The American Rescue Plan Act (ARPA) of 2021

How Will the ARPA Impact Employers and Employees

March 16, 2021

The American Rescue Plan Act of 2021 is an enormous and intricate piece of legislation that has direct consequence for employers.

Signed into law by President Joe Biden on March 11, 2021, ARPA mandates several important changes for employers of all types. In this alert, we break down the most significant developments, from fully subsidized COBRA premiums to extended tax credits for employers voluntarily providing employees paid leave and more.

Full Subsidies for Employer-Paid COBRA Premiums

Workers and their dependents who lost group health coverage during the COVID-19 pandemic because they were unable to afford COBRA premiums now will have an opportunity to receive fully subsidized coverage for up to six months under ARPA. This is a dramatic departure from the regular COBRA scenario in which the worker and dependents have full financial responsibility to pay premiums and up to a 2% administrative fee. Under ARPA, the employer, insurer or multiemployer plan sponsor must pay eligible employees' COBRA premiums, but may offset the cost by claiming a new federal tax credit.

ARPA makes the subsidized premiums available for the six-month period from April 1 through September 30, 2021. The subsidized coverage will be available, as well, to certain workers and their dependents who lose group health benefits between April 1 and September 30, 2021.

ARPA does not extend or modify the period of COBRA eligibility, which is most often 18 months (but may be as long as 29 or 36 months). So, most typically, if an employee and dependents lose benefits as of August 1, 2021, for example, subsidized coverage will be available for only the months of August and September 2021, even though their COBRA eligibility period extends to January 31, 2022. As another example, if an employee and dependents lost benefits as of March 1, 2020, 18 months of eligibility would expire at the end of August 2021 and premiums would be subsidized for five months, namely, April through August 2021.

The Act provides the opportunity to retroactively elect COBRA benefits or start benefits effective as of April 1, 2021 as a result of the new election. The new 60-day election period also applies if the employee initially elected COBRA and then dropped the COBRA benefits or declined to elect coverage.

People who left a job voluntarily are not eligible for the subsidized coverage. The subsidy is available to workers and dependents who lost group health coverage on account of an involuntary loss of employment or involuntary reduction in work hours. People who qualify for subsidized coverage and later start a new job with group health insurance will no longer be eligible for the subsidy.

The subsidy applies to group health benefits but not to health care flexible spending accounts. It currently is unclear whether the subsidy applies to dental or vision coverage.

The subsidy applies to self-funded and fully insured plans, multi-employer plans and governmental employer plans. The subsidy is not taxable income to the insured. Recoupment of the subsidy awaits guidance from the Internal Revenue Service (which already is busy with the stimulus payments and the height of the 2021 tax season). Depending upon the type of plan, the premium payments will be advanced by employers, their insurers or a multiemployer plan, and will be recouped either by a payroll tax credit or a refund.

In order to comply with the changes made by ARPA, employers will need to revise all COBRA notices and must send notice of the subsidy and the right to elect coverage to certain COBRA-eligible workers, current COBRA recipients and their dependents. Model notices should be issued by the U.S. Department of Labor in the next few weeks. Notices will address the availability of the new subsidy, the option to enroll in different coverage and the extended period to enroll in COBRA continuation coverage. The initial notices must be issued no later than May 31, 2021.

Employers will need to provide notice to subsidy-eligible individuals no less than 15 and no more than 45 days before any subsidy ends, unless the subsidy ends because the individual has obtained other group health plan coverage.

Compliance with the COBRA changes made by ARPA will be one of the most demanding aspects of the American Rescue Plan for employers. We encourage employers to become familiar with what ARPA requires of their operations before the subsidies become effective April 1.

Incentives for Employers to Continue Paid FFCRA Leave

The American Rescue Plan does not require that employers provide any form of paid leave to employees, whether those impacted by COVID-19 or otherwise. However, the Act does wield federal tax credits in order to encourage employers to voluntarily offer paid leave of the type required under last year's Families First Coronavirus Response Act (FFCRA).

The FFCRA required, among other things, that covered employers of fewer than 500 employees provide emergency paid sick leave and paid expanded family and medical leave to employees affected by COVID-19. Although the FFCRA expired as of December 31, 2020, a federal tax credit was extended late last year through March 31, 2021 for employers who *voluntarily* continue providing such paid leaves. ARPA, in turn, extends the tax credit for six months from March 31 through September 30, 2021 in an effort to encourage employers to voluntarily provide the emergency paid sick leave (EPSL) or paid expanded FMLA leave that were required by the FFCRA.

ARPA also adds the following as qualifying reasons for employees to take the paid leaves: the employee is obtaining immunization (vaccination) related to COVID-19; the employee is recovering from a condition, illness or disability related to the vaccination; and, the employee is seeking or awaiting the results of a COVID-19 test or diagnosis (including where the employer has requested the test or diagnosis).

ARPA re-sets as of April 1, 2021 the limit on the tax credit available for EPSL, namely, a maximum of 80 hours in wages per full-time employee. In other words, employers may voluntarily provide employees up to 80 hours of EPSL in the period from April through September 2021, in addition to any EPSL provided earlier, and be eligible for the corresponding tax credit.

The Act increases the amount of wages for which an employer may claim the tax credit for paid expanded FMLA leave from $10,000 to $12,000 annually per employee.

ARPA disqualifies employers from the tax credit where they treat highly compensated employees, full-time employees or employees with more tenure differently under a voluntary paid sick leave plan.

In light of ARPA extending through September 2021 the available tax credits, employers may wish to consider whether to continue or implement FFCRA-like EPSL and paid expanded FMLA leave. Employers should consider factors such as the state and local paid leave mandates already in effect where their employees work, the anticipated timeline and extent to which the workforce will be vaccinated, workforce morale if such paid leave is voluntarily implemented (or *not* implemented) and other factors unique to their circumstances.

Increased Limit on Employer-Provided Dependent Care Assistance
Dependent care assistance programs (DCAPs) under Internal Revenue Code Section 129 typically are funded with pre-tax, salary reduction contributions made by participating employees through a Code Section 125 cafeteria plan. These funds are held in the employer's general account until needed to reimburse the employee for qualified childcare and other dependent care expenses incurred during the year.

The annual limit on contributions to DCAPs normally is $5,000 ($2,500 for married employees filing separately). The limit for 2021 is increased under ARPA to $10,500 ($5,250 for married employees filing separately).

The increased benefit limits are not mandatory and will necessitate plan amendment. ARPA allows the amendment to be adopted as late as the last day of the plan year, with retroactive effect, as long as the plan is operated during the year in a manner consistent with the terms of the amendment. Participants should be made aware of the increased limits as soon as possible so that they will be able to spread the increased salary reductions over as many pay periods as possible.

Extension of Employee Retention Tax Credit

The federal employee retention tax credit (ERTC) continues to evolve to provide eligible employers with significant tax benefits by claiming a refundable tax credit for paying qualified wages and certain health plan expenses. Some employers may be able to access as much as $33,000 per employee in incentives.

In March 2020, the ERTC was created by the Coronavirus Aid, Relief and Economic Security Act (CARES Act). In December 2020, the ERTC was extended into 2021 by the Taxpayer Certainty and Disaster Tax Relief Act. ARPA, in turn, extends the ERTC through the end of 2021. There are different rules for treatment of wages employers (1) paid from March 12, 2020 through December 31, 2020; (2) pay in the first half of 2021; and (3) pay in the second half of 2021.

Eligibility for the tax benefits is linked to an employer’s size, the impact of the pandemic on an employee’s ability to provide services and the suspension of operations because of government mandates or reductions in quarterly gross receipts. Employers can both receive Paycheck Protection Plan loans and claim ERTC benefits, but there are limits on “double dipping.” ARPA also makes the ERTC available to “recovery start-up businesses” that began carrying on a trade or business after February 15, 2020 and that have annual gross receipts of $1 million or less.

Expanded Subsidies to Cut Affordable Care Act Premiums

In at least two respects, ARPA expands the number of people eligible for federal tax credits intended to help individuals and families afford healthcare coverage through the Affordable Care Act (ACA) exchanges. First, while prior to ARPA households had to contribute up to 9.83% of their annual income to pay for health insurance premiums to be eligible for the tax credits, changes made by ARPA mean that the maximum that individuals and families must pay in premiums will be capped at 8.5% of their annual income.

Secondly, while prior to ARPA individuals and families making more than 400% of the federal poverty line were not eligible for the federal tax credits, ARPA permits such insureds to be eligible for the tax credits and caps how much they must spend on premiums at 8.5% of their annual income.

The important date for taking advantage of the expanded tax credits is April 1, 2021. Consumers without exchange coverage and current enrollees who submit an application and select a plan on or after April 1, 2021 will receive the increased premium tax credits for 2021 exchange coverage. The federal Centers for Medicare & Medicaid Services recommend that uninsured consumers who need coverage starting April 1, 2021, however, should apply and select a plan by the end of March in order to have coverage in place by April 1. Consumers who apply before April 1 may then, after April 1, reselect their plan in order to obtain the increased tax credits effective May 1, 2021 and thereafter.

Absent further federal action, the changes ARPA makes in the Affordable Care Act will expire in two years.

Extended Federal Unemployment Insurance Assistance
ARPA extends until September 6, 2021 three federal unemployment insurance programs that otherwise would have expired in March or April this year. The Act, first, extends federal Pandemic Unemployment Assistance (PUA), which provides benefits for people who do not qualify for regular state unemployment benefits, including, for example, independent contractors, business owners, self-employed workers and people who have used all regular and any extended unemployment insurance benefits. The Act also extends the federal program, known as Pandemic Emergency Unemployment Compensation (PEUC), providing benefits for those who have exhausted their state unemployment insurance benefits. Third, the Act funds $300 per week in benefits for each person receiving unemployment benefits, in addition to what people are receiving through PUA, PEUC or regular state unemployment benefits.

ARPA also for the first time excludes from federal income tax the initial $10,200 in unemployment benefits an individual or each spouse earns in a household with less than $150,000 in adjusted gross income in tax year 2020.

Employers may wish to consider whether and how the extended federal unemployment insurance benefits may affect any efforts to recruit and hire they may make this year and when in 2021 those efforts may be most successful.

Relief for Multiemployer Pension Plans
The Act provides important relief to multiemployer pension plans, contributing employers and plan participants. Firm partner Michael G. McNally provides an insightful summary of ARPA's provisions in those respects here.

Relief for Restaurants
ARPA creates a $28.6 billion pool, known as the Restaurant Revitalization Fund, from which Washington will make grants to restaurants, restaurant groups, caterers, breweries and tasting rooms that have suffered losses because of the pandemic.

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