

The American Rescue Plan Act—Key Takeaways for Employers

By Amy Robinson, Iván Resendiz Gutierrez, Gena Gibson, and Nicoleas Mayne

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On March 11, 2021 President Biden signed the much-anticipated [American Rescue Plan Act of 2021](#) (ARPA) into law. While there are a wide range of impacts from this massive and intricate piece of legislation, this summary addresses what we see as the key highlights for employers, including the following topics:

- Additional, but voluntary, Families First Coronavirus Response Act (FFCRA) leave
- Extended unemployment insurance (UI) benefits
- 100% COBRA premium subsidy, additional notice requirements, and a new election period
- Increased caps for Dependent Care Assistance Plan (DCAP) benefits
- Extension of the Employee Retention Credit (ERC) until the end of 2021

FAMILIES FIRST CORONAVIRUS RESPONSE ACT LEAVE EXTENDED BUT IS NOW VOLUNTARY, WITH SOME ADDITIONAL CHANGES

The mandatory Emergency Paid Sick Leave (E-PSL) and [Emergency Family and Medical Leave Act](#) (E-FMLA) leave components of the FFCRA expired at the end of 2020, although the associated tax credits were still available through March 31, 2021 for eligible employers (primarily, private employers with less than 500 employees) who voluntarily provided either type of FFCRA leave during the 1st quarter of 2021. ARPA extended the tax credits through September 30, 2021, and added 10 additional days of leave that may be used between April 1, 2021 and September 30, 2021, in addition to any unused balance from the prior year.

ARPA also expanded the [covered reasons](#) that FFCRA leave may now be used if employers opt to voluntarily extend it, to include time away from work:

- To seek testing and/or awaiting results when the employee has been exposed to COVID-19 or the employer requires such testing; and
- To be vaccinated; and
- For recovery “from any injury, disability, illness, or condition related to such immunization.”

The aggregate cap for paid leave (and the associated tax credits) was increased from \$10,000 to \$12,000, and [E-FMLA](#) may now be used for any FFCRA-covered reason, including those listed above, and not just for circumstances related to school or daycare closures due to the pandemic. E-FMLA no longer requires the first 10 days to be unpaid if E-PSL is not available. The leave is still subject to the same [caps on amounts](#) that depend on the reason used (either \$200 per day or \$511 per day), with the higher amount applying to the additional covered reasons outlined in the section above when used as E-PSL, or the lower threshold when used as E-FMLA. Also, ARPA now allows employers to recover the costs for health care premiums associated with the leave in addition to the leave costs, and those caps remain the same.

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Lastly, there are nondiscrimination rules that would prohibit an employer from qualifying for these credits even if it opted in, if it limited this leave to only certain employees (for example, only exempt personnel, or only full-time staff).

Employers who qualify should carefully consider whether to avail themselves of these extended benefits, and ensure that their leave policies are updated accordingly in order to meet the necessary requirements to qualify for the corresponding tax benefits. Additional guidance from the IRS related to these changes is anticipated as well. (See the [IRS website](#)).

UNEMPLOYMENT INSURANCE BENEFITS EXTENDED WITH INCREASED INCENTIVES

ARPA extends the UI benefits that were available under the [Coronavirus Aid, Relief, and Economic Security Act](#) (CARES Act) and the Consolidated Appropriations Act, 2021 (CAA), which were scheduled to expire after March 14, 2021.

Now, three federal UI programs will continue through Labor Day, September 6, 2021:

1. [Federal Pandemic Unemployment Compensation \(FPUC\)](#). Under FPUC, every eligible individual receiving at least \$1 in UI benefits will receive a supplemental weekly benefit of \$300 per week for each eligible week of unemployment between March 14, 2021, and September 6, 2021. This extra amount is in addition to what individuals are receiving through PEUC (defined below), PUA (defined below), or regular state UI benefits.
2. [Pandemic Emergency Unemployment Compensation \(PEUC\)](#). PEUC is extended by providing up to 53 weeks of additional UI benefits to eligible individuals who have exhausted the UI benefits available under state law.
3. [Pandemic Unemployment Assistance \(PUA\)](#). PUA is extended to up to 79 weeks. PUA provides benefits for people who do not qualify for regular state UI benefits, including, for example, independent contractors, self-employed workers (i.e. "gig"-economy workers, freelancers, and consultants), and people who worked too few hours to qualify for regular UI benefits.

ARPA also provides governmental entities and nonprofit organizations a more favorable reimbursement rate for UI benefits. Between March 31, 2021, and September 6, 2021, these entities will receive reimbursements for 75 percent rather than 50 percent of the covered UI benefits.

The CARES Act and the CAA provided incentives for states to waive waiting periods (also known as "waiting weeks") for UI benefits and encouraged the use of state short-time compensation (STC) programs (called [Work Share](#) in Oregon and [SharedWork](#) in Washington). The ARPA extends these incentives through September 6, 2021.

ARPA also excludes from federal income tax the initial \$10,200 of UI benefits that an individual or each spouse earns in a household with *less than \$150,000* in adjusted gross income in the tax year 2020.

In light of the extension of these benefits, employers may need to consider participating in STC programs or evaluate the effect of efforts to recruit and hire workers.

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100% COBRA PREMIUM SUBSIDY, ADDITIONAL NOTICE REQUIREMENTS, AND A NEW ELECTION PERIOD

Employers who sponsor group health plans¹ should be attentive to the COBRA-related provisions in the ARPA, as there is a short time period to implement required changes. ARPA's key COBRA provisions include (1) a 100 percent COBRA premium subsidy for up to six months for certain assistance eligible individuals (AEIs), (2) required notifications, and (3) an extended period for certain individuals to elect COBRA.²

An AEI is a COBRA-qualified beneficiary who has lost group health plan coverage due to an involuntary termination of employment or reduction in hours, who elects continuation coverage, and whose continuation coverage period includes some or all of the subsidy period beginning on April 1, 2021, and ending on September 30, 2021. (The subsidy period can end earlier than September 30, 2021, in certain circumstances.) Under the ARPA, an AEI is excused from paying COBRA premiums otherwise due during the subsidy period. The amounts not paid by the AEI during the subsidy period may be claimed by the employer (or in some cases, the plan or the insurer) as a tax credit against certain payroll taxes.

Group health plans must provide written notification of the availability of the subsidy (along with certain other specified information) to AEIs who become entitled to elect COBRA continuation coverage during the subsidy period. In addition to the "availability" notice, group health plans must provide written notification to an AEI at least 15 days but no more than 45 days prior to the date the subsidy will expire (unless the subsidy is expiring because the AEI is eligible for certain other coverage). By May 30, 2021, written notice also must be provided to individuals who otherwise would qualify as AEIs but who do not have a COBRA election in effect on April 1, 2021, because they did not initially elect COBRA or they elected and then discontinued coverage. Such individuals are given an additional opportunity to elect COBRA coverage during the period beginning on April 1, 2021, and ending 60 days after the date on which notification is provided.

INCREASED CAPS FOR DEPENDENT CARE ASSISTANCE PLAN BENEFITS

Employers who sponsor a DCAP should note that the ARPA temporarily increases the maximum amount of DCAP benefits excludable from income. For taxable years beginning after December 31, 2020, and before January 1, 2022, the maximum exclusion increased to \$10,500 (or \$5,250 in the case of a married individual who files separately). A retroactive plan amendment to implement this change is permitted if it is adopted by the last day of the plan year in which the amendment is effective and the plan is operated consistently with that amendment from the amendment's effective date.

EXTENSION OF THE EMPLOYEE RETENTION CREDIT THROUGH 2021

The ARPA expands the [employee retention credit initially introduced as part of the CARES Act](#) and amended by the CAA. The credit, originally available for qualified wages paid after March 12, 2020, and before January 1, 2021, was initially available to employers who experienced a full or partial suspension of business due to a COVID-19-related government order, or a significant decline in gross receipts of more than 50 percent in 2020 as

¹ARPA uses the group health plan definition in Employee Retirement Income Security Act of 1974 (ERISA) Section 607(1). However, health flexible spending arrangements are excluded from the ARPA's "COBRA continuation coverage" definition, meaning that the ARPA's COBRA-related provisions do not apply to health flexible spending accounts (FSAs).

²ARPA has additional COBRA-related provisions not described here.

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compared to the same quarter in 2019. The CAA extended the credit to June 30, 2021, and expanded eligibility by reducing the gross receipts reduction requirement to 20 percent, increasing the qualifying wage limit to \$10,000 per quarter per employee (instead of \$10,000, annually) and the amount of the credit from 50 percent of qualifying wages to 70 percent, and increasing the full-time employee limit in the definition of qualified wages from 100 to 500.

The ARPA further extends the employee retention credit until the end of 2021, and retains the expanded eligibility requirements put in place by the CAA. However, the credit as revised can only be claimed against Medicare, not Social Security, and is limited to \$50,000 per quarter for an eligible employer that is a “recovery startup business” (meaning a business that started after Feb. 15, 2020, with annual gross receipts averaging less than \$1.0M). In addition, the ARPA clarifies that double-dipping with Paycheck Protection Program (PPP) loan funds and certain other grants (such as shuttered venue grants) is not permitted.

We hope that this snapshot of the ARPA's key considerations for employers outlined above is helpful as employers navigate the wide range of issues covered in this significant piece of legislation. As always, employers should call on us if they have questions or need assistance with evaluating their approach related to updating policies and practices.

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Amy Robinson represents public and private employers throughout Washington, Oregon, and Alaska in a broad range of workplace-related issues. She skillfully handles matters for clients regarding wage-and-hour, leave laws, disability and accommodation, and complaints related to discrimination, retaliation, and harassment. Amy is adept at guiding employers through policy and handbook creation, as well as crafting employment contracts, such as noncompete agreements, nonsolicitation agreements, and nondisclosure agreements.

Direct: 360.619.7024 or 503.205.2512 | **Email:** amy.robinson@millernash.com



Iván Resendiz Gutierrez is a litigation and appellate attorney on the firm's employment and labor relations, appellate, and education practice teams. Iván is known for handling complex cases and situations, providing practical advice, and finding creative solutions for clients from such diverse industries as education, energy, and manufacturing. Iván advises employers on knotty employment-related issues, including discrimination, harassment, retaliation, unemployment insurance benefits (including shared work benefits), and wage-and-hour compliance.

Direct: 503.205.2377 | **Email:** ivan.resendiz@millernash.com



Gena Gibson assists employers on a variety of issues related to health and welfare and retirement plans, including HIPAA privacy and portability, business associate contracts, ERISA compliance, plan administration questions, service provider contracts, and drafting and amending plan documents. She also assists with reporting and disclosure requirements and qualified plan corrections.

Direct: 503.224.5858 | **Email:** gena.gibson@millernash.com



Nicoleas Mayne focuses on reviewing, drafting, and negotiating a wide variety of contracts, including service agreements, distribution agreements, asset purchase and sale agreements, and early-stage agreements for corporations, limited liability companies, partnerships, and joint ventures. Nic also works with business owners and executives on choice-of-entity and formation agreements, and assists established clients throughout the M&A process with merger, employment, nondisclosure, and other related agreements.

Direct: 503.205.2336 | **Email:** nicoleas.mayne@millernash.com