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Client Alert: Extension of Families First Leave Benefits

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Jason A. Collier
W. Jan Pietruszka
Frederick M. Thurman, Jr.

MEDIA CONTACT

Wendy M. Byrne
wbyrne@shumaker.com

On March 11, 2021, President Biden signed into law the American Rescue Plan Act of 2021 (“American Rescue Act”). In addition to the widely touted direct stimulus payments and extension of the \$300 federal unemployment supplement, the Act also renewed the refundable tax credits for private employers with less than 500 employees under the Families First Coronavirus Response Act (FFCRA). As you may recall, the FFCRA expired as of December 31, 2020, but the Consolidated Appropriations Act (passed in late 2020) permitted employers to voluntarily continue offering Emergency Paid Sick Leave and/or Emergency Family and Medical Leave from January 1 through March 31, 2021 and receive tax credits.

Under the American Rescue Act, employers with less than 500 employees can again voluntarily choose to offer paid leave related to COVID-19 through September 30, 2021 and receive refundable tax credits. However, as you will see below, there have been a number of significant changes in the types and amounts of leave available. Employers will need to carefully consider whether to offer such leave and, if so, what documentation and operational changes will be necessary.

Below is a summary of the key terms of the leave available under the American Rescue Act:

- **Extension Period:** Tax credits may be claimed for qualifying leave taken from April 1, 2021 through September 30, 2021.
- **Reset of Paid Sick Leave Amount:** The Act resets an employee’s FFCRA Emergency Paid Sick Leave amount to 80 hours on April 1, 2021. Thus, if an employee took FFCRA sick leave prior to April 1, 2021, this will not prevent the employee from taking up to an additional 80 hours of sick leave between April 1 and September 30, 2021, for the covered reasons. As of this Client Alert, it is unclear if an employee’s 12 weeks of Emergency Family Medical Leave also resets, but it appears that was the intent.
- **Additional Covered Reasons for Emergency Paid Sick Leave or Emergency Family and Medical Leave:** Under the FFCRA, employees were entitled to take Emergency Paid Sick Leave when they were unable to work (or telework) because they: **(1)** were subject to a federal, state, or local quarantine or isolation order related to COVID-19; **(2)** had been advised by a health care provider to self-quarantine due to concerns related to COVID-19; **(3)** were experiencing symptoms of COVID-19 and seeking a medical diagnosis; **(4)** were caring for an individual who was subject to an order as described in reason (1) or has been advised as described in reason (2); **(5)** were caring for their child whose school or place of care had been closed, or child care provider was unavailable, due to COVID-19 precautions; and **(6)** were experiencing any other substantially similar condition specified by the federal government (none

has ever been specified). Under the FFCRA, Employees were entitled to take Emergency Family and Medical Leave only for reason number (5).

Under the American Rescue Act, employees can now take both Emergency Paid Sick Leave and Emergency Family Medical Leave for all six reasons above. Additionally, employees who are unable to work (or telework) can now also take both Emergency Paid Sick Leave and Emergency Family Medical Leave for three new reasons:

7. Obtaining a COVID-19 vaccine;
8. Recovering from any illness, injury, or condition related to such vaccine; and
9. Seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID-19 because either the employee has been exposed to COVID-19 or the employer requested the test or diagnosis.

For Emergency Sick Leave under the American Rescue Act, employees will be paid their regular rate of pay, capped at \$511 per day, for reasons (1) through (3) and (7) through (9), and be paid 2/3 their regular rate of pay, capped at \$200 per day, for reasons (4) through (6). For Emergency Family Medical Leave under the American Rescue Act, employees will be paid 2/3 their regular rate of pay, capped at \$200 per day, for all nine reasons.

- **Emergency Family Medical Leave Expansion:**

- Under the American Rescue Act, all 12 weeks of Emergency Family Medical Leave (EFMLA) are now paid leave (previously under FFCRA the first two weeks were unpaid). Thus, an employee now has potentially 14 weeks of paid leave available, if he or she qualifies: two weeks of sick leave and 12 weeks of family medical leave.
- To account for the two additional weeks of paid leave, employers can now receive tax credits under the EFMLA up to \$12,000 per employee, increased from the previous limit of \$10,000.

- **Non-Discrimination:** Employers are ineligible for tax credits if the Emergency Sick Leave or Emergency Family Medical Leave is offered in a manner that discriminates in favor of highly compensated employees, full-time employees, or based upon an employee's tenure.

Offering Emergency Sick Leave and/or Emergency Family Medical Leave after April 1, 2021 remains voluntary. Although not stated specifically in the Act, it appears that employers can choose to offer Emergency Sick Leave, but not Emergency Family Medical Leave. Employers choosing to offer Emergency Sick Leave and/or Emergency Family Medical Leave after April 1, 2021 should: 1) continue to maintain documentation of the reasons for and amount of leave taken, and 2) update their forms and policies to take into account the above modifications, especially the additional qualifying reasons for paid sick and family medical leave. While the Department of Labor and Internal Revenue Service have yet to issue guidance on the American Rescue Act, Shumaker will continue to monitor developments and share updates as they become available.