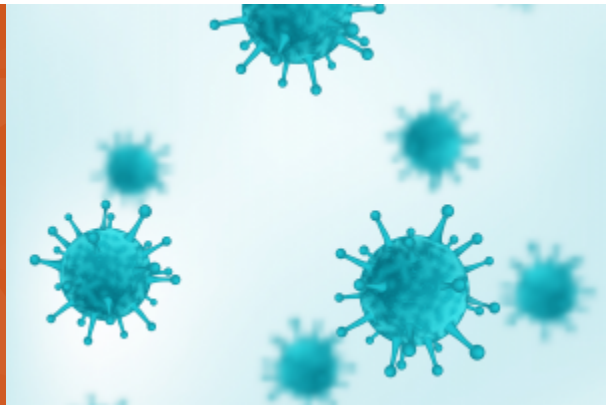
COVID-19 Alert: The American Rescue Plan Act Of 2021

What Employers Need to Know

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On March 11, 2021, President Biden signed into law the American Rescue Plan Act of 2021 ("ARPA"). ARPA provides $1.9 trillion in stimulus, and establishes new, significant employee rights and employer obligations, to address the economic fall-out of the COVID-19 pandemic.

The key ARPA provisions that affect employers are summarized below:

"Free" COBRA

The Consolidated Omnibus Budget Reconciliation Act ("COBRA") generally requires employers with 20 or more employees who maintain a group health plan to offer continued coverage under the plan to employees (and covered dependents) for up to 18 months following a loss of coverage due to, among other things, a job loss or reduction in hours. An employer is permitted to charge up to 102% of the applicable monthly premium cost for COBRA coverage.

Under ARPA, effective April 1, 2021, employers subject to COBRA must allow qualified employees who experience a loss of group health coverage due to an ARPA "qualifying event" – *either (i) a reduction in hours or (ii) an involuntary termination of employment other than for gross misconduct* – to receive free COBRA coverage from April 1, 2021 through the earlier of September 30, 2021 or the date that the individual's COBRA is set to expires (the "Subsidy"). In other words, between April 1, 2021 and September 30, 2021, employers subject to COBRA may not charge qualified employees for monthly COBRA premiums. Instead, employers must assume such costs.

Employers that incur COBRA costs under ARPA are eligible for a refundable tax credit against an employer's Medicare taxes. If the credit exceeds the amount of an employer's Medicare taxes due, the credit is refundable when an employer submits its quarterly Form 941.

Employees who qualify for the Subsidy include:

- An employee who experiences an ARPA qualifying event on or after April 1, 2021;
- An employee who has already qualified for and elected COBRA coverage as of April 1, 2021, as a result of an ARPA qualifying event.
- An employee who experiences an ARPA qualifying event prior to April 1, 2021 but had not yet elected COBRA coverage as of April 1, 2021.
- An employee who experiences an ARPA qualifying event prior to April 1, 2021, but declined or discontinued COBRA coverage prior to April 1, 2021.

The Subsidy is not available to employees who voluntarily terminate employment or who are eligible for coverage under another employer's health plan or Medicare.

ARPA requires plan administrators to satisfy certain notice requirements, with certain specified time frames, including: notifying eligible individuals, including individuals who previously rejected COBRA coverage, of the availability of the Subsidy.

The United States Department of Labor ("DOL") is expected to publish specific guidance on the Subsidy, including model notices, before the end of April 2021.

FFCRA Leave

The Families First Coronavirus Response Act (the "FFCRA") generally required companies with 500 or fewer employees to provide up to 10 days of Paid Sick Leave and up to 50 days of Paid Family Leave to employees who were unable to work for certain reasons related to COVID-19. Employers were entitled to reimbursement for the associated wages with refundable tax credits.

Although the mandate to provide FFCRA leave expired on December 31, 2020, the Consolidated Appropriations Act of 2021 (the "CAA") extended, through March 31, 2021, the tax credits (with some modifications) to employers that voluntarily provided such paid family and sick leave after December 31.

ARPA now extends these tax credit programs through September 30, 2021.

In addition:

- *Expanded Tax Credit Limits for Paid Sick Leave.* Under ARPA, employers may voluntarily provide employees up to 80 hours of Paid Sick Leave in the period from April 1, 2021 through September 2021, in addition to any Paid Sick Leave provided earlier, and be eligible for the corresponding tax credit. Any days an employee took before April 1, 2021 will not count toward the cap on the tax credit.
- *Expanded Eligibility for Paid Leave.* ARPA also expands the types of leave available under both the Paid Sick Leave and the Paid Family Leave. Leave can now be taken: (1) when an employee is obtaining a COVID-19 vaccination; (2) when an employee is suffering or recovering from side effects related to the COVID-19 vaccination; and (3) when an employee is seeking or waiting the results of a COVID-19 test if the employee has either been exposed to COVID-19 or the employer has requested the COVID-19 test, in addition to the six reasons for leave set forth in the FFCRA.
- *Non-Discrimination Provision.* ARPA adds a non-discrimination rule that eliminates tax credits eligibility for any employer who discriminates with respect to leave under both the Paid Sick Leave and the Paid Family Leave: (1) in favor of highly compensated employees (as that term is defined in Section 414(q) of the Internal Revenue Code); (2) in favor of full-time employees; or (3) on the basis of employment tenure.
- *Changes to Paid Family Leave Pay.* ARPA also increases the amount of Paid Family Leave that may be paid. Previously, the first two weeks of Paid Family Leave were unpaid. Under ARPA, employers may choose to make all 12 weeks of Paid Family Leave paid and may qualify for tax credits for the entire 12 weeks. In addition, the caps for tax credits for voluntarily providing Paid Family Leave have increased from $10,000 to $12,000.

Moreover, the Paid Family Leave benefits have been expanded to include all of the reasons an employee can take emergency paid sick leave. Under the original version of the FFCRA, Paid Family Leave was only available for school or childcare issues.

Short-Time Compensation Programs

Short-Time Compensation ("STC") programs, also known as work sharing or shared-work

programs, are an alternative to layoffs for employers experiencing a reduction in business activities and allows those employees facing a reduction in wages to collect a percentage of their unemployment compensation ("UC") benefits to replace a portion of their lost wages. Currently, 27 states have STC programs established in law that meet the federal definition, including Massachusetts.

The ARPA contains provisions intended to encourage employers to enact short-time STC programs in lieu of laying off employees. The ARPA permits states to receive reimbursement for 100% of unemployment benefits paid out pursuant to STC programs until September 6, 2021.

Massachusetts Employers should coordinate with the Massachusetts Division of Unemployment Assistance to facilitate approval of their STC plans for their employees.

Employee Retention Credits

Originally enacted as part of the 2020 Coronavirus Aid, Relief, and Economic Security Act ("CARES") and extended through the 2020 Consolidated Appropriations Act ("CAA"), the ARPA adopts many of the changes brought on by the CAA and extends the Employee Retention Credit ("ERC") through December 31, 2021. Broadly speaking, the ERC is a refundable quarterly payroll tax credit against certain employer payroll taxes. Recognizing the complexity of the ERC, it is easier to understand the ERC through the lens of all three stimulus acts.

Under the original CARES Act, businesses and certain non-profit organizations received a refundable credit against Social Security taxes equal to fifty percent (50%) of the "qualified wages" paid to employees, plus the cost to provide health benefits, and eligibility depended upon the business paying wages to employees while (1) business operations were either fully or partially suspended due to a COVID-19 government shut down order or (2) the business' gross receipts for a particular quarter of 2020 declined by more than 50 percent when compared to the same quarter in the prior year. The CARES Act imposed a more restrictive limitation on employers with more than 100 employees, limiting the ERC to wages paid to employees not providing services because of the COVID-19 state of emergency. For employers with 100 or fewer employees, the ERC was less restrictive and could be utilized against all wages. Under the CARES Act as originally enacted, the maximum ERC amount for 2020 was $5,000 per employee, and businesses obtained an SBA loan under the Payroll Protection Program ("PPP") were ineligible for the ERC. As a result, most employers who qualified for both the PPP and the ERC chose to obtain a PPP loan.

Last fall, President Trump signed into law the CAA which served to expand the ERC in a number of important ways. While the CARES Act applied to taxable periods through December 31, 2020, the CAA applied to the first two quarters of 2021, running from January 1 through June 30, 2021. Under the CAA and beginning January 1, 2021, the threshold for "large employers" was increased from 100 employees to 500 employees, the ERC was increased from 50% of "qualified wages" to 70% of "qualified wages," (inclusive of the employer's cost of providing health benefits), and the amount of the ERC was increased from a limit of $5,000 per employee for the entire year (under the CARES Act) to $7,000 per employee per quarter. In addition to the extended window and increased ERC amount, the CAA relaxed eligibility, making the ERC available to (1) employers whose business operations are either fully or partially suspended by a COVID-19 government shut down order, or (2) for any quarter in 2021 if gross receipts are less than 80% of gross receipts compared to the same quarter in 2019. In addition, to the extent an employer's gross receipts for a particular quarter in 2021 do not meet even this relaxed 80% test, the CAA provides employers with the ability to elect to have the test determining eligibility for the quarter measure whether the gross receipts for the immediately preceding quarter are less than 80% of the gross receipts for the same calendar quarter in 2019.

Finally, in a rather remarkable turn of events, the CAA struck from the CARES Act the prohibition of an employer taking advantage of both the PPP and the ERC and made this change retroactive to the enactment of the CARES Act. In plain English, this change meant that

employers could potentially benefit from both the PPP and the ERC, with the caveat that PPP loan forgiveness and the ERC are not available for the same wages – to the extent an employer obtained a PPP loan and utilized those proceeds to pay wages and subsequently received forgiveness of the PPP loan – those wages could not be counted again to obtain the benefits of the ERC.

The ARPA recently signed by President Biden extends the ERC through December 31, 2021 (making the ERC available to businesses under the relaxed CAA standards for all 4 quarters of 2021). While the credit itself is retained – 70% of "qualified wages" (inclusive of the employer cost to provide health benefits) – and extended to cover the period July 1 through December 31, 2021, the ARPA makes two significant changes to the CAA.

First, the election to use the prior quarter's gross receipts for purposes of determining whether a business' gross receipts were less than 80% of gross receipts compared to the same quarter in 2019 is extended to include Q3 and Q4 of 2021 (which means that an employer could election to compare Q2 2021 gross receipts to Q2 2019 gross receipts to determine eligibility for the ERC in Q3 2021).

Second, the ARPA creates a new layer on the broader ERC for certain new startup business that were not in existence prior to the outbreak of COVID-19 (a "Recovery Startup Business" or "RSB"). Under the ARPA, an RSB is a business which: (1) began business on or after February 15, 2020, (2) has no more than $1,000,000 in average annual gross receipts over the prior three years; and, (3) is not otherwise eligible for the ERC because the business was neither shut down per a COVID-19 shut down order nor had gross receipts less than 80% of gross receipts compared to the same quarter in 2019. This new RSB category seeks to make the ERC available to new startup *business even if the RSB does not satisfy the impact tests required of other businesses*. The RSB ERC is available for Q3 and Q4 2021 and can provide a maximum credit of $50,000 per quarter, and unlike the ERC under the other acts is a refundable credit specifically against Medicare taxes rather than Social Security taxes.

Finally, the ARPA retains the higher employer threshold enacted by the CAA (providing that employers with 500 or fewer employees can utilize the ERC for all employees' wages), but makes one change providing that employers with more than 500 employees can take advantage of the ERC only for furloughed employees (with a carveout for "severely financially distressed large employers" – a business that experienced a gross receipts reduction of more than 90% compared to the same calendar quarter in 2019 – enabling them to treat all wages up to the $10,000 limitation as qualified wages for Q3 and Q4 2021, even if the business is a large employer).

As previously noted, the ERC is a refundable credit, and the ARPA retains the advance payment provision enacted under CAA, which allows an employer to receive an advance refund payment even before any wages have been paid, with the advance payment for a quarter in 2021 based on 70% of the average quarterly payroll for the same quarter in 2019. If the actual ERC due to an employer determined at the end of the quarter is *less* than the amount of the advance payment, the employer would be obligated to repay the excess amount to the IRS. An employer should utilize Form 7200 to obtain an advance on the ERC.

Finally, while neither the CARES Act nor the CAA provided any special enforcement provisions, the ARPA includes an unusually long five (5) year statute of limitations period that would allow the IRS to assess a deficiency against an employer for improperly claiming the ERC. While it is difficult to predict the future, it seems likely that the government anticipates taxpayers taking unfair advantage of the lax standards for the ERC and that the IRS is likely to vigorously enforce the tax laws to combat abuse the ERC.

Morse is focused on assisting our clients through these unprecedented and challenging times. Please contact Matthew L. Mitchell or Joseph E. Hunt should you have questions concerning this subject, or any other COVID-19 response matters.