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3 Employer Takeaways From The Latest Virus Relief Push

By **Vin Gurrieri**

Law360 (March 19, 2021, 8:59 PM EDT) -- The $1.9 trillion coronavirus relief package recently signed into law by President Joe Biden extended tax incentives that may make it more palatable for businesses to give workers paid leave to get vaccinated, but left out a proposed minimum wage hike that's sure to resurface in future legislation, experts say.

The American Rescue Plan Act, or ARPA, was signed by Biden shortly after it cleared the House of Representatives on March 10. The Senate had passed an amended bill days earlier over unanimous GOP opposition.

Although many highlights of the sweeping legislative package don't directly relate to the workplace, such as a fresh round of stimulus checks for Americans with qualifying incomes and expanded vaccination efforts, the law includes numerous provisions that are relevant for employers. These include an extension of tax credits for offering workers virus-related leave.

But the run-up to its passage also saw lawmakers eschew a mandated paid leave program and jettison a phased-in minimum wage increase — fights that may be picked up again by legislators in the months ahead, attorneys say.

"For employer purposes, the new legislation doesn't add any new obligations," said Larry Lorber of Seyfarth Shaw LLP. "There are some benefits in it … but what this does not do is continue paid leave, [and] obviously minimum wage has been taken out of it … which I think employers would generally view to be helpful."

FFCRA-Lite

On the paid leave front, Congress extended the ability of employees to access paid leave under last year's Families First Coronavirus Response Act until September 2021, but opted not to mandate that employers provide such leave as it did when the statute was passed in the early days of the pandemic.

Signed into law in March 2020, the FFCRA included two components: the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act.

Employers with fewer than 500 employees were required to provide workers with short-term paid sick time for various reasons tied to COVID-19, and long-term paid leave to care for kids whose schools or child care facilities were closed. Businesses covered by the law could also seek reimbursement of any qualifying FFCRA leave through tax credits.

Although the paid leave mandates ended Dec. 31, Congress allowed employers to keep on offering employees such leave on a voluntary basis and continue claiming the tax credits until the end of March.

In the ARPA, Congress scrapped the March deadline and pushed it to Sept. 30, giving employers an additional six months to allow their workforces to take FFCRA leave and claim the tax credit if they do. But lawmakers this time around stopped short of reinstituting the mandate that employers must provide FFCRA leave to workers who qualify for it.

Fiona Ong, a management-side partner at Shawe Rosenthal LLP, said that even though paid leave remains at employers' discretion, workers would have access to a new bank of leave under both prongs of the FFCRA. So, if a worker already burned through their FFCRA leave last year, their bucket of days resets if employers sign off on them tapping into it, according to Ong.

"Many employees are going to need time off for various things, and if the employer is going to give that time off anyway, if they're going to have to, this allows the employer to provide paid leave and get a tax credit for it," Ong said. "That's really quite beneficial, assuming that employees are not abusing it. But, again, because it's a voluntary, there's a lot more control on the part of the employer to deal with the fraud issues."

Ong also pointed out that Congress in the ARPA "vastly expanded" the list of reasons workers can cite to qualify for FFCRA leave, including going to get vaccinated or taking time to recover from any ill side effects they experience after getting inoculated, considerations that weren't relevant when the paid leave mandate was first passed.

"An interesting point for us is that many employers are trying to figure out how to incentivize employees to take the vaccination and they were providing paid leave," Ong said. "It would seem that under the [ARPA] that you can now provide that and get the tax credit for doing so, which basically means that it's a free incentive to the employer."

No Minimum Wage Hike … For Now

Besides not including a new paid leave mandate, the final version of the ARPA that made it across the legislative finish line also dropped a proposal for a phased-in minimum wage increase to $15 per hour by 2025.

Although Democrats largely backed the plan, it was ultimately cut out of the legislative package after the U.S. Senate parliamentarian decreed that it wasn't appropriate for inclusion.

However, despite not being implemented as part of the ARPA, the support it garnered among congressional Democrats and how close it came to being implemented are signs that the idea of raising the current $7.25 federal wage floor won't fade away any time soon, according to J. Hagood Tighe, co-chair of Fisher Phillips' wage and hour practice.

Tighe noted that some GOP lawmakers led by Sen. Mitt Romney, R-Utah, floated their own plan for increasing the minimum wage. While the GOP proposal would set a lower wage floor than the $15 per hour Democrats had sought, Tighe said it indicates that "there is at least some appetite" on the Republican side to act on the issue.

"Based on President Biden's campaign promises and comments he'd made since he was elected, and the comments made by Sen. Bernie Sanders and others, I think it's very likely that we will see additional legislation proposed to raise the minimum wage," Tighe said. "I think most employers were hopeful that it would not pass this time around, [but] I would think most employers foresee the likelihood that the minimum wage will be increased. The question is: How much and over what period of time?"

Feds Gift COBRA Subsidies to Workers

For Americans who were laid off and are eligible for continuing health benefits under the Consolidated Omnibus Budget Reconciliation Act, the federal government through the ARPA will allow them to stay on their workplaces' health plans for free from April 1 until Sept. 30 within COBRA's 18-month period of extended coverage.

The subsidies are available to anyone who lost a job or had to work part-time since Nov. 1, 2019, as long as that person didn't leave the company or reduce hours voluntarily, or qualify for Medicare or another group health plan after losing company-provided coverage. The law makes a tax credit available to employers that offer the subsidies.

The new federal subsidy, however, will mean that employers have to figure out who qualifies for it and issue notices within 60 days of April 1 that the government benefit is available. The legislation also directs the U.S. Department of Labor, in tandem with several other agencies, to issue model notices.

Jonathan Zimmerman, an employee benefits partner at Morgan Lewis & Bockius LLP, said the model notices, when they are issued, "hopefully … will make administration of this a little bit easier."

"More notices will have to go out. One thing you can rely on in the world of COBRA is that employers will have to send notices," Zimmerman said. "But the federal government is preparing a model and that will be very helpful."

The new legislation also "applies retroactively" going back to the start of the pandemic, Zimmerman said, creating an exception to the general rule that any worker who declines COBRA coverage in the weeks after losing their job can't later change their mind.

"Normally with COBRA, you sort of get a one-and-done opportunity to opt into that coverage," Zimmerman said. "But there's an exception to that rule under this new statute where people who declined COBRA coverage over the course of the past year can make a new election now to opt into COBRA and get the subsidized coverage between April and September."

"So, in other words, you don't have to pay for six, or nine or 12 months of COBRA on your own in the lead-up to this six-month period in order to get the subsidized coverage for that period. You can just get the subsidized coverage," he said.

--Additional reporting by Emily Brill and Andrew Kragie. Editing by Abbie Sarfo and Neil Cohen.