

COVID-19 Relief Bill Will Have A Significant Impact On Employers And Employees

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On December 27, 2020, the President signed a bill passed by Congress providing additional COVID-19 related relief and stimulus. The key provisions impacting employers and current and former employees are summarized below, including provisions impacting unemployment benefits, stimulus checks, COVID-19 related paid leave, payroll protection program loans, and employee benefit plans are summarized below.

COVID-19 Related Paid Leave Tax Credits

The bill did *not* extend the obligation for employers to provide paid Emergency Paid Sick Leave (EPSL) and Expanded Family and Medical Leave (EFML) beyond December 31, 2020. This means that on January 1, 2021, public employers of all sizes and private employers with less than 500 employees are no longer required to provide such benefits.

The bill does allow covered private employers to continue receiving tax credits for EPSL and EFML *voluntarily* granted to employees through March 31, 2021. While additional guidance from the U.S. Department of Labor and Internal Revenue Service is needed, it appears the tax credits continue are available only for leave voluntarily granted to employees who did not already exhaust 80 hours of EPSL and 12 weeks of EFML. In other words, if an employee exhausted 80 hours of EPSL in 2020, the employer cannot receive additional tax credits for additional EPSL granted in 2021. And, if the employer already claimed tax credits for the 10 weeks of paid EFMLA, the employer cannot receive additional tax credits for additional EFMLA

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granted in 2021.

The tax credits continue to be available only to private employers and have not been extended to public employers.

Additional guidance is also needed from the DOL and IRS on other key issues. For example, what happens if an employee's EPSL or EFML began in 2020, the employee did not exhaust the available hours prior to December 31, 2020, and the employee's need for leave continues on and after January 1, 2021? It appears that the employee no longer has a statutory right to the leave on or after January 1, 2020. Instead, it is up to the employer whether to voluntarily grant such leave. Another open question is whether EFML an employer voluntarily grants in 2021 counts against an employee's 12 weeks of FMLA allowed per 12-month period? It appears the answer is no. But EPSL voluntarily granted in 2021 would count against an employee's 12 weeks of FMLA if the reason for the leave would also qualify as traditional FMLA (e.g., the employee needs to leave for his or her own serious health condition or to care for a family member with a serious health condition).

Public and private employers should review their COVID-19 related leave policies as employees will likely continue to need leave in 2021. Employers should also pay attention to State and local laws. For example, employees may continue to use Chicago and Cook County Sick Leave when an employee is absent for COVID-19 related reasons, including school closures.

Unemployment Benefits

The legislation extends certain CARES Act unemployment programs. The Federal Pandemic Unemployment Compensation ("FPUC") program supplement will be extended from December 26, 2020 to March 14, 2021, but the payment amount will be lowered from \$600 to \$300 per week. The Pandemic Unemployment Assistance ("PUA") program, which covers workers who are not traditionally eligible for unemployment insurance (such as independent contractors or "gig" workers), will be extended to March 14, 2021. The PUA will then have a three-week phase-out period that ends on April 5, 2021. Additionally, the legislation increases the number of weeks employees are eligible for PUA benefits from 39 to 50.

Lastly, the Pandemic Emergency Unemployment Compensation ("PEUC") program, which provides additional weeks of unemployment insurance benefits to individuals who exhaust their state unemployment benefits, is extended through March 14, 2021, but has a three-week phase-out to April 5, 2020. Additionally, the number of PEUC benefit weeks will be increased from 13 to 24.

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Stimulus Checks

The legislation provides an additional round of direct payments of \$600 for individuals making up to \$75,000 per year and \$1,200 for couples making up to \$150,000 per year, as well as a \$600 payment for each child dependent (this means, e.g., that an eligible family of four will receive \$2,400 in direct payments). These direct payments remain subject to a possible increase at this time.

Payroll Protection Program Loans

The bill apportions approximately \$284 billion to a second Paycheck Protection Program (PPP). It provides small businesses with much-needed financial support in the form of potentially forgivable loans equal to the total money spent on payroll and other specified costs during an eight or 24-week period after the disbursement of the loan. However, the second program makes many critical changes from the previous PPP, including lowering the employee threshold for businesses to 300 employees or fewer (down from 500), and the loan maximum to \$2 million (down from \$10 million). The bill revises many aspects of what are considered qualifying expenses and deductible expenses under the PPP, especially for new borrowers. In addition, the bill calls for a streamlined process for smaller loans. Businesses should carefully review and monitor these changes to the programs.

Employee Benefits Provisions

Some of the more relevant provisions to employers sponsoring health and welfare and retirement plans include the following.

Health and Welfare Plan Provisions

Flexible Spending Account (“FSA”) Flexibility

For plan years ending in 2020 or 2021, the bill permits health FSAs and dependent care FSAs to allow participants to carry over any unused account to the following plan years (2021 or 2022, respectively). Additionally, health or dependent care FSAs that offer grace periods will be permitted to extend those grace periods to 12 months (as opposed to the typical 2-1/2 months) after the end of the plan years ending in 2020 or 2021.

A similar provision applies with respect to health FSAs for employees who terminate participation in the arrangement in 2020 or 2021 due to termination of employment or any other reason. Under the bill, an FSA may allow such participants to continue to be eligible for reimbursements through the end of the year in

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which the employee's participation ends.

These provisions are optional, but if an employer chooses to implement them, an amendment to their cafeteria/FSA plan likely will be required.

Exclusion of Employer Payments for Student Loans

Under the Internal Revenue Code, there is an exclusion for amounts paid to an employee for certain educational expenses through an educational assistance program (up to \$5,250). The CARES Act expanded the definition of what qualified as educational assistance for this purpose for the 2020 tax year to include an employer's payment of principal or interest on any qualified educational loan of an employee for his/her education. The bill expanded this rule to allow for such payments to be excluded by employees for an additional five years, i.e., for such payments made prior to January 1, 2026.

No Surprise Medical Billing

Prior to the bill, an all-too-common problem was emerging for plan participants where insured individuals would be surprised with bills from out-of-network providers who administered services in a network setting (e.g., a non-network anesthesiologist in an emergency room in a hospital). Patients utilizing air ambulance services were subjected to similar out-of-network surprises.

Effective January 1, 2022, the bill made several changes in an attempt to curb these practices. First, the bill requires a plan or insurer to apply in-network prior authorization and cost-sharing rules to emergency services provided by an out-of-network provider, out-of-network providers at in-network facilities, and out-of-network air ambulance services. In addition, the bill prohibits out-of-network providers from "balance billing" patients for emergency or air ambulance services.

The bill also requires providers, with certain exceptions, to send patients an estimate of the amount the provider is going to charge for non-emergency services and to get patient consent before performing those services. Likewise, plans will be required to provide an Explanation of Benefits ("EOB") in advance of the services outlining the plan's and patient's respective expected costs.

Transparency Regarding Deductibles and Out-of-Pocket Limits

The bill imposes additional disclosure requirements on health plans and insurers with respect to cost-sharing requirements and limits that will be effective January 1, 2022. Specifically, a plan or insurer must disclose on any insurance ID cards issued to participants any deductibles and out-of-pocket limits that

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apply to the plan or coverage, as well as a telephone number and website address through which participants can access plan related information, such as a list of in-network facilities.

Price Comparison Tool

The bill also will require plans and insurers to provide price comparison tools via telephone and a plan's website. These tools would permit participants to compare cost-sharing under the plan for a particular service for a plan year based on geographic regions and participating providers.

Prohibition on Gag Clauses

Effective January 1, 2022, the bill prohibits the inclusion of "gag clauses" in agreements between group health plans and insurers that restrict the plan or insurer from, among other things (i) furnishing specific cost or quality of care information to referring providers, plan sponsors, participants, or beneficiaries, or (ii) electronically accessing de-identified claims data for a participant or beneficiary on request (subject to HIPAA, GINA, ADA). However, the bill permits providers and service providers to place reasonable limits on any such disclosures.

Retirement Plan Provisions

Temporary Prevention of Partial Terminations

Generally, the Internal Revenue Code requires a plan to fully vest all of its unvested "affected employees" where the qualified retirement plan is subject to a "partial termination" (generally a decline of at least 20% of active participants in a particular plan year). The bill provides for temporary relief from the partial plan termination vesting requirement during any plan year that includes the period from March 13, 2020, through March 31, 2021, so long as the number of active participants covered by the plan on March 31, 2021, is at least 80% of the number of participants covered by the plan on March 13, 2020.

Disaster Relief Rules

The bill also includes provisions allowing for increased plan loans (up to \$100,000 from \$50,000) and excise tax-free distributions for participants residing in a "disaster area" (not related to COVID-19), as declared between January 1, 2020, and 60 days after the bill's enactment.