

March 24, 2021

CLIENT ALERT – CORONAVIRUS (COVID-19)
LABOR, EMPLOYMENT AND EMPLOYEE BENEFIT UPDATES

Dear Clients and Friends:

President Biden signed The American Rescue Plan, a \$1.9 Trillion coronavirus relief bill, into law on Thursday, March 11, 2021. This new stimulus package not only provides direct payments to individuals within certain income thresholds and direct aid to small businesses that have been impacted by the COVID-19 Pandemic; it also, *inter alia*, provides: (1) for an extension of leaves originally authorized by the Families First Coronavirus Response Act (“FFCRA”); (2) an increase in certain limits for Dependent Care Flexible Spending Accounts (FSAs); (3) a COBRA subsidy; and (4) single employer defined benefit relief. The State of New York also enacted a paid leave provision to allow employees to receive the Covid vaccine.

This Client Alert provides a general summary of these provisions of The American Rescue Plan and the New York State vaccine leave. This information is not legal advice and may not be suitable for all client situations. As always, if you would like specific legal assistance with respect to these programs or any other matters, please do not hesitate to contact your HH&K attorney.

Extension of Families First Coronavirus Response Act Leave Provisions

The American Rescue Plan extends both the emergency sick leave provision and the emergency Family and Medical Leave Act (FMLA) provision (emergency FMLA) that were created by the FFCRA through September 30, 2021; however, it made several changes to both programs.

Employers with fewer than 500 employees may still use both programs and receive tax credits, but the programs are no longer mandatory. Under the American Rescue Plan, on April 1, 2021, employees will receive a new bank of emergency sick leave of ten (10) days. Employers who seek to claim the tax credit must offer the program to both high and low earners, including part-time employees.

The emergency sick leave may be used for the original six reasons:

- self-isolation because of a COVID-19 diagnosis;
- to obtain a medical diagnosis or care when experiencing COVID-19 symptoms;
- because a health official or health care provider has recommended quarantine;
- to care for a family member with COVID-19 or who is seeking diagnosis/care;
- to care for a family member in quarantine; and
- when a child’s school or childcare provider is unavailable because of COVID-19.

It may also be used for two new reasons:

- to get a COVID-19 vaccine; and
- to recover from adverse reactions to the vaccine.

The emergency FMLA provision was amended to allow employees to use the emergency FMLA for any of the reasons emergency paid sick leave can be used. Congress also eliminated the two-week waiting period on using emergency FMLA, which raises the aggregate cap on emergency FMLA from \$10,000 to \$12,000.

New York Passes Covid Vaccine Paid Leave Bill

New York has added another paid leave provision for employers. Employers must now provide employees paid time off to obtain a COVID vaccine. Employers must provide up to four (4) hours of paid leave for each shot. Time must be paid at the employee’s regular rate. The leave cannot replace any other leave (such as PTO, or New York Sick Leave). It appears, however, that after April 1, an employer may run the new FFCRA leaves described above concurrently with the Covid

Vaccine leave in order to claim the tax credit that bill provides. The Covid vaccine leave is set to automatically expire (sunset) in December 2022.

Employee Benefits Provisions

The American Rescue Plan also makes a number of changes that will be of interest to the sponsors of employee benefit plans.

Dependent Care Assistance Flexible Spending Accounts (FSAs)

Dependent Care Flexible Spending Accounts under a Section 125 of the Internal Revenue Code ("Code") may be amended to increase the annual limit for married employees as set forth in the table below, but only for the Plan Year that begins in 2021. For Code Section 125 dependent care assistance account plans that use the calendar year as the Plan Year, that period is January 1 – December 31, 2021.

Employee Tax Filing Status	Old 2021 Limit	New 2021 Limit
Married Filing Jointly	\$5,000	\$10,500
Married Filing Separately	\$2,500	\$ 5,250

Employers considering making this change should contact your service provider to be sure that they have the ability to adopt this change and coordinate its implementation. FSA plans must be amended to incorporate this change by the last day of the Code Section 125 plan's 2021 Plan Year, retroactive to the first day of the 2021 Plan Year. Employers who adopt this change should notify their employees of the decision as soon as possible.

A prior Client Alert ([available here](#)) described the optional midyear election change available for each of the 2020 and 2021 Plan Years. Employers who adopt the optional midyear election change provision and the increased limits for the 2021 Plan Year may permit participants to increase their Dependent Care FSA election for the balance of the 2021 Plan Year.

COBRA Changes

COBRA Premium Subsidies

In 2009 the American Recovery and Reinvestment Act of 2009 created a federal subsidy of the premiums payable by certain terminated employees for continuation coverage provided under employer-sponsored group health plans pursuant to the requirements of the Consolidated Omnibus Budget Reconciliation Act of 1985, as amended (also known as "COBRA"). The American Rescue Plan creates a similar COBRA premium subsidy.

The COBRA premium subsidy is available to "assistance eligible individuals" which generally includes any employee or dependent who loses coverage due to an involuntary termination of employment or due to an involuntary reduction in hours. Subsidies are not available to employees or dependents who voluntarily terminated employment or voluntarily reduced their hours and lost their group health plan coverage.

The employer must provide assistance eligible employees who became entitled to COBRA before April 1, 2021 with a notice written in "clear and understandable language" describing the COBRA subsidy and the other items specified by the statute no later than May 31, 2021. (The American Rescue Plan directs the Treasury Department, the Department of Labor (DOL) and the Department of Health and Human Services to issue a model notice for those group health plans not subject to federal COBRA) by Monday, April 26, 2021.)

The subsidy (which seems to include the 2% administrative fee) that is available to "assistance eligible individuals" is available only for the period beginning April 1, 2021 and ending September 30, 2021. An assistance eligible individual loses the subsidy when her or she (a) becomes *eligible for* (not enrolled in) another group health plan (such as becoming *eligible for* a new employer's plan or becoming eligible for coverage under a spouse's plan); (b) becomes *eligible for* (not

enrolled in) Medicare; or (c) exhausts their maximum period of COBRA coverage. Under the new law, assistance eligible individuals are required to notify the group health plan providing their COBRA coverage if they become (a) *eligible for* (not enrolled in) another group health plan or (b) *eligible for* (not enrolled in) Medicare. Assistance eligible individuals who fail to provide such notice to the plan are subject to a \$250 penalty; a penalty of 110% of the COBRA subsidy applies if the failure was intentional. No penalty applies if the failure to notify is due to reasonable cause.

During the period of the subsidy, the assistance eligible individual does not pay any COBRA premiums. The manner in which the COBRA subsidies are paid will depend on the employer's group health plan. For group health plans subject to federal COBRA (those group health plans sponsored by employers with more than twenty (20) employees) and for all self-inured group health plans, the employer pays the COBRA premiums for these individuals and is reimbursed by the federal government through a refundable tax credit against the employer's Medicare tax deposits. For fully insured group health plans not subject to deferral COBRA (those sponsored by employers with less than twenty (20) employees), the insurer receives the tax credit. For multiemployer plans (typically a union plan), the multiemployer plan is eligible for the credit.

The American Rescue Plan also requires that assistance eligible individuals receive a notice at least fifteen (15) and no more than forty-five (45) days before the end of their COBRA subsidy period notifying them that the subsidy is ending soon, a "prominent identification" of the date the subsidy ends, and a statement that the individual may be eligible for coverage without the subsidy through COBRA or another group health plan. The American Rescue Plan directs the Treasury Department, DOL and the Department of Health and Human Services to issue a model notice by Monday, April 26, 2021. The termination notice is not required to be issued to an assistance eligible individual who (a) becomes *eligible for* (not enrolled in) another group health plan or (b) becomes *eligible for* (not enrolled in) Medicare.

Optional COBRA Election Change

An employer is permitted (but not required) to allow assistance eligible individuals to change COBRA coverage to a lower-cost option (assuming one exists). The lower cost option cannot be an "excepted benefit" under the terms of the Affordable Care Act (such as dental only or vision only coverage), a medical FSA or a qualified small employer health reimbursement arrangement (QSERA).

The employer must provide assistance eligible employees who became entitled to COBRA before April 1, 2021 with a notice written in "clear and understandable language" describing the COBRA subsidy and the ability to elect the lower cost option, together with the other items specified by the statute, no later than May 31, 2021.

The assistance eligible individual then has 90 days after receiving this notice to make the election to change coverage.

Additional COBRA Election

The American Rescue Plan allows an assistance eligible individuals who did not elect COBRA continuation coverage but who would otherwise be eligible for the COBRA subsidy a second chance to elect COBRA coverage. In addition, it provides a special election period for any individual who elected COBRA continuation coverage and discontinued such coverage before April 1, 2021.

The employer must provide these assistance eligible employees with a notice written in "clear and understandable language" describing the COBRA subsidy and the ability to elect the lower cost option, together with the other items specified by the statute, no later than May 31, 2021.

These individuals may elect COBRA continuation coverage within 60 days of receiving this notice of the opportunity. This COBRA coverage will be effective with the first period of coverage beginning on or after April 1, 2021 and will terminate as of the end of the original COBRA

continuation period (calculated as if the individual elected COBRA during the individual's initial 60-day election window or if the individual had not terminated COBRA early).

It is unclear how this election period will apply to those who haven't yet elected COBRA due to the tolling of COBRA election periods as described in a previous Client Alert ([available here](#)). It is hoped that the Internal Revenue Service and DOL will issue guidance on this point.

Single Employer Defined Benefit Plan Relief

The changes made by the American Rescue Plan to the single-employer defined benefit plan funding rules will be welcome to the sponsors of these plans, as minimum required contributions are generally reduced. One of the changes extends and modifies the smoothing of interest rates used to determine pension liabilities. The new smoothing rules decrease pension plan liabilities, which means lower minimum required contributions will be required. The employer has the option to apply the new smoothing rules for the 2020, 2021 or 2022 plan years and may be applied separately for purposes of applying the benefit restrictions of Code Section 436.

The new law allows repayment of prior year shortfalls over fifteen (15) years, rather than the current seven (7) year period. As with the new smoothing rules, the employer has the option of applying this extended amortization period to prior year shortfalls, using a "fresh-start" approach, to plan years starting in 2019, 2020, 2021 or 2022.

Multiemployer Pension Plan Reform

The American Rescue Plan provides desperately-needed relief to multiemployer pension plans in both a temporary and more long-term fashion.

The temporary relief is directed at plans that have been adversely effected by the Covid pandemic and is similar to the single-employer pension relief that was provided to combat the effects of the 2008 financial downturn. This relief includes (a) a one-time freeze of zone status (defined under the Pension Protection Act of 2006); (b) a five-year extension of funding improvement or rehabilitation periods; (c) a longer period for amortization of losses resulting from the pandemic; (d) an extension of the asset-smoothing period; and (e) a widened corridor for determining the actuarial value of plan assets. The relief described in (c), (d) and (e) is not available if the plan is also receiving special financial assistance (described below). The availability of these temporary relief provisions depends on a solvency test; the new law also imposes restrictions on improving benefits.

The longer-term relief comes in the form of a new financial assistance program at the Pension Benefit Guaranty Corporation (PBGC) to support the more poorly funded multiemployer plans and those that are already insolvent or have already imposed benefit cuts under a 2014 law that permitted multiemployer pension plan benefits to be cut under certain conditions. To be eligible for financial assistance a multiemployer plan must meet one of four criteria: (i) it is in "critical and declining status" for any plan year beginning in 2020, 2021 or 2022; (ii) the plan must have an approved suspension of benefits as of March 11, 2021; (iii) the plan must be certified by its actuary to (A) be in critical status, (B) have a modified funding percentage of less than forty percent (40%), and have a ratio of active to inactive participants that is less than 2:3 for any plan year beginning in 2020, 2021 or 2022; or (iv) the plan must have become insolvent after December 31, 2014, remained insolvent, and not have been terminated as of March 11, 2021.

For those multiemployer plans that receive this financial assistance, the new law provides that no new benefit cuts can be imposed and certain prior cuts must be restored.

Contact Your HH&K Attorney for Legal Guidance

This information is not legal advice and may not be suitable for all client situations. This Client Alert provides general information regarding certain employee benefit provisions of The American Rescue Plan and the New York State vaccine leave and does not outline all of the important

considerations related thereto. We anticipate that the terms of each of these programs may continue to evolve as applicable authorities release guidance.

This Client Alert is not a substitute for legal guidance regarding program details and how those may be applicable to your business. As always, if we can be of assistance with these programs or any other matters, please do not hesitate to contact your HH&K attorney.



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