). So employer would only pay difference (e.g., $150,000)
  - If employer overpaid, IRS "will send a refund" or "apply it to your next return" if employer requests
- Presumably IRS will follow similar process here

"Free" Coverage

- Who claims the credit?
  - Self-funded plan: Employer / plan sponsor
  - Fully-insured plan subject to federal COBRA: Employer / plan sponsor
  - Fully-insured plan, not subject to federal COBRA: Seems to be insurer
- Last one raises some coordination concerns. Employer may owe the premium, but really should not pay it if the insurer is receiving the tax credit (i.e., insurer may get the "windfall" of tax credit AND the premium)
  - Employers in this category should discuss with insurer
- Can employer "opt out" and not follow this process? Almost certainly no. Seems to be mandatory, employer must follow the rules
- What if former employee already paid for COBRA for April or May 2021? Amount must be returned within 60 days

AEI Notices

- AEIs are required by law to tell the plan of the loss of AEI status. Will they understand that?
  - It is mentioned in new model DOL form, so, maybe....?
- What happens if AEI notifies plan very late about loss in AEI status? Or employer finds out some other way?
  - Fran is an AEI who used to work at Original Systems. She receives free COBRA from 4/1/2021 – 9/30/2021. However, she started working at a new job in June 2020 and joined their health plan July 1, 2021. Fran never tells Original Systems of this. Original Systems relies on Fran's representation of AEI status and claims the tax credit on IRS Form 941. In July 2022, Original Systems learns that Fran joined the other plan on July 1, 2021. Must Original Systems now tell the IRS and "return" the amount it previously claimed as a tax credit?
- AEIs who fail to provide the notification may face a penalty of $250. If "intentional", greater of $250 or 110% of premium assistance provided after AEI status lost
- Not clear who receives the penalty (presumably not plan / plan sponsor, but not clear)

New Model Notices

- Five new DOL model notices from April 7, 2021
- Model General Notice and COBRA Continuation Coverage Election Notice
  - 14 pages long (but can delete 2-page instruction sheet, making it 12 pages long)
  - Use it for all qualified beneficiaries (NOT just AEIs) who have qualifying events occurring from 4/1/2021 – 9/30/2021
  - Informs qualified beneficiary that they may be an AEI and if they think so, they must complete the "Request for Treatment as an Assistance Eligible Individual" and return it to plan / COBRA vendor
  - On page 12, optional page if allow qualified beneficiaries to switch COBRA benefit options
    - We suspect most employers will NOT want that. So you likely want to delete page 12
- Model Notice in Connection with Extended Election Period
  - For qualified beneficiaries who had a reduction in hours / involuntary termination who would currently be an AEI if they had elected and / or maintained COBRA, but they did not (see upcoming slides)

New Model Notices

- Model Alternative Notice
  - ARPA allows plan sponsor to have qualified beneficiaries switch plan options
  - If higher-cost option is selected, subsidy is not available for some portion of that
  - As noted before, unlikely many plan sponsors will want to do this – seems like a lot of work
- Model Notice of Expiration of Premium Assistance – discussed more later
- Summary of COBRA Premium Assistance Provisions under ARPA
  - Include it with model notices, but not Expiration of Premium Assistance Notice
  - Person can request to be treated as AEI
  - Form has an "For Employer or Plan Use Only" section. It says that the employer's reason in denying AEI status must be individual and "a copy of this form" must be returned to the individual
  - What if individual disagrees with employer's determination? Can it be appealed? Must an employer agree to hear such an appeal? If employee is unionized, does union have any role?

New Model Notices

- Person would complete this section in the Summary of COBRA Premium Assistance Notice

[*Insert Plan Name*]	**REQUEST FOR TREATMENT AS AN ASSISTANCE ELIGIBLE INDIVIDUAL**	[*Insert Plan Mailing Address*]

PERSONAL INFORMATION

Name and mailing address of employee (list any dependents on the back of this form)	Telephone number E-mail address (optional)

To qualify, you must be able to check 'Yes' for all statements.

1. The qualifying event was a loss of employment that was involuntary or a reduction in hours.	☐ Yes ☐ No
3. I elected (or am electing) COBRA continuation coverage.	☐ Yes ☐ No
4. I am NOT eligible for other group health plan coverage (or I was not eligible for other group health plan coverage during the period for which I am claiming premium assistance).	☐ Yes ☐ No
5. I am NOT eligible for Medicare (or I was not eligible for Medicare during the period for which I am claiming premium assistance).	☐ Yes ☐ No

New Model Notices

- What must be returned by employer to individual if employer and individual disagree on AEI status

FOR EMPLOYER OR PLAN USE ONLY

This request is: ☐ Approved ☐ Denied Specify reason in #3 below and return a copy of this form to the applicant.

REASON FOR DENIAL OF TREATMENT AS AN ASSISTANCE ELIGIBLE INDIVIDUAL

1. Loss of employment was voluntary.	☐
2. Individual did not experience a reduction in hours.	☐
3. Individual did not elect COBRA coverage.	☐
4 Other (please explain)	☐

Signature of employer, plan administrator, or other party responsible for COBRA administration for the Plan

→ _____ Date → _____

Type or print name → _____

Telephone number → _____ E-mail address → _____

COBRA Extended Election Period

- New enrollment period available to AEIs eligible to elect COBRA for some portion of the "free" period (4/1/2021 – 9/30/2021)
  - So, even if an AEI's 18 months of COBRA would end on April 2, 2021, AEI must receive option to elect two days (April 1 and 2) worth of free coverage
- Includes AEI who previously elected COBRA, but then stopped paying
- Also AEIs who never elected COBRA in the first place – now can join as of 4/1/2021
- Plan sponsors must provide this notice by May 31, 2021, but can send it earlier
- AEI will have 60 days to elect following date when AEI receives the notice

Model COBRA Continuation Coverage Notice in Connection with Extended Election Periods

(For use by group health plans for qualified beneficiaries currently enrolled in COBRA continuation coverage, due to a reduction in hours or involuntary termination (Assistance Eligible Individuals), as well as those who would currently be Assistance Eligible Individuals if they had elected and/or maintained COBRA continuation coverage)

COBRA Extended Election Period

- For example, suppose AEI had involuntary termination of employment on 12/1/2019. COBRA would have normally ended 18 months later (5/31/2021). AEI elected COBRA for 6 months, but then stopped paying and it was terminated
- Plan sponsor sends AEI extended election period form. AEI must actually elect COBRA (plan sponsor should not just provide it automatically) in 60 days. If AEI elects it, AEI need not pay for prior, unpaid amounts
- AEI receives free COBRA for April and May 2021, without ever paying anything
- Wait – is the 60-day time period still accurate? Does COVID relief provide longer for AEI to make election? No, not here – this is the "exception to the rule"
  - Helpful for employers. Provides a lot of certainty in a quick period of time. If AEI does not elect COBRA within 60 days, status is known

Notice of Expiration of Premium Assistance

- New, mandatory notice that plan sponsors must send

Model Notice of Expiration of Period of Premium Assistance

(For use by group health plans to Assistance Eligible Individuals 15-45 days before their premium assistance expires)

IMPORTANT INFORMATION: Notice of Expiration of Period of Premium Assistance

- Provides AEIs notice that their premium assistance will end (presumably so they can arrange for other coverage or, later in 2021, prepare to pay 100% of COBRA cost)
- Plan must: (1) tell AEI at least 15 days, no more than 45 day, prior to subsidy's end date; (2) identify date subsidy ends; (3) tell AEI that further coverage may be available through COBRA or another health plan

Notice of Expiration of Premium Assistance

- Plan sponsor need not provide it if AEI's subsidy ends because AEI became eligible for other group health plan coverage or Medicare
- Plan sponsors should identify AEIs whose COBRA ends 4/30/2021 (or even earlier in April) because they should receive notice
- Timing is awkward. DOL model forms came out 4/7/2021. Suppose plan sent out election form 4/14/2021. Former employee returns it 4/21/2021 and elects COBRA. But suppose 18 months of COBRA ends 4/30/2021
  - Technically plan should have sent out Notice of Expiration by 4/16/2021, it seems. But plan did not even know person's AEI status then, because that was not known until 4/21/2021 (5 days later)
  - Presumably plan sponsors should just "muddle through it" and send out form, even if it's technically late

Open Issues Remain

- As discussed before, definition of "involuntary" is critical and needed urgently
- What, if any, appeals process applies if employer and individual disagree on AEI status?
- Will modifying severance arrangement or plan terms result in problems?
  - E.g., suppose that Ed is a former employee of Super Co. Ed entered into a severance agreement with Super Co. where Super Co. would pay for 100% of the cost of COBRA for three months – which happens to be March, April and May 2021. The March "free" COBRA was helpful. But the April and May don't have value to Ed, because ARPA makes it free. Can Ed and Super Co. agree to "move" the Super Co.-subsidized months to October and November 2021?
- Premium subsidy seems to be available for all types of group health plans, beyond medical (e.g., dental; vision; health FSA; HRA; EAP) but will the IRS clarify that?
- If plan sponsor does not pay Social Security or Medicare taxes, will they receive the credit? Presumably so, but IRS clarification would be helpful

CAA: Required MHPAEA Analysis

- Group health plans / insurers that provide mental health or substance use disorder benefits ("MH/SUD") must comply with Mental Health Parity and Addiction Equity Act ("MHPAEA")
- One requirement is that nonquantitative treatment limitations ("NQTLs") cannot, in general, apply more stringently to MH/SUD benefits compared to medical / surgical ("M/S") benefits
- Starting February 10, 2021, federal government can ask for a written "comparative analysis" of how NQTLs apply to those different types of benefits
  - New FAQs provide that enrollees (and their lawyers, presumably) and state regulators can ask for it also
- Practical problem: CAA vague on what, exactly, must be in the written report
  - Made it difficult for employers / insurers to do much

CAA: MHPAEA Analysis cont.

- "Specific plan or coverage terms" and a description of "all" MH/SUD benefits to which each such term applies in each "respective benefits classification"
- Factors used to determine that the NQTLs will apply to MH/SUD and M/S benefits
- Evidentiary standards used for those factors
  - Every factor "shall be defined"
  - Any source or evidence relied upon to design and apply the NQTLs to MH/SUD and M/S benefits
    - This is information that a TPA, PBM or insurer would probably know, but a plan sponsor would not. Will require discussions among the parties. Also not information that, in our experience, TPAs have typically provided to plan sponsors (very "in the weeds" and some would argue is proprietary)

CAA: MHPAEA Analysis cont.

- Comparative analysis demonstrating that processes, strategies, evidentiary standards and other factors used to apply NQTLs, "as written and in operation" are not applied more stringently
  - The "and in operation" piece may be difficult because, almost by definition, it involves procedures which are not written (so plan sponsor cannot just ask for the plan, SPD, written policies, etc. – may need to go "beyond the documents")
- "Specific findings and conclusions" reached by the plan / issuer "including any results of the analyses ... that indicate that the plan or coverage is not in compliance with this section"
  - In essence, "confess your sins" if asked to do so
  - Is it possible to shield that through attorney-client privilege?

CAA: MHPAEA Analysis

- April 2, 2021 IRS / DOL / HHS FAQs provide much more detail about what must be in written report
- Clarifies that a written report may have been a "best practice" in the past, but now "it is required"
- Nine require elements that MUST be in the written report
- 1: Clear description of "the specific NQTL, plan terms and policies at issue"
  - Seems like DOL / IRS / HHS does not want a general statement – need to take general statement and apply it to specific plan terms (e.g., "Page 27 of the SPD defines 'Experimental'. The definition for that comes from .... ")
- 2: Identify specific mental health / substance use disorder ("MH/SUD") and medical / surgical ("M/S") benefits to which the NQTL applies within each benefit classification. Explain if certain factors "were given more weight than others" and if so why
  - TPAs and PBMs likely hold this information, but plan sponsors almost never would

CAA: MHPAEA Analysis

- 3: Identify factors, evidentiary standards, sources, strategies, processes considered in design or application of NQTL and in determining which benefits are subject to NQTL. Explain whether any factors given more weight and if so reasons why
  - Again, TPAs and PBMs may have this, but plan sponsors will not
- 4: If define any of above "in a quantitative manner" include precise definitions used and supporting sources
  - A little vague on what is meant (numerical treatment limits for particular condition, probably). Usually plan sponsors just adopt TPA's / PBM's definitions
- 5: Document any variation in the application of a guideline or standard and if so describe process and factors used to establish that variation
- 6: If application of NQTL "turns on specific decisions in administration of the benefits", identify decision makers, timing of decisions and qualifications
  - TPAs and PBMs usually have various committees in place to decide treatment limitations, etc.

CAA: MHPAEA Analysis

- 7: If rely on experts, include an assessment of expert's qualifications and extent to which plan or issuer ultimately relied on expert's evaluation in setting recommendations regarding MH/SUD and M/S benefits
  - Plan sponsors won't know this, most likely
- 8: Reasoned discussion of plan's findings and conclusions on comparability of processes, etc. and their "relative stringency, both as applied and as written". Provide citations to any specific evidence considered
  - "As applied" likely means that plan sponsor needs to "dig into" actual operations of TPA / PBM and talk to personnel or obtain some statement about same
- 9: Date of the analysis, name, title and position of person who performed it
- FAQs and DOL attorney statements indicate that plan sponsors and insurers are "on the clock" – NO grace period
  - DOL attorney last week: We must present a report to Congress by December 2021 (so no extended due date)

CAA: MHPAEA Analysis

- Note: General summary that a TPA or PBM has put together in the past almost certainly will not include all 9 required elements – will need to be updated
  - Big question: Who will do the updating? TPA / PBM? Law firm? Consultant? What is the cost?
  - If TPA / PBM does it, is there a concern about "bias"? That is, TPA reviewing its own MHPAEA policies and procedures might say "Wow, these are the best policies we've ever seen. They are great!"
    - But, because TPA / PBM hold much of the information, their input and assistance is critical
- Initial reactions we've seen is that TPAs and PBMs might be prepared to do a report that gets employers 50% - 75% complete, but will not get it to 100% level
- Quarles & Brady is gathering "pods" of employers who use same TPA / PBM. Cost of that piece of analysis could be split equally among clients in same "pod", to bring down cost
  - E.g., if 10 employers all use UHC and analysis costs $30,000, each of the 10 would pay $3,000
  - Some portions cannot be split (e.g., applying it to employer's specific plan and identifying plan provisions which violates MHPAEA and should have been addressed years ago)

Questions?

Thank You

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