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NONPROFIT LEGAL NEWS

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American Rescue Plan Act: Impact on Nonprofit Employers and Employees

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The most recent COVID-19 relief bill, the American Rescue Plan Act (ARPA), was signed into law on March 11. Among other relief it provides, ARPA includes a much-anticipated COBRA premium subsidy, pension plan funding relief, and several employer and employee protections for those hit hard by COVID-19. Notably missing from ARPA is an increase to the minimum wage.

COBRA Premium Subsidy

Under federal and state COBRA laws that provide for continuation of health coverage, most employers who sponsor group health plans, including nonprofit employers, are required to provide continuation coverage upon certain "qualifying events." ARPA creates a premium subsidy for federal and state COBRA coverage for "assistance eligible individuals," defined generally as including any employee or dependent who loses group health plan coverage due to an involuntary termination of employment or because of a reduction of hours.

ARPA also creates a special election period for any individual who did not elect federal COBRA continuation coverage but who otherwise is eligible for the COBRA subsidy and for any individual who elected and discontinued federal COBRA continuation coverage and whose maximum COBRA period has not expired as of April 1, 2021. These individuals are allowed an opportunity to elect COBRA coverage within 60 days of receiving the required employer notice. The resulting COBRA continuation coverage begins with the first period of COBRA continuation coverage beginning on or after April 1, 2021.

The premium subsidy applies for any period of coverage during the period April 1, 2021 through September 30, 2021 (the Period of Coverage), subject to otherwise applicable maximum periods of coverage under COBRA. Individuals who are eligible for and elect COBRA coverage for the Period of Coverage are not required to pay the otherwise applicable COBRA premium during the Period of Coverage. For-profit and nonprofit employers offering self-insured and fully insured plans that are subject to federal COBRA must cover the cost of the COBRA premium and seek reimbursement through a payroll tax credit equal to the amount of the premium assistance.

On April 7, 2021, the Department of Labor (DOL) issued FAQs and sample notices to aid employers with the application and administration of ARPA's COBRA subsidy provisions. ARPA also calls for the Internal Revenue Service (IRS) to release guidance, but it has not yet been published.

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Plan Enrollment Option

ARPA also provides for a "Plan Enrollment Option," which may permit assistance eligible individuals to change coverage to a lower-cost option within 90 days of receiving the required employer notice, if:

- the plan sponsor permits the change;
- the premium for the lower-cost option is less than the premium for the coverage option in which the individual was enrolled at the time the COBRA qualifying event occurred;
- the lower-cost option is offered to similarly situated employees; and
- the lower-cost option provides more than limited health coverage (coverage other than coverage providing only excepted benefits, qualified small employer health reimbursement arrangement coverage or flexible spending arrangement coverage).

Coordination of COBRA Premium Subsidy and Extension of Deadlines

The DOL guidance issued on April 7 confirms that deadline extension relief provided in 2020 in response to the COVID-19 pandemic and revised on February 26, 2021, does not apply to the notices or elections related to the COBRA premium subsidy available under ARPA.

Single-Employer Pension Plan Relief

ARPA makes changes that generally will reduce single-employer pension plan minimum required contributions. First, it extends and modifies smoothing of interest rates used to determine pension liabilities, which decreases pension liabilities, resulting in lower contribution requirements. Modified smoothing applies, at the plan sponsor's option, to plan years starting in 2020, 2021 or 2022 and may be applied separately for purposes of benefit restrictions. In addition, ARPA allows repayment of prior year shortfalls over 15 years, rather than over seven years as required under current law. This extended amortization of prior year shortfalls, using a fresh-start approach, could be implemented in any plan year starting in 2019, 2020, 2021 or 2022, at the plan sponsor's option.

Dependent Care Flexible Spending Account Maximum Limit Increase

ARPA increases the maximum amount that may be excluded from an employee's gross income under a Section 129 dependent care assistance program from $5,000 ($2,500 married filing separately) to $10,500 ($5,250 married filing separately). While this provision is voluntary, retroactive amendments are permitted if an amendment is adopted by the last day of the 2021 plan year and the plan is administered consistently with the terms of the amendment beginning on its effective date. This relief will be welcome to employers seeking to apply the unlimited carryover or extended grace period relief enacted late last year under the Consolidated Appropriations Act, 2021, Pub. L. 116-260, 134 Stat. 1182 (Dec. 27, 2020) (CAA). Without the related increase to the Section 129(a) exclusion limits, the CAA relief may have resulted in employees receiving reimbursements in excess of the standard exclusion limit during 2021 and 2022.

Funding for COVID-19-Related Worker Protection Activities

ARPA appropriates $150 million to various DOL agencies, including the Wage & Hour Division and OSHA, to "carry out COVID-19-related worker protection activities" through September 2023, at least $75 million of which is specifically allocated to OSHA. Given the Biden administration's focus on workplace safety and enforcement, we expect an increase in audits and inspections.

Federal Unemployment Supplement Extension

ARPA also extends federal supplemental unemployment benefits for those who have lost their jobs as a result of the COVID-19 pandemic that were initially made available through the Families First Coronavirus Response Act (FFCRA) and the Coronavirus Aid, Relief, and Economic Security Act (CARES). These supplements, which were slated to expire March 14, 2021, have been extended through September 6, 2021. Like CARES, ARPA provides $300 in weekly unemployment compensation in addition to the amount provided under state law.

More Funding, More Time for PPP Loans

Business loans through the Payroll Protection Program (PPP) play a lesser role under ARPA than in previous COVID-19 relief legislation. ARPA appropriates an additional $7.25 billion in funding to the $284 billion in current PPP funding still available.

While ARPA did not extend the PPP's application period beyond its schedule closure date of March 31, 2021, Congress extended that date shortly after ARPA's passage through the PPP Extension Act of 2021, which extends the application deadline through June 30, 2021.

Expansion of PPP to Additional Nonprofits

ARPA also makes more nonprofit organizations eligible for PPP funding by creating a new category called "additional covered nonprofit entity," which are those nonprofits listed in Section 501(c) of the Internal Revenue Code other than 501(c)(3), 501(c)(4), 501(c)(6) or 501(c)(19) organizations. These additional covered nonprofit entities can receive an initial PPP loan if:

- the organization does not receive more than 15% of receipts from lobbying activities;
- the lobbying activities do not comprise more than 15% of activities;

- the cost of lobbying activities of the organization did not exceed $1 million during the most recent tax year that ended prior to February 15, 2020; and
- the organization employs not more than 300 employees per physical location.

In addition, ARPA makes some larger nonprofits eligible for PPP funding, including 501(c)(3) organizations and veterans organizations that employ not more than 500 employees per physical location, and 501(c)(6) organizations, domestic marketing organizations and additional covered nonprofit entities that employ not more than 300 employees per physical location.

FFCRA Paid Sick and Family Leave Tax Credit Extension

FFCRA's provisions requiring certain employers to provide federal paid sick leave and family leave expired on December 31, 2020. While ARPA does not reinstate the requirement to provide paid FFCRA sick leave, it does temporarily extend a tax credit to employers who voluntarily choose to provide eligible employees with Emergency Paid Sick Leave (EPSL) or Emergency Family Medical Leave (EPFL) through September 30, 2021. ARPA also expands the qualifying reasons for which EPSL and EPFL may be taken should an employer choose to provide such leave, including leave for absence due to obtaining a COVID-19 vaccination or recovering from injury, disability, illness or other condition related to receiving the vaccination.

Although the federal requirement to provide paid sick and family leave has expired, eligible employees may still qualify for unpaid leave under the Family Medical Leave Act. Also, some states and localities require employers to provide employees with paid or unpaid sick or family leave for reasons related to COVID-19. Thus, employers should be careful to ensure their leave policies comply with applicable law.

Employee Retention Tax Credit Extension

ARPA encourages businesses, including nonprofit organizations, to retain employees despite the challenges posed by COVID-19 by extending the Employee Retention Tax Credit, previously set to expire in June 2021, until December 31, 2021. Eligible employers who experience a full or partial shutdown due to COVID-19 or a qualifying decline in their 2021 receipts may qualify for the credit.

No Minimum Wage Increase

Finally, although the House initially proposed a gradual increase of the federal minimum wage from the current hourly rate of $7.25 to $15 by 2025, that measure fell short in the Senate and was not included in the version signed into law by President Biden.

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