CLIENT ALERTS & INSIGHTS

Key Provisions for Employers in the American Rescue Plan Act of 2021

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President Joseph R. Biden signed the American Rescue Plan Act of 2021 ("ARP") on March 11, 2021, which provides $1.9 trillion in relief funds for individuals and businesses in response to the coronavirus pandemic. This follows nearly $4 trillion in COVID-19 relief funds in 2020. Here are some key takeaways from ARP that will be impactful to employers across the United States.

Unemployment Provisions

ARP extends unemployment benefits until September 6, 2021 and provides an additional $300 Federal Pandemic Unemployment Compensation payment per week for each week of unemployment between March 14, 2021 and September 6, 2021. The mixed-earner supplement provides an extra $100 per week for those whose income is a mix of self-employed and wages paid by their employer.

The Act also extends the Pandemic Unemployment Assistance program to September 6, 2021, capped at 79 weeks. This program covers the self-employed, gig workers, part-time workers, and others who are not eligible to receive regular unemployment benefits.

Additionally, ARP extends the Pandemic Emergency Unemployment Compensation for those who exhaust state benefits from 24 weeks to 53 weeks. With the latest extension under ARP, eligible recipients of unemployment benefits in many states can now receive up to 79 weeks of benefits (including the 13 weeks of benefits from the March 2020 CARES Act and the 24 weeks added by the December 2020 Consolidated Appropriations Act).

Although unemployment benefits are taxable, ARP waives federal taxes on the first $10,200 of unemployment benefits that an individual collected in 2020. This tax suspension only applies to taxpayers whose adjusted gross household income in 2020 was less than $150,000.

Generally, to qualify for unemployment, an individual cannot refuse what is considered "suitable work." However, with respect to the COVID-19 pandemic, the Biden Administration's position is that "workers have a federally guaranteed right to refuse employment that will jeopardize their health and if they do so, they will still qualify for unemployment insurance." Given this stance and the President's corresponding executive order, states may follow a broader standard in their criteria for unemployment benefits so more individuals may qualify for these extended ARP unemployment benefits in some states.

Family and Sick Leave Tax Credit Extension

The Families First Coronavirus Response Act ("FFCRA") required employers with less than 500 employees to provide COVID-19-related paid family leave and paid sick leave, and established corresponding tax credits. The employer mandate expired on December 31, 2020, meaning that since January 2021, covered employers have not been required to provide FFCRA leave to employees. Employers who chose to provide FFCRA leave to employees could obtain tax credits to offset certain costs associated with providing the leave. ARP did not reinstitute the mandate to provide leave or require employers to provide any additional leave, but extended the tax credits for qualifying family leave and sick leave wages that an employer voluntarily pays between April 1, 2021 and September 30, 2021.

The tax credit is only available to employers who uniformly provide leave to all employees, without discriminating against certain categories of workers.

ARP also modifies the FFCRA in a few other ways. The modifications are effective on April 1, 2021. As noted, these modifications are only applicable if an employer chooses to provide FFCRA leave, and claim the tax credits to offset the costs of providing such leave.

- Previously, tax credits taken by employers to cover the cost of providing emergency FMLA leave were only available if the employee was unable to work or telework to care for his or her child whose school or place of care has been closed or was unavailable due to the public health emergency. ARP allows employers to claim tax credit for emergency FMLA leave for any of the six reasons provided in the FFCRA and adds two additional reasons. Under ARP, employers will also receive tax credits for providing leave to employees who are: (i) obtaining an immunization related to COVID-19 or recovering from any injury, disability, illness or condition related to such immunization; or (ii) seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID-19, when such employee has been exposed to COVID-19 or the employer has requested such test or diagnosis.
- ARP creates a reset date for counting paid sick leave (March 31, 2021). For employees who previously took 10 days of emergency paid sick leave under the FFCRA, the ARP permits an employer to provide such employees with an additional 10 days of leave.
- The Act increases the total number of days of eligible paid family leave from 10 weeks (50 days) to 12 weeks (60 days) (which increases the total amount of wages eligible for tax credit from $10,000 to $12,000, plus health plan expenses properly allocable to qualifying leave).
- The Act extends covered employer eligibility to 501(c)(1) governmental organizations.

Employee Retention Credit

ARP increases the availability and value of the employee retention credit to those employers who are "severely financially distressed" (i.e., those who experienced a severe decline in gross receipts) by allowing such employers to take all wages into account, not only those that are paid for employees not providing services.

Further, the Act expands credit availability to employers who qualify as a "recovery startup business" (i.e., those employers who began a trade or business after February 15, 2020, and whose gross receipts average less than $1 million).

Finally, ARP expands the availability of the credit from the current June 30, 2021 deadline to those wages paid in 2021.

COBRA Subsidies

ARP will subsidize 100 percent of the cost of premiums for COBRA continuation coverage for an employee or dependent who is a COBRA qualified beneficiary (or will become one) due to an involuntary termination of employment or a reduction of hours. Employees who voluntarily terminate employment are not eligible for the COBRA premium subsidy. The subsidy will begin on April 1, 2021 and extend through September 30, 2021. The ARP simply suspends the eligible individual's obligation to make COBRA premium payments for up to 6 months.

This COBRA premium subsidy will be available to any eligible individual who is enrolled in COBRA (or will enroll in COBRA) on or after April 1, 2021, and before the subsidy ends on September 30, 2021. In addition, any former employee who fits the eligibility criteria and who did not elect COBRA coverage or dropped COBRA coverage prior to April 1 but would otherwise be within his or her 18-month COBRA coverage period between April 1 and September 30, 2021, is also eligible for the COBRA premium subsidy. The subsidy would terminate if the individual becomes eligible to enroll in another group health plan (other than excepted benefits coverage), a flexible spending arrangement, a qualified small employer health reimbursement arrangement or Medicare. Individuals who fail to notify their health plan that they are no longer eligible for the COBRA subsidy may face penalties.

The availability of the COBRA subsidy does not extend the availability of COBRA continuation coverage itself so if an individual's COBRA coverage is set to expire, ARP does not require it to be extended through the end of September.

The employer, multiemployer plan or insurer (for fully insured coverage), must provide subsidized COBRA coverage and pay or incur the COBRA premium cost. But the Act provides that the entity may recover the cost of the coverage by claiming a credit against its quarterly Medicare payroll tax liability. The credit can be advanced under rules that will be set out by the Treasury Department. The credit would be refundable if the subsidy paid exceeds the taxes due.

The legislation also includes specific requirements for employers to update COBRA notices or send a separate notice describing the new subsidies (and the key terms) to all eligible individuals. Failure to provide such notice will be treated as a failure of the COBRA notice requirements. Federal agencies are directed to provide model notices for these purposes within 30 to 45 days of enactment.

Key Takeaways

This stimulus package sends immediate aid to individuals and businesses and includes a sweeping range of policies aimed at pandemic relief. In terms of specific actions for employers to take: (1) review and update COBRA notices, referring to the model notices that will be released; (2) review the names of COBRA qualified beneficiaries who had a qualifying event in 2020 in order to be able to send the proper notice to anyone who is eligible for COBRA during the six-month subsidy period; (3) determine whether you will start or continue to provide paid sick leave and paid family leave to employees until September 30, 2021, under the ARP's provisions; and (4) if choosing to offer either type of leave, update any paid sick leave and family leave forms to take into consideration the extension of the FFCRA leave and the additional qualifying reasons and review the anticipated additional guidance from the Department of Labor regarding the ARP's modifications to the FFCRA.

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Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.

