

# **COBRA Premiums, DCAP Amounts, and FFCRA Tax Credits Under The American Rescue Plan Act of 2021**

**CARLTON C. PILGER**

**Of Counsel  
Fisher Phillips**

Email: [cpilger@fisherphillips.com](mailto:cpilger@fisherphillips.com)

Phone: (404) 240-4141



# Agenda



- Introduction
- The American Rescue Plan Act of 2021 (ARPA)
  - COBRA Premium Assistance
  - Increased Income Exclusion for Dependent Care Assistance Plans (DCAP)
- The Families First Coronavirus Response Act (FFCRA)
  - Emergency Paid Sick Leave
  - Emergency Family and Medical Leave
  - ARPA provisions affecting FFCRA relief

# American Rescue Plan Act (ARPA)

- Latest in a series of massive COVID-19 relief packages
  - Signed into law March 11, 2021.
  - Contains provisions that affect continuation coverage under the Consolidated Budget Reconciliation Act of 1985 (COBRA) starting April 1, 2021.
  - Increases income exclusion under DCAP.

# American Rescue Plan Act (ARPA)

- COBRA premium assistance
  - 100% subsidized coverage for certain eligible qualified beneficiaries
  - Premium assistance available for periods of continuation coverage beginning on or after April 1, 2021 and ending September 30, 2021
    - Could later be extended but would require further legislative action
  - Employers can claim tax credit against quarterly tax returns
    - Details to follow in Treasury Department guidance
  - New election period for certain Assistance Eligible Individuals (AEI)
  - New COBRA notice requirements
    - [Model notices](#) available on DOL website

## COBRA premium assistance: Which plans are covered?

- Any plans sponsored by private-sector employers or unions and subject to federal COBRA under ERISA.
- Plans sponsored by state or local governments and subject to COBRA under the Public Health Service Act (PHSA).
- Group plans subject to state mini-COBRA laws (e.g., small group insured plans not subject to federal COBRA).
- ARPA does not apply to health flexible spending accounts (FSA).

## COBRA premium assistance: Who is eligible?

- Assistance Eligible Individuals (AEI) are qualified beneficiaries (and spouse and dependents) whose qualifying event is a reduction in hours or an involuntary termination of employment and who elect COBRA.
  - Reductions in hours do not have to be involuntary and include:
    - reduced hours due to change in a business's hours of operations;
    - change from full-time to part-time status;
    - taking of a temporary leave of absence; and
    - individual's participation in a lawful labor strike

As long as individual remains an employee when hours are reduced.

- Employment terminations must be involuntary, but no additional guidance on determining involuntariness.

# American Rescue Plan Act (ARPA)

## COBRA premium assistance: Who is eligible?

- Assistance Eligible Individuals (AEI) include:
  - Qualified beneficiaries who are receiving COBRA coverage due to a reduction in hours or involuntary termination of employment and whose period of continuation coverage includes periods on or after April 1, 2021; encompasses individuals whose COBRA coverage began as long ago as November 1, 2019.
  - Qualified beneficiaries whose qualifying event was a reduction in hours or an involuntary termination of employment prior to April 1, 2021 and who did not elect COBRA continuation coverage when it was first offered prior to that date or who elected COBRA continuation coverage but is no longer enrolled (for example, an individual who dropped COBRA continuation coverage because he or she was unable to continue paying the premium).
  - Qualified beneficiaries who experience a reduction in hours or involuntary termination of employment between April 1, 2021 and September 30, 2021.

## COBRA premium assistance: Who is NOT eligible?

- Qualified beneficiaries who are receiving COBRA coverage due to a qualifying event other than a reduction in hours or involuntary termination of employment.
- Individuals whose termination of employment was for “gross misconduct.”
- Qualified beneficiary-specific and can be a high standard that varies by jurisdiction.
- Beneficiaries who are, or who become, eligible for another group health plan such as a new employer’s plan or a spouse’s plan (not including excepted benefits, a qualified small employer health reimbursement arrangement (QSEHRA), or a health flexible spending arrangement (FSA)) or Medicare.
- Qualified beneficiaries whose maximum continuation coverage ended before April 1, 2020.



## COBRA premium assistance: When can AElS elect COBRA?

- Qualified beneficiaries whose qualifying event was a reduction in hours or an involuntary termination of employment prior to April 1, 2021 and who did not elect COBRA continuation coverage when it was first offered prior to that date or who elected COBRA continuation coverage but is no longer enrolled (for example, an individual who dropped COBRA continuation coverage because he or she was unable to continue paying the premium) have a new 60-day election period.
- Employers must provide a new election notice by May 31, 2021; deadline not extended by prior COBRA emergency relief.

## COBRA premium assistance: When can AEs elect COBRA?

- AEs will have 60 days after receiving a newly required notice from employer to elect coverage; deadline not extended by prior COBRA emergency relief.
- AEs may begin continuation coverage prospectively from the date of their election, or, if an individual has a qualifying event on or before April 1, 2021 choose to start their coverage as of April 1, even if the individual receives an election notice and makes such election at a later date.

## COBRA premium assistance: What notices must employers provide?

- Employers must notify AEI that they are eligible for ARPA COBRA premium assistance.
- The notice should include any forms necessary for enrollment, including forms to indicate that an individual is an AEI, and that they are not eligible for another group health plan (not including excepted benefits, a QSEHRA, or a health FSA), or eligible for Medicare.
- A general notice to all qualified beneficiaries *who have a qualifying event that is a reduction in hours or an involuntary termination of employment* from April 1, 2021 through September 30, 2021; can provide separately or with the COBRA election notice following a COBRA qualifying event.

## COBRA premium assistance: What notices must employers provide?

- A notice of the extended COBRA election period to any AEI (or any individual who would be an AEI if a COBRA continuation coverage election were in effect) who had a qualifying event before April 1, 2021.
- Plans and issuers must provide individuals with a notice of expiration of periods of premium assistance explaining that the premium assistance for the individual will expire soon, the date of the expiration, and that the individual may be eligible for coverage without any premium assistance through COBRA continuation coverage or coverage under a group health plan.
  - Plan must provide premium assistance expiration notice 15 to 45 days before an individual's premium assistance expires.

## COBRA premium assistance: What notices must employers provide?

- New notices must include:
  - The forms necessary for establishing eligibility for the premium assistance;
  - Contact information for the plan administrator or other person maintaining relevant information in connection with the premium assistance;
  - A description of the additional election period (if applicable to the individual);
  - A description of the requirement that an AEI notify the plan when they become eligible for coverage under another group health plan (not including excepted benefits, a QSEHRA, or a health FSA), or eligible for Medicare and the penalty for failing to do so.

## COBRA premium assistance: What notices must employers provide?

- New notices must include:
  - A description of the right to receive the premium assistance and the conditions for entitlement; and
  - If offered by the employer, a description of the option to enroll in a different coverage option available under the plan
- DOL has created [model notices](#) for all ARPA-required notices.
- DOL has also created a document to include with new notices entitled “Summary of COBRA Premium Assistance Provisions under the American Rescue Plan Act of 2021” (Premium Assistance Summary).
- The Premium Assistance Summary also includes two helpful forms for individuals to request to be treated as AEI and to notify employer of eligibility for other coverage.

## COBRA premium assistance: When will premium assistance end?

- ARPA COBRA premium assistance will end on the earlier of:
  - Period of continuation coverage ending September 30, 2021.
  - Last day of a maximum COBRA coverage period that ends between April 1, 2021 and September 30, 2021; ARPA does not extend maximum COBRA coverage period.
  - The date that an otherwise assistance eligible individual becomes eligible for another group health plan (other than excepted benefits, QSEHRA or health FSA) or Medicare.
    - Individuals must notify employer of other coverage eligibility or face penalty
      - \$250 or 110% of assistance amount if fraudulent.

## COBRA premium assistance: Can AEI elect different coverage option?

- Group health plans can (but are not required to) allow qualified beneficiaries to enroll in coverage that is different from the coverage they had at the time of the COBRA qualifying event.
- Changing coverage will not cause an individual to be ineligible for COBRA premium assistance, if:
  - The COBRA premium charged for the different coverage is no greater than for the coverage the individual had at the time of the qualifying event;
  - The different coverage is also offered to similarly situated active employees; and
  - The different coverage is not limited to only excepted benefits, a QSEHRA, or a health FSA.



## COBRA premium assistance: Can AEI elect different coverage option?

- If a plan permits individuals to change coverage options, the plan must provide the individuals with a notice of their opportunity to do so.
- Individuals have 90 days to elect to change their coverage after the notice is provided.

## **COBRA premium assistance: How are COBRA premiums paid between April 1, 2021 and September 30, 2021?**

- No refunds or assistance for coverage periods prior to April 1, 2021
- AEs are treated as if they made COBRA premium payments (including administrative fees) in full for affected periods of coverage.
- Employers cannot and should not require AEs to make premium payments for any period of coverage beginning on or after April 1, 2021 and before employer issues newly required premium assistance notice, if individual has requested to be treated as an AEI.
- Employers should refund, within 60 days of receipt, any COBRA premiums inadvertently paid by AEs for periods of coverage starting on or after April 1, 2021; can offset refunded amounts against quarterly taxes.

## **COBRA premium assistance: How are COBRA premiums paid between April 1, 2021 and September 30, 2021?**

- Refundable tax credits available to employers who pay AEI COBRA premiums for periods of coverage starting on or after April 1, 2021 and ending September 30, 2021.
- Tax credits claimed against Medicare taxes employer pays quarterly to IRS.
- If amounts claimed by employer exceed amount of taxes due, treated as refundable to employer.
- More guidance needed on tax credits but should be similar to FFCRA tax credit process.

## Dependent Care Assistance Plan Provisions

- ARPA increases amounts that eligible individuals may contribute to a dependent care flexible spending account.
- For plan years beginning on or after January 1, 2021 and ending before January 1, 2022, single individuals and married couples who file a joint tax return may contribute up to \$10,500 (up from \$5,000) to a qualified dependent care FSA; married individuals filing separate tax returns may each contribute \$5,250 (up from \$2,500).
- Plans that allow for increased contributions should be amended by the end of the year in which the change is adopted and should be operated according to the adopted amendment from its original effective date.

# Families First Coronavirus Response Act Overview

- Effective April 2, 2020
- Paid and Unpaid Leave for Coronavirus-Related Reasons
  - Emergency Paid Sick Leave
  - Emergency Family and Medical Leave Act (Expands FMLA)

# EMERGENCY PAID SICK LEAVE



# Emergency Paid Sick Leave

- **Employers with 1-499 employees**
  - How do you count employees?
  - When are separate entities combined?
- **Any employee who works for employer is eligible**
  - No minimum days/hours of employment
- **If the EMPLOYEE is sick, employee is entitled to:**
  - Full-time Employees – 80 hours of paid sick leave
  - Part-time Employees – Paid based on the average number of hours worked six months prior to leave.
    - Or, if employed for less than six months, the average number of hours per week the employee would normally be scheduled

# Emergency Paid Sick Leave

## Qualifying Reasons

- Paid sick time if employee is unable to work (or telework) due to:
  - (1) The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.
  - (2) The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
  - (3) The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.
  - (4) The employee is caring for an **individual** who is subject to an order or self-quarantine as described above.
  - (5) The employee is caring for a son or daughter if school or child care is closed/unavailable.
  - (6) The employee is experiencing “any other substantially similar condition” specified by HHS (catch-all).



# Emergency Paid Sick Leave

- At employee's regular rate for reasons (1), (2) or (3)
  - Compensated at HIGHER of their regular rate, federal minimum wage or local minimum wage
- At 2/3 the employee's regular rate for reasons (4), (5) or (6)
- Benefit capped at the following levels:
  - \$511 per day and \$5,110 in the aggregate per person for qualifying reasons (1), (2) and (3).
  - \$200 per day and \$2,000 in the aggregate per person for qualifying reasons (4), (5) and (6).

# Emergency Paid Sick Leave

- Exemption
  - Employers of health care providers or emergency responders may elect to exclude such employees.
- Secretary of Labor has *authority to issue regulations*:
  - To exclude certain health care providers and emergency responders from the definition of “eligible employee”
  - To exempt small businesses (<50 employees) from leave to care for a son or daughter if school or child care is closed/unavailable when the imposition of such requirement would
    - *jeopardize the viability of the business as a going concern*
  - To exempt “As necessary” (catch-all)

# Emergency Paid Sick Leave

## Additional General Rules

- Sick leave does not carry over
- Employer may not require employee to find a replacement to cover scheduled hours
- Employer may not require employee to use other paid leave provided by the employer before using this paid sick leave
- Employee may first use this paid sick time before other paid leave

## Notice Requirements

- **Employers:** Must post a notice
  - DOL produced a model notice available [here](#).
- **Employees:** After the first workday (or portion thereof) an employee receives paid sick leave, the employer may “require the employee to *follow reasonable notice procedures* in order to continue receiving such paid sick time.”

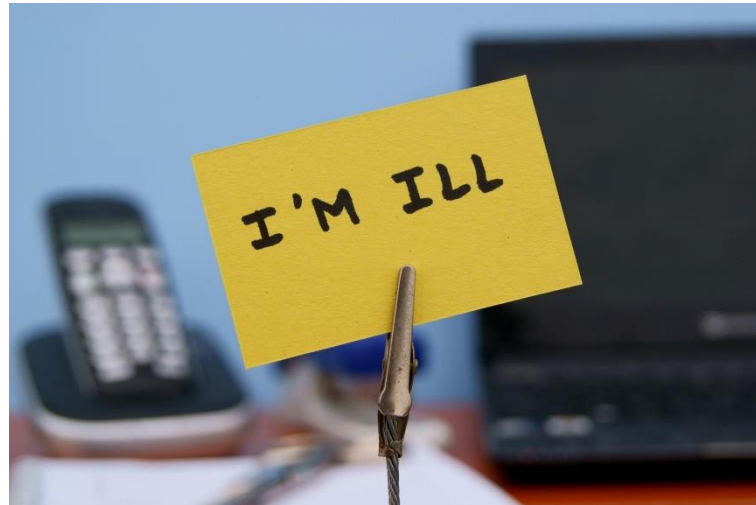
# Emergency Paid Sick Leave

## Tax Credits

- Employers are entitled to a refundable tax credit equal to the amount of the qualified paid sick leave requirements paid by the employer per quarter.
- The tax credits are applied against employer quarterly taxes, but employers are reimbursed if their costs for qualified leaves exceed the taxes they would owe.



# EMERGENCY FAMILY AND MEDICAL LEAVE



# Emergency Family And Medical Leave Act

- **Employers with 1-499 employees**
  - How do you count employees?
  - When are separate entities combined?
- **Significantly expands FMLA on a temporary basis**
- **Any employee who worked for employer for 30 days**
- **12 weeks of job-protected leave**
  - Paid after the first 10 days

# Emergency Family And Medical Leave Act

## Qualifying Reasons

- **12 weeks of job-protected leave when:**
  - Unable to work (or telework) due to the need to care for son or daughter under 18 if the school or place of care has been closed, or the child care provider is unavailable, due to a public health emergency.
- **“Public Health Emergency”**
  - COVID-19 emergency declared by a Federal, State or local authority



# Emergency Family And Medical Leave Act

- **First 10 days of E-FMLA may be unpaid**
  - Employee may elect accrued PTO, vacation, or sick leave to cover any portion of first 10 days
  - Employer cannot require an employee to substitute such leave
- **After the first 10 days:**
  - Compensated at 2/3 of the regular rate
  - Part-time employees/irregular schedule
    - average hours worked in prior 6 months
  - Pay capped at \$200 per day and \$10,000 in aggregate per employee
  - Bargaining unit employees – apply E-FMLA consistent with the CBA

# Emergency Family And Medical Leave

- Exemption
  - Employers of health care providers or emergency responders may elect to exclude such employees.
- Secretary of Labor has *authority to issue regulations*:
  - To exclude certain health care providers and emergency responders from the definition of “eligible employee”
  - To exempt small businesses (<50 employees) from leave to care for a son or daughter if school or child care is closed/unavailable when the imposition of such requirement would
    - *jeopardize the viability of the business as a going concern*
  - To exempt “As necessary” (catch-all)

# Emergency Family And Medical Leave Act

## Job Restoration/Reinstatement

- If 25 or more employees, traditional restoration obligation
- If **fewer than 25 employees**, traditional reinstatement provisions do not apply **IF**:
  - Employee takes E-FMLA
  - Position no longer exists due to economic conditions or other changes in operating conditions (i) that affect employment; and (ii) are caused by a public health emergency
  - Employer makes reasonable efforts to restore the employee to an equivalent position, with equivalent pay, benefits, and other terms
  - If reasonable efforts fail, employer makes reasonable efforts to contact the employee if an equivalent position becomes available during the 1 year period beginning on the earlier of (A) the date on which the qualifying need related to a public health emergency concludes; or (B) the date that is 12 weeks after the date on which the employee's leave for E-FMLA commences.

# Emergency Family And Medical Leave Act

## Interplay With Other Paid Leave

- Full-time employees may take Emergency Paid Sick Leave for first 80 hours of E-FMLA leave so that it is paid
- Employees also may elect to use other accrued paid leave such as vacation and PTO during the first 10 days
- Eligibility for E-FMLA and FMLA is 12 weeks total per DOL FAQ guidance.

# Emergency Family And Medical Leave Act

## Notice Requirements

- **Employers:** No new specific notice requirement.
  - But don't forget regular poster
- **Employees:** If leave is foreseeable, employee shall provide notice of leave "as is practicable."

# Emergency Family And Medical Leave

## Tax Credits

- Employers are entitled to a refundable tax credit equal to the amount of the qualified paid sick leave requirements paid by the employer per quarter.
- The tax credits are applied against employer quarterly taxes, but employers are reimbursed if their costs for qualified leaves exceed the taxes they would owe.

# State And Local Laws

- Many states and local jurisdictions have their own paid sick and family/medical leave laws, which may be in addition to these new federal requirements.
- Many states and localities also amended laws and/or added new requirements due to COVID-19 pandemic.



# American Rescue Plan Act (ARPA)



## Families First Coronavirus Response Act (FFCRA)

- ARPA extends the available FFCRA employer tax credit that were designed to reimburse small and mid-size employers for making required payments for sick or family leave related to the COVID-19 pandemic.
- The original FFCRA required paid leave expired December 31, 2020, but the Consolidated Appropriations Act, 2021 extended the credit through March 31, 2021 for employers that voluntarily continued to provide such paid leave.
- ARPA extends the available FFCRA credit to leave provided through September 30, 2021.
- The extended credit applies to Medicare taxes (as does the new COBRA premium assistance credit) rather than Social Security.



# American Rescue Plan Act (ARPA)

## Families First Coronavirus Response Act (FFCRA)

- ARPA resets the 10-day limit on the qualified sick-leave wages taken into account with respect to any employee and increases the aggregate maximum credit for qualified family leave wages to \$12,000.
- If employer takes advantage of extended tax credit, it must allow EPSL and EFML for absence because employee is:
  - Seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID-19, provided that the employee has been exposed to COVID-19 or the employer has requested that the employee obtain such test or diagnosis;
  - Obtaining immunization related to COVID-19; or
  - Recovering from any injury, disability, illness, or condition related to immunization for COVID-19.

## Families First Coronavirus Response Act (FFCRA)

- Employer cannot refuse to pay first 10 days of EPFL as originally allowed under FFCRA.
  - But employer cannot double-dip on tax credits, so must claim EPSL which will reduce tax credits available for EPFL.
- Employer cannot discriminate in favor of any highly compensated employee (HCE), full-time employee or any employee based on tenure.
  - HCE generally means, for calendar year 2020, the employee had more than \$130,000 in compensation in 2019 or is a 5% business owner.

# American Rescue Plan Act (ARPA)

## Families First Coronavirus Response Act (FFCRA)

- ARPA also adds credits for collectively bargained defined benefit pension and apprenticeship program contributions and FICA taxes (both Social Security and Medicare) to the extent they are allocable to sick or family leave wages covered by the available credit.



# Questions?



HRCI –

SHRM –



**CARLTON C. PILGER**

Of Counsel

Fisher Phillips

Email: [cpilger@fisherphillips.com](mailto:cpilger@fisherphillips.com)

Phone: (404) 240-4141



# Thank You

**CARLTON C. PILGER**

Of Counsel

Fisher Phillips

Email: [cpilger@fisherphillips.com](mailto:cpilger@fisherphillips.com)

Phone: (404) 240-4141