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# Employment and Business Changes in the American Rescue Plan Act of 2021

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The American Rescue Plan Act (“ARPA”) of 2021 (H.R. 1319), signed into law on March 11, 2021, is a \$1.9 trillion economic stimulus package intended to provide the tools and support critical to tackling the urgent public health and economic crisis the Nation faces as a result of COVID-19.

ARPA provides funding to set up community vaccination sites nationwide, scale up testing and tracing, eliminate supply shortage problems, invest in treatments, address health disparities, and ensure workplace health and safety. It extends tax credits for employers that provide workers with paid sick and family leave to contain the spread of the virus, and provides K-12 schools and institutions of higher learning with the resources they need to reopen safely and stay open, as well as to address the academic, social and emotional needs of students.

To help businesses and communities, ARPA expands the Paycheck Protection Program (“PPP”), and provides additional funding for the Economic Injury Disaster Loan (“EIDL”) Advance program, the Shuttered Venue Operators Grant Program (“SVOGP”), and a program that finances innovative small businesses. It establishes a new program to help struggling businesses in the hospitality industry, and a new Community Navigator pilot program to increase awareness of, and participation in, COVID-19 small business relief programs.

Because of the huge scope of ARPA, this article will largely be limited to providing an overview of the employment and business-related rules. However, these changes, combined with the cumulative effect of the changes made last year, are substantial and have caused business owners and the IRS alike to struggle with keeping ahead of all the changes.

## Credits for Paid Sick and Family Leave

ARPA extends the employer payroll tax credits for paid sick and family leave

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created under the Families First Coronavirus Response Act (“FFCRA”) from March 31, 2021 through September 30, 2021. Originally, these credits applied to leave that employers with fewer than 500 employees were required to provide through December 31, 2020. The credits were later extended through March 31, 2021, for employers voluntarily providing qualified leave that would otherwise have been payable under FFCRA. However, the overall caps on the paid leave amounts for which tax credits could be claimed was not modified.

In the case of sick leave, employers could claim a tax credit under the FFCRA for 100% of the amount required to be paid in qualifying sick leave wages. Sick leave wages were required to be paid for up to 80 hours (i.e., two work weeks) for a full-time employee (prorated for part-time employees). The maximum amount of qualified sick leave wages required to be paid depended on the purpose for which the sick leave was taken.

For example, paid sick leave wages could not exceed \$511 per day or \$5,110 in aggregate for employees if they took leave because (i) they were subject to a federal, state or local quarantine order related to COVID-19, (ii) the employee had been advised by a health care provider to self-quarantine due to COVID-19, or (iii) the employee was experiencing symptoms of COVID-19 and was seeking a medical diagnosis.

In contrast, paid sick leave wages could not exceed \$200 per day or \$2,000 in the aggregate for employees if they took leave because (i) the employee was caring for an individual who was subject to a quarantine order or who has been advised by a health care provider to self-quarantine due to COVID-19, (ii) the employee was caring for a minor child whose school, place of care, or caregiver was closed or unavailable due to COVID-19, or (iii) the employee was experiencing any other “substantially similar condition” specified by the Secretary of Health and Human Services.

In the case of family leave, employers could claim a tax credit for 100% of the amount required to be paid in qualifying family and medical leave wages for employees who took leave because they had to care for their own minor child, or if the child’s school or place of care was closed, or if the child care provider was unavailable due to COVID-19. In the case of this credit, the paid leave period began after an individual had already taken 10 days of unpaid family leave (for which the employee could elect to use paid vacation, personal or another form of paid leave, including the FFCRA paid sick leave). After that 10-day period, the

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employees were entitled to receive from their employer at least two-thirds of their usual pay, but not more than \$200 per day. The credit for family leave wages was then limited to \$10,000 in total per employee.

ARPA makes the following changes to the foregoing scheme of paid sick and paid family leave credits:

- Under FFCRA, paid sick leave was limited to 10 days per employee during the period from April 1, 2020 through December 31, 2020. ARPA would extend and reset the 10-day limit starting April 1, 2021, and continuing through September 30 2021, for those employers electing to provide it.
- The paid sick leave is expanded to cover employees who are seeking or awaiting the results of a diagnostic test for, or medical diagnosis of, COVID-19 and such employee has been exposed to COVID-19 or the employee's employer has requested such test or diagnosis, or the employee is obtaining immunization related to COVID-19 or recovering from any injury, disability, illness or condition related to COVID-19 immunization. This leave could be provided the higher rate of 100% of the employee's wages up to \$511 per day (or \$5,110 in the aggregate), and the corresponding credits would be based on that amount.
- The definition of qualifying paid family leave is expanded to allow the family leave payroll tax credits to be claimed for all of the same qualifying uses permitted for the newly defined sick leave credit.
- While the limits on sick leave have remained the same, the limits on family leave have changed in two respects. First, under ARPA the first two weeks of the twelve-week available family leave do not have to be unpaid. Second, although employees are still entitled to be compensated at two-thirds of regular rate with a \$200 daily cap, the overall limit on family leave has increased from \$10,000 to \$12,000.
- A nondiscrimination rule is added which prevents employers from claiming the credits if paid leave discriminates in favor of highly compensated employees (as defined in 414(q)), full-time employees, or employees on the basis of tenure with the employer.
- Credits would be denied to an employer that unlawfully discharges, disciplines or discriminates against an employee who has taken leave in accordance with the FFCRA or who has filed any complaint or instituted or caused to be instituted any proceeding under the FFCRA, or who has testified or is about to testify in any such proceeding.

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ARPA provides for the paid sick and paid family leave tax credits to be increased by the amount Old-Age, Survivors and Disability Insurance (“OASDI”) tax (6.2%), or the equivalent amount of the Railroad Retirement Tax Act (“RRTA”) tax, and the employer’s share of Hospital Insurance (HI) tax (1.45%) on qualified leave wages. It also provides for them to be structured as a refundable payroll tax credit against only the Hospital Insurance (HI) tax (1.45%), beginning after March 31, 2021.

Self-employed individuals were also allowed a refundable income tax credit for paid sick and family leave under FFCRA. ARPA extends and expands the paid sick and family leave tax credits for self-employed individuals in a similar manner to the changes made for employers as described above. For the self-employed, the number of days for which self-employed individuals can claim the paid family leave credit is increased from 50 to 60 days.

## **Extension of Unemployment Benefits**

ARPA reauthorizes and expands unemployment benefits, which will apply to Michigan employees from March 13, 2021 through September 4, 2021, for:

- Pandemic Unemployment Compensation (PUC), which provides all unemployment recipients with an additional \$300 per week;
- Pandemic Unemployment Assistance (PUA), which provides coverage to the self-employed, gig workers and others in non-traditional employment;
- Pandemic Emergency Unemployment Compensation Program (PEUC), which provides additional weeks of benefits to those who exhaust their regular state benefits; and
- Mixed Earners Unemployment Compensation (MEUC), which provides an additional \$100 per week to claimants on some benefits programs who have self-employment income of at least \$5,000.

In addition to the unemployment benefit changes outlined above, ARPA also provides a waiver of federal taxes on the first \$10,200 in unemployment benefits received in 2020 for those individuals who earned less than \$150,000. The \$150,000 threshold applies regardless of the taxpayer’s filing status (i.e., married filing jointly, single, or head of household).

Finally, ARPA provides \$2 billion in additional administrative funding to the Department of Labor to “detect and prevent fraud, promote equitable access, and

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ensure the timely payment of benefits,” and an additional \$8 million to the Department of Labor for necessary expenses to carry out federal activities related to the administration of the aforementioned unemployment insurance programs.

## **Employee Retention Credit**

Under prior law, the employer retention credit is available through June 30, 2021, and is in the amount of 70% of qualified wages. This refundable payroll credit can be computed on up to \$10,000 in qualified wages paid to an eligible employee per quarter. Thus, the maximum credit for 2021 is \$14,000 (70% of up to \$20,000 in qualified wages paid over the first two quarters).

Qualified wages depend on the number of employees the employer had in 2019. For employers with 500 or fewer full-time employees, all wages paid by eligible employers are credit-eligible. For employers with more than 500 full-time employees, qualified wages are wages paid when employee services are not provided.

ARPA extends the employee retention credit through December 31, 2021. This will double the maximum credit for 2021 from its prior limit of \$14,000 per employee to \$28,000 per employee (\$7,000 per employee per quarter). In addition, a credit of up to \$50,000 per calendar quarter is provided to “recovery startup businesses,” defined as businesses established after February 15, 2020, with average annual gross receipts that do not exceed \$1 million. Severely financially distressed employers, those with gross receipts that are less than 10% of what they were in the same calendar quarter in 2019, will be able to treat all wages as qualified wages. The credit is also restructured to be claimed against the employer’s share of the Hospital Insurance (HI) payroll tax, as opposed to the OASDI or equivalent amount of RRTA tax.

## **COBRA Subsidy**

ARPA includes a six-month federally financed COBRA subsidy covering the full COBRA premium for eligible individuals starting April 1, 2021. The subsidy is available to employees who lose their health coverage due to a job loss or reduction in hours (and their family members) if they meet the following requirements:

- They are enrolled in COBRA or become eligible for COBRA on or after

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- April 1, 2021, and before the subsidy ends on September 30, 2021; or
  - They became eligible for COBRA prior to April 1, 2021, and the period of COBRA coverage to which they would be entitled (18 months) includes any month between April and September of 2021 — even if the individual did not elect COBRA when it was initially offered or elected COBRA but discontinued it before April 1, 2021.

The subsidy would end earlier if the individual's maximum period of COBRA coverage (generally, 18 months) ends prior to September 2021. It would also end earlier if the individual becomes eligible for coverage under another group health plan or Medicare. Individuals are required to notify their group health plan if they become eligible for coverage and are subject to a penalty if they fail to do so. Eligibility for excepted benefits, such as limited-scope dental or vision coverage or a health flexible spending arrangement, does not terminate eligibility for the subsidy. However, the subsidy is not available if the employee voluntarily terminates employment.

ARPA requires group health plans to provide a notice regarding the availability of the subsidy to any individual who becomes eligible to elect COBRA between April 1, 2021 and September 30, 2021. Plans also have to provide the notice to individuals who are eligible for the subsidy due to a job loss or reduction in hours followed by a loss of coverage occurring before April 1, 2021. The federal government is required to issue model notices by April 10, 2021. Plans are also required to notify individuals if their subsidy will terminate before September 30, 2021. This notice is not required if the subsidy will terminate due to the individual's eligibility for other coverage. The federal government is required to issue a model for this notice by April 25, 2021.

The subsidy is paid to the plan or plan sponsor as a credit against quarterly payroll taxes. Multiemployer plans and governmental plans are also eligible to receive the credit. If the credit exceeds the amount of the payroll taxes due, the credit is refundable. It can also be advanced under rules that will be issued by the Treasury.

## **PPP Expansion and Other Economic Support for Businesses and Non-Profit Organizations**

ARPA provides an additional \$15 billion in new funding for EIDL grants; expands the PPP for non-profit organizations, online news publishers, restaurants, and

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shuttered venues; and modifies the loan forgiveness rules.

Non-profit organizations that are 501(c) entities (other than 501(c)(3), (4), (6) or (19)) that are exempt from taxation under 501(a) (“Additional Non-profits”) are eligible to receive first draw PPP loans if those Additional Non-profits meet the following requirements:

- They employ no more than 300 employees per physical location;
- They do not receive more than 15% of their receipts from lobbying activities;
- Lobbying activities do not comprise more than 15% of their total activities; and
- The cost of the lobbying activities for the most recent tax year ending prior to February 15, 2020, does not exceed \$1 million.

Additional Non-profits are also eligible to receive second draw PPP loans if they meet the revenue reduction and size criteria for a second draw. Lastly, 501(c) organizations that employ not more than 500 employees per physical location are now eligible for first draw PPP loans.

Internet-only news or periodical publishers (or organizations that are majority owned or controlled by internet-only news or periodical publishers) are now eligible under ARPA to receive first and/or second draw PPP loans if they employ no more than 500 employees per physical location or meet the NAICS size standard and they certify in good faith that the proceeds of the PPP loan will be used to support expenses supporting local or regional news.

Restaurants may receive a tax-free federal grant from the Restaurant Revitalization Fund (“RRF”) equal to the amount of their pandemic-related revenue loss for the period from February 15, 2020 to December 31, 2020, if the following requirements are met:

- The restaurant is not a publicly traded company and does not own or operate, together with any affiliated businesses, more than 20 locations as of March 13, 2020. An affiliated business is one that has equity or a right to profit distribution of 50% or more, or has contractual authority to control the direction of the business, and was established as of March 13, 2020.
- A good faith certification is required that the uncertainty of current economic conditions makes it necessary to request the grant to support

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ongoing operations and the restaurant has not applied for or received a Shuttered Venues Operators grant.

- The total grant amount for eligible restaurants, and any affiliated businesses, is capped at \$10 million overall, and \$5 million per physical location. The grant must be spent on eligible expenses, which generally means payroll, principal or interest on mortgage obligations, rent, utilities, maintenance, supplies, food and beverage inventory, operational expenses, and paid leave.

Grants for Shuttered Venue Operators (“SVO”) were established on December 27, 2020, under the Economic Aid to Hard-Hit Small Businesses, Non-Profits and Venues Act. Among the requirements for a business to receive an SVO grant are the following:

- The business must be a live venue operator/promoter, a theatrical producer, a live performing arts organization operator, a “relevant” museum operator, a motion picture theatre operator, or a talent representative as defined under the Act.
- The business must not be a publicly traded corporation, be majority-owned by a publicly traded corporation, or have received more than 10% of its 2019 gross revenue from the federal government.
- The business must have been fully operational on February 29, 2020, and experienced a reduction in its gross revenue of at least 25% during one calendar quarter in 2020 compared to the same calendar quarter in 2019.
- The business must have, or intend to, resume its operations.

Previously, an SVO could not access both a PPP loan and SVO grants. This has been changed by ARPA. Thus, an SVO that is a PPP loan recipient may now also apply for an SVO grant.

Finally, PPP loan forgiveness is expanded to include payments for premiums on behalf of individuals who qualify for COBRA health insurance continuation coverage. This expansion applies only with respect to loan forgiveness applications received after March 10, 2021.

## **Tax Treatment of EIDL Advances and Restaurant Revitalization Grants**

A forgiven debt is generally treated as taxable income to the borrower. Prior



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COVID-19 legislation has allowed forgiven loans for certain programs, such as those provided by the PPP, to be excluded from income. Following an IRS ruling that associated expenses would not be deductible, legislation specified that associated expenses would be deductible. ARPA extends this treatment, i.e., the exclusion from income and deduction of expenses, to additional Economic Injury Disaster Loan (“EIDL”) advances on loans that are not required to be repaid.

ARPA likewise extends the exclusion from income and deduction of expenses treatment to additional grants made from the new Restaurant Revitalization Fund (“RRF”).

## **What’s Next?**

There were at least six major pieces of legislation during 2020, providing over \$5 trillion in economic relief. In spite of all the changes already made, we can expect more legislation to come.