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Latest COVID-19 Relief Package Brings New Employment Law Changes for Businesses

On March 11, 2021, President Biden signed the $1.9 trillion dollar American Rescue Plan Act of 2021 into law (the Act). The latest COVID-19 relief package aims to provide continuing aid to individuals and businesses as the country continues to grapple with the economic fallout created by COVID-19. The new legislation continues some programs (with modifications) from previous stimulus packages, while also creating new programs that affect employers.

The key business and employment law aspects of the bill include:

- Voluntary FFCRA Tax Credits for Employers
- Unemployment Insurance Program Changes
- COBRA Continuation Coverage Subsidies
- Small Business and Restaurant Relief Aid
- Multiemployer Pension Plan Relief

In the coming weeks, Boardman Clark will publish more detailed guidance on some of the specific components of the Act.

Voluntary FFCRA Tax Credits for Employers

The Act extends tax credits to employers who voluntarily provide Families First Coronavirus Response Act (FFCRA) emergency paid sick leave (EPSL) or expanded family and medical leave to employees (EFMLA) through September 30, 2021. However, as has been the case since January 1, 2021, covered employers (those with fewer than 500 employees) are not required to provide FFCRA leave to employees. Instead, covered employers can choose whether to provide FFCRA leave to employees and obtain tax credits to offset certain costs associated with providing the leave. Here are the highlights:

- Tax credits are available from April 1, 2021, through September 30, 2021.
- The Act adds new categories of EPSL leave: (1) leave to seek or await the results of a diagnostic test for or a medical diagnosis of COVID-19 after an exposure or at the employer's request; (2) leave to obtain the COVID-19 vaccine; and (3) leave to recover from any injury, disability, illness, or other condition related to the COVID-19 vaccine.

- As of April 1, 2021, the Act provides employees a new "bucket" of EPSL leave. Employers may voluntarily provide employees 10 new days of EPSL leave for all of the existing six leave reasons plus the new categories and receive a tax credit for those payments through September 30, 2021, up to certain statutory caps per employee based on the reason the employee is taking the leave.
- The Act also allows (but does not require) employers to extend employees' EFMLA eligibility through September 30, 2021. The Act increases an employee's total EFMLA aggregate payment cap from $10,000 to $12,000. Currently, it is unclear whether private sector employees are allowed to receive an entirely new "bank" of EFMLA leave, or whether they are only entitled to two additional weeks of EFMLA leave if they previously used all of their EFMLA allotment in 2020 or the earlier part of 2021 and the employer claimed tax credits for that leave. The Department of Labor (DOL) will hopefully provide additional clarification on this point in the coming weeks. An employee's use of EFMLA benefits will count against an employee's twelve weeks of unpaid, "regular" FMLA benefits, provided they work for a "regular" FMLA covered employer
- Previously, employees were only eligible to take EFMLA leave if the employee was unable to work or telework to care for his or her child whose school or place of care was closed or was unavailable due to COVID-19. The Act now allows employees to use EFMLA leave for any of the six reasons provided for EPSL leave plus the new EPSL categories, provided their employer voluntarily extends EFMLA leave.
- The Act also permits public sector employers to receive a tax credit for providing employees with voluntarily FFCRA paid leave from April 1, 2021 through September 30, 2021. Our article on the implications of this change for school districts can be found here.
- If an employer voluntarily extends these FFCRA benefits and wants to claim additional tax credits, the Act requires employers to implement to FFCRA in a non-discriminatory manner. Employers must generally allow all employees to receive FFCRA benefits equally and cannot favor highly compensated employees, full-time employees, or favor employees with more seniority. Additionally, employers likely may not "pick and choose" which reasons to offer leave for and must allow employees to take EPSL and EFMLA for all reasons provided by the FFCRA if employers choose to extend these leave programs at all.
- As a voluntary program, it appears that employers can extend the use one type of FFCRA leave but not the other. For examples, employers may be able to authorize continued EPSL leave through September 30, 2021, but not EFMLA leave. The DOL has yet to offer specific guidance on this issue and may release more information in the coming weeks.

Boardman Clark's Labor & Employment team is continuing to examine the Act's changes to the voluntary FFCRA extension and will update readers as more detailed guidance becomes available.

Unemployment Insurance Program Changes

The Act extends several COVID-19 unemployment insurance programs:

- The Pandemic Unemployment Assistance (PUA) program, which provides UI benefits for traditionally non-covered individuals such as gig workers, independent contractors, and the self-employed, has now been extended through September 6, 2021. The number of eligibility weeks have been increased from 50 weeks to 79 weeks.

- The Pandemic Emergency Unemployment Compensation (PEUC) program provides additional weeks of unemployment insurance benefits to individuals who have exhausted their state unemployment benefits. PEUC has been extended through September 6, 2021, and the eligibility weeks have been increased from 24 weeks to 53 weeks.
- The Federal Pandemic Unemployment Compensation program, which provides a $300 federal supplement on top of existing state UI benefits, will be extended through September 6, 2021.
- The Act also provides that the first $10,200 of UI benefits received in 2020 will be free of federal tax for workers earning less than $150,000 per year.

COBRA Continuation Coverage Subsidies

Individuals who are involuntarily terminated, furloughed, or have their hours reduced are eligible to continue group health benefits through the Consolidated Omnibus Benefits Reconciliation Act (COBRA) without paying for COBRA premiums. The Act provides for 100% premium assistance for periods of coverage beginning on or after April 1, 2021, and ending September 30, 2021. The Act allows eligible individuals to forego paying applicable COBRA coverage premiums but be deemed to have made full payment.

Depending on the structure of the employer's benefits plan, this means that either the employer, the plan, or the insurer will be required to pay the cost of the employee's unpaid COBRA premium. To offset this cost, employers or benefit plan providers will be able to claim a tax credit against its Medicare payroll tax.

The DOL and IRS will provide additional guidance regarding premium assistance eligibility, newly required notices to employees, and instructions for claiming available tax credits. Boardman Clark will update readers as soon as additional guidance becomes available.

Small Business and Restaurant Relief Aid

Two existing Small Business Administration (SBA) programs received additional funding. The Paycheck Protection Program receives another $7.25 billion in aid, but is still set to expire on March 31, 2021. The Economic Injury Disaster Loan program, which provides loans to small businesses and nonprofit organization that have suffered substantial economic injury as a result of COVID-19, received another $15 billion in federal funding.

The Act also provides $28.6 billion to create the "Restaurant Revitalization Fund," which will also be administered by the SBA. Under this program, restaurants, bars, lounges, caterers, and other small hospitality businesses with no more than 20 locations and are not publicly traded will be eligible for SBA grants. Money awarded under the fund can be used for payroll costs, rent and mortgage payments, utilities, maintenance costs, food and beverage expenses, employee paid sick leave, and other costs. $1.25 billion is also set aside for small venue operators (such as theatres, live performing arts organizations, and museums).

OSHA Oversight Fundings

The Act provides the DOL, including the Wage and Hour Division and Occupational Safety and

Health Administration (OSHA), $200 million in new funding "to carry out COVID-19 related worker protection activities, and for the Office of Inspector General for oversight of the Secretary's activities to prevent, prepare for, and respond to COVID-19."

$100 million of the funding is reserved for OSHA, and at least $5 million of that amount is specifically for "enforcement activities related to COVID-19 at high risk workplaces including health care, meat and poultry processing facilities, agricultural workplaces and correctional facilities."

With a new presidential administration and new funding, employers may see increased OSHA enforcement activity in 2021, especially as it relates to worker health and safety measures related to COVID-19.

Multiemployer Pension Plan Relief

The Act creates a fund to provide financial assistance to financially distressed multi-employer pension plans and aims to ensure employees covered by these pensions continue to receive their promised pension benefits for the next 30 years.

Future Guidance

Several federal agencies, including the DOL and IRS, may issue guidance in the coming weeks to address the implementation of these programs. Employers are encouraged to watch for updates from these agencies. Boardman Clark will continue to monitor these developments and provide any new guidance.

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