

CLIENT ALERT: Understanding the Employment-Related Provisions of the American Rescue Plan Act of 2021

On March 11, 2021, President Biden signed into law H.R. 1319, the American Rescue Plan Act of 2021 (the “ARP”), a \$1.9 trillion economic stimulus package and comprehensive COVID relief bill that provides broad-ranging assistance to businesses, non-profits, state and local governments, and individuals. The ARP contains a number of employment-related provisions including (a) an extension and expansion of existing tax credits to private sector employers with less than 500 employees who voluntarily provide COVID-related leave; (b) a 100% COBRA premium subsidy for individuals who become eligible for COBRA through an involuntary termination or a reduction of hours; and (c) extension of unemployment assistance benefits and programs through September 6, 2021. In addition, the ARP makes limited changes to the Paycheck Protection Program and provides federal agency funding for pursuing COVID worker protection measures.

FFCRA Tax Credit Extension for Eligible Employers

The requirement to provide COVID-related family and sick leave under the Families First Coronavirus Response Act (FFCRA) expired on December 31, 2020. Around that time, however, legislation was passed allowing private employers to continue claiming a payroll tax credit (up to applicable maximum limits) for voluntarily-provided FFCRA leave through March 31, 2021. The ARP extends the availability of this tax credit for leave provided through September 30, 2021. In addition, the ARP makes the following updates to the FFCRA:

- **Extension and expansion of covered FFCRA leave purposes.** Originally under the FFCRA, there were six different reasons employees could take COVID-related emergency paid sick leave (EPSLA), but employees could only take emergency paid family leave (EFMLEA) for one of those reasons – child care. Under the ARP, all six of the emergency paid sick leave (EPSLA)-covered leave reasons are now considered emergency paid family medical leave (EFMLEA)-covered reasons as well. This significantly expands the availability of the tax credit for employers who voluntarily provide lengthy periods of paid COVID-related leave for covered FFCRA reasons other than those relating to childcare needs.

The ARP also identifies two additional circumstances that will be considered FFCRA-covered leave, under both the emergency paid sick leave (EPSLA) and the emergency paid family leave (EFMLEA) provisions: (1) employee seeking or awaiting a COVID-19 test or diagnosis because the employee was exposed to COVID-19 or their employer requested the test or diagnosis, or (2) employee is obtaining a COVID vaccine shot or is recovering from an injury or other condition related to the vaccination.

- **Emergency paid sick leave balances topped off as of April 1.** As of April 1, covered employers may refill employees’ banks of emergency paid sick leave (EPSLA) back up to the maximum 10-day allotment and seek a tax credit for providing that time, even if the employer already claimed a credit for providing emergency paid sick leave prior to April 1.

- **Unpaid period of emergency family and medical leave is eliminated.** In addition, and for purposes of the payroll tax credit only, the ARP eliminates the requirement that the first two weeks of emergency paid family leave (EFMLEA) be treated as unpaid – effectively expanding that paid leave period from 10 weeks to 12 weeks – and correspondingly raises the wages for which the employer may seek a tax credit for such leave from a maximum of \$10,000 to \$12,000. Existing daily rates/caps continue to apply.
- **Employers who voluntarily provide FFCRA leave cannot receive the tax credit if they leave out low earners, part-time workers, or new employees.** Under the ARP, employers who voluntarily elect to provide paid FFCRA leave may not seek tax credits if the employer’s voluntary provision of such leave discriminates in favor of highly-compensated employees, full-time employees, or on the basis of employment tenure with the employer. Further, the ARP retains the requirement that employers are not eligible for a tax credit for providing FFCRA leave if they retaliate against employees for taking such leave.

Extension of Unemployment Benefits

The ARP extends through September 6, 2021 certain unemployment insurance (“UI”) programs that otherwise would have expired on March 14, 2021:

- **PEUC (Pandemic Emergency Unemployment Compensation - federally financed UI benefits for those who have exhausted state/federal UI benefits):** After employees had already exhausted their regular unemployment compensation or were not eligible for regular unemployment, the PEUC originally provided an additional 13 weeks of unemployment pay until December 26, 2020. This was extended for an additional 11 weeks beginning on December 26, 2020. The ARP provides an additional 29 weeks for unemployment from March 14, 2021 through weeks ending on or before September 6, 2021.
- **FPUC (Federal Pandemic Unemployment Compensation - weekly UI benefit augmentation):** Under the CARES Act in March 2020, unemployment benefits were temporarily augmented by an extra \$600 a week until late July 2020. A federal grants program then provided a \$300 weekly augmentation to unemployment compensation through September 5, 2020. In December 2020, the \$300 weekly augmentation was reauthorized for unemployment between December 26, 2020 and March 14, 2021. The ARP extends the additional \$300 benefit for unemployment through weeks ending on or before September 6, 2021.
- **PUA (Pandemic Unemployment Assistance - UI for independent contractors, self-employed workers, gig workers who are unemployed due to COVID-19, not able to telework and not receiving paid leave):** These benefits for those ordinarily ineligible to receive unemployment benefits was scheduled to expire on March 14, 2021. The ARP extends these benefits through weeks ending on or before September 6, 2021.
- **Mixed Earner Supplement:** In addition to the \$300 weekly UI benefit augmentation under FPUC, the mixed earner supplement provides an additional \$100 per week payment in participating states for individuals who received at least \$5,000 in self-employment income in the most recent tax year preceding their application for UI benefits and who receive a UI benefit other than PUA. Originally due to expire March 14, 2021, the ARP extends this supplement

through weeks ending on or before September 6, 2021.

- **Unemployment Excluded From Income Tax:** The ARP also permits taxpayers with a modified adjusted gross income (AGI) of less than \$150,000 to exclude up to \$10,200 in UI benefits from 2020 federal income tax.

COBRA Premium Subsidies

Under the ARP, eligible employees who are terminated (except for individuals who voluntarily terminate employment) or subject to a reduction of hours who continue employer-sponsored health insurance through COBRA will not have to pay the monthly premium from April 1, 2021 through September 30, 2021. This subsidy is recouped through a tax credit to the employer, the insurer, or the multiemployer plan as applicable. The premium subsidy will end if the individual becomes eligible for alternate coverage or Medicare or reaches their maximum period of continuation coverage. Individuals have an obligation to self-report their eligibility for health insurance coverage other than under the COBRA plan.

Deadlines to select COBRA coverage have also been extended, such that an individual terminated in 2020, for example, may be eligible to select COBRA coverage in 2021, and would not have to pay the monthly premium from April through September 2021.

Employers will be required to provide eligible employees with notices of the availability of premium assistance, the option, if applicable, to enroll in different coverage within their plan, and of the expiration of the premium assistance. The DOL has been directed to issue model notices for these purposes within the next 30 days, and employers should stay tuned for these notices.

Employee Retention Tax Credit Extended

Under the ARP, the Employee Retention Tax Credit for eligible private sector employers is extended through December 31, 2021, bringing the total maximum credit for 2021 up to \$28,000 (pre-ARP, the credit was available only through June 30, 2021). For recovery startup businesses (business established after February 15, 2020, with average annual gross receipts of \$1 million or less), there is an available tax credit of up to \$50,000 per calendar quarter. While large employers (more than 500 employees) are only entitled to claim the tax credit for furloughed employees, those in severe financial distress (with gross receipts that are less than 1/10 of what they were for the same 2019 calendar quarter) may claim the tax credit for all employees.

Funding for OSHA, Including COVID-related Enforcement and Training

The law provides \$200 million in funding for specified federal agencies to carry out “COVID-19 worker protection activities” through September 30, 2023. At least \$100 million of that funding is earmarked for OSHA, with at least \$5 million of that to be spent on enforcement activities for COVID-19 high risk workplaces “including health care meat and poultry processing facilities, agricultural workplaces and correctional facilities.”

Limited Extensions to Paycheck Protection Program

The ARP appropriates approximately \$7 billion in additional Paycheck Protection Program (“PPP”) funding, and extends PPP funding availability to additional nonprofit entities, including 501(c)(3) organizations that employ no more than 500 employees per physical location. The PPP’s application window is currently slated to close effective March 31, 2021, but on March 18 the U.S. House of Representatives nearly unanimously approved a bill that would extend the application deadline through May 31.

This summary only addresses certain employment-related aspects of the American Rescue Plan Act based on information reasonably known as of the date of this client alert. Please note that the ARP is an enormous and complex piece of legislation, and formal guidance and additional clarifications are expected in the next few weeks and months. Employers with questions about the ARP, FFCRA leave, tax credits, employee leave, and other related issues should consult with their MBJ attorney.

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Morgan, Brown & Joy, LLP focuses exclusively on representing employers in employment and labor matters.

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