

The American Rescue Plan Act of 2021: Understanding the Key Provisions Impacting Employers

Written by Christopher Feudo, Nicola Lemay, Ellie Kang, Mary Kate Sexton

March 31, 2021

On March 11, 2021, President Biden signed the [American Rescue Plan Act of 2021 \(the “ARPA”\)](#) into law. In addition to providing nearly \$2 trillion of monetary relief for individuals and business sectors impacted by the COVID-19 pandemic, the ARPA contains several important provisions that specifically impact employers. These key features of the ARPA include:

Extension of Voluntary Paid Sick and Family Leave Tax Credit Programs

The Families First Coronavirus Response Act (the “FFCRA”) generally required companies with 500 or fewer employees to provide up to 10 days of paid sick leave and up to 50 days of paid family leave to employees who were unable to work for certain reasons related to COVID-19. Employers were entitled to reimbursement for the associated wages with refundable tax credits. (Our alert on the FFCRA can be found [here](#).) While the FFCRA expired on December 31, 2020, the Consolidated Appropriations Act of 2021 (the “CAA”) extended, through March 31, 2021, the tax credits (with some modifications) to employers that voluntarily provided such paid family and sick leave. With further modifications, the ARPA now extends these tax credit programs through September 30, 2021. In particular:

- **Paid sick leave.** The ARPA allows employers a refundable tax credit for up to 10 days of qualifying paid sick leave per employee for the period starting on April 1, 2021 and ending on September 30, 2021 (regardless of whether the employee had previously taken qualified paid sick leave under the FFCRA and CAA programs, but with no carryover of unused days from prior to April 1, 2021). In addition, the ARPA expands the scope of the covered reasons for which employees can be provided qualifying paid sick leave to also include (a) obtaining a COVID-19 vaccine; (b) recovering from side effects of a COVID-19 vaccine; or (c) seeking or awaiting the results of a COVID-19 test or diagnosis either because the employee was exposed or because the employer required the test or diagnosis.
- **Paid family leave.** The ARPA removes the previous requirement that the first two weeks of family leave be unpaid. Accordingly, employers can now provide, on a voluntary basis, up to 12 (rather than 10) weeks of qualifying paid family leave per employee and the cap on the aggregate amount of refundable tax credits per employee for this leave has been correspondingly increased from \$10,000 to \$12,000. The additional two weeks of paid family leave and \$2,000 of tax credits are available for leave taken between April 1, 2021 and September 30, 2021. In addition, the ARPA expands the scope of the covered reasons for which employees can be provided qualifying paid family leave to also include all of the reasons for which paid sick leave can be provided.
- **Non-discrimination requirements.** The ARPA provides that employers will only be eligible for the applicable tax credits if they apply their voluntary paid sick and family leave policies in a neutral manner, and do not discriminate against certain classifications of employees. In particular, the ARPA prohibits an employer from discriminating in favor of full-time employees, highly compensated employees, or on the basis of employee seniority.
- **Creditable taxes.** The ARPA expands the credit to include (among other things) the cost of the employer’s collectively bargained contributions to a defined benefit pension plan. The ARPA also changes the creditable payroll taxes for the third and fourth quarters of 2021 to be the employer’s portion of Medicare tax in respect of the qualifying paid sick and family leave wages, rather than the employer’s share of Social Security taxes on such wages. In addition, the ARPA permits the Internal Revenue Service to waive penalties for failure to deposit applicable employment taxes if the failure to deposit such taxes is due to an anticipated credit.

COBRA Subsidy Extension

The Consolidated Omnibus Budget Reconciliation Act (“COBRA”) allows workers and their families who lose group health benefits for a qualifying reason to continue their health benefits generally for up to 18 months after a qualifying event. Employees typically are responsible for bearing the costs of the extended insurance premiums during the period covered by COBRA. The ARPA, however, provides a 100% subsidy, for up to six months, of the health insurance premiums under COBRA (including any permitted administrative fees) for eligible employees who lost insurance coverage due to an involuntary reduction in hours or involuntary termination. The subsidy period runs from April 1, 2021 until September 30, 2021 (but the period ends sooner if the employee becomes eligible for coverage under another group health plan or the employee’s COBRA period ends). The subsidy does not extend an employee’s maximum period of COBRA coverage, but does allow for qualified employees to retain COBRA coverage at no cost during the subsidy period.

Employers have an obligation to notify impacted employees of the ARPA’s COBRA provisions. Employees who lost their group health coverage due to a qualifying event on or after November 1, 2019, but who either did not elect COBRA or let it lapse, will have 60 days after receipt of the notice to elect COBRA coverage. Employers should identify any employees who lost group health coverage for a qualifying reason on or after November 1, 2019, and ensure that these employees are notified of their COBRA rights under the ARPA. To assist with employer notice obligations, the Department of Labor will issue a model notice by April 10, 2021, which employers then must distribute to impacted employees by May 31, 2021.

Employers who comply with the notice requirements can claim a reimbursement of the applicable COBRA premiums paid through a refundable payroll tax credit, similar to the procedures through which employers recover paid qualifying sick and family leave costs.

Short-Time Compensation Programs and Employee Retention Credits

The ARPA contains provisions intended to encourage employers to enact short-time compensation (“STC”) programs in lieu of laying off employees. The ARPA extends the federal reimbursement provisions in the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”), and permits states to receive reimbursement for 100% of unemployment benefits paid out pursuant to STC programs until September 6, 2021. Employers should coordinate with their respective states to facilitate approval of their STC plans for their employees.

The ARPA also encourages employers to keep employees on their payroll through employee retention credits (“ERCs”). ERCs were originally introduced as part of the CARES Act and subsequently enhanced by the CAA, and generally provide payroll tax credits to employers based on the amount of qualified wages paid to employees who were inactive due to the employer’s economic hardship (as defined in the CARES Act). The ERC program was set to expire on July 1, 2021, but the ARPA extends the duration of these tax credits (up to \$7,000 per employee per quarter, capped at \$14,000 per employee) through the end of 2021.

The ARPA also expands the scope of the ERC program. For qualifying employers with 500 or fewer employees, ERCs generally are available for all employees; for qualifying employers with more than 500 employees, ERCs generally are available only for furloughed employees. However, the ARPA allows “severely financially distressed” employers with more than 500 employees to claim ERCs for all employees for the third and fourth quarters of 2021. A “severely financially distressed” employer for this purpose has gross receipts for a 2021 calendar quarter of less than 10% of the gross receipts it had for the same calendar quarter in 2019. Separately, the ARPA provides that “recovery startup businesses” are also eligible for ERCs during the third and fourth quarters of 2021. For this purpose, a “recovery startup business” means a business that started after February 15, 2020 and had up to \$1 million in average annual gross receipts during the specified measurement period, but that did not otherwise meet the ERC eligibility tests. ERCs for recovery startup businesses are limited to a \$50,000 maximum per quarter.

Under the ARPA, the statute of limitations for assessments relating to ERCs is extended and will not expire until five years after the date that the original tax return claiming the credit is filed or treated as filed.

For additional information as to how these and other relevant provisions of the ARPA impact their businesses, employers should contact their employment, benefits or tax counsel.

RELATED INDUSTRIES

- [Technology](#)
- [Life Sciences](#)
- [Education](#)
- [Healthcare](#)

RELATED PRACTICES

- [Labor & Employment](#)
 - [COVID-19 Task Force](#)
 - [Business Counseling](#)
 - [Taxation](#)
-

This communication is intended for general information purposes and as a service to clients and friends of Foley Hoag LLP. This communication should not be construed as legal advice or a legal opinion on any specific facts or circumstances, and does not create an attorney-client relationship.

United States Treasury Regulations require us to disclose the following: Any tax advice included in this document was not intended or written to be used, and it cannot be used, for the purpose of avoiding penalties under the Internal Revenue Code.

Attorney advertising. Prior results do not guarantee a similar outcome. © 2017 Foley Hoag LLP. All rights reserved.