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The American Rescue Plan Act— Key Employer Takeaways

The Rescue Plan Extends COVID-19-Related Unemployment Benefits and Payroll Tax Credits for Voluntary Provided Leave Under the FFCRA, and Creates New COBRA Subsidy and Notice Requirements for Employers

SUMMARY

The American Rescue Plan Act of 2021 (the “Rescue Plan”), the latest COVID-19 stimulus plan, was signed into law on March 11, 2021 and contains several key provisions relevant to employers. Among other things, the Rescue Plan extends and modifies certain employment-related provisions of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), including several key unemployment compensation programs and the refundable Employee Retention Tax Credit (“ERTC”). The Rescue Plan also extends the refundable payroll tax credits established by the Families First Coronavirus Response Act (“FFCRA”) for paid sick and paid family leave wages paid through September 30, 2021 and provides that those credits are available for additional qualifying reasons. The Rescue Plan also subsidizes 100 percent of the cost of premiums under the Consolidated Omnibus Budget Reconciliation Act (“COBRA”) and continuation coverage under state mini-COBRA laws for certain assistance eligible individuals due to an involuntary termination of employment or a reduction of hours, and provides that employers, multiemployer plans or insurers pay or incur the COBRA premium cost. The Rescue Plan includes specific requirements for employer-provided notice related to the subsidy. In addition, the Rescue Plan allocates funds for the Labor Department to carry out worker protection activities related to the COVID-19 pandemic.

UNEMPLOYMENT INSURANCE

The CARES Act created an unprecedented pandemic-related unemployment compensation program that, among other things, (i) expanded eligibility for unemployment compensation to certain individuals who did not traditionally qualify; (ii) provided an additional fixed amount of unemployment compensation in addition to regular unemployment compensation; and (iii) extended the duration of certain unemployment benefits. Subsequently, the Consolidated Appropriations Act (“CAA”) modified certain unemployment provisions created by the CARES Act and extended the relevant coverage period for those provisions from December 31, 2020 to March 14, 2021. The Rescue Plan further extends and modifies several of these unemployment provisions, as discussed below.¹

Pandemic Unemployment Assistance. The Pandemic Unemployment Assistance program provides extended unemployment compensation to certain individuals who are not eligible for regular unemployment compensation, including, for example, self-employed workers or “gig” workers such as rideshare drivers. The Rescue Plan modifies the Pandemic Unemployment Assistance program as follows:

- **Duration.** The Pandemic Unemployment Assistance program coverage period for unemployment, partial unemployment, or inability to work caused by COVID-19 is extended from March 14, 2021 to September 6, 2021. The total number of weeks for which a covered individual may receive Pandemic Unemployment Assistance is increased from a maximum of 50 weeks (including any weeks for which the covered individual received regular unemployment benefits under federal or state law) to 79 weeks.²

Federal Pandemic Unemployment Compensation. The Federal Pandemic Unemployment Compensation program initially provided for an additional \$600 weekly payment to certain eligible individuals who were receiving other unemployment benefits through July 31, 2020. The CAA subsequently provided for an additional \$300 weekly payment to those eligible individuals through March 14, 2021. The Rescue Plan modifies the Federal Pandemic Unemployment Compensation program as follows:

- **Duration.** Federal Pandemic Unemployment Compensation payments will be available for weeks of unemployment beginning after March 14, 2021 and ending on or before September 6, 2021, subject to a state’s agreement to participate in the program.³
- **Amount.** Under the Rescue Plan, the Federal Pandemic Unemployment Compensation amount remains \$300 per week.
- **Mixed Earner Unemployment Compensation.** Under the Rescue Plan, individuals who received at least \$5,000 of self-employment income in the most recent taxable year prior to the individual’s application for regular unemployment compensation will continue to receive an additional \$100 per week.⁴

Pandemic Emergency Unemployment Compensation. The Pandemic Emergency Unemployment Compensation program allows states to enter into agreements with the federal government to provide extended unemployment benefits to individuals who have exhausted the unemployment benefits available

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to them. The Rescue Plan modifies the Pandemic Emergency Unemployment Compensation program as follows:

- **Duration.** Pandemic Emergency Unemployment Compensation agreements may now be entered into for weeks of unemployment ending on or before September 6, 2021, an extension from the previous March 14, 2021 end date. The total number of weeks for which a covered individual may receive Pandemic Emergency Unemployment Compensation is increased from a maximum of 24 weeks (including any weeks for which the covered individual received regular unemployment benefits under federal or state law) to 53 weeks.⁵

Short-Time Compensation Payments. The CARES Act provided funding for short-time compensation programs, which allow employers to retain trained employees by allowing employers to reduce the hours of all employees as an alternative to layoffs. These CARES Act provisions provided that any state with an existing short-time compensation program was eligible for reimbursement of the full amount of any short-time compensation paid and that any state that did not have a short-time compensation program would be reimbursed for up to 50 percent of the costs of starting such a program. The Rescue Plan extends this funding through September 6, 2021.⁶

Suspension of Federal Tax on Portion of Unemployment Benefits. For taxpayers whose adjusted gross household income in 2020 was less than \$150,000, the Rescue Plan waives federal taxes on the first \$10,200 of unemployment benefits received.⁷

PAID LEAVE CREDITS

The FFCRA, among other things, expanded mandatory family and medical leave and created the first-ever federal sick time mandate for employers with fewer than 500 employees. Although the mandate to provide that leave expired on December 31, 2020, under the subsequently enacted CAA, covered employers who voluntarily provided FFCRA leave through March 31, 2021 were able to take certain payroll tax credits through that date. The Rescue Plan extends the refundable payroll tax credits established by the FFCRA (and extended by the CAA) for paid sick and paid family leave wages with respect to the period beginning on April 1, 2021 and ending on September 30, 2021.⁸ The Rescue Plan also modifies the refundable payroll tax credits as follows:

- **Expanded Credits.** The Rescue Plan provides that the tax credits are available for additional qualifying reasons, including that the employee is: (i) seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID-19 and such employee has been exposed to COVID-19 or the employee's employer has requested such test or diagnosis; (ii) obtaining vaccination related to COVID-19; or (iii) recovering from any injury, disability, illness, or condition related to such vaccination.⁹
- **Covered Wage Increase.** The Rescue Plan increases the wages covered by the paid family leave credit from \$10,000 per worker to \$12,000 per worker.¹⁰

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- **Allotment of Paid Sick Leave.** The extended payroll tax credit for paid sick leave wages under the Rescue Plan is available for up to 10 days of qualifying wages per employee per calendar year (without taking into account the first quarter of 2021).¹¹
- **Amount of Tax Credit.** The tax credit an employer can receive for paid sick leave is capped at \$511 a day, if the leave is needed for one of the new reasons related to testing or vaccination or because of the employee's own symptoms, quarantine, or isolation. If the paid sick leave is for any other reason, the amount of tax credit an employer can receive is capped at \$200 a day. For paid family leave, the available tax credit per employee is still limited to a maximum of \$200 per day for all reasons for leave, including the new leave reasons related to testing or vaccination.¹²
- **Disqualification from Receiving Tax Credits.**
 - **Employer Noncompliance with FFCRA.** An employer is disqualified from obtaining a payroll tax credit if it fails to abide by the provisions of the FFCRA, including its anti-retaliation provision.
 - **Non-discrimination Requirement.** The Rescue Plan provides that no payroll tax credit is available for employers that, in determining availability of paid leave, discriminate in favor of highly compensated employees, full-time employees or employees on the basis of employment tenure with such employer.¹³

OTHER EMPLOYER TAX PROVISIONS

- **Extension and Expansion of the Employee Retention Tax Credit.** The Rescue Plan extends to December 31, 2021 the refundable ERTC established by the CARES Act and expanded and extended by the CAA. In addition to the qualifications established by the CARES Act and the CAA, the Rescue Plan establishes eligibility for the extended ERTC capped at \$50,000 per calendar quarter (versus \$7,000 per employee per calendar quarter for other employers) for certain startup businesses which began business after February 15, 2020, have less than \$1 million average annual gross receipts for the three-year period ending with the taxable year preceding the calendar quarter for which the credit is determined, and that otherwise would not qualify for the ERTC. In addition, for employers whose gross receipts for the relevant quarter in 2021 are less than 10% of gross receipts for the same calendar quarter in 2019 (or 2020 if such employer was not in existence during the relevant quarter in 2019), the Rescue Plan generally removes limitations on the wages paid to employees that are eligible to be credited for such employers.¹⁴
- **Expanded Limitation on Executive Compensation.** Section 162(m) of the Internal Revenue Code provides that a publicly traded corporation may not deduct compensation in excess of \$1 million per year paid to certain executive officers, including the chief executive officer, chief financial officer and the three other most highly paid executive officers. As expanded by the Rescue Plan, beginning in 2027 this limitation on deducting compensation will be extended to cover the corporation's next five highest compensated employees for the taxable year.¹⁵

COBRA PREMIUM SUBSIDY

The Rescue Plan creates a six-month subsidy period from April 1, 2021 through September 30, 2021, during which certain "assistance eligible individuals" may qualify for a 100% subsidy of the cost of premiums for COBRA and continuation coverage under state mini-COBRA laws, due to an involuntary termination of employment or a reduction of hours. The subsidy is not available for individuals who voluntarily terminate employment.¹⁶

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- **Assistance Eligible Individuals.** Under the Rescue Plan, assistance eligible individuals include: (i) individuals who are enrolled in COBRA on or after April 1, 2021, and before the subsidy ends on September 30, 2021; and (ii) eligible former employees who do not have a COBRA election on April 1 or who elect and then drop COBRA coverage prior to April 1 but would otherwise be within their 18-month COBRA coverage period between April 1 and September 30, 2021.¹⁷
- **Termination of Subsidy.** The subsidy terminates if the individual becomes eligible to enroll in another group health plan (other than coverage consisting of only excepted benefits), a flexible spending arrangement, a qualified small employer health reimbursement arrangement or Medicare.¹⁸
- **Maximum Coverage Period Not Extended.** The availability of the COBRA subsidy does not extend the maximum COBRA coverage period.¹⁹
- **Premium Payments and Payroll Tax Credit.** The employer, multiemployer plan or insurer (for fully insured coverage) must provide subsidized COBRA coverage and pay or incur the COBRA premium cost. The Rescue Plan provides that the entity may recover the cost of the coverage by claiming a credit against its quarterly Medicare payroll tax liability. The credit may be advanced and is refundable, if the subsidy paid exceeds the taxes due.²⁰
- **Notice Requirements.** The Rescue Plan includes specific requirements for employers to update COBRA notices or send separate notices describing the new subsidies to all eligible individuals within 60 days of April 1, 2021, as well as to send notices about the upcoming expiration of the available subsidy. Failure to provide such notice “shall be treated as a failure to meet the notice requirements under the applicable COBRA continuation provision.” Federal agencies are directed to provide model notices for within 30 to 45 days of enactment, respectively. Additionally, an employer may, but is not required to, allow assistance eligible individuals to enroll in a different coverage option available from the employer, subject to certain conditions. If offered, this option must be described in the notice to assistance eligible individuals.²¹

WORKPLACE SAFETY

The Rescue Plan additionally allocates funds for the Labor Department to carry out worker protection activities related to the COVID-19 pandemic, including at least \$100 million to the Occupational Safety and Health Administration (“OSHA”).²² Our blog post covering OSHA’s enforcement guidance on reporting COVID-19 cases is available [here](#), and our blog post covering OSHA’s guidance on mitigating and preventing the spread of COVID-19 in the workplace is available [here](#).

ADDITIONAL INFORMATION

To stay informed of litigation and regulatory developments that affect the workplace, [click here](#) to subscribe to our *Legal Developments Affecting the Workplace* [blog](#).

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ENDNOTES

- 1 Our memorandum to clients covering unemployment programs established by the CARES Act is available [here](#), the FFCRA leave provisions is available [here](#), and the CAA’s subsequent modifications to certain employment-related provisions of the CARES Act and the FFCRA is available [here](#).
- 2 American Rescue Plan Act of 2021, Div. N. H.R. 1319 (2021) (hereinafter, the “Rescue Plan”), § 9011(b).
- 3 *Id.* § 9013(a)–(b).
- 4 *Id.* § 9013(a)–(b).
- 5 *Id.* § 9016(a)–(b).
- 6 *Id.* § 9017.
- 7 *Id.* § 9042(a).
- 8 *Id.* § 9641.
- 9 *Id.* § 9641.
- 10 *Id.* § 9641.
- 11 *Id.* § 9641.
- 12 *Id.* § 9641.
- 13 *Id.* § 9641.
- 14 *Id.* § 9651(a).
- 15 *Id.* § 9708.
- 16 *Id.* § 9501(a)(1)(A), (a)(3)(A).
- 17 *Id.* § 9501(a)(3)–(4).
- 18 *Id.* § 9501(a)(2)(A)(i).
- 19 *Id.* § 9501(a)(2)(A)(ii).
- 20 *Id.* § 9501(b)(1)(A).
- 21 *Id.* § 9501(a)(1)(B), (a)(5)–(6).
- 22 *Id.* § 2101(a)–(b).

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