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INFORMATION MEMO
LABOR AND EMPLOYMENT LAW

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Extension and Expansion of Payroll Credits for FFCRA Style Paid Sick and Paid Family Leave

On March 11, 2021, President Biden signed the American Rescue Plan Act of 2021 (ARPA) into law. Notably, the law did not create a new mandate of paid sick and family leave. Instead, the ARPA simply extended and expanded the availability of payroll tax credits for covered employers who voluntarily choose to continue offering "FFCRA" style paid sick and paid family leave.

By way of background, the Families First Coronavirus Response Act (FFCRA) required employers with fewer than 500 employees to provide two weeks (up to 80 hours) of Emergency Paid Sick Leave (EPSL) and up to 10 weeks of paid Expanded Family and Medical Leave (EFML) for qualifying COVID-19-related reasons. The mandate required covered employers to provide paid leave benefits in accordance with the FFCRA from April 1, 2020 through Dec. 31, 2020. However, covered employers were eligible to receive a dollar-for-dollar tax credit for the required leave. Despite being subject to the leave mandate, government employers and their instrumentalities were ineligible to claim the tax credits.

The FFCRA leave mandate expired on Dec. 31, 2020. However, the Consolidated Appropriations Act of 2021, passed on Dec. 27, 2020, extended the payroll tax credit to employers who *voluntarily* provided the leave, through March 31, 2021. The ARPA further extends the payroll tax credits through Sept. 30, 2021, for eligible employers who voluntarily choose to extend EPSL or EFML leave benefits.

In addition, the ARPA made considerable changes to the available tax credit, all of which become effective April 1, 2021.

The ARPA expanded the qualifying reasons for which leave can be taken and tax credit claimed under the EPSL and/or EFML, to include leave: (1) to obtain COVID-19 immunization; (2) to recover from any injury, disability, illness or condition related to the COVID-19 immunization; and (3) to seek or await the results of a diagnostic test for, or medical diagnosis of COVID-19, and the employee has been exposed to COVID-19 or the employer has requested such test or diagnosis.

The Act also expanded the qualifying reasons for which EFML could be taken to incorporate ***all*** of the qualifying reasons under the EPSL. Under the original FFCRA framework, EFML was only available to care for a child whose school or place of care was closed for reasons related to COVID-19. The Act also strikes the provision of the EFMLA that required the first two weeks (10 days) of leave taken, to be unpaid. Accordingly, the entire 12 weeks of EFMLA is paid. The limit on the tax credit for paid family leave wages has also been increased to up to $200 per day, up to $12,000 per employee (previously, $10,000).

The ARPA also provides a "reset" to the 10-day (80-hour) allotment of EPSL effective April 1, 2021. Under the original FFCRA, paid sick leave was limited to two weeks (10 days/80 hours) for qualifying leave taken from April 1, 2020 through Dec. 31, 2020. The previous extension of the credits under the CAA did not renew any paid sick leave allotment. Therefore, if an employer voluntarily elected to extend the FFCRA style benefits through March 31, 2021, employees were left with whatever remaining balance they had from the original two-week allotment. If an employee exhausted their two-week EPSL allotment, employers could not claim any additional tax credits for leave provided, even if they voluntarily provided additional leave after Dec. 31, 2020. Under the ARPA, employees whose employers choose to extend

EPSL benefits may receive a "reset" of their 10-day allotment to be used commencing on April 1, 2021. What is currently unclear is whether employers choosing to extend EPSL benefits *must* provide the 10-day reset in order to claim any corresponding EPSL credit, or not.

The ARPA implements two important conditions on eligibility to claim the tax credit. The first is a clear directive that employers must meet *any requirement* of the EPSL or EFML in order to claim the tax credit. The second is a "non-discrimination" provision, which provides that if employers choose to extend the leave benefits, they may only avail themselves of the tax credits if they do not discriminate in favor of highly compensated employees, full-time employees, or employees on the basis of tenure with the employer.

Only employers with fewer than 500 employees, at the time the leave is to be taken, continue to be eligible to claim the tax credit. Governmental (public) employers and their instrumentalities are still generally ineligible claim the tax credit. The ARPA modified this limitation slightly to explicitly provide 501(a) and 501(c)(1) organizations to be eligible to claim the available payroll tax credits for paid leave provided in conformity with the Act.

We anticipate that the U.S. Department of Labor and the Internal Revenue Service will issue updated guidance reflecting the changes made by the ARPA. We will continue to monitor for developments and updates on this topic.

Employers are encouraged to consult with their tax attorney or other tax professional for further information or limitations on eligibility, reporting, and claiming tax credits on their quarterly tax filing (Form 941).

If you have any questions about the information presented in this memo, please contact Stephanie H. Fedorka, Shannon Knapp or any attorney in Bond's Labor and Employment practice.

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