

# What the American Rescue Plan Means for Employers

Expanded financial relief, compliance requirements, and employee benefit developments under the new legislation.

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SpencerFane

# Presenters



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# President Biden's Wish List Versus Reality

## **ARPA's Original Proposals**

- Economic Stimulus
- Extension of Prior Benefits
- FFCRA's New Beneficiaries

# President Biden's Wish List Versus Reality

## Areas of Greatest Impact

- FFCRA
- COBRA and Pension Reform
- Other Employee Benefits



# FFCRA under the ARPA

# COVID-19 Paid Leave (Extension of FFCRA)

- Does not expand federal paid leave to large employers (500+).
- FFCRA paid leave remains **optional** for small employers.
- Tax credit also available for eligible self-employed individuals.
- Payroll tax credit was set to expire today, but...
- American Rescue Plan extends the tax credit again through Sept. 30.

# COVID-19 Paid Leave (Extension of FFCRA)

- The paid leave provisions of the ARPA provide only for tax credits.
- Reimbursement via tax credit available for paid leave taken from April 1 to Sept. 30, 2021.
- No Department of Labor enforcement or private causes of action.
- But... small employers seeking to take advantage of the tax credit must comply with FFCRA's provisions or they risk losing out on the credit.

# Families First Coronavirus Response Act

- New reasons available for both types of paid leave:
  - To obtain COVID-19 vaccination.
  - Recovery from vaccine side effects or complications.
  - To seek or await the results of a COVID-19 test or diagnosis after exposure or an employer's request for such test or diagnosis.
- Expanded reasons for EFML leave:
  - All of the new reasons above, plus...
  - All of the original reasons available for EPSL leave.
  - Reasons for EPSL and EFML leave now identical.



# COVID-19 Paid Leave (Extension of FFCRA)

- April Fools: Paid Leave Clock resets on April 1!
  - New 80 hour bank of emergency paid sick leave (EPSL) available.
  - Now \$12,000 maximum EFML / employee (previously capped at \$10,000).
  - New allotment of 12 weeks EFML? Probably.
- What does this effectively mean?
  - Does not matter if employee previously used all available EPSL or EFML time between April 1, 2020 and March 31, 2021.

# COVID-19 Paid Leave (Extension of FFCRA)

- Anti-Discrimination Provision:
  - Voluntary EPSL and/or EFML policies cannot favor **highly-compensated** employees, **full-time** employees, or employees based on **tenure**.
  - Otherwise permissible to differentiate between groups of employees based on facially neutral reasons.
    - By department
    - Customer facing
    - Office vs. remote (work from home)

# COVID-19 Paid Leave (Extension of FFCRA)

Hypothetical #1: One leave but not the other?

Acme Co. did not voluntarily offer any EPSL or EFML from January 1 to March 31. Acme now wants to encourage more employees to get vaccinated for COVID-19, but it does not want to make up to 12 weeks of additional EFML available. Can it offer ESPL from April 1 to September 30 but not EFML?

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**Yes.\* ARPA's provisions on EPSL and EFML are separate.**

\*Unless IRS or DOL guidance comes out to the contrary.

# COVID-19 Paid Leave (Extension of FFCRA)

Hypothetical #2: One reason for leave but not the others?

Acme Co. decides to allow employees to use EPSL to miss work for purposes of vaccination and recovering from any side effects. But does it have to make the other reasons for EPSL available, such as to care for children whose school or daycare is closed due to COVID-19?

# COVID-19 Paid Leave (Extension of FFCRA)

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**Yes.\* Selectively choosing among available EPSL reasons could be construed to violate FFCRA, which would put ACME at risk of losing the tax credit.**

# COVID-19 Paid Leave (Extension of FFCRA)

## Hypothetical #3: Shortening Period of Available Leave

News reports suggest that vaccines will be widely available to the general public by May. Can Acme shorten the EPSL window so that it ends on June 30 because presumably all of its employees will have had access to the vaccine by then?

# COVID-19 Paid Leave (Extension of FFCRA)

## Hypothetical #3: Shortening Period of Available Leave

News reports suggest that vaccines will be widely available to the general public by May. Can Acme shorten the EPSL window so that it ends on June 30 because presumably all of its employees will have had access to the vaccine by then?

**Probably.\* The tax credit is available for leave taken through Sept. 30, but the ARPA does not appear to require employers voluntarily offering such leave to make it available for the entire period from April 1 to Sept. 30.**



# COVID-19 Paid Leave (Extension of FFCRA)

## Hypothetical #3.5: Shortening Amount of Available Leave

Acme's primary goal is to encourage vaccination, and it expects most employees will only need to miss one day of work, although a small percentage may need to miss a few additional days due to side effects. Can it reduce the amount of EPSL available from 80 hours to 24 hours (i.e., 3 days)?

# COVID-19 Paid Leave (Extension of FFCRA)

## Hypothetical #3.5: Shortening Amount of Available Leave

Acme's primary goal is to encourage vaccination, and it expects most employees will only need to miss one day of work, although a small percentage may need to miss a few additional days due to side effects. Can it reduce the amount of EPSL available from 80 hours to 24 hours (i.e., 3 days)?

**Probably.\* Again, EPSL is voluntary, and the ARPA's language does not appear to restrict an employer from reducing the amount of paid leave it offers from the maximum reimbursable amount.**

# COVID-19 Paid Leave (Extension of FFCRA)

Hypothetical #4: Limiting Leave to Full-Time Employees

Acme expects that its part-time employees can be vaccinated on days that they are not scheduled to work. Can Acme limit the availability of EPSL to only its full-time employees?

# COVID-19 Paid Leave (Extension of FFCRA)

Hypothetical #4: Limiting Leave to Full-Time Employees

Acme expects that its part-time employees can be vaccinated on days that they are not scheduled to work. Can Acme limit the availability of EPSL to only its full-time employees?

**No. Remember, the ARPA prohibits employers from implementing FFCRA paid leave policies that discriminate in favor of full-time employees.**

# COVID-19 Paid Leave (Extension of FFCRA)

Hypothetical #5: Counting EFML against regular FMLA allotment

Summer months are slow at Acme, so it decides to be generous and make 12 weeks of EFML available to employees from June 1 to August 31. Can Acme count any EFML taken by an employee against that employee's classic FMLA entitlement in 2021?

# COVID-19 Paid Leave (Extension of FFCRA)

Hypothetical #5: Counting EFML against regular FMLA allotment

Summer months are slow at Acme, so it decides to be generous and make 12 weeks of EFML available to employees from June 1 to August 31. Can Acme count any EFML taken by an employee against that employee's classic FMLA entitlement in 2021?

**TBD. Absent DOL guidance, we simply don't know. Since the ARPA only provides for tax credits, employees could arguably be entitled to 12 weeks of EFML and 12 weeks of regular FMLA in 2021.**

# COVID-19 Paid Leave (Extension of FFCRA)

- Considering scenarios similar to any of the hypotheticals?
- Establish policy and communicate it clearly up front.
  - **Amount** of paid leave available.
  - **Time period** in which the paid leave is available.
  - **Reasons** for which the paid leave is available (presumably all of them).
  - **Types of Employees** eligible for the paid leave (don't discriminate).

# COVID-19 Paid Leave (Extension of FFCRA)

- Tax credit can be used to reimburse an employer for...
  - Wages
  - Qualified health plan expenses (prorated cost during period of leave)
  - Pension plan expenses under a CBA (same)
  - Apprenticeship plan expenses under a CBA (same)



# COVID-19 Paid Leave (Extension of FFCRA)

- Tax credit can't be used to “double dip.”
- Tax credit amount is included in employer's gross income for taxable year.
- Tax credit not available for paid leave that qualified as a payroll expense for a forgiven PPP loan.
- Tax Credit not available for paid leave taken into account as payroll costs in connection with a grant under the Economic Aid to Hard-Hit Small Businesses, Non-Profits and Venues Act or Restaurant Revitalization Grant.

# COBRA and Pension Reform

# COBRA Premium Subsidy

- Federal government will subsidize 100% of COBRA premiums for “assistance eligible individuals” and their covered dependents
- Subsidy coverage period runs from April 1 to Sept. 30
- Employers required to update COBRA notices or provide a separate notice describing the premium subsidy

# COBRA Premium Subsidy

- **Eligibility:**
  - Qualified beneficiaries who lose coverage due to (i) involuntary termination or (ii) reduction in work hours
  - Who are still within COBRA continuation window (e.g., 18 months)
  - Even if they did not timely elect COBRA earlier
  - Even if qualifying event occurred before effective date of ARPA
- **Subsidy amount:**
  - Full cost of COBRA coverage (including 2% administration charge)
- **Extended election period:**
  - Applies to qualified beneficiaries who are eligible for COBRA but (i) did not elect it as of April 1, or (ii) elected and discontinued COBRA before April 1
  - Second election opportunity beginning April 1 and ending 60 days after receiving notice of extended election period

# COBRA Premium Subsidy

- **Employer notice obligations:**
  - Update general notice (for those eligible during subsidy period)
  - Notice of extended election period
  - Notice of expiration of subsidy period
  - Models coming from DOL April 10
- **Refund of previously paid premiums:**
  - Premiums already paid (e.g., April) that are subject to subsidy
  - Entity receiving the premium must refund it within 60 days
- **Refundable tax credit:**
  - Subsidy funded through Medicare payroll tax credit
  - Employers (for plans subject to federal COBRA), insurers (plans subject to state continuation rules), and Taft-Hartley funds claim credits

# COBRA Premium Subsidy

- **Practical considerations:**
  - Promptly identify individuals affected by COBRA subsidy
  - May need to adjust severance packages to account for subsidy
  - Confirm who will be sending required notices
  - Be prepared for extension of subsidy period beyond September
  - Coordination with “Outbreak Period” rules that toll notice and election deadlines
  - Employers that subsidized COBRA during pandemic may want to cease subsidies
  - Subsidy will increase likelihood of COBRA enrollment, potentially leading to increased claims costs

# Pension Reform

- Single-employer pension funding changes
  - “Fresh start” amortization of unfunded liability over 15 (rather than 7) years
  - Applicable to 2022 plan year (or at election of employer, 2019, 2020, or 2021)
  - Extended MAP-21 interest rate stabilization
- Multiemployer pension funding relief
  - Option to freeze funding zone status for 2020 or 2021 plan year at preceding year
  - Plans in critical or endangered status can extend funding improvement or rehab. plans by 5 years
  - Plans can amortize COVID-19-related losses over 30-year period (rather than 15)
- Direct assistance to approx. 200 highly-distressed Taft-Hartley pension funds
  - \$81.2 billion

# Other Employee Benefits





# Extended Unemployment Benefits

- \$300 weekly federal subsidy extended through Sept. 6.
- First \$10,200 in 2020 unemployment benefits are tax-free for households earning up to \$150,000 per year.
  - But jobless benefits are excluded from that earnings calculation (so more people eligible).
- Federal unemployment benefits extended for certain categories of workers typically ineligible for state benefits, including:
  - Self-employed individuals
  - Gig workers

# Small Business Relief

- Total of \$50 billion allocated to small business
- Includes additional \$7.25B in PPP funds; Application deadline just extended to May 31.
- Includes \$28.6B in grants for bars, restaurants, and venues
  - Restaurant Revitalization Grant Program
  - Up to \$5 million per location; up to \$10 million total
  - Payroll, rent, utilities, maintenance, supplies, other expenses in 2021 fiscal year

# FSA: Increased Dependent Care Contribution Limits

- Increased contribution limits for 2021 dependent care FSAs (DCAPs)
- Annual pretax limit increased for 2021:
  - \$10,500 (up from \$5,000) for individuals and married couples filing jointly
  - \$5,250 (up from \$2,500) for married individuals filing separately
- Health care FSA contribution limits remain unchanged at \$2,750
- Optional change, but plans must be amended by end of 2021 plan year for increased limits to become effective
- Consider impact on nondiscrimination testing

# Executive Compensation: Limitation on Deductions

- Code § 162(m) limits compensation deduction for publicly traded companies to \$1M per covered exec.
- Deduction limit currently applies to CEO, CFO, and three other highest paid officers
  - Once subject to limit, always subject to limit
- ARPA expands covered individuals to additional five highest-paid employees, regardless of officer status
  - Additional five covered employees may change yearly based on compensation
- Applicable to tax years beginning on/after January 1, 2027

# Employee Retention Tax Credit

The Consolidated Appropriations Act of 2021 (CAA), signed December 27, 2020, and the ARPA combined to do the following:

- **Increased** the requirements for the types of businesses eligible to use the employee retention tax credit
- **Increased** the length of time the credit applies

# Employee Retention Tax Credit

## ***Which Businesses can Claim the Employee Retention Tax Credit?***

- Employers whose operations were fully or partially suspended because of government orders;
- Employers who experienced a significant decline in their gross receipts because of the pandemic;
- Recovery startup business (employers who began business after February 15, 2020, have gross annual receipts of up to \$1 million and are otherwise ineligible under the eligibility test); or
- Severely financially distressed employers (companies with gross receipt reductions of more than 90% as compared to the same quarter in 2019).

# Employee Retention Tax Credit

- Under the CARES Act, the employee tax credit was **50% of the qualified wages** paid to an employee, **plus** the cost to continue providing health benefits to the employee through 2020.
  - Annual cap of \$5,000 per employee (\$10,000 in qualified wages x 50%).
- With the CAA plus the ARPA, the employee tax credit is now **70% of the qualified wages** paid to an employee, **plus** the cost to continue providing health benefits to the employee through 2021.
  - The maximum benefit for each of the 4 quarters in 2021 (\$10,000 in qualified wages x 70%), yielding a possible \$28,000 credit per employee.

# Employee Retention Tax Credit

- **Important Note**: The 2021 credit is available even if the employer received the \$5,000 maximum credit for wages paid to such employee in 2020.
- Beginning January 1, 2021 (with the CAA), an **employer with 500 or fewer** employees will be eligible for the credit, even if employees are working.
- When calculating the 500-employee threshold, the employees of **all affiliated companies** sharing more the 50% common ownership are aggregated.



# Employee Retention Tax Credit

## **Additional Modifications** of the CARES Act

- The CAA (plus ARPA) can be applied to employers who increased wages for **hazardous duty pay increases**
- Certain entities are **now eligible** for the credit:
  - Public colleges and universities
  - Organizations whose principal purpose is providing medical or hospital care
  - Certain Federal instrumentalities, such as federal credit unions

# President Biden's Wish List versus Reality

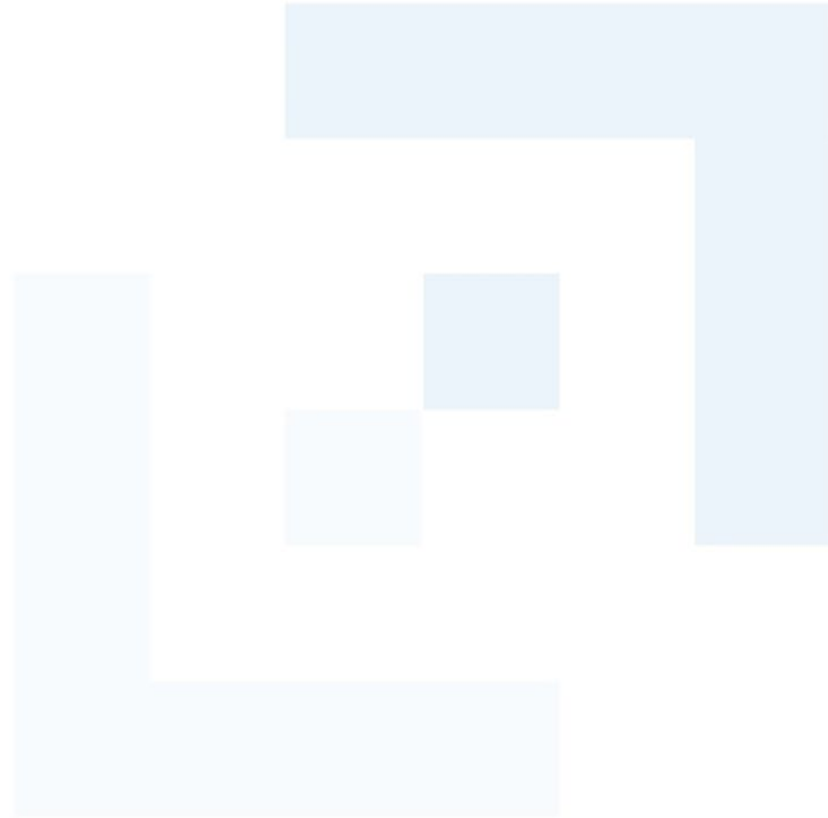
## Areas under Development (and other Items of Interest)

### *a/k/a* Items Left Off the Table

- \$15 Minimum Wage (or an alternative higher federal threshold)
- Tax Credit for Paid Leave Offered by Large Employers, i.e., companies with 500+ employees
- Mandatory Paid Leave for All Employees (FMLA Amendment)
- Elimination of the New Proposed FLSA Tip Credit Rule
- 18 month delay of the New Prevailing Wage Rate Rule
- Marty Walsh's confirmation as the Secretary of Labor
- Seema Nanda's nomination as the DOL's Solicitor



# Questions?



# Save the Date!

## WorkSmarts Half Day Seminar | May 12

### **The Swinging Pendulum: The Timing of Anticipated Changes at the NLRB Under the Biden Administration**

12:30 – 1:30pm CT | Paul Satterwhite and Matt Morrison

### **A Must-Do Spring Cleaning Project: Updating Your Leave Management Policies and Practices**

1:45 – 2:45pm CT | Sue Willman and Ruthie White

### **OFCCP: The Times They Are-A-Changin'**

3:00 – 4:00pm CT | Fred Johnson and Elizabeth Wente

# COBRA Deep Dive

## Spring Employee Benefits Webinar

Date: TBD

# Thank You!



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