What Employers Need To Know About Biden's American Rescue Plan

Insights
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After several weeks of tense negotiations and legislative twists and turns, President Biden's latest COVID-19 stimulus package – the American Rescue Plan – has been passed by Congress and will become law once the president signs it into effect this Friday. The measure provides $1.9 trillion in economic relief, with many of the specific items directly affecting employers. What do businesses need to know about this finalized legislation?

What Is Not Included In The American Rescue Plan?

Before examining the areas of law that changed, it is just as important to review portions of the initial proposal which were not included in the final version signed by the president. The three most critical pieces:

- **$15 Minimum Wage:** Despite House passage of a bill including a minimum wage hike and efforts by Senator Bernie Sanders and others, the Senate (with bipartisan support) removed the minimum wage provisions from the American Rescue Plan before sending it to Biden for signature.
- **Elimination of Tip Credit:** Though it has gotten little press, buried in the provisions to raise the minimum wage was language which would have phased the tip credit out of existence. Hospitality employers hope this is more than a temporary reprieve.
- **Paid Leave:** The White House originally planned for the plan to include paid leave for employees needing to be absent for COVID-19 reasons, including to get vaccinated or to recover from side effects related to the vaccination. These paid leave benefits were not included in the House bill and were not added as the bill proceeded.

What You Should Do: While these provisions did not make it into the final American Rescue Plan, the White House and Democratic leaders have stated their intent to introduce new legislation to fulfill these campaign promises (read more here and here). Whether such proposals can clear the current Senate is yet to be seen, but we recommend you subscribe to Fisher Phillips Legal Alerts to stay up to speed on these developments.

Extension Of FFCRA Tax Credits

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The federal Families First Coronavirus Response Act (FFCRA) expired on December 31, 2020 – and with it, covered employers' obligation to provide emergency paid sick leave and emergency family and medical leave. Shortly before the end of the year, Congress extended the tax credit for employers who ***voluntarily*** continued to provide such paid leave through March 31, 2021.

As we previously discussed, President Biden's original vision for the American Rescue Plan proposed to extend and expand emergency paid leave obligations in several key areas. However, the House version of the current COVID-19 relief bill does not extend the employer obligation to provide paid leave. Instead, the legislation merely extends the tax credit for voluntary provision of leave through September 30, 2021 and makes related changes. These provisions of the relief bill include the following:

- Extends the tax credits available for employers who voluntarily provide FFCRA leave from March 31, 2021 to September 30, 2021.
- Provides that the tax credits are available for paid sick leave and paid family leave provided for the additional following qualifying reasons:
- the employee is obtaining immunization (vaccination) related to COVID-19;
- the employee is recovering from any injury, disability, illness or condition related to such vaccination; or
- the employee is seeking or awaiting the results of a diagnostic test or medical diagnosis for COVID-19 (or their employer has requested such a test or diagnosis).
- Adds non-discrimination rules to provide that no tax credit is available if the employer, in determining availability of the paid leave, discriminates against highly compensated employees, full-time employees, or employees on the basis of tenure with the employer. This provision appears designed to compel employers who make the decision to voluntarily provide leave do so in a uniform manner, without discriminating against certain categories of workers.
- Re-sets the 10-day limit for the tax credit for paid sick leave under the FFCRA beginning April 1, 2021. As a result, an employer could *voluntarily* provide an additional 10 days of FFCRA paid sick leave beginning April 1, 2021, and would be eligible for a tax credit for doing so. But employers are not required to do so.

Even though the current legislation does not extend the employer mandate to provide paid FFCRA leave, this is likely not the last conversation on this topic. There are indications that the Biden administration may attempt to resurrect pieces of the American Rescue Plan that did not make it into this bill into subsequent legislation in the near future. There are also various pending proposals at the federal level to adopt a more comprehensive paid leave obligation for employers (such as the FAMILY Act, discussed in more depth here). Therefore, employers will need to stay tuned. In addition, employers need to be aware of state and local COVID-19 paid leave obligations, many of which continue to apply or have been extended beyond the expiration of the FFCRA.

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What You Should Do: Consult with counsel to determine which, if any, state and local paid sick leave laws may apply to you as many have been extended beyond the December 31, 2020 expiration of the FFCRA paid leave mandate. In addition, you should continue to monitor developments at the federal level. Although an extension of paid leave was not included in this stimulus package, it is still on the Biden administration's and many members of Congress's "to do" list. We could see new leave mandate proposals in the immediate future, so this will be one area to watch closely.

Boost For Vaccine Efforts

The American Rescue Plan provides over $15 billion aimed toward enhancing, expanding and improving the nationwide distribution and administration of vaccines, including the support of efforts to increase access, especially in underserved communities, to increase vaccine confidence and to fund more research, development, manufacturing, and procurement of vaccines and related supplies as needed. The upshot? We may see the widespread proliferation of vaccine availability even earlier than expected.

What You Should Do: Despite developments indicating that vaccines are likely to become much more widely available in the short term, many employers remain unprepared to deal with related issues. Those issues include not only the initial administration process, but also the extent to which the greater prevalence of vaccinated employees may (or may not) affect your safety protocols in terms of mask mandates, physical distancing, and related rules. To prepare for the imminent widespread distribution of vaccines, we recommend you review our 10-point action plan to assist employers, available on the FP Vaccine Resource Center.

Relief For Small Businesses

The American Rescue Plan Act provides additional funding for small businesses, with an focused effort on those in hard-hit industries like restaurants and bars. The new bill provides $25 billion for a new Small Business Administration program focused on supporting restaurants and other food and drinking establishments. These grants are available for up to $10 million for those eligible and can be used to pay expenses like payroll, mortgage, rent, utilities, and food and beverages.

The bill provides an additional $7 billion for the Paycheck Protection Program, which provides small businesses with the potential for 100% forgivable loans. The additional PPP funding brings the total for the current round of the program to over $813 billion. Likewise, both bills expand PPP eligibility for certain nonprofit organizations.

The new law also provides $15 billion to the Economic Injury Disaster Loan (EIDL) Advance program designed to provide economic relief to businesses currently experiencing a temporary loss of revenue due to COVID-19. Like the PPP, the EIDL program is administered through the SBA to help qualifying businesses meet financial obligations and operating expenses that could have been met had the disaster not occurred. Priority funding is also allocated to businesses with less than 10 employees that the pandemic has severely impacted.

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Finally, the law includes funding under the Shuttered Venue Operators Grant (SVOG) program, which had previously appropriated $15 billion in the December 2020 stimulus package. Eligible entities for the SVOG include live venue operators or promoters, theatrical producers, live performing arts organization operators, museum operators, motion picture theatre operators, and talent representatives. Eligible entities for the SVOG program can also qualify for loans under the PPP.

What You Should Do: If you're a small business operating in a hard-hit industry such as the hospitality sector, you should quickly determine eligibility for funding. Even if you're not a bar or a restaurant, you might still be eligible for economic assistance through the various grants or loan programs detailed in the plan if the COVID-19 pandemic has severely impacted your business. Be sure to consult with your Fisher Phillips attorney concerning any questions to help your business respond to the unprecedented economic challenges caused by the COVID-19 pandemic.

Unemployment Benefits

President Biden considers it imperative that workers impacted by the pandemic not lose out on emergency enhanced unemployment benefits, but the expanded unemployment assistance under the CARES Act and Stimulus 2.0 are set to expire soon in mid-March. Without an extension, millions of unemployed Americans impacted by the COVID-19 pandemic would be impacted. Luckily, both the House's and Senate's versions of the American Rescue Plan increase and further extend these unemployment benefits. However, there were some key differences between the two versions of the proposal, and the finalized version differs from the initial proposal.

While an earlier version sought to generally boost weekly unemployment benefits from $300 per week to $400 per week through August 29, the finalized legislation retains the $300 per week unemployment benefits. However, the version signed into law extends these benefits until September 6, which is more in alignment with Biden's proposed outline for the American Rescue Plan.

Another major change related to the unemployment benefits in the finalized version is the addition of a provision making the first $10,200 in unemployment received in 2020 non-taxable for households with incomes under $150,000. This provision will go a long way to address the looming concerns for the millions of Americans currently on unemployment insurance.

What You Should Do: There is not much for employers to do in response to this provision of the bill, as it is primarily geared toward workers. However, it is important to understand the lay of the land in terms of unemployment insurance, as certain industries may face obstacles in hiring for certain positions for the time being. You should be aware that the benefits will expire on September 6 and adjust your hiring plans accordingly.

Stimulus Payments

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The American Rescue Plan means that the federal government will send $1,400 stimulus checks on top of the $600 payments issued through the December stimulus bill. Under the structure agreed to during lawmaking negotiations, the payments will phase out at a quicker rate for those at higher income levels compared with the initial proposal floated by President Biden. Those earning $75,000 per year and couples earning $150,000 will still receive the full $1,400-per-person benefit but those earning more than $80,000 and couples earning more than $160,000 will not be eligible.

Tax Credits And Benefits

The bill expands three important tax credits: the child tax credit, the earned income credit, and the employee retention credit. The bill also increases certain health and pension benefits.

- The bill increases the **child tax credit** from $2,000 per child under age 17 to $3,000 for those age six through 17 and to $3,600 for those under age 6. Currently, the credit phases out at $200,000 for single tax return filers and $400,000 for joint filers. The new bill lowers those thresholds to $75,000 and $150,000 respectively. Another key provision makes the credit fully refundable – meaning that those who pay little or no taxes will still be able to take full advantage of the credit. Recipients can receive monthly installments (which would facilitate paying monthly living expenses) or a lump sum.
- The **earned income credit** for lower income taxpayers has also been expanded. The amount has nearly tripled and the minimum age to claim to the credit is reduced from 25 to 19. No upper age limit is imposed under the new bill.
- The **employee retention credit** (ERC) is extended through December 31, 2021. It also is expanded to include certain start-up businesses (with an ERC capped at $50,000 per quarter) that otherwise would not have qualified for the ERC.

The bill also provides for a 100% COBRA premium subsidy effective April 1 through September 2021 for those who are involuntarily terminated and want to remain on their employer's health insurance. The employer would pass along the subsidy so that qualifying individuals would pay nothing for their COBRA coverage during this period.

Finally, the bill expands the class of those who are entitled to help with the cost of their insurance under the Affordable Care Act. Consumers would be able to receive assistance if their premiums exceed 8.5% of their incomes rather than the current income cutoff of $51,000. The bill provides over $24 billion to shore up childcare facilities which have been hit particularly hard by the pandemic. It provides help to childcare workers making less than $12 per hour.

A "Rescue Plan" for Multiemployer Union Pensions

The perpetual debate over how to rescue sick multiemployer pension plans appears poised to end with a whimper. Tacked on at the very end of the COVID-19 relief bill, the Butch Lewis Emergency Pension Relief Act of 2021 essentially kicks the can down the road for another 30 years.

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Many unionized employers had hoped for a comprehensive measure addressing the systemic problems that have plagued multiemployer pension plans for years. Fading industries, "last man standing" concerns, unfair withdrawal liability rules, orphan participants, undue vulnerability to economic downturns, and other hobgoblins were crying out for a thoughtful legislative solution. Instead, Congress ignored the systemic issues in favor of mass bail-out directing billions of dollars to the sickest multiemployer plans. There are no reforms or substantive fixes for the system that brought many of these plans and their contributing employers, plus the Pension Benefit Guaranty Corporation, to the brink of disaster.

So what's in store for multiemployer plans and the employers who contribute to them? First, the current withdrawal liability rules stay in place, unchanged. There are no surcharges on employer contributions, no employer-paid PBGC premiums, and no additional withdrawal penalties. The sickest of the multiemployer plans – those in "critical and declining" status, plus a few others – will be given enough money in a lump sum by the U.S. Treasury to pay benefits through 2051. Termed "financial assistance," these amounts will not be repaid. There will be restrictions on how this money may be invested, future benefit increases will be prohibited, and PBGC will keep an eye on other plan activities such as employer contribution rates, withdrawal liability, and grants of unfunded benefit service. A provision in the House version that required withdrawal liability to be calculated and paid as if bailout money had not been received was removed by the Senate before the bill was finalized and signed by the president.

How this change plays out remains to be seen. If pension funds get billions in bailout money, their underfunding should be reduced significantly. That in turn should significantly reduce withdrawal liability to contributing employers, giving those employers a chance to get out of the funds for much less money. This could create a race to the exits for those that can afford it and have the opportunity to withdraw.

Whether this occurs remains to be seen. The PBGC and the funds may try to impose rules to stop employers from withdrawing, or the House may try to reinstate its earlier restrictions.

Finally, under other parts of the new law, retirees who were forced to take benefit cutbacks under prior law will have their benefits restored and will be paid back. There will be no future cutbacks. Rehabilitation plans will remain in place, but employers may see some relief as future contribution rate increases may not be as severe as now required. Finally, PBGC premiums (paid by multiemployer plans) will increase to an indexed $52 per participant per year in 2031. Current flat-rate premiums are $31 per participant per year.

Who loses here? Aside from taxpayers in general and the healthy multiemployer plans that will incur PBGC premium increases, the big pie-in-the-face goes to highly paid executives and their employers. Tax code rules which disallow deductions for salaries above $1 million in public companies have been expanded to include up to 10 executives from the prior limit of five. Provisions

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in the House bill which froze contribution limits to 401(k) plans beginning in 2031 were removed by the Senate before the bill was finalized.

What You Should Do: If you contribute to multiemployer plans, you should request annual estimates of withdrawal liability from each plan. This is critical information for planning purposes and often takes weeks to obtain. Regular requests for this information mean that information is in hand when needed, and does not arouse unnecessary suspicions with local union leadership.

Conclusion

We will keep a close eye on further legislative proposals and provide updates as warranted. You should ensure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions about any aspect of this new law and its impact on your workplace, contact your Fisher Phillips attorney.

This Legal Alert provides an overview of a specific federal bill. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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