



NAPEO's Webinar Series: Legal/HR/Government Affairs

The American Rescue Plan Act What it Means for PEOs

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**Randy Hardock and Courtney Zinter
Davis & Harman LLP**

**Seth Perretta and Malcolm Slee
Groom Law Group**

Key Tax-Related Changes Relevant to PEOs and Employers in the American Rescue Plan Act

Randy Hardock & Courtney Zinter
Davis & Harman LLP

Employee Retention Tax Credit (ERTC)

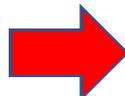
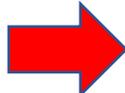
Original ERTC (CARES Act):

- ERTC was available for qualified wages paid March 13, 2020 – December 31, 2020

December 2020 Bill:

- Extended ERTC through June 30, 2021
- Retroactive change allowed eligible employers that received a PPP loan to also claim the ERTC (but not for same wages)
- For Q1 & Q2 2021, the ERTC was enhanced and expanded to more employers

American Rescue Plan Act:

-  • Extends ERTC through December 31, 2021
-  • ERTC for Q3 & Q4 is otherwise **very similar** to ERTC in Q1 & Q2 2021 (with certain expansions)

ERTC: Changes in ARPA for Q3/Q4 2021

- Creates a new category of “eligible employer” for a **recovery startup business**
 - Defined as an employer that (1) started business after February 15, 2020, (2) has avg. annual gross receipts not over \$1M, and (3) is not otherwise eligible for ERTC for the quarter
 - Limited to \$50,000 total ERTC per quarter (new employer limit)
- The more generous definition of “qualified wages” is available to **severely financially distressed employers**
 - Defined as an eligible employer whose gross receipts declined more than 90% as compared to the comparison quarter
- Becomes a credit against **Hospital Insurance tax** (instead of OASDI)
 - Change required to meet limitations on reconciliation bills from affecting Social Security

ERTC: PEO-related Provisions that Continue from Q1/Q2 to Q3/Q4 2021

- ERTC treated as a credit described in Code section 3511(d)(2) (list of credits that apply to client of certified PEO and not the certified PEO)
- Treasury Secretary must issue guidance as is necessary:
 - In the case of third-party payors (e.g., PEOs, CPEOs), “**allowing such payors** to submit documentation necessary to substantiate the eligible employer status of employers that use such payors”
 - Any such guidance “**shall require the customer** to be responsible for the accounting of the credit and for any liability for improperly claimed credits and **shall require the [CPEO] or other third party payor** to accurately report such tax credits based on the information provided by the customer”

Employer Credits for Paid Sick and Family Leave

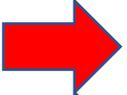
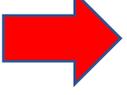
Families First Coronavirus Response Act (FFCRA):

- Required certain employers to provide paid sick and paid family and medical leave through 12/31/2020
- Provided employer tax credits to offset, on a dollar-for-dollar basis, the amount of wages paid to an employee due to the mandate through 12/31/2020

December 2020 Bill:

- Extended the FFCRA employer tax credits for 3 months (to 3/31/2021)

American Rescue Plan Act:

-  • Extends the FFCRA employer tax credits an additional 6 months (to 9/30/2021)
-  • Makes other changes to paid leave credits and availability of paid leave (if employer chooses to offer leave)

Changes to FFCRA Paid Leave for Q2/Q3 2021

Paid Sick Leave

- 10-day limit on paid sick leave restarts April 1, 2021
- Reasons for taking paid sick leave are expanded, for example:
 - Employee is obtaining COVID immunization or recovering from immunization

Paid Family Leave

- Wages covered by credit increased from aggregate \$10,000 to \$12,000 per individual
- Eliminates requirement to take unpaid FMLA leave for first 10 days
- Reasons for taking leave expanded to include all reasons available with respect to FFCRA's paid sick leave

Changes to FFCRA Paid Leave Credits for Q2/Q3 2021

- Credit amount may be increased by:
 - Amount of employer contributions to collectively bargained defined benefit plans and apprenticeship programs
 - Amount of OASDI imposed on qualified wages paid (instead of excluding paid leave from OASDI, as initially provided under FFCRA)
- Specifies coordination with wages taken into account as payroll costs under PPP, other SBA programs
- Becomes a credit against Hospital Insurance tax (instead of OASDI), similar to ERTC

Healthcare Changes in the American Rescue Plan Act

Seth Perretta and Malcolm Slee
Groom Law Group

Overview

- APTC Eligibility Changes
- Dependent Care FSA Changes
- COBRA Subsidy Program

Affordable Care Act Subsidies

- ACA subsidy changes:
 - Eliminates upper income limit for 2021 and 2022

“In the case of household income (expressed as a percent of poverty line) within the following income tier:	The initial premium percentage is—	The final premium percentage is—
Up to 150.0 percent	0.0	0.0
150.0 percent up to 200.0 percent	0.0	2.0
200.0 percent up to 250.0 percent	2.0	4.0
250.0 percent up to 300.0 percent	4.0	6.0
300.0 percent up to 400.0 percent	6.0	8.5
400.0 percent and higher	8.5	8.5”.

- Decreases amounts individuals must contribute toward coverage
- Special provisions for unemployed individuals

Dependent Care FSAs

- Dependent care FSA limit is increased for 2021 from \$5,000 to \$10,500 (from \$2,500 to \$5,250 for married filing single)
- An employer can amend its cafeteria plan retroactively to adopt this increased limit, as long as it amends the plan by the end of the plan year and operates consistently with the amendment

COBRA Subsidies- Overview

- ARPA includes a temporary 100% COBRA subsidy for COBRA qualified beneficiaries where the qualifying event was an involuntary termination of employment or reduction in hours
- Subsidies apply to coverage periods beginning on April 1, 2021 and ending on September 30, 2021
- Subsidy applies to “assistance eligible individuals” (AEIs), which appears to include both employees and dependents who had elected or will elect COBRA
- The AEI doesn’t pay the COBRA premium- the premium is “advanced” by the employer, plan, or insurer and then reimbursed by the government through a refundable tax credit (against Medicare hospital insurance taxes).
 - **In most instances, for an insured group health plan sponsored by a PEO, the PEO will be advancing the subsidized COBRA premiums and then claiming the federal tax credit**
- Individuals who already had an involuntary termination of employment or reduction in hours within the last 18 months and did not timely elect COBRA or dropped COBRA must be given a new COBRA election
- There are two new COBRA notice requirements tied to the ARPA COBRA subsidy program

COBRA Subsidies- Who and What Coverage is Eligible?

- “Assistance Eligible Individual” is COBRA qualified beneficiary (QB) whose qualifying event is termination of employment (except for voluntary terminations) or a reduction of hours
 - Includes such AElS who do not have a COBRA election in effect on April 1, 2021, and AElS who previously elected COBRA coverage but are no longer enrolled as of April 1, 2021 because they stopped paying the applicable premium
 - This could effectively require employers to analyze qualifying events dating back to November 2019 (because the 18-month COBRA period would extend past April 2021)
 - Subsidies apply to all plans subject to COBRA (medical, dental, vision, etc.), but not health FSAs

COBRA Subsidies – Who and What Coverage is Eligible?

- No eligibility for COBRA subsidies (or the tax credit) if the qualifying event was the **“voluntary termination of such individual’s employment by the individual”**
- What is a “voluntary termination”?
 - Regulators may look to prior agency COBRA Subsidy guidance (from 2008-2009 economic crisis) for definition of “involuntary,” and who determines
 - This guidance provided IRS would not challenge an employer’s determination that the termination was involuntary as long as the determination was consistent with a reasonable interpretation of the applicable statutory provisions and IRS guidance
 - Employer was also required to maintain supporting documentation of its determination
- PEOs may not currently have information regarding which past terminations/reduction of hours were “voluntary”
- Consider whether possible/appropriate to get attestation from client employer and/or employee regarding whether event was “voluntary”
- What should you do about terminated clients?

COBRA Subsidies - New Election Periods

- If AEI did not previously elect COBRA, or elected COBRA and dropped, will have new 60-day election period starting on the date that he/she receives the new COBRA election notice
- Employer also may permit AEI to change elections to another plan option, as long as same or lower cost
 - This is optional, not required
 - If allowed, must describe option in new COBRA election notice and must allow 90 days to change elections, counted from date notice provided

COBRA Subsidies - Duration

- Subsidies extend through September 30, 2021
 - AEs may continue on COBRA for longer, but coverage won't be subsidized
- Subsidies end if AEI becomes eligible for Medicare or other GHP coverage
 - Note- actual enrollment not required, just eligibility for other coverage
- Subsidies end if maximum COBRA coverage otherwise ends
 - For example, if AEI makes special election, he/she only qualifies for COBRA for remainder of otherwise applicable COBRA period

COBRA Subsidy – Notice Requirement #1

- Plan must add notice of subsidy to COBRA notices during this period
 - Can add to current notice or in document accompanying current notice
- Plan must provide notice of new election period to those who are eligible for subsidy
 - Must provide by May 31
- Statute lists required content
- DOL required to issue Model Notice by April 10

COBRA Subsidy – Notice Requirement #2

- Also must provide notice of end of premium subsidy between 15-45 days before end of subsidy
- DOL required to provide Model Notice
- This notice requirement does not apply if COBRA ending due to other coverage / maximum coverage period ending

COBRA Subsidy - Tax Credit

- “Person to whom premiums are payable” can apply for tax credit with respect to subsidized premiums that are advanced
- Who is “person whom premiums are payable”?
 - If multiemployer (collectively bargained union) plan – the **plan**
 - If insured or self-funded group health plan subject to COBRA under ERISA, PHSa, or Code – the **employer**
 - Other insured group health plans – the **insurer**
- Tax credit is fully refundable FICA tax credit, determined each calendar quarter that full premiums are not paid by AEs
- Credit can be advanced

COBRA Subsidies- Interaction with COVID-19 Extensions

- DOL/IRS has separately issued one-year extensions on COBRA elections/premium payment/notices
- Unclear whether these extensions apply to new election right under COBRA subsidy or plan's requirement to provide new election notice
- Regardless of extension of original election right, AEs within their 18-month COBRA coverage period still have new special election right for the prospective subsidized coverage

COBRA Subsidies- Interaction with COVID-19 Extensions

Example: Jose had a COBRA qualifying event on May 1, 2020. His regular deadline to elect COBRA coverage was June 30, 2020, but that was extended until June 30, 2021. On May 31, 2021, he elects subsidized COBRA coverage retroactive to April 1, 2021.

- Can the PEO require that the May 31, 2021 election include a decision regarding the retroactive period from May 1, 2020 – March 31, 2021? Or is that a separate election that is still extended until June 30, 2021 (assuming the National Emergency continues beyond April 30, 2021)?
- Once the subsidized COBRA coverage ends on September 30, 2021, does Jose automatically continue on with unsubsidized COBRA for October 2021 (i.e., the last month of the COBRA period)? If Jose makes a payment in October 2021, can the PEO credit that to May 2020?
- Can the PEO claim the tax credit in July 2021 (or later) for the April – June 2021 coverage months?

COBRA Subsidies- State Continuation Coverage

- Under some states' continuation coverage provisions (e.g., New York and California), certain qualified beneficiaries covered under insured group health plans have a right to an additional 18 months of coverage once their initial 18-month period under federal COBRA coverage ends
- ARPA permits individuals to receive the subsidy for state continuation coverage (including for months 19-36 after federal COBRA coverage ends)
- However, it does not appear that the special election right applies to state continuation coverage
 - In other words, if individual is in extended state continuation coverage period (months 19-36), it appears they do not get special election right under ARPA
 - This is subject to confirmation by the federal agencies
 - Also, states could adopt their own special election right- important to monitor state DOI guidance in coming weeks

COBRA Subsidies- Many Open Questions Remain

- Whether “involuntary” applies just to termination or also reduction in hours
- Whether and how an individual can appeal a determination by an employer that an individual is not an AEI
- How the tax credit applies to employer-subsidized post-termination coverage (such as in case of severance)
- Whether an AEI can make an ARPA COBRA election for subsidized coverage but continue to utilize one-year “Outbreak Period” relief for pre-4/1/21 COBRA coverage election and payment
- Whether an employer can require an individual to pay premiums for months he/she was eligible for COBRA prior to April 2021 as a condition to providing eligibility for the subsidized months

Questions?

Randy Hardock: rhardock@davis-harman.com

Courtney Zinter: cazinter@davis-harman.com

Seth Perretta: sperretta@groom.com

Malcolm Slee: mslee@groom.com