It's a Roll of the Dice: The Fate of the CARES Act and FFCRA Under Congress's New Stimulus Bill

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As 2020 comes to an end and we seek to close the books on what can only be described as an unprecedented, exhausting year, many employers are wondering what happens to the COVID-19-related benefits provided through the Coronavirus Aid, Relief, and Economic Security ("CARES") Act and Families First Coronavirus Relief Act ("FFCRA"), some of which have either already expired or are due to sunset on December 31st. While the fate of this legislation hung in the balance for a few tenuous weeks, as Congressional leaders duked out the details of another stimulus package, in a last minute push, Congress passed a new $900 billion stimulus bill, which, after additional delay, was finally signed into law by President Trump on December 27th.

In true pandemic fashion – filled with Netflix binges, wine, and board games – Hasbro's Monopoly is not only a fun pastime to whittle away the hours and cure the coronavirus blues, it also tells us everything we need to know about the new stimulus package, including Congress's selected distribution of funds subject to its purse strings. Although the details of the new law provide some much needed clarity on a few coronavirus-related employment issues, it has left others in a state of uncertainty.

Pass Go, Collect $300

When the CARES Act was initially enacted, unemployment benefits were expanded to provide those out of work with an extra $600 per week, on top of amounts already afforded under state unemployment laws. When this increased benefit expired on July 31, 2020, President Trump executed an executive memo providing for a $300 per week benefit, in the anticipation that Congress would pass another stimulus bill. With the expiration of Trump's stop-gap benefit, the new stimulus package now provides for a continued enhanced unemployment benefit of $300 per week through March 14, 2021. The new bill was intended to provide an additional 11 weeks of unemployment benefits, but due to the delay in signing the bill into law coupled with no language that provides for retroactive payments, jobseekers will only receive 10 weeks of boosted payments before the renewed benefit expires.

Likewise, the Pandemic Unemployment Assistance program (PAU), which provides unemployment assistance to those who ordinarily would not qualify for such benefits (contractors, gig workers, and individuals who are self-employed), and the Pandemic Emergency Unemployment Compensation program (PEUC), which allows states to provide up to 13 weeks of federally funded unemployment benefits to those who have already used all available state benefits, have also been extended.

Free Parking

The Payroll Protection Program (PPP), which provided forgivable loans to small businesses to assist with meeting payroll obligations and other specific business costs, has also been re-upped in the new bill, presumably to assist those business that were most adversely impacted by pandemic-related closures, such as restaurants, cultural institutions, and other live venues. The new stimulus package provides over $284 billion for first and second forgivable PPP loans, and notably expands PPP eligibility to nonprofit organizations.

Chance ?

Most significant to many private employers with fewer than 500 employees is the status of the FFCRA, which has two major provisions: the Emergency Paid Sick Leave Act (EPSLA) and the Emergency Family and Medical Leave Expansion Act (EFMLA). The EPSLA provides paid sick leave benefits of up to eighty hours (approximately 10 days) to employees who need to take leave for certain coronavirus-related reasons enumerated in the Act, such as to quarantine or care for an individual who must quarantine. The EFMLA provides employees who must care for a child whose school or place of care is closed or whose child care provider is unavailable due to COVID-19 with an additional 10 weeks of paid family leave. At the time the FFCRA was enacted, it included a provision automatically sun setting these benefits on December 31, 2020.

Until recently, it was unclear whether Congress intended to make any provision for extension of these benefits, leaving employers to speculate whether they would be forced to provide FFCRA-like benefits on their own dime with no tax setoff. We now know the stimulus bill provides a continued tax credit to support employers offering paid sick leave, based on the FFCRA framework through March 2021. However, at least for now, the FFCRA's actual paid sick and family leave benefits have not been extended under the new bill, which ultimately means that as of January 1, 2021, employers are not required by law to provide these benefits. While details are scant, there has been speculation that Congress may move to extend or modify the FFCRA within in the next few weeks (after the December 31st deadline), with all changes made retroactive to January 1, 2021, but it is still unclear whether such an extension will actually occur.

As a result, because it is anticipated that employees will need the same COVID-related time off in 2021, the new stimulus package – through the implementation of continued tax credits – is crafted to incentivize employers to continue providing FFCRA-like benefits to their workforce. Given this voluntary framework, in order to adequately manage employee expectations, employers should expeditiously communicate with employees about any changes to leave benefits (paid sick and family leave) for 2021, especially if the business does not intend to implement its own FFCRA copycat policy. Additionally, employers who elect to forgo the extension of FFCRA-like benefits should educate employees on the leave benefits available and be prepared to deal with any logistical issues that may arise with awarding back payments for benefits, should Congress decide to retroactively extend the FFCRA.

Community Chest

With the recent development and first wave of distribution of a new coronavirus vaccine, the stimulus bill has set aside $16 billion for further vaccine development and distribution, as well as funding for additional testing and contact tracing efforts. Additionally, $82 billion has been earmarked for educational institutions, primarily to include support for HVAC repair and replacement to mitigate virus transmission and reopen classrooms, as well as a $10 billion allotment for childcare to allow facilities to remain open so parents can return to work.

No Get Out of Jail Free Card

During negations, there was much talk about implementing the Safe to Work Act, which would shield certain business that stayed open during the pandemic (think: hospitals, schools, and other critical industries) from COVID-related lawsuits brought by individuals who claim they contracted the virus from these business. However, this push from some lawmakers did not make the final cut.

Despite the absence of any federal protection, North Carolina has implemented its own legislation providing employers with liability protections. North Carolina Session Law 2020-89 provides that businesses that create COVID-19 mitigation plans are protected from claims that another person contracted COVID-19 based on the property owner or business owner's negligent act. In South Carolina, a similar law has been proposed (the COVID-19 Liability Safe Harbor Act), but has not been successfully passed to date.

Much like the first stimulus package passed earlier this year, delays in payment and other procedural hiccups are expected as agencies scramble to implement these new benefits. We may also see updated guidance, especially with respect to the proposed changes to the Payroll Protection Program (stay tuned for more on this), as well as enhanced paperwork for receipt of unemployment benefits. During this time of continued uncertainty, Nexsen Pruet's employment team is here to help, providing practical solutions to your most complex issues.