

Legal Update

March 30, 2021

Temporary 100% COBRA Subsidy

The American Rescue Plan Act of 2021 (“ARPA”) includes multiple provisions that impact employers including a 100% COBRA subsidy for Assistance Eligible Individuals. The subsidy applies to continuation coverage premiums for the coverage period April 1, 2021 through September 30, 2021.

Who is eligible? An Assistance Eligible Individual (“AEI”) is anyone who (1) is a qualified beneficiary on a covered health insurance plan, (2) loses group health insurance due to an involuntary termination or a reduction in hours, and (3) is still within the maximum period for continuation coverage under COBRA or comparable state law. The involuntary termination or reduction in hours need not be related to the COVID-19 pandemic. Individuals who lose coverage due to a voluntary termination (*i.e.*, quit/retirement), termination for gross misconduct, or any other qualifying event that is not an involuntary separation or reduction in hours (*e.g.*, divorce, children aging off the plan, etc.) are not eligible for the subsidy.

What insurance plans are included? The premium subsidy will apply to almost all employers with group health plans (including dental and vision plans) regardless of whether continuation coverage is provided under COBRA or comparable state law. (In Ohio, employees working for companies with two to 19 employees may be eligible for Ohio’s mini-COBRA for up to 12 months pursuant to R.C. § 3923.38.) The ARPA subsidy applies to fully insured plans, self-funded plans, and multi-employer plans. The subsidy does not apply to healthcare flexible spending accounts (FSAs) provided pursuant to a cafeteria plan.

What are the notice requirements? Employers (or their COBRA Plan Administrators) will be required to provide notice to all AEIs no later than May 31, 2021. The Department of Labor in consultation with the Treasury Department and Health and Human Services will be issuing model notices in the coming weeks. AEIs will have 60 days to elect coverage after receipt of the required notice. A separate notice will be required at the end of the coverage period to inform enrolled participants when the subsidy will end.

Employers should be aware that individuals separated as far back as November 1, 2019, may be entitled to notice. ARPA provides for a second election opportunity for AEIs who previously waived coverage or who dropped coverage before the end of their 18-month maximum coverage period (12 months for Ohio’s mini-COBRA). In addition, AEIs are not required to pay missed premiums back to the original COBRA eligibility date and may begin coverage on April 1, 2021, without closing the gap.

Who pays for this? (Tax Credits) Employers that sponsor group plans will need to pay premiums to the insurance carrier and employers that sponsor self-funded plans will need to pay claims under the plan without receiving a COBRA premium from the AEI. Premiums for multi-employer and other plans may be paid by the plan or insurer. In all cases, the entity that funds the assistance will be eligible to functionally recoup the cost through a dollar-for-dollar Medicare tax credit equal to the amount of the assistance.

What's Next? Employers should move quickly to prepare for these changes by identifying AEIs entitled to notice. Additional guidance and regulations should be forthcoming to address unanswered questions. Employers are encouraged to work closely with their COBRA Plan Administrators, benefit advisors, payroll providers, and/or legal counsel to ensure compliance with these special requirements.

Martin Browne will continue to monitor these situations and provide updates, as appropriate. Our attorneys are on hand to answer your questions and provide guidance on how to navigate these critical issues. Please contact **Shannon Wahl, Randall Comer, Steve McCready**, or any attorney in Martin Browne's **Labor & Employment** Practice group to discuss how this update may impact your business.

The information contained in this legal update is not intended as a substitute for professional legal advice and its receipt does not constitute an attorney-client relationship.

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March 30, 2021

Modifications to the FFCRA

The American Rescue Plan Act of 2021 (“ARPA”) includes multiple provisions that impact employers including a continuation of the payroll tax credit and other revisions to the Families First Coronavirus Response Act (“FFCRA”).

By way of background, the FFCRA became effective on April 1, 2020, in response to the COVID-19 pandemic. It required public employers and private employers with fewer than 500 employees to provide paid leave benefits to employees for certain qualifying reasons related to COVID-19. The mandate to provide paid leave expired on December 31, 2020. On December 27, 2020, the Consolidated Appropriation Act was signed into law, which extended the FFCRA’s payroll tax credits until March 31, 2021, to Eligible Employers that voluntarily continued to provide FFCRA benefits.

Do employers have to provide FFCRA leave under ARPA? No. Under ARPA, employers are not required to provide paid leave benefits to employees. The mandate to provide paid leave expired on December 31, 2020. However, as an incentive for employers to voluntarily continue FFCRA leave to employees unable to work for reasons related to COVID-19, ARPA further extends the payroll tax credits through September 30, 2021.

What else is new? In addition to the continued tax credits, ARPA also extends and expands the FFCRA’s provisions in the following ways:

- **Adds three (3) new qualifying reasons for leave.** Last year, employees could take Emergency Paid Sick Leave (“EPSL”) for [six qualifying reasons](#). This year, effective April 1, 2021, employees may also take EPSL to (1) to receive their COVID-19 vaccination; (2) when recovering from an injury, disability, illness or condition related to COVID-19; or (3) when waiting for results of a COVID-19 test.
- **Broadens the Expanded Family & Medical Leave (“EFMLA”) Provisions.** Under ARPA, EFMLA may now be used for all qualifying reasons for FFCRA leave, including the three (3) new reasons permitted as of April 1, 2021. (Previously, EFMLA could only be used to care for a child whose school or place of care is closed due to COVID-19.) In addition, the two-week waiting period to begin receiving EFMLA has been removed and employers may now receive tax credits for up to 12 weeks of EFMLA at two-thirds (2/3) of the employee’s regular rate of pay (if they choose to allow this benefit). To support this change, the aggregate cap for tax credits available for EFMLA has been increased from \$10,000 to \$12,000 per employee.

- **Resets the Emergency Paid Sick Leave limits.** Beginning April 1, 2021, employers may offer a new allotment of EPSL (up to 10 days), and such leave would be eligible for the tax credit.
- **Non-Discrimination Provision.** If employers choose to provide FFCRA leave after April 1, 2021, they must do so in a non-discriminatory fashion. Tax credits will not be allowed for employers who discriminate in favor of highly compensated employees or full-time employees, or on the basis of the employee's length of service.

Employers continuing to provide FFCRA leave should keep track of all required documentation necessary to receive the tax credits.

Martin Browne will continue to monitor these situations and provide updates, as appropriate. Our attorneys are on hand to answer your questions and provide guidance on how to navigate these critical issues. Please contact **Shannon Wahl, Randall Comer, Steve McCready**, or any attorney in Martin Browne's **Labor & Employment** Practice group to discuss how this update may impact your business.

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