Wolters Kluwer

When you have to be right

*Special Report*

March 22, 2021

## Highlights

- The ARPA establishes an Emergency Federal Employee Leave Fund.
- The legislation includes a third round of direct stimulus payments.
- The federal government will pay 100 percent of COBRA premiums for eligible individuals.
- The legislation continues to provide an additional $300 per week in unemployment benefits until September 6, 2021.
- The ARPA earmarked billions of dollars for the COVID-19 vaccine and testing.

## Inside




*By Wolters Kluwer Editorial Staff and Authors*


# President Signs American Rescue Plan Act to Aid Americans, Boost Economy

With the United States experiencing the worst economic crisis since the Great Depression and the worst public health emergency in over 100 years, President Joe Biden has signed into law the American Rescue Plan Act of 2021 (ARPA), P.L. No. 117-2, a $1.9 trillion stimulus package to aid recovery from the COVID-19 pandemic. The ARPA contains not only funding for vaccination programs, but also support for individuals, businesses, schools, and state and local governments. The law joins the list of growing relief efforts enacted since the beginning of the pandemic.

On February 27, 2021, the House passed the bill with a mostly party-line vote of 219-212, and on March 6, 2021, the Senate approved the bill, with changes, by a 50-49 vote. Due to the changes, which included reducing the level of weekly additional unemployment benefits from $400 to $300 and removing the controversial $15 per hour minimum wage increase, the bill was sent back to the House for final approval. The House passed the new version on March 10, 2021, by a 220-211 vote; the president signed it on March 11, 2021.

Legislators had announced a goal of passing the bill by March 14, when many relief provisions would have expired after their extension by the Consolidated Appropriations Act, 2021. To secure approval in the evenly divided Senate, the bill proceeded using the budget reconciliation process in order to obtain a simple majority. To use that process, the contents of the bill were required to adhere to specific rules and be approved by the Senate Parliamentarian. Before the House could even vote on the package, the Parliamentarian announced that the bill's $15 minimum wage provision did not meet the rules. The wage increase remained in the House-passed version of the bill but was dropped in the Senate.

The law largely aligns with the framework the President presented before his inauguration on January 20. It includes a third round of direct stimulus payments, extensions of unemployment relief, increased funding for COVID-19 testing and vaccinations, an extension and expansion of the paid sick and FMLA leave tax credits, health care coverage assistance, enhancements of personal tax credits, broadband investments, changes related to retirement plan funding, and more.

This special report, written by Wolters Kluwer editorial staff and authors, provides a summary of the law across a range of key practice areas.

# *Labor and Employment*

*By Pamela Wolf, J.D.*

The ARPA includes several provisions aimed at providing relief to workers, including COVID-19 safety protections and paid leave for federal employees.

Notably, the controversial $15 per hour minimum wage boost was tossed from the bill after the provision had cleared the House the first time around. Democrats gave up on the wage raise after the Senate Parliamentarian ruled that it could not be included because it infringed on the reconciliation process.

*According to President Biden, "This legislation is about giving the backbone of this nation—the essential workers, the working people who built this country, the people who keep this country going—a fighting chance."*

## Department of Labor COVID-19 oversight

The ARPA gives the Secretary of Labor $2 million in additional funding (available through September 30, 2023) for the Wage and Hour Division, the Office of Workers' Compensation Programs, the Office of the Solicitor, the Mine Safety and Health Administration, and the Occupational Safety and Health Administration (OHSA) to carry out COVID-19-related worker protection activities. The funding is also intended for the Office of Inspector General's oversight of the Secretary's activities to prevent, prepare for, and respond to COVID-19.

**High-risk workplaces.** From that DOL funding, not less than $100 million is designated for OSHA—with at least $5 million earmarked for enforcement activities related to COVID-19 at high-risk workplaces, including health care, meat and poultry processing facilities, agricultural workplaces, and correctional facilities.

## Emergency federal employee paid leave

The ARPA also establishes an Emergency Federal Employee Leave Fund of $570 million, available through September 30, 2022, under which paid leave is available to federal employees for COVID-19 related reasons, including to obtain immunization. The allotted leave may not exceed 600 hours for each full-time employee. For part-time employees, employees on an uncommon tour of duty, or employees with a seasonal work schedule, the leave is capped at the proportional equivalent of 600 hours to the extent funding remains available for reimbursement.

The paid leave may be provided only up to payments of $2,800 in the aggregate for any biweekly pay period for a full-time employee, or a proportionally equivalent biweekly limit for a part-time employee. The leave is paid at the same hourly rate as other leave.

## Transportation industry support

The ARPA includes measures designed specifically to help transportation industry employers, including:

- **Public transportation.** $30.4 billion of additional relief funding to transit agencies to prevent layoffs of transit workers and prevent severe cuts to transit services that essential workers and the general public rely upon.
- **Amtrak.** Additional relief for Amtrak to keep rail service running across the nation, to rehire 1,230 workers who have been involuntarily furloughed as a result of COVID-19, and to restore full long-distance service to remote communities that rely on Amtrak as a link to economic centers.

## Additional COVID-related reasons for paid sick leave

The ARPA extends and expands the paid sick and FMLA leave tax credits created in the Families First Coronavirus Response Act (FFCRA) of 2020.

It provides payroll tax credits for employers who voluntarily provide paid leave (without mandating that employers provide leave) through the end of September 2021. It also expands eligibility to state and local governments that provide this benefit.

The FFCRA provided 10 days of Emergency Paid Sick Leave that could be used through December 31, 2020, and the Consolidated Appropriations Act signed late in 2020 extended that period until March 31, 2021. The ARPA provides that employers may offer a new 10-day period of Emergency Paid Sick Leave beginning on April 1, 2021.

The ARPA also permits the credit for "qualified sick leave wages" to be claimed for additional leave-related reasons, including when the employee is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID–19 and the employee has been exposed to COVID–19 or the employee's employer has requested such a test or diagnosis; or the employee is obtaining immunization(s) related to COVID–19; or the employee is recovering from any injury, disability, illness, or condition related to a COVID-19 immunization after a medical diagnosis.

**Emergency Family Medical Leave**: Tax credits for Emergency Family Medical Leave initially were available only if an employee was unable to work or telework due to the unavailability of a child's school or childcare for COVID-related reasons. The ARPA allows family leave payroll tax credits to be claimed for all of the qualifying reasons that Emergency Paid Sick Leave may be taken. Also, another change from the FFCRA is that the ARPA provides that the Emergency Family Medical Leave tax credit limit has been increased to $12,000, meaning that employers could obtain a tax credit for up to 12 weeks of paid EFMLA leave.

# *Tax*

*By Linda O'Brien, J.D., LL.M*

The ARPA contains a number of tax provisions which largely align with the framework set forth by President Biden before his inauguration on January 20. Those provisions include a third round of direct stimulus payments and enhancements of several personal credits aimed at benefiting individuals with lower incomes and children.

## Individual Tax Relief

### Recovery Rebates

The legislation includes a third round of direct stimulus payments. The Coronavirus Aid, Relief, and Economic Security (CARES) Act signed into law in March 2020 provided the first round, with $1,200 for individuals and $500 for qualifying children. In December 2020, the Consolidated Appropriations Act, 2021 included additional $600 stimulus payments for individuals and children.

The ARPA provides a $1,400 stimulus payment. The payments are credits against 2021 taxes but fully refundable and payable in advance. Similar to the previous stimulus payments, the third round is subject to income limitations. The stimulus amount phases out ratably for single filers with adjusted gross income over $75,000 ($112,500 for heads of households and $150,000 for joint filers) and phases down to $0 for single filers with $80,000 of adjusted gross income ($120,000 for heads of households and $160,000 for joint filers).

Adjusted gross income amounts are used in applying the phaseout. However, the 2019 amounts will be used in lieu of the 2020 amounts for taxpayers who have not yet filed their 2020 returns.

### How Much Will Stimulus Payment Be?

| | $1400 | Less than $1,400 | No stimulus payment |
|---|---|---|---|
| Individual earns | ≤ $75,000 | > $75,000 but < $80,000 | ≥ $80,000 |
| Married couple earns | ≤ $150,000 | > $150,000 but < $160,000 | ≥ $160,000 |
| Heads of Household | ≤ $112,500 | > $112,500 but < $120,000 | ≥ $120,000 |

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Similar to the previous two stimulus payments, payments to which taxpayers would have been entitled but did not receive will be credited when preparing their 2021 tax returns in 2022. Also, amounts received based on 2019 and 2020 returns that would have been lower when the 2021 are prepared do not have to be repaid. The payments are available for all persons for whom a social security number is associated and is $1,400 for individuals, children, and non-child dependents.

## Child Tax Credit

The ARPA includes significant changes for the child tax credit but only for the 2021 tax years. Currently the amount of the child tax credit is equal to $2,000 per child, $1,000 of which is refundable. The Act increases the amount to $3,000 per child ($3,600 for a child under the age of six) and makes the credit fully refundable. The maximum age of qualifying children is increased to include 17-year old children.

*The IRS is directed to issue advance payments of half of the child tax credit amount beginning July 1, 2021.*

The excess of the amount of the credit over $2,000 is phased out by $50 for every $1,000 of modified adjusted gross income in excess of the threshold amount ($150,000 for joint filers, $112,500 for heads of households, and $75,000 for single filers). Once the excess amount is eliminated, the amount of the credit remains at $2,000 until the current phaseout thresholds are reached ($400,000 for joint filers, $200,000 for all other filers). The IRS is directed to issue advance payments of half of the credit amount beginning on July 1, 2021. The advance payments are to be issued monthly if feasible, or as frequently as possible if monthly payments are not feasible. The remaining half of the credit not paid in advance is received when filing 2021 returns. In the case of a taxpayer who received advance payments in error, a safe harbor is provided which protects taxpayers from having to pay back overpayments of up to $2,000 per child. The safe harbor is available for single filers with modified adjusted gross income of $80,000 or less ($120,000 for joint filers, $100,000 for heads of households).

## Earned Income Tax Credit

The legislation provides several enhancements to the earned income tax credit (EITC). For 2021 only, the amount of the EITC increases from $543 to $1,502 for filers without children, the amount of income at which the credit is maximized is increased from $7,100 to $9,820, and the threshold for the phaseout of the credit for non-joint filers is increased from $8,880 to $11,610. The minimum age for filers without children is reduced from 25 to 19 (except for full time students). Also, taxpayers are allowed to substitute 2019 earned income for 2021 earned income in claiming the EITC on 2021 returns if 2021 earned income is less than 2019 earned income.

Certain provisions of the EITC are made permanent. This includes the elimination of the prohibition of filers claiming the EITC without children solely because they are unable to claim the EITC for filers with children due to the lack of satisfying the identification requirements. Additionally, a married but separated individual can claim the EITC as an unmarried person as long as certain requirements relating to children are satisfied. Also, the amount of disqualifying investment income for purposes of the EITC is increased from $3,650 to $10,000, adjusted for inflation after 2021.

## Dependent Care Assistance

The amount of the child and dependent care credit is significantly enhanced for 2021 only. Currently, the amount of the credit is equal to 35 percent of qualified expenses for care of a qualifying individual up to $3,000 for one qualifying individual or $6,000 for two or more qualifying individuals. The credit percentage is reduced by one point for every $2,000 of adjusted gross income in excess of $15,000 until reaching 20 percent.

Also, the credit is increased to 50 percent of qualified expenses and reduces the credit percentage by one point for each $2,000 of adjusted gross income in excess of $125,000. The credit percentage is not further reduced below 20 percent until adjusted gross income reaches $400,000 at which point the reduction of the credit percentage continues until it reaches zero. Also, the amount of eligible expenses qualifying for the credit are increased to $8,000 for one individual and $16,000 for two or more individuals. The credit is fully refundable. Additionally, the maximum exclusion of employer provided dependent care assistance is increased for 2021 to $10,500 ($5,250 for married taxpayers filing separately).

### Student Loans

The ARPA provides an expanded exclusion of forgiven student loans applicable to loans discharged after 2020 and before 2026. Currently forgiven student loans are only excludable under certain circumstances, such as the death or disability of the borrower. The expanded exclusion applies to the discharge of federal student loans for any reason during the time frame. However, the exclusion does not apply to loans discharged by private lenders.

## Other Tax Relief

Several other tax provisions are included in the law with some aimed at ensuring that pandemic-related aid does not create tax burdens on the businesses receiving the relief.

### Tax Treatment of COVID-19 Relief

The legislation provides that Targeted Economic Injury Disaster Loan (EIDL) and Restaurant Revitalization Grants received from the Small Business Administration will not be subject to income tax and the exclusion will not result in the denial of a deduction reduction of tax attributes or denial of increase in basis.

### Worldwide Allocation of Interest

The ARPA includes a repeal of the one-time election available to an affiliated group of corporations to determine foreign source taxable income of the group by allocating and apportioning interest expense of the domestic members of a worldwide affiliated group on a worldwide group basis, as if all members of the worldwide group were a single corporation. The election was to be available for the first time in 2021 but the law provides that treatment of such income will continue under the pre-2021 rules.

# *Employee Benefits*

*By Lauren Bikoff, M.L.S., and Tulay Turan, J.D.*

The ARPA addresses a few employee benefits-related issues, including COBRA and health care coverage.

## COBRA subsidy

The ARPA includes health insurance premium assistance for COBRA continuation coverage from April 1, 2021, through September 31, 2021. Under the law, the federal government will pay 100 percent of COBRA premiums for employees who lost their health insurance after a layoff, reduction in hours, or furlough, by allowing them to stay on their employer-sponsored health plan at no cost. Note that the relief is not available for employees that voluntarily leave employment.

Under the law, a terminated worker who is eligible for assistance and who has not elected COBRA coverage by April 1, or who elected COBRA coverage but then discontinued it, may elect COBRA coverage during an enrollment period starting April 1 and ending 60 days after the date on which the COBRA notification was delivered. Eligibility for the premium assistance would last through September 31, 2021, but would end earlier if the individual's maximum period of COBRA coverage (generally 18 months) ends earlier than that date.

*The federal government will pay 100 percent of COBRA premiums for employees who lost their health insurance after a layoff, reduction in hours or furlough.*

An individual also would not be able to receive the subsidy if they become eligible for coverage under another group health plan or Medicare.

The assistance will be provided by reimbursing the employer for unreceived COBRA premiums through a payroll tax credit against quarterly taxes. Employers are required to amend COBRA notice forms, and the federal government is directed to issue model notices within 30 days of enactment.

The law excludes the premium reductions from income. It also includes a penalty for failing to provide adequate notice to former employees whose COBRA continuation period has lapsed.

## Premium tax credits

The ARPA makes changes to the premium tax credit under the Affordable Care Act. For 2021 and 2022, the law modifies affordability percentages used in calculating the premium tax credit to make credits available for individuals with incomes below 400 percent of the federal poverty line and increases credit amounts for those already qualified. For 2021, the law makes advance premium tax credits available for individuals receiving unemployment compensation. In addition, the law eliminates the recapture provisions applicable to 2020 for taxpayers receiving excess premium tax credits.

# *Pension*

*By Glenn Sulzer, J.D.*

The ARPA includes provisions designed to address the multiemployer plan funding crisis and modify the funding rules applicable to single employer plans. Generally, the law would: create a special financial assistance program under which cash payments would be made by the Pension Benefit Guaranty Corporation (PBGC) to financially troubled multiemployer plans to ensure that such plans can continue to pay retiree benefits though the 2051 plan year; authorize a temporary delay in the designation of a multiemployer plan as being in endangered, critical, or critical and declining status; increase the multiemployer plan premium rate to $52, per participant (beginning in 2031); and extend amortization periods and pension stabilization percentages (i.e., interest rate smoothing) for single employer plans. In addition, the ARPA would, effective for tax years beginning after 2026, expand the number of covered employees subject to the $1 million limit on deductible compensation.

Significantly, a proposal approved by the House that would have frozen the annual additions and annual defined benefit limit under Code Sec. 415 and the annual compensation limit under Code Sec. 401(a)(17), beginning with calendar years after 2030 was not included in the ARPA as finalized.

## Multiemployer plan relief

***Temporary delay of designation of plan as in endangered, critical, and declining status.*** The ARPA in Sec. 9701(a)(1) authorizes the sponsor of a multiemployer plan to make an election, pursuant to which the funding status of the plan for its first plan year beginning during the period beginning on March 1, 2020, and ending on February 28, 2021, or the next succeeding year (as designated by the plan sponsor) will be the same as the status of the plan as determined under Code Sec. 432(b)(3) and ERISA Sec. 305(b)(3) for the plan year preceding such designated plan year. Thus, a calendar year plan could retain its funding status (e.g., critical or endangered or non-critical and non-endangered) as of a plan year beginning in 2019, for plan years beginning in 2020 or 2021.

***Temporary extension of funding improvement and rehabilitation periods***. Plans in endangered or critical status for plan years beginning in 2020 or 2021 are permitted under Act Sec. 9702(a), effective for plan years beginning after December 31, 2019, to extend the applicable funding and improvement and rehabilitation periods, by 5 years, from 10 to 15 years.

***Note:*** The House approved bill would have further allowed plans in seriously endangered status to extend the funding improvement period from 15 to 20 years. The final ARPA does not contain this option.

***Adjustments to funding standard account rules for 2020 and 2021***. Multiemployer plans under Act Sec. 9703(a)(1) and (2), effective for plan years ending on or after February 29, 2020, may use a 30-year (rather than a 15-year) amortization base to spread out two years of investment losses, including Covid-19 related losses and reductions in regularly scheduled employer contributions. The previous relief authorizing plans to amortize investment losses from 2008 or 2009 over a 30-year period has been extended to plans that have met the solvency test as of February 29, 2020.

***Note:*** The relief will not apply to a plan to which special financial assistance under newly enacted ERISA Sec. 4262 (see "Special financial assistance program for financially troubled multiemployer plans" below) has been granted under Act Sec. 9703(a)(1) and (2). The Treasury is to rely on the plan sponsor's calculations of plan losses unless the contributions are clearly erroneous.

***Special financial assistance program for financially troubled multiemployer plans***. ARPA creates a special financial assistance program, within the PBGC, under which cash payments, financed from the General Fund of the Treasury, would be made by the PBGC to financially troubled multiemployer pension plans to ensure that such plans can continue paying retirees' benefits through the 2051 plan year. The assistance would not need to be repaid.

Multiemployer pension plans eligible for the program would include plans in critical and declining status and plans with significant underfunding with more retirees than active workers in any plan year beginning in 2020 through 2022. Plans that have suspended benefits and certain plans that have already become insolvent would also be eligible to participate in the program (See Act Sec. 9704, adding ERISA Sec. 4262). The financial assistance provided would be the amount required for the plan to pay all benefits due during the period beginning on the date of enactment and ending on the last day of the plan year ending in 2051, with generally no reduction in a participant's or beneficiary's accrued benefit. Significantly, the amount of the financial assistance would not be capped by the PBGC's multiemployer plan benefit guarantee.

## Single employer plan relief

***Extended amortization for single employer plans***. The shortfall amortization bases for all plan years preceding the first plan year beginning after December 31, 2021, and all shortfall amortization installments determined with respect to such bases, will be reduced from 7 years to zero (See Act Sec. 9705 adding Code Sec. 430(c)(8) and ERISA Sec. 303(c)(8)). In addition, the shortfall amortization installments of the plan for plan years beginning after December 31, 2021 will be determined over a 15-year period, rather than a 7-year period (Code Sec. 430(c)(8)(B), as added by Act Sec. 9705(a); ERISA Sec. 303(c)(8)(B), as added by Act Sec. 9705(b)).

*Plan sponsor election to apply relief to plan years beginning after 2018.* The relief generally applies to plan years beginning after December 31, 2021. However, plan sponsors may elect to apply the relief to plan years beginning after December 31, 2018, December 31, 2019, or December 31, 2020 under Code Sec. 430(c)(8) and ERISA Sec. 303(c)(8).

***Extension of pension funding stabilization percentages for single employer plans.*** The ARPA, effective for plan years beginning after December 31, 2019, revises the specified range from the applicable minimum percentage to the applicable maximum percentage of average segment rates for determining whether a segment rate must be adjusted upward or downward. Specifically, the ARPA: (1) reduces the 10 percent interest rate corridor to 5 percent, effective in 2020 and (2) delays the phase-out of the 5 percent corridor until 2026, at which point the corridor would increase by 5 percentage points each year until it attains 30 percent in 2030 (See Act Sec. 9706, amending Code Sec. 430(h)(2)(C)(iv) and ERISA Sec. 303(h)(2)(C)(iv).

*The financial assistance would be conditioned on compliance with stipulated conditions, including the reinstatement of suspended benefits. In addition, no financial assistance payments may be made to a plan after September 30, 2030.*

***Modification of special rules for minimum funding standards for community newspaper plans.*** The ARPA extends existing funding relief provided for community newspaper plans that have been frozen as of December 31, 2017, to additional community newspapers (See Act Sec. 9707, amending Code Sec. 430(m) and ERISA Sec. 303(m)). Under the relief, sponsors of eligible community newspaper plans under which the accrued pension benefit of no participant has been increased after April 2, 2019, may make an election under which the interest rate used to calculate a plan's funding target and target normal cost will be 8 percent and the amortization period for shortfall installments will be extended from 7 to 30 years.

### Expansion of covered employees subject to $1 million limit on deductible compensation

Covered employees, for purposes of the $1 million limit on deductible compensation will include, effective for tax years beginning after December 31, 2026, the five most highly compensated employees for the tax year (See Act Sec. 9708, adding Code Sec. 162(m)(3)(C)). Such covered employees will be in addition to the principal executive officer, the principal financial officer, and other employees among the three most highly compensated officers for the tax year. Thus, the compensation cap effectively will apply, after 2026, to a corporation's principal executive officer, principal financial officer, and its eight highest paid employees.

### Freeze on cost-of-living adjustment to plan contribution limits

The House approved version of the bill would have, effective for calendar years beginning after 2030, frozen the annual additions and annual defined benefit limits under Code Sec. 415 and the annual compensation limit under Code Sec. 401(a)(17). As a result of the freeze, the cost-of-living adjustments that applied for calendar year 2030 would continue to apply for calendar years after 2030. However, the freeze would not apply to collectively bargained plans.

The proposal drew immediate criticism as discouraging retirement savings and was not included in the final Act.

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## *Unemployment Insurance*

*By Kathleen Kennedy-Luczak, J.D. and Melanie King, J.D.*

The ARPA extends the CARES Act's (P.L. 116-136) unemployment insurance provisions, specifically the Pandemic Unemployment Assistance (PUA) and the Pandemic Emergency Unemployment Compensation (PEUC) programs, until September 6, 2021. Its provisions will continue to cover both regular unemployment benefit claimants as well as gig workers and the self-employed. This extension also applies to emergency unemployment relief for governmental entities and nonprofit organizations. Note that an individual may not receive benefit payments under both PUA and PEUC and no benefits will be payable with respect to any week of unemployment ending on or before March 14, 2021.

> *An individual with modified adjusted gross income for 2020 of less than $150,000, can exclude the first $10,200 of his or her unemployment benefits from income.*

The law continues to provide an additional $300 per week in unemployment benefits for the next 25 weeks, from March 14, 2021, until September 6, 2021, under the Federal Pandemic Unemployment Compensation (FPUC) program.

In addition, the new legislation extends the number of weeks of benefits an otherwise eligible individual may receive from 50 weeks to 79 weeks, as well as the funding of the first week of compensable regular unemployment for states with no waiting week.

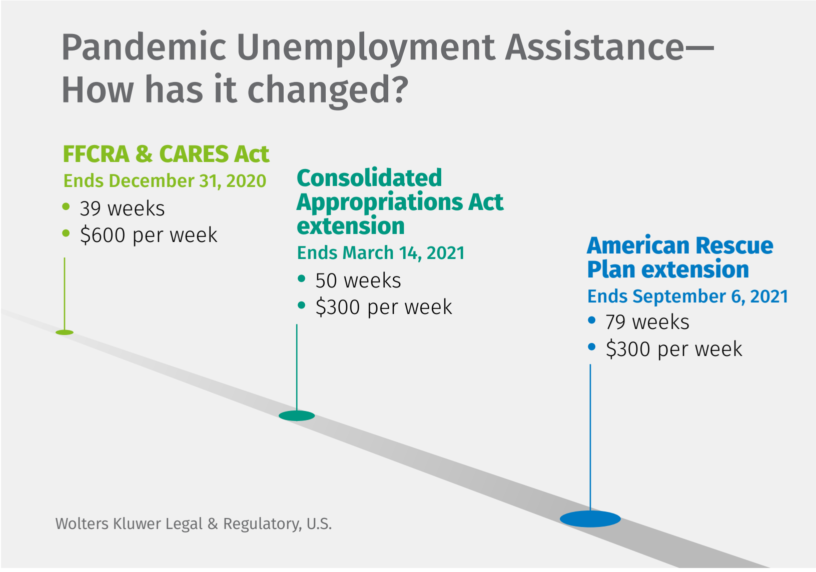
Under the PEUC program, individuals who have exhausted benefits they otherwise would be entitled to are now eligible for up to an additional 53 weeks of unemployment benefits. The extended benefits are available for weeks of unemployment until September 6, 2021.

## Federal funding

Temporary federal financing of short-time compensation paid under short-time compensation programs has also been extended to September 6, 2021, as has full federal funding of extended unemployment compensation under the Families First Coronavirus Response Act (FFCRA) (P.L. 116-127).

## Railroad retirement benefits

Railroad retirement benefits have been extended to September 6, 2021, as has the waiver of the seven-day waiting period.




## Tax break

Importantly, the new legislation provides that if an individual's modified adjusted gross income is less than $150,000, the individual can exclude from income the first $10,200 of his or her unemployment benefits paid in 2020.

# *Health Law*

*By Sheila Lynch-Afryl, J.D., M.A.*

The ARPA earmarked billions of dollars for the COVID-19 vaccine and testing and created an incentive for 12 holdout states to expand Medicaid. In addition, it allocated funds to grants addressing substance abuse and mental health and the public health workforce.

## COVID-19 Vaccine and Testing

The ARPA allocated $47.8 billion for HHS to detect, diagnose, trace, and monitor COVID-19 infections and related strategies to mitigate the spread of COVID-19. Congress allocated $10 billion to provide, pursuant to the Defense Production Act, testing, personal protective equipment, vaccines, and other materials. In addition, $1.75 billion was allocated to the CDC to strengthen and expand activities and workforce related to genomic sequencing, analytics, and disease surveillance.

Congress allocated $7.5 billion for the CDC to "plan, prepare for, promote, distribute, administer, monitor, and track" COVID-19 vaccines. It also

*The CDC was allocated $7.5 billion to "plan, prepare for, promote, distribute, administer, monitor and track" COVID-19 vaccines.*

provided $6 billion for the research, development, manufacturing, production, and purchase of vaccines, therapeutics, and ancillary medical products and supplies to prevent, prepare, or respond to COVID-19. It allocated $1 billion to the CDC to strengthen vaccine confidence and improve vaccination rates and $500 million to the FDA for COVID-19 vaccine, therapeutic, and device activities.

## Medicaid and CHIP

Twelve states have not yet expanded Medicaid pursuant to section 2001(a)(1) of the Patient Protection and Affordable Care Act (ACA) (P.L. 111-148) to nonpregnant adults aged 19 to 64 with incomes up to 133 percent of the federal poverty level who are not eligible for Medicare and not otherwise eligible for mandatory Medicaid coverage. To entice these remaining states to expand Medicaid, the law provides a two-year, 5 percent increase to the federal medical assistance percentage (FMAP) for newly expanding states.

The law mandates Medicaid and CHIP coverage, without cost-sharing, of the COVID-19 vaccine and its administration, and testing and treatment for COVID-19. The FMAP will be temporarily increased for coverage and administration of the vaccine.

The legislation eliminates the cap on the Medicaid drug rebate program amount—currently 100 percent of the average manufacturer price of the drug—beginning January 1, 2024. The House version of the bill would have eliminated the cap a year earlier. In addition, covered outpatient drugs used for COVID-19 treatment will be included in the Medicaid drug rebate program.

States are permitted to extend Medicaid eligibility for pregnant women from the current 60-day postpartum period to one year postpartum. Coverage must include full benefits throughout the woman's pregnancy and the 12-month postpartum period. States making this election must provide the same coverage under CHIP. This change is effective for five years beginning one year after the date of enactment of ARPA.

The legislation also allows states to provide coverage for qualifying community-based mobile crisis intervention services and temporarily increases the FMAP for home and community-based services and Urban Indian Health Organizations and Native Hawaiian Health Care Systems. In addition, it requires CMS to recalculate the annual disproportionate share hospital (DSH) allotment for any year that the temporary FMAP increase applies due to the COVID-19 pandemic (see Families First Coronavirus Response Act (P.L. 116-127) §6008) to ensure that total DSH allotments that a state makes in a year are equal to the total DSH payments that the state could have made without the FMAP increase. This amendment is retroactive to the beginning of the COVID-19 emergency period and the start of the FMAP increase.

## Medicare

The legislation creates a floor on the Medicare area wage index for hospitals in all-urban states for discharges after October 1, 2021. It also allows the HHS Secretary to reimburse providers of ground ambulance services when they render care in response to a 911 call and would have transported the patient to a permitted destination but were unable due to community-wide emergency medical service protocols resulting from the pandemic.

## Provider Funding and Support

Section 9911 of the legislation provides $8.5 billion to Medicare- and Medicaid-enrolled rural providers for health care-related expenses and lost revenues that are attributable to COVID-19.

Congress allocated $200 million for quality improvement organizations to provide skilled nursing facilities (SNFs) infection control and vaccination uptake support relating to the prevention or mitigation of COVID-19. In addition, $250 million was allocated for states to establish strike teams, which will be deployed to SNFs with diagnosed or suspected COVID-19 cases among residents or staff to help with clinical care, infection control, or staffing during the pandemic.

## Health Insurance Exchanges

In addition to expanding premium tax credit subsidies, the legislation applies the reduction in cost-sharing established by section 1402 of the Patient Protection and Affordable Care Act (P.L. 111-148) to those who receive unemployment compensation in 2021. It also appropriated $20 million for exchanges to modernize and update their systems, programs, and technologies.

# Aviation

*By Kathleen Bianco, J.D.*

The Biden Administration's American Rescue Plan Act of 2021 appropriated an additional $8 billion to commercial and general aviation airports to aid in the prevention, preparation for, and response to the coronavirus. The budgeted funds must be used for purposes directly related to airports and will not be available to any airport that was allocated in excess of four years of operating funds in coronavirus aid in fiscal year 2020.

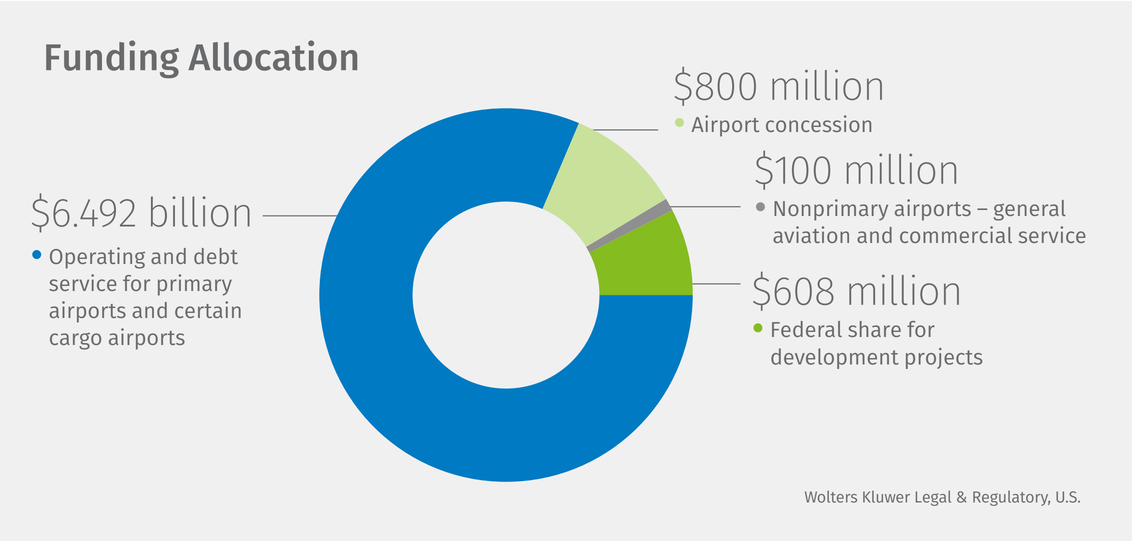
The funding will support continuing operations and replace lost revenue resulting from the sharp decline in passenger traffic and other airport business due to the COVID-19 public health emergency. The funds are available for airport operating expenses, including payroll and utilities, and airport debt payments. The ARPA also provides funds to increase the federal share to 100 percent for grants awarded in fiscal year 2021, or in fiscal year 2020 with less than a 100-percent federal share, for airport development projects.

For the administration of the airport relief funds, the Federal Aviation Administration (FAA) may retain up to 0.1 percent of the money allocated to fund the award of, and oversight by the FAA Administrator of, grants made under this Act. The Act further requires airports receiving funds to comply with workforce retention requirements or obtain a waiver. The workforce retention requirement provides, that, as a condition for receiving funds, an airport must continue to employ, through September 30, 2021, at least 90 percent of the number of individuals employed (after making adjustments for retirements or voluntary employee separations) by the airport as of March 27, 2020. Nonhub and nonprimary airports are not subject to the workforce retention requirements. Failure to comply with workforce retention requirements can result in clawback.

## Emergency Employee Leave Funds

In addition to providing financial support to airports, the ARPA establishes emergency employee leave funds for the FAA and the Transportation Security Administration (TSA). The funds allocated—$9 million to the FAA and $13 million to the TSA—will allow federal employees to take paid leave if they are unable to work due to, among other things:

- Federal or state quarantine or isolation orders related to COVID-19.
- Personal health concerns resulting in a need to self-isolate upon the recommendation of a health care professional.
- Caring for a family member with COVID-19.
- Experiencing symptoms of COVID-19 themselves.
- Caring for a child whose school or place of care has been closed due to the pandemic.



The paid leave funds will be available through September 30, 2022; however, any leave must be taken before September 30, 2021. Moreover, the duration of paid leave provided to an employee under these provisions should not exceed 600 hours for each full-time employee. Finally, paid leave may not be provided to an employee if the leave would result in payments greater than $2,800 in aggregate for any biweekly pay period for full-time employees, or a proportionally equivalent biweekly limit for part-time employees.

# Securities

*By Mark Nelson, J.D.*

Section 7301 within Subtitle C of Title VII of the American Rescue Plan Act of 2021 extends relief previously afforded to airlines with similar limits on executive compensation, stock buybacks, and the payment of dividends by air carriers and contractors that receive federal aid. The Treasury Department is directed to provide up to $15 billion in financial assistance to eligible air carriers and contractors based on either a ratio of prior payments received (air carriers) or the actual amount of prior payments received (contractors) under previous aid legislation. Specifically, the provision allocates $14 billion to air carriers and $1 billion to contractors. The Treasury Department must publish streamlined and expedited procedures for requesting aid within 5 days after enactment and must begin making aid payments within 10 days after enactment. The Treasury Department must apportion funds to eligible air carriers and contractors by April 15, 2021.

## Limits on eligible air carriers and contractors

The limits on eligible air carriers and contractors largely follow the provisions originally included in the Coronavirus Aid, Relief, and Economic Security (CARES) Act (Pub. L. No. 116–136), which became law on March, 27, 2020 and, with respect to certain amounts of aid previously received by eligible air carriers and contractors, the Consolidated Appropriations Act, 2021 (Pub. L. No. 116–260), which became law on December 27, 2020.

Air carriers and contractors are considered eligible to request and receive aid under the ARPA if: (1) the carrier or contractor received funds under the provisions contained in the Consolidated Appropriations Act, 2021 (See, Sections 402(a)(1) and 402(a)(2) within Subtitle A of Title IV of Division N of Pub. L. No. 116–260); (2) the carrier or contractor provided air transport or provided catering or other functions on airport property that directly related to air transport as of March 31, 2021; (3) the carrier or contractor does not impose involuntary furloughs or reduce employee pay rates or benefits until the later of September 30, 2021 or the date any assistance received has been exhausted; and (4) the carrier or contractor makes certifications about stock buybacks, payment of dividends, and executive compensation. The following discussion emphasizes the limits on stock buybacks, payment of dividends, and executive compensation, although an eligible air carrier or contractor also must certify compliance with the limits on employee furloughs and related reductions in employee pay or benefits.

- ***Stock buybacks—***An eligible air carrier or contractor may not repurchase its own or its parent company's equity securities that are listed on a national securities exchange through September 30, 2022.
- ***Dividends—***An eligible air carrier or contractor may not pay dividends or make other capital distributions regarding the company's common stock (or equivalent interest) through September 30, 2022.
- ***Executive compensation—***During the period April 1, 2021 to April 1, 2023, no officer or employee with total compensation greater than $425,000 in 2019 (other than under an existing collective bargaining agreement) may receive: (1) compensation in excess of total compensation received in 2019; or (2) severance or other termination benefits exceeding two times the maximum total compensation received in 2019. Moreover, no officer or employee with 2019 total compensation

over $3 million may receive more than: (1) $3 million; and (2) 50 percent of the excess over $3 million of total compensation received in 2019.

The ARPA does not define "total compensation." However, the term was defined most recently in the Consolidated Appropriations Act, 2021 to mean "salary, bonuses, awards of stock, and other financial benefits provided by a passenger air carrier or contractor to an officer or employee of the passenger air carrier or contractor" (See, Section 406(b) within Subtitle A of Title IV of Division N of Pub. L. No. 116–260). The term was similarly defined in the CARES Act (See, Section 4004(b)).

### Taxpayer protections

In order to provide a degree of protection for taxpayers, the Treasury Department must obtain from eligible air carriers and contractors that receive assistance financial instruments that satisfy the requirements set forth in Section 408 of the Consolidated Appropriations Act, 2021 that air carriers and contractors provide compensation to the federal government for having received financial assistance. The main difference between the assistance made available via the Consolidated Appropriations Act, 2021 and the ARPA is that the ARPA states that the Treasury Secretary "shall receive" such financial instruments from eligible air carriers and contractors while the Consolidated Appropriations Act, 2021 used discretionary language ("may receive"). However, the other terms and conditions of the financial instruments, which may include warrants, options, preferred stock, debt securities, or notes, are the same as those stated in the Consolidated Appropriations Act, 2021, which are the terms and conditions agreed to by the Treasury Secretary and the recipient or with other similarly situated recipients (See, Section 408 within Subtitle A of Title IV of Division N of Pub. L. No. 116–260).

# *Government Contracts*

*By William A. Van Huis, J.D., George M. Gullo, J.D., and Marilynn Helt, J.D.*

Section 4015 of the American Rescue Plan Act, Extension of Reimbursement Authority for Federal Contractors, amends section 3610 of the Coronavirus Aid, Relief, and Economic Security Act (P.L. 116-136). The amendment extends, to September 30, 2021, the final date for which the government may reimburse a contractor for paid leave under Section 3610.

Section 3610 allowed government agencies to reimburse, at the minimum applicable contract billing rates (not to exceed an average of 40 hours per week), any paid leave, including sick leave, that a contractor provided to keep its employees or subcontractors in a ready state during the COVID-19 public health emergency. However, section 3610 did not allow the government to provide this reimbursement beyond September 30, 2020. Congress extended the expiration date for this authority twice—first as part of a continuing resolution (P.L. 116-159), and then in the Consolidated Appropriations Act, 2021 (P.L. 116-260), but this authority was set to expire on March 31, 2021.

The Department of Defense—the government's largest contracting agency—issued DFARS 231.205-79, a new cost principal that tracks the language of section 3610 and allows DoD contracting officers to treat as allowable paid leave costs a contractor incurs to keep its employees and subcontractor employees in a ready state during the emergency. It allows COs to use any "funds made available to the agency" by Congress to reimburse contractors for workers' lost time, not otherwise reimbursable, between March 27, 2020, and March 31, 2021, if the contractor provides leave to its employees or subcontractor employees "to maintain a ready state, including to protect the life and safety of Government and contractor personnel" through quarantining, social distancing, and other COVID-19 related interruptions discussed in Office of Management and Budget Memorandum M-20-18, Managing Federal Contract Performance Issues Associated with the Novel Coronavirus. DoD also authorized COs to modify contracts to provide for reimbursement of allowable paid leave costs, not otherwise reimbursable, without securing additional consideration.

# American Rescue Plan—What changed from the House Bill?

| House bill | Senate changes |
|---|---|
| **Sec. 2101(a) –** Gradual increase to $15 per hour minimum wage. | Removed. |
| **Sec. 2101(b) –** Gradual increase to $15 per hour minimum wage for tipped employees and elimination of tip credit. | Removed. |
| **Sec. 2101(c) –** Gradual increase to $15 per hour minimum wage for new hires less than the age of 20. | Removed. |
| **Sec. 2101(d) –** Gradual increase to $15 per hour minimum wage for employees with disabilities. | Removed. |
| **Sec. 2102 –** $150,000,000 in funding for labor protection activities, $75,000,00 of it to OSHA, from which $5,000,000 is earmarked for enforcement related to COVID–19 at high risk workplaces including health care, meat and poultry processing facilities, agricultural workplaces and correctional facilities. | Funding increased to $200,000,000, with $100,000,000 for OSHA and same amount for high risk workplaces. |
| **Sec. 2103 –** Compensation for Covid-19-reated claims under Longshore and Harbor Workers' Compensation Act. | Removed. |
| **Sec. 3035 –** Provides $1.8 billion for detecting, diagnosing, tracing, monitoring, and reporting on COVID-19 in congregate settings. | Removed. |
| **Sec. 3107 –** Amends Soc. Sec. Act 1927(c)(2)(D) to sunset the limit on the maximum rebate amount for single source drugs and innovator multiple source drugs under Medicaid. | Sec. 9816 – Changed the sunset date from December 31, 2022 to December 31, 2023. |
| **Sec. 3103 –** Allows for Medicaid coverage for inmates during the period 30 days preceding their release. | Removed. |
| **Sec. 3108 –** Establishes requirements for a Medicaid FMAP increase for home and community-based services. | **Sec. 9817 –** The specific activities required to enhance, expand, or strengthen home and community-based services under the state Medicaid program in (b)(2) were dropped from the House to the Senate bill. |
| **Sec. 9011 –** Pandemic Uemployment Assistance extended through August 29, 2021 and the number of weeks available to individuals who are not able to return to work safely increased from 50 to 74. | Extended to September 6, 2021 and number of weeks increased to 79. |
| **Sec. 9013 –** Amount of pandemic unemployment compensation is $400 for weeks ending on or before August 29, 2021. | The amount decreased to $300 per week. Time period exended to weeks ending on or before September 6, 2021. |
| **Sec. 9016 –** Increased the number of weeks of benefits a worker may receive in the Pandemic Emergency Unemployment Compensation program from 24 to 48, and extended the period of time in which workers can receive PEUC benefits if they exhaust regular state UI benefits through August 29, 2021. | Benefits extended to September 6, 2021, and for 53 weeks. |
| **Sec. 9501(a)(1)(A) –** Provides premium assistance of 85 percent for COBRA continuation coverage for eligible individuals and families from the first of the month after enactment through September 30, 2021. | Premiums reduction increased to 100% for eligible individuals. |
| **Sec. 9601 –** Stimulus payment of $1,400 for individual with adjusted gross income (AGI) up to $75,000. Phased out completely for individuals with AGI of $80,000 ($2,800 for married couple with AGI of $150,000; phased out if AGI of $160,000). | Complete phase-out changed to $80,000 for individuals ($160,000 for married couples). |
| **Sec. 9708 –** Code Section 415(c) annual contribution limit for defined contribution plans and the Code Sec. 415(b)(1)(A) annual defined benefit limit would be frozen starting in calendar year 2030. | Removed. |
| Not in House bill. | **Sec. 2305 –** The reduction in cost-sharing established by ACA sec. 1402 applies to those who receive unemployment compensation in 2021. |
| Not in House bill. | **Sec. 4015 –** The authority under CARES Act Sec. 3610 for Federal contractors to reimburse employees unable to perform work due to the COVID-19 pandemic is extended from March 31, 2021, to September 30, 2021. |
| Not in House bill. | **Sec. 9675 –** exempts all student loan forgiveness from taxation through January 1, 2026. |
| Not in House bill. | **Secs. 9831 and 9832 –** Medicare provisions creating a floor on the Medicare area wage index for hospitals in all-urban states and allowing the HHS Secretary to temporarily waive or modify application of certain Medicare requirements with respect to ambulance services furnished during emergency periods. |
| Not in House bill. | **Sec. 9911 –** Appropriates $8.5 billion for payments to health care providers for expenses and lost revenues attributable to COVID–19. |

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