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Impact of COBRA Premium Assistance Rules on Exempt Employers

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INTRODUCTION

On April 7, 2021, the U.S. Department of Labor (DOL) issued guidance¹ interpreting the premium assistance requirements for employers providing group health plan continuation coverage under the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended (COBRA).² COBRA was amended on March 11, 2021, by the American Rescue Plan Act of 2021 (ARPA) to assist employees who lost health insurance coverage amid the Covid-19 pandemic.³ On May 18, 2021, Treasury and the IRS published Notice 2021-31 containing interpretive tax guidance for COBRA premium assistance, including the employment

tax credit available for sponsoring employers or insurers providing coverage (the Notice).⁴

COBRA requirements are set forth in the I.R.C.,⁵ the Employee Retirement Income Security Act of 1974, as amended (ERISA),⁶ and the Public Health Service Act of 1944, as amended (PHSA).⁷ Thus, the DOL, the IRS and the Department of Health and Human Services (HHS) share jurisdiction over group health plan administration and compliance with COBRA.⁸ Whereas DOL has interpretive authority over notice and disclosure requirements, the IRS is authorized to issue regulations defining the required continuation coverage.⁹

HHS is authorized to interpret COBRA as it applies to state and local government plan sponsors, in conformity with DOL and IRS rules.¹⁰ This article focuses on applicability of COBRA provisions in ERISA and the I.R.C. to fully-insured group health plans sponsored by private sector or certain not-for-profit employers. The Frequently Asked Questions published by DOL on April 7, 2021 (the “April 7 guidance”)¹¹ follow Disaster Relief Notice 2021-01, issued by DOL with concurrence from the Treasury on February 26, 2021,¹² and prior joint department guidance, which extended certain periods and dates

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¹ Dept. of Labor, “FAQs About COBRA Premium Assistance Under the American Rescue Plan Act of 2021” (Apr. 7, 2021), <https://www.dol.gov/sites/dolgov/files/EBSA/about-ebsa/our-activities/resource-center/faqs/cobra-premium-assistance-under-arp.pdf>.

² Pub. L. No. 99-272, 100 Stat. 82 (1986). See ARRA, Pub. L. No. 111-5, 123 Stat. 115 (2009); HIPAA, Pub. L. No. 104-191, 110 Stat. 1936 (1996) (preceding amendments to COBRA).

³ An Act to Provide for Reconciliation Pursuant to Title II of S. Con. Res. 5 §9501, Pub. L. No. 117-2 (Mar. 11, 2021) (“American Rescue Plan Act of 2021” or “ARPA”). DOL guidance refers to the legislation as ARP.

⁴ Notice 2021-31; see Notice 2021-31 Q&A 82 (providing that third-party administrators (“TPAs”) may be third-party payees (“TPPs”) eligible for PAC under certain conditions), Q&A 77 (eligibility of multiemployer plan (“MEP”) as premium payee for the refundable PAC). See generally ERISA §3(37) (defining a MEP).

⁵ I.R.C. §4980B.

⁶ Pub. L. No. 93-406 §1 *et seq.*, 88 Stat. 829 (1974); ERISA §601–§608.

⁷ Pub. L. No. 78-410 §1 *et seq.*, 58 Stat. 682 (1944); 42 U.S.C. §300bb-1 *et seq.*

⁸ See H.R. Conf. Rep. No. 99-453 at 562 – 563 (1985).

⁹ See H.R. Conf. Rep. No. 99-453, at 562 – 563.

¹⁰ See H.R. Conf. Rep. No. 99-453 at 563.

¹¹ See Note 1, above.

¹² Empl. Ben. Security Admin. Disaster Relief Notice 2021-01 (Feb. 26, 2021), <https://www.dol.gov/sites/dolgov/files/ebsa/employers-and-advisers/plan-administration-and-compliance/disaster-relief/ebsa-disaster-relief-notice-2021-01.pdf>.

for group health plans to comply with I.R.C. §4980B continuation coverage requirements as the result of the Covid-19 pandemic.¹³

ARPA SECTION 9501 GENERALLY

ARPA §9501(a) provides that assistance eligible individuals, who generally are former employees or employees with reduced hours enrolled in a group health plan offered by a plan sponsor (AEIs), are exempt from paying monthly premiums for COBRA continuation coverage during the premium assistance period.¹⁴ The premium assistance amounts are not required to be paid by the employee to employer or insurer.¹⁵ Instead, ARPA §9501(b)(1) provides a refundable credit (premium assistance credit or “PAC”) against the employer portion of Medicare tax for payments of premiums under extended COBRA coverage provided under a group health plan from April 1, 2021, through September 30, 2021 (the “premium assistance period”).¹⁶

Terminated employees or those with reduced hours who receive premium assistance exclude the amounts of premiums that are treated as paid from gross income under new I.R.C. §139I.¹⁷ The income exclusion provisions are effective for taxable years of employees ending after March 11, 2021, the date of the enactment of ARPA.¹⁸ ARPA §9501 also contains extended election period and notice requirements subject to COBRA continuation coverage provisions in ERISA, the Code and PHSa.¹⁹ In addition, by contrast to qualified beneficiaries, premium payees, which generally are employers or insurance carriers providing group health plan coverage, must include the amount of PAC in gross income.²⁰

SCOPE OF COBRA EXCEPTION FOR EXEMPT EMPLOYERS FROM ERISA

In general, ERISA was designed to protect private sector employees from losing pension rights after many years of service. As originally enacted in 1974,

ERISA did not address employees’ health insurance benefits. In 1985, Congress enacted COBRA, codified in ERISA, the Code and PHSa, to protect workers’ health benefits by requiring employers to continue to provide group health plan coverage to employees who leave work subject to certain statutory requirements.²¹

Generally, as discussed below, not all employers sponsoring group health plans must offer COBRA coverage. Accordingly, as a general matter, employers, insurers or TPAs would not incur excise tax or ERISA liability under COBRA in connection with such plans.²² The COBRA exception has been the subject of ERISA litigation. For example, federal courts have held that an attempt to comply by excepted or exempt employer does not trigger COBRA.²³ Likewise, under some federal jurisprudence, a small employer exempt from COBRA is not subject to suit under ERISA.²⁴ Federal courts have treated the small employer exception as an affirmative defense or an element of plaintiff’s claim.²⁵

In general, ERISA contains a broad preemption provision which states that ERISA shall “supersede any and all State laws insofar as they may not or hereafter relate to any employee benefit plan.”²⁶ For example, federal courts have held that state common law

²¹ See *Kidder v. H & B Marine, Inc.*, 932 F.2d 347, 349 n.1 (5th Cir. 1991).

²² However, federal courts have held that a group health plan of an ostensibly exempt employer might be subject to COBRA provisions in ERISA based on certain common law principles. See, e.g., *Black v. TIC Investment Corp.*, 900 F.2d 112, 115 (7th Cir. 1990) (holding, *inter alia*, for COBRA purposes, that “estoppel principles are applicable to claims for benefits under unfunded single employer welfare benefit plans under ERISA.”)

²³ *Cabral v. Olsten Corp.*, 843 F. Supp. 701, 704 (M.D. Fla. 1994) (citing *Mlsna v. Unitel Communications, Inc.*, 825 F. Supp. 862, 864 (N.D. Ill. 1993), *aff’d in part, rev’d in part*, 41 F.3d 1124 (7th Cir. 1994), *cited in Colvin v. Peterson Indus.*, No. 4:13-CV-1458-VEH, 2015 BL 213163, at 33 (N.D. Ala. July 2, 2015).

²⁴ ERISA §601(b); see, e.g., *Aucoin v. RSW Holdings, LLC*, 494 F. Supp. 2d 418, 423 n.22 (M.D. La. 2007).

²⁵ See *Arbaugh v. Y & H Corp.*, 546 U.S. 500, 516 (2006) (holding a numerical application threshold is an element of a Title VII claim rather than a jurisdictional bar); *Just v. Accu-Turn, Inc.*, No. 09-C-0181, 2012 BL 85957, 4-6 (E.D. Wis. Nov. 20, 2013) (holding that determination of whether defendant was a small employer for COBRA purposes was an element of plaintiff’s claim); *Rodriguez v. Andox Corporation*, 2005 BL 59570, at 2-4 (D.P.R. Feb. 28, 2007) (holding numerical threshold under COBRA was an element of ERISA claim; permitting plaintiff to submit evidence defendant had 20 or more employees). Cf. *Cirigliano v. Vil. of Afton*, No. 3:09-CV-0298 (LEK/DEP), 2010 BL 156018, 11-14 (N.D.N.Y. July 9, 2012) (denying defendant’s motion to dismiss an ERISA claim that did not state that defendant was not a small employer and therefore, subject to COBRA).

²⁶ ERISA §514(a); see *Metropolitan Life Insurance Company v. Massachusetts*, 471 U.S. 724, 739 (1985) (seminal ERISA preemption Supreme Court case holding that ERISA “was intended to displace all state laws that fall within its sphere, even including

¹³ See 85 Fed. Reg. 26,351 (May 4, 2020).

¹⁴ ARPA §9501(a)(1)(A), §9501(a)(2).

¹⁵ I.R.C. §6432(b).

¹⁶ ARPA §9501(b)(1)(A) (adding new I.R.C. §6432); §9501(b)(1)(C) (effective date). See I.R.C. §3111(b) (employer portion of hospital insurance (“Medicare”) excise tax); I.R.S. Notice 2021-24 (providing failure to deposit penalty relief with respect to premium assistance tax credit).

¹⁷ ARPA §9501(b)(4) (adding new I.R.C. §139I).

¹⁸ ARPA §9501(b)(4)(C).

¹⁹ ARPA §9501(a)(4), §9501(a)(5), §9501(a)(6); ERISA §§605(a), §606(a)(4); I.R.C. §4980B(f)(5)(A), §4980B(f)(6)(D); PHSa §2205(a), §2206(4).

²⁰ See I.R.C. §6432(e); Notice 2021-31, Q&A 79.

fraud claims that relate to an employee benefit plan are preempted by ERISA.²⁷ In addition, courts have held that waiver by employer of immunity from an ERISA claim under the small employer exception does not apply to impose ERISA liability on such exempt employer for violating COBRA.²⁸ Other federal courts have limited the preemption doctrine in holding that promissory estoppel may impose ERISA liability on small employer for violating COBRA requirements in some cases.²⁹

COBRA exempts generally group health plans, also referenced as excepted plans,³⁰ of employers that employ fewer than twenty full-time employees or are certain religious organizations or their affiliates (“exempt employers”).³¹ As stated generally above, exempt employers are not subject to COBRA rules applicable to employers under ERISA, the Code or PHSAs. However, to an extent, ARPA rules impact fully-insured group health plans maintained by exempt employers subject to State “mini-COBRA” laws discussed further below, which, fully or partially, are not preempted by ERISA.

PREMIUM ASSISTANCE FOR EXPECTED PLANS

ARPA §9501(b) provides that in the case of a fully-insured group health plan not subject to COBRA, the person to whom the premiums are payable for purposes of the PAC, and which is eligible for the PAC, is the insurer providing coverage under the group

state laws that are consistent with ERISA’s substantive requirements”).

²⁷ See *Hammons v. Osbourne & Assoc.*, 2008 U.S. Dist. LEXIS 128439, at *6-7 (N.D. Ga. Apr. 9, 2008) (holding that, “plaintiff’s fraud claim arises from the same underlying facts as her COBRA claim and relates to an ERISA plan. Therefore, plaintiff’s fraud claim is preempted by ERISA.”)

²⁸ See *Thomas v. Miller*, 2005 U.S. Dist. LEXIS 41258, at *2-4 (E.D. Mich. Sep. 7, 2005).

²⁹ See *Black v. TIC Investment Corp.*, 900 F.2d 112, 115 (7th Cir. 1990). See also *Thomas v. Miller*, 2005 U.S. Dist. LEXIS 41258, at *3, n.3 (E.D. Mich. Sep. 7, 2005) (district court noting in *dictum* that plaintiff argued waiver but failed to argue equitable estoppel for precluding defendant from raising the small employer exception). But see *Alisz v. Benefit Trust Life Ins. Co.*, 874 F. Supp. 224, 228 (N.D. Ind. 1994) (holding, *inter alia*, that plaintiff’s claim for promissory estoppel is preempted by ERISA).

³⁰ See T.D. 8812, 64 Fed. Reg. 5160, 5162 (Feb. 3, 1999).

³¹ ERISA §3(2), §601(b); I.R.C. §4980B(d); PHSAs §2201(b)(1); see generally I.R.C. §52(a) (controlled group definition), I.R.C. §4980B(g), I.R.C. §5000(b)(1) (defining a group health plan for COBRA purposes). See also I.R.C. §414(e); ERISA §3(33) (definition of plans of certain religious organizations or their affiliates). But see ERISA §609(a) (requiring certain continuation coverage for children of employees pursuant to a QMCSO).

health plan.³² DOL published model notices for employers providing premium assistance, including for employers subject to mini-COBRA.³³ In turn, the Notice addresses applicability of ARPA premium assistance tax provisions to small employers and religious organizations or their affiliates.³⁴

Although small employers and certain religious organizations or their affiliates are exempt from federal COBRA, a majority of the states have enacted “mini-COBRA” statutes that require such employers to provide continuation coverage similar to COBRA under analogous circumstances, including involuntary termination, reduction in hours or similar qualifying events.³⁵ The Notice clarifies certain ARPA premium assistance rules with respect to exempt employers subject to mini-COBRA.³⁶ In particular, the Notice sheds light on whether exempt employers subject to mini-COBRA are not required to pay premium assistance amounts.³⁷

PAC previously was made available in connection with the “Great Recession” of 2008 - 2009 under §3001 of the American Recovery and Reinvestment Act of 2009, (ARRA)³⁸, and provided subsidized COBRA coverage, generally to involuntarily terminated employees and their families.³⁹ ARRA offered a 65% subsidy for COBRA premiums paid by AEIs, which phased out above an annual salary of \$125,000 and was extended subsequently by Congress to apply for 15 months.⁴⁰ By contrast, ARPA offers generally a 100 percent subsidy for employees who were let go or whose hours were reduced for maximum duration of six months, without an income cap.⁴¹

MINI-COBRA PREMIUM PAYMENT ARRANGEMENTS OF EXEMPT EMPLOYERS

Employers subject to mini-COBRA laws may have various arrangements with insurance carriers for col-

³² I.R.C. §6432(b)(3).

³³ See 86 Fed. Reg. 19,027 (Apr. 12, 2021).

³⁴ See Notice 2021-31.

³⁵ See, e.g., N.Y. C.L.S. Ins. §3221(m) (effective until Oct. 1, 2021); Notice 2021-31, Q&A 15, 17 (clarifying that ARPA premium assistance applies to continuation coverage under mini-COBRA), Q&A 19 (clarifying an individual must be deemed a qualified beneficiary under federal COBRA to be eligible for ARPA premium assistance under mini-COBRA). See also ARPA §9501(a)(9)(E); ERISA §607(3) (qualified beneficiary definition).

³⁶ See Notice 2021-31.

³⁷ Notice 2021-31.

³⁸ Pub. L. No. 111-5 (2009)

³⁹ Pub. L. No. 111-5 §3001 (2009).

⁴⁰ See ARRA §3001.

⁴¹ See ARPA §9501(a).

lection and payment of employee premiums. An employer voluntarily may pay all or a portion of the COBRA premium of an employee under various arrangements with insurer, subject to group health plan terms and employment or severance agreements with employee. For example, employer may make payments of premium to the insurer and subsequently be reimbursed by employee. Also, certain mini-COBRA statutes may require, to a varying extent, an employer to collect and remit payments of premiums in accordance with plan documents.⁴² Alternatively, an insurer may accept direct payments of premium from employee, and employer may reimburse employee for the payments or pay the employee the amount of premium in advance as severance.

There also are instances, in which the employer does not pay or reimburse any portion of employee COBRA continuation coverage. In those cases, an employer still may have an obligation to collect and remit the premium payments to the carrier, in compliance with mini-COBRA laws of certain states.⁴³ On the other hand, absent a statutory requirement, an employee may make direct payments of COBRA premiums to insurer, without employer as intermediary.

REFERENCES TO EXEMPT EMPLOYERS IN ARPA SECTION 9501

If an exempt employer only must collect any premium payments from employee and remit the amounts to insurer, neither ARPA §9501(a)(1)(A) nor the Notice requires the employer to make premium assistance payments.⁴⁴ ARPA §9501(a)(1)(A) states in passive voice that an assistance eligible individual (AEI) “shall be treated for purposes of any COBRA continuation provision as having paid the full amount of such premium.”⁴⁵

Furthermore, the extended election period for premium assistance under ARPA §9501(a)(4)(A) applies

only to a group health plan subject to COBRA.⁴⁶ The Notice distinguishes this COBRA requirement from a rule that an exempt employer may have to offer an extended election right under mini-COBRA.⁴⁷ In the latter case, premium assistance would be available during the state-law-mandated extended election period that coincides with the extended election period under ARPA §9501(a)(4)(A).⁴⁸

Moreover, ARPA §9501(a)(5)(A)(ii) clarifies that notice provisions under ERISA §606(a)(4) or I.R.C. §4980B(f)(6)(D) do not apply to group health plans exempt from COBRA.⁴⁹ Instead, ARPA §9501(a)(5)(A)(ii) provides that special rules requiring issuance to AEIs of notice of premium assistance would be provided in consultation with plan administrators.⁵⁰ DOL had issued a model alternative notice of ARPA continuation coverage election in connection with the April 7, 2021 guidance, to be used for insured group health plan coverage subject to mini-COBRA during the premium assistance period.⁵¹

By contrast to the general notice or the extended election period notice under ARPA §9501(a)(5), there is no stated or implied penalty for failure to furnish an alternative notice for mini-COBRA coverage subject to ARPA premium assistance availability.⁵² Also, the Notice states by way of background that ARPA §9501 provides for a temporary premium reduction for participants making a COBRA election subject to Code and ERISA rules.⁵³ Then, the Notice states separately that premium assistance is “also available” to participants enrolled in group health plans subject to mini-COBRA, without explicit reference to mandatory premium assistance under ARPA §9501.⁵⁴

Additionally, DOL April 7, 2021 guidance states that ARPA “does not change any requirement of a State continuation coverage program. [ARPA] only allows [AEIs] who elect continuation coverage under State insurance law to receive premium assistance”

⁴² Compare, e.g., S.C. Code Ann. §38-71-770 (South Carolina mini-COBRA statute, silent on premium remittance mode); S.C. Dept. of Ins., *State Continuation of Health Insurance Coverage*, <https://www.doi.sc.gov/DocumentCenter/View/11352/State-Continuation-of-Health-Insurance-Coverage> (stating that responsibilities of employer include providing notice of eligibility and accepting and remitting mini-COBRA premium payments to insurer in accordance with plan guidelines) with A.L.M. G.L. ch. 176J, §9(c) (provision of Massachusetts mini-COBRA statute permitting insurer to require the small employer or other intermediary to collect mini-COBRA premium payments from qualified beneficiary and remit the payments to insurer). See also Mass. Div. of Ins. Bull. 97-05 (May 22, 1997), <https://www.mass.gov/doc/1997-05-the-small-group-continuation-of-coverage-law/download> (providing rules for small employer as intermediary).

⁴³ See Note 42, above.

⁴⁴ See ARPA §9501(a)(1)(A); Notice 2021-31.

⁴⁵ ARPA §9501(a)(1)(A).

⁴⁶ See ARPA §9501(a)(4)(A).

⁴⁷ See Notice 2021-31, Q&A 52.

⁴⁸ See ARPA §9501(a)(4)(A); Notice 2021-31, Q&A 52.

⁴⁹ See ARPA §9501(a)(5)(A)(ii); ERISA §606(a)(4); I.R.C. §4980B(f)(6)(D).

⁵⁰ See ARPA §9501(a)(5)(A)(ii).

⁵¹ See 86 Fed. Reg. 19,027 (Apr. 12, 2021); Dept. of Labor, *Model Alternative Notice of ARP Continuation Coverage Election Notice* (expiring Oct. 31, 2021), <https://www.dol.gov/sites/dolgov/files/ebsa/laws-and-regulations/laws/cobra/premium-subsidy/model-alternative-election-notice.pdf>.

⁵² See ARPA §9501(a)(5)(A)(ii). Cf. ARPA §9501(a)(5)(A)(i), §9501(a)(6)(A).

⁵³ ARPA §9501(a); Notice 2021-31.

⁵⁴ See ARPA §9501(a); Notice 2021-31.

during the premium assistance period.⁵⁵ Thus, there is no mechanism under Federal law, including COBRA to enforce to premium assistance requirement with respect to exempt employers. ARPA ensures only availability of nonpayment of premium during the premium assistance period for AEIs who elect continuation coverage under mini-COBRA. Therefore, any failure to treat an AEI as having paid the premium in full during the premium assistance period would be limited only to the extent required under applicable State insurance laws or other applicable State laws.⁵⁶

APPLICABILITY OF ARPA ELECTION PERIOD, NOTICE, PAYMENT RULES

Accordingly, an exempt employer is not subject to the ARPA requirement to provide an extended election period under COBRA. Similarly, for an employer that is a mere intermediary and is not subject to COBRA rules under ERISA or the I.R.C., there is no affirmative requirement under ARPA to make up any deficit in premium assistance amount. On the other hand, if the group health plan provides comparable continuation coverage under mini-COBRA, in addition to applicable state law requirements, the insurer must treat the AEI as having paid the full amount of the premium to be eligible for the PAC.⁵⁷

An exempt employer may be obligated to make COBRA premium payments to insurer pursuant to applicable arrangements and plan terms, or under mini-COBRA. In this scenario, ARPA §9501(a)(1)(A) does not exempt the employer from liability for failure to pay all or a portion of the COBRA premium to the insurer required by agreement or mini-COBRA. This rule applies despite the fact that the insurer, and not

the small employer subject to mini-COBRA, would be entitled to PAC.⁵⁸

The ARRA Notice clarified that, even if a small employer subject to mini-COBRA paid 65% of the COBRA premium to the insurer, along with the subsidized amount collected from employee, the small employer would not be eligible for PAC for any portion of the paid premium amount.⁵⁹ The Notice provides similarly that, if an exempt employer must make COBRA premium payments to insurer, implicitly either by agreement or as required under mini-COBRA, the employer does not receive PAC for any of the continuation coverage payments.⁶⁰

NON-ARPA CONCERNS FOR EXEMPT EMPLOYERS WITH RESPECT TO PREMIUM PAYMENTS

On the other hand, ARPA §9501(a)(1)(A) does not impose statutory penalties on the employer for failure to pay the employer portion of the premium payment to the insurer. The reason is that, an exempt employer generally is not subject to COBRA. The insurer providing coverage under an excepted plan is subject to ARPA provisions only for claiming the PAC with respect to such plan.⁶¹ The insurer also may have recourse at common law against employer for breach of contract due to failure of employer to pay its portion of the mini-COBRA premium to the insurer.

Thus, the ARRA Notice provided that, with respect to a plan subject to COBRA, if insurer and employer agreed that the insurer would collect the premiums directly from individuals, the insurer would have to treat the 35% payment as having been made in full even if employer failed to remit any payment.⁶² The insurer would be liable for excise tax under §4980B for failure to provide benefits.⁶³ An employer subject to COBRA would also would incur excise tax liability, albeit due to failure to pay over the premium assistance amount to the insurer.⁶⁴ The Notice sets forth a similar requirement with respect to payment of ARPA premium assistance.⁶⁵ However, this requirement does not apply to an employer or insurer of an excepted plan not subject to COBRA.

⁵⁵ See Note 1, above.

⁵⁶ See, e.g., PA Ins. Dept, "Mini COBRA," Q&A 19, <https://www.insurance.pa.gov/Coverage/Documents/Health/PA%20Mini%20COBRA%20Update%20Final%2003272015.pdf> ("There are no specific penalties laid out in the Mini-COBRA law. However, to the extent any person or entity is performing activities in the business of insurance, it is subject to the penalties set forth in the Pennsylvania insurance laws. Employers may be subject to additional penalties by the Department of Labor & Industry or by the federal Department of Labor"). See also N.Y. Dept of Fin. Serv., "American Rescue Plan: Frequently Asked Questions" (Apr. 15, 2021), <https://info.nystateofhealth.ny.gov/sites/default/files/American%20Rescue%20Plan%20Frequently%20Asked%20Questions.pdf>

(providing only that ARPA "includes temporary premium assistance to individuals who have lost their job-based coverage and are enrolled or eligible to be enrolled in COBRA", not referencing any incorporation of premium assistance benefits in New York mini-COBRA statute); N.Y. C.L.S. Ins. §3221(m)(6) (effective Oct. 1, 2021) (New York mini-COBRA generally not applicable where employee or member is entitled to COBRA continuation coverage under ERISA or PHSA).

⁵⁷ See I.R.C. §6432(b)(3); Notice 2021-31 Q&A 61, 62, 74.

⁵⁸ See I.R.C. §6432(a).

⁵⁹ See Notice 2009-27, Q&A 56.

⁶⁰ See Notice 2021-31, Q&A 62.

⁶¹ See I.R.C. §6432(a); Notice 2021-31, Q&A 62.

⁶² See Notice 2009-27, Q&A 56.

⁶³ See I.R.C. §4980B(a); Notice 2009-27, Q&A 56.

⁶⁴ See I.R.C. §4980B(a); Notice 2009-27, Q&A 56.

⁶⁵ See Notice 2021-31, Q&A 60.

CONCLUSION AND ACTION ITEMS FOR EXEMPT EMPLOYERS

If downsizing, small employers and religious organizations or their affiliates exempt from COBRA but subject to state mini-COBRA laws should take note of the requirements under ARPA, ERISA and the Code. Exempt employers should be aware that, if an exempt employer sponsors a fully insured group health plan for its employees, ARPA does not require the employer to make premium assistance payments and does not provide a corresponding PAC to exempt employer. Conversely, ARPA does not exempt employers from compliance with applicable state mini-COBRA statutes or terms of group health plan documents, which may require the employer to collect, remit or otherwise pay the continuation coverage.

Thus, during the premium assistance period, exempt employers would benefit from provisions in provider agreements requiring employee to pay COBRA premiums directly to insurer. Exempt employers establishing new group health plans for their employees and entering into initial arrangements with insurers

have more flexibility in planning for ARPA compliance. Such employers may consider as part of the overall benefit package plan terms and provisions in provider agreements that exempt them from making or remitting COBRA premium payments to insurer, to the extent applicable mini-COBRA, ERISA or other federal or state laws permit.

In addition, small employers and religious organizations or affiliates must continue to comply with mini-COBRA, group health plan terms, or provider agreements in making premium payments and meeting applicable state-mandated election periods and notice rules. Accordingly, exempt employers may find advisable to review new or existing group health plan documents, including arrangements with insurance carriers providing group health plan coverage. Concurrently, exempt employers should review any employment or severance agreements that may trigger ARPA premium assistance to ensure compliance and maximize the value of health benefit packages offered to employees in light of current COBRA continuation coverage legislation.