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HEALTH & WELFARE PLAN LUNCH GROUP

April 1, 2021

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Agenda

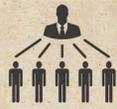
- IRS guidance delaying 1040 filing date (impact on HSAs) and addressing PPEs
- Legislative and Regulatory Update
- ARPA DCAP increase to \$10,500
- Outbreak Notice Reminders and implementation issues
- ARPA: A deeper dive on COBRA subsidies
- HIPAA Update

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IRS guidance delaying 1040 filing date (impact on HSAs) and addressing PPEs

- IRS Notice 2021-21
 - Extends individual tax filing deadline to May 17th (extends HSA contribution deadline)
 - Extends Form 5498 filing requirements to June 30th
- IRS Disaster Relief
 - Extends filing dates for certain areas of TX, LA, OK until June 15th
- IRS Announcement 2021-07
 - Allows PPE for personal protective equipment, such as masks, hand sanitizer and sanitizing wipes, for the primary purpose of preventing the spread of COVID as amounts paid for medical care under § 213(d)
 - How do you administer primary purpose requirement?
 - Allows treatment retroactively to January 1, 2020
 - Is a plan amendment required?
 - Are election changes allowed?

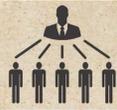
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Legislative Update



Infrastructure and Reconciliation Round II

- What's on the agenda?
- Timeline

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ARPA DCAP Increase to \$10,500

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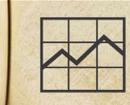
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ARPA DCAP Increase to \$10,500

- For 2021, ARPA temporarily increased the amount (from \$5,000 to \$10,500) that an employee can exclude from gross income for DCAP benefits. For married filing separately, the amount increased from \$2,500 to \$5,250.
- Employers may amend a DCAP plan retroactively so long as the amendment is adopted by the last day of the plan year in which the amendment is effective and the plan is operated in accordance with the amendment's terms beginning on its effective date.
 - Is an amendment needed? Does your plan reference the statutory limitation or the static dollar amount?
 - Can increases in elections be made under current election change (change in cost or coverage) provisions?
- Don't forget:
 - Separately under the Consolidated Appropriations Act, 2021, an employer can amend its DCAP for 2020 and/or 2021 to:
 - (1) Allow a 12-month grace period or carryover for amounts that remain unused at the end of each of those years;
 - (2) Increase the dependent childcare age to 13 for 2020 and 2020 carryover amounts;
 - Allow open ended DCAP election changes

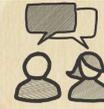
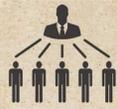
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ARPA DCAP Increase Practice Pointers

- Prudently consider 2021 Midyear Election Changes
 - Take note of any unused 2020 DCAP amounts that become incurred in 2021 due to an extended grace period or carryover provision adopted by the employer.
 - Unclear whether employees should be allowed to increase their 2021 DCAP elections to an amount that, when combined with the amount still available from 2020, exceeds the new \$10,500 exclusion limit for 2021.
- Analyze Nondiscrimination Requirements and Previous Testing Results
 - Employers that previously experienced difficulty passing DCAP nondiscrimination requirements may decide not to allow employees to increase 2021 DCAP midyear elections.
 - IRC Section 129 nondiscrimination requirements remain unchanged for 2021. Consider specifically the Average Benefits Test which requires that the average benefit provided to non-HCEs equal at least 55% of the average benefits provided to HCEs. Employers could limit the ability to increase 2021 DCFSA elections to non-HCEs only, but that may only result in a more complex administrative burden.
- Monitor New Legislation Affecting the 2022 Exclusion Limit
 - ARPA does not extend to 2022; at present, any unused DCFSA amount from 2021, that remain available for use in 2022, will be subject to the prior \$5,000 limit (any expenses over such amount becomes taxable in 2022).

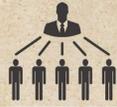
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Outbreak Period Update

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Outbreak Period Guidance

- DOL issued guidance on 2/26/21 (Notice 2021-01) addressing the end of the Outbreak Period But first, a little history
- IRS/DOL jointly issued Notice 2020-01 in April of 2020.
- The Joint Notice prescribed a period that plans were required to disregard when determining due dates for certain enumerated actions.
 - HIPAA special enrollment
 - COBRA elections, premium payment, QB notices, and even election notices
 - Claims and appeals for all welfare and retirement plans subject to ERISA
 - External Review requests for non-grandfathered health plans subject to ACA
- This period of disregard is called the “Outbreak Period”
- The Outbreak Period began March 1 and ends 60 days after the declared end of the National Emergency.



Outbreak Period Guidance

- Joint notice stopped the counting during the Outbreak Period of any time frame that fell within the Outbreak Period.
 - E.g. If 45 days of your 60 day election period had occurred on March 1, 2020, then you would get 15 days to elect once the Outbreak Period ended.
 - E.g. If your COBRA election period fell entirely within the Outbreak Period, then you would get 60 days when the Outbreak Period ended.



Outbreak Period Guidance

- The Joint Notice was a product of ERISA Section 518/IRC 7508A, which says:
 - In the case of a pension or other employer benefit plan, or any sponsor, administrator, participant, beneficiary or other person with respect to such plan,the Secretary may, notwithstanding any other provision of law, prescribe, by notice or otherwise, **a period of up to 1 year which may be disregarded** in determining the date by which any action is required or permitted to be completed under this chapter (emphasis supplied).
- Joint Notice acknowledged the 1 year limitation

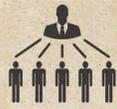


Outbreak Period Guidance

- Fast forward to February 2021.
 - National Emergency yet to be declared over (in fact Biden Administration extended the declaration under the NEA)—no end in foreseeable future
 - Nevertheless, did Outbreak Period end 2/28/21---1 year after it began on March 1, 2021?
 - New DOL/IRS guidance says No.

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Outbreak Period Guidance

- Instead of applying the 1 year limitation to the Outbreak Period itself, the agencies applied it to the individual's affected time period.
- An affected time period will have the applicable periods under the Notices disregarded until the earlier of (a) 1 year from the date the individual was 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.

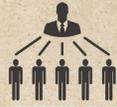
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Outbreak Period Guidance

- Basically, identify the original due date (but for the Outbreak Period) and add 1 year (per the examples in the guidance).
 - COBRA election period would have otherwise ended May 31, 2020. Plan can require election by May 31, 2021.
 - Health FSA run out period for 2019 plan year would have otherwise ended March 31, 2020. Plans can require submission of 2019 claims by March 31, 2021.
 - 1 year period for filing health plan claim would have otherwise ended July 31, 2020. Plan can require filing of claim by July 31, 2021.

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Outbreak Period Guidance

- Still some unknowns:
 - My COBRA election would have been due on May 31, 2020. I elect on April 1, 2021. I have 45 after I elect to pay my first premium. (May 16, 2021).
 - I don't make the first premium payment.
 - Since (assume) Outbreak Period is still ongoing, payment is presumably not late yet.
 - What is maximum time period for requiring payment?
 - May 16, 2022?
 - What periods of coverage are included in the initial premium payment?

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Outbreak Period Guidance

- Still some unknowns:
 - I failed to make any COBRA premiums beginning with the March 2020 premium.
 - No doubt that the plan can require payment of March 2020 premium by March 31, 2021.
 - What about other monthly payments? E.g. Is April 2020 premium also due March 31, 2021 or does the plan have to allow until April 30, 2021 to pay the April premium now that march has been paid?
 - Original guidance indicated that all outstanding payments would be due 30 days after outbreak period ended. Does that apply here?

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American Rescue Plan: COBRA SUBSIDY DEEPER DIVE

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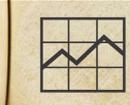
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American Rescue Plan – COBRA Subsidy

- 100% subsidy for coverage from April 1 through Sept. 30, 2021
Does not extend normal COBRA coverage period.
 - **100% subsidy in Senate substitute of 3/3/2021.**
- Triggering event is loss of coverage due to involuntary termination of employment or a reduction in hours.
 - Applies to all qualified beneficiaries who lose coverage (e.g., spouse and dependents).
- Subsidy not available if individual is (or becomes) eligible under another group health plan (e.g., spouse’s plan) or Medicare.
 - Qualified beneficiary must provide notice if no longer eligible or face a \$250 penalty.
 - Higher penalty if the failure to notify is fraudulent

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American Rescue Plan – COBRA Subsidy

- Which plans are covered?
 - All COBRA covered plans except for Health FSAs.
 - Would include dental and vision.
 - HRAs and ICHRAs.
 - Certain EAPs and wellness programs.
 - Most onsite clinics.
- Also covers “a State program that provides comparable continuation coverage” (e.g. Mini-COBRA laws).

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AMERICAN RESCUE PLAN--COBRA Subsidy

- Assistance Eligible Individuals (AEIs) are those whose involuntary termination or reduction in hours occurred:
 - During the subsidy period.
 - Prior to the subsidy period but they have existing COBRA coverage extending into the subsidy period.
 - Prior to the subsidy period and have not elected COBRA. But if they had elected, coverage would have extended into the subsidy period.
 - Includes those who elected and subsequently dropped COBRA coverage before the subsidy period begins.

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American Rescue Plan--COBRA Subsidy

- To receive the subsidy the COBRA event must be a reduction in hours or involuntary termination of employment.
 - COBRA administrators will need information on involuntary terminations since they likely do not have it.
 - Gross misconduct exception still applies but, as always, use with caution.
 - Reduction in hours can apparently be voluntary or involuntary (but must cause a loss of coverage).
- Very similar procedurally to the ARRA subsidy back in 2009.
 - IRS FAQs to ARRA subsidy (Notice 2009-27) contain a number of FAQs around involuntary termination of employment.
 - ARRA did not have reduction in hours as a subsidy trigger.
 - Later amended to provide for subsidy for a reduction in hours followed by an involuntary termination of employment.

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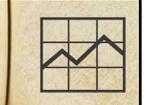
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American Rescue Plan--COBRA Subsidy

- What is an involuntary termination of employment?
 - Slightly different language in ARRA and ARPA (involuntary in ARRA “except for voluntary” in ARPA).
 - Is there a difference?
 - ARRA Definition from 2009-27:
 - “[T]he independent exercise of the unilateral authority of the employer to terminate the employment, other than due to the employee’s implicit or explicit request.”
 - Good reason resignation due to employer action that causes a material negative change in the employment relationship for the employee is an involuntary termination.
 - Facts and circumstances test.
 - Buyout package accepted by the employee is an involuntary termination.
- What about an employee who does not return to work because of worries of COVID exposure or continued childcare issues because of COVID?

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American Rescue Plan--COBRA Subsidy

- AEs include the qualified beneficiaries associated with the employee.
- ARRA FAQs had guidance on some issues that may arise with family members:
 - Second qualifying event
 - Adding family members during plan open enrollment.
 - Generally, very restrictive.
- ARRA FAQs indicated each qualified beneficiary had an independent election right.
 - Employee involuntarily terminated while on family coverage but elects self-only COBRA.
 - Family member qualified beneficiaries will have an individual election right to the subsidy.

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American Rescue Plan--COBRA Subsidy

- Special Notice to AEs must go out within 60 days from Aprils 1st (May 31st).
 - DOL to issue model notices within 30 days of enactment (April 10th)
- General Election Notice must be modified or supplemented.
 - Most likely to use supplement since subsidy is temporary.
- Can AEs currently on COBRA be auto-enrolled in subsidy?
 - Unclear, but should at least be given notice that they must inform the plan if they are eligible for other group health plan coverage or Medicare and therefore ineligible for the subsidy.

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American Rescue Plan--COBRA Subsidy

- AEIs have 60 days to elect coverage after receipt of the Special Notice with the subsidy back to April 1st
 - Because of Outbreak Period many qualified beneficiaries will have the option to elect COBRA *without* the subsidy back to the qualifying event and with the subsidy beginning April 1st.
 - It appears that the special election period does not apply with respect to coverage under state mini-COBRA.
- Notice on the expiration of the subsidy and the right to continue COBRA paying the full premium is also required.
 - Notice must go out in the period beginning 45 days before the subsidy ends and ending 15 days before the subsidy ends.
 - DOL to issue a model notice within 45 days of enactment.
- Will there be a special enrollment right to Marketplace coverage after the end of the subsidy?
 - Unclear and may be addressed in guidance or DOL model notice.
 - End of an employer-provided COBRA subsidy has been treated as a special enrollment event in the federal Marketplaces.

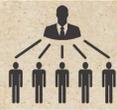
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American Rescue Plan--COBRA Subsidy

- Employer may allow (permissive) AEIs to change plan options provided the premium for the option is less than current premium and certain other conditions are met.
 - Cannot be excepted benefits (e.g. standalone dental or vision or a Health FSA).
 - Why would an AEI change to a lower cost option? Possibly because AEI wants to continue with COBRA coverage after subsidy period ends.
- Expedited review with DOL of disputes concerning the subsidy (15 business days).

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American Rescue Plan--COBRA Subsidy

- Employer is responsible for the subsidy and takes a tax credit against Medicare payroll tax.
- Employer takes the tax credit for ***plans covered by federal COBRA whether fully insured or self-funded.***
 - Except for multiemployer plans (collectively bargained) where the plan takes the credit.
 - Mechanics with COBRA administrator likely to vary whether fully insured or self-funded.
- Insurer takes the tax credit in only very limited circumstances.
 - Fully insured and under the small employer exception to COBRA (under 20 employees) and covered by a state mini-COBRA law.
 - Fully insured and a church plan and covered by a state mini-COBRA law.

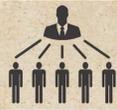
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American Rescue Plan--COBRA Subsidy

- Unclear as to who takes the credit for a multiple employer welfare association (MEWA).
 - Under ARRA it was the participating employer.
 - Guidance will be issued with respect to PEOs.
- Credit likely to be taken on quarterly Form 941s
 - Credit is fully refundable. If credit exceeds the Medicare payroll tax, then employer receives a tax refund.
 - Guidance will be issued on a method of advancing the credit.

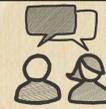
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American Rescue Plan--COBRA Subsidy

- What if an employer is currently subsidizing COBRA for an AEI through a severance agreement or severance plan?
 - Unclear but appears that employer subsidy must end for employer to receive the tax credit.
- What if an employer has continued active coverage for those on furlough, can that coverage be ended triggering COBRA and the subsidy?
 - Subject to further guidance, COBRA regulations provide for “springing” COBRA rights where identical coverage is provided after a qualifying event but then that coverage is terminated before the COBRA maximum coverage period.

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Points to Ponder

- Begin allocating responsibilities **NOW**. Who does what?
 - Issues regarding costs associated with mailing the two notices.
 - Preparation and timely delivery of notices.
 - Difficult issues for AHPs and MEWAs.
- Identify involuntary terminations and reductions in hours going back to November 2019.
- Review any severance agreements or severance plans that provide for subsidized COBRA.
- Alert payroll departments to possible changes to remitting payroll taxes (Form 941).
- Can any communication be coordinated with the now phased end to the Outbreak Period?

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HITECH Amendment for Cybersecurity Practices

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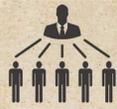
HITECH Amendment

- H.R. 7898 was signed into law on January 5, 2021 and amends the HITECH Act.
- This amendment directs OCR to consider “recognized security practices” implemented by covered entities and business associates to prevent cyber security threats when accessing fines for violations, conducting audits, and determining remedies for potential violations during settlement agreements.
- Recognized security practices must be adequately demonstrated by the covered entity or business associate and have been in place for at least the previous 12 months.

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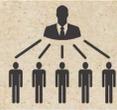
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Recognized Security Practices

- **Recognized security practices** generally are:
 - Standards, guidelines, best practices, methodologies, procedures, and processes developed by NIST;
 - Specific security practices for the health care industry developed under section 405(d) of the Cybersecurity Act of 2015; and
 - Other programs and processes that address cybersecurity through regulations under other statutory authorities.
- The covered entity or business associate must determine that the recognized security practices adopted are consistent with the HIPAA Security Rules.



Next Steps

- Adequately document current HIPAA security policies and procedures and determine if these are consistent with NIST and section 405(d) recognized security practices.
 - Tools and information specific to the health care industry are available at <https://www.phe.gov/Preparedness/planning/405d/Pages/reportandtools.aspx>
- Ensure that a HIPAA Security Risk Assessment has been recently performed and documented.
- Develop updated training materials for anyone with access to PHI.