

Client Alert

May 4, 2021

Tax Credits for Paid Sick & Family Leave due to COVID-19

Under the American Rescue Plan Act of 2021, employers are entitled to claim refundable tax credits for providing paid sick and family leave to their employees due to COVID-19, including leave taken by employees to receive or recover from COVID-19 vaccinations. Eligible employers will be reimbursed for wages paid for leave taken by employees who are not able to work or telework due to reasons related to COVID-19, including leave taken to receive COVID-19 vaccinations, or to recover from any injury, disability, illness or condition related to the vaccinations. Credits are available for wages paid for leave taken from April 1, 2021, through September 30, 2021.

The credits are a credit against the employer's share of Medicare tax, and they are refundable, which means that the employer is entitled to payment of the full amount of the credits even if it exceeds the employer's share of the Medicare tax.

Eligible employers include: (1) any business, including a tax-exempt organization, with fewer than 500 employees, and (2) a governmental employer, other than the federal government, and any agent of the federal government that is not a tax exempt organization within the meaning of Section 501(c)(1) of the Internal Revenue Code. Self-employed individuals are eligible for similar tax credits.

The HERO Act

On April 23, 2021, the New York state legislature delivered to Governor Andrew Cuomo for signature, the Health and Essential Rights Act (the "HERO" Act).

The Legislation, which was drafted as a response to COVID-19 workplace safety concerns, will direct the New York Department of Labor (NYDOL) to issue enforceable, industry-specific, minimum workplace health and safety standards that will impose sweeping new obligations on New York State employers in the wake of the COVID-19 pandemic.

All New York employers, regardless of size will be subject to the NYDOL issued standards. Employers will be required to (1) implement a health and safety plan that meets or exceeds the standards that are issued; (2) post the health and safety plan in the workplace, and (3) distribute a copy to all employees. Employers who do not adopt a

plan will be subject to a penalty of at least \$50/day until a plan is implemented. Employers who do not comply with an adopted plan may be subject to fines from \$1,000 to \$10,000. The HERO Act also creates a private right of action for employees, who can sue for equitable relief and monetary damages. Courts are authorized to award up to \$20,000 in liquidated damages and attorneys' fees to a prevailing plaintiff unless the employer can prove "a good faith basis" for believing that their established health and safety measures were in compliance with the applicable standards. Furthermore, retaliating against an employee who reports a violation may give rise to a separate cause of action.

The Act would also require employers to permit workers to establish and administer a "joint labor-management workplace safety committee." These Committees would be authorized to: (1) raise health and safety concerns, to which the employer must respond, (2) review any employer policy required by the HERO Act or the New York Workers' Compensation Law and provide feedback, (3) review any workplace policy promulgated in response to any health or safety law, (4) participate in any site visit by a government entity responsible for enforcing health and safety standards, (5) review any employer health and safety report, and (6) regularly schedule a meeting during work hours at least once per quarter. Committee members must also be permitted to attend training associated with their role without loss of pay. Retaliating against a committee member is prohibited and punishable by a civil fine of up to \$10,000, and aggrieved Plaintiffs may also recover liquidated damages and attorney's fees.

Topics that the NYDOL must address when issuing these standards include: employee health screenings, face coverings, personal protective equipment, hand hygiene, cleaning and disinfecting, social distancing, and compliance with mandatory or precautionary orders of quarantine.

FY 2021-2022 Budget Updates

On April 7, 2021, lawmakers agreed to a final state budget for Fiscal Year (FY) 2022. The final enacted budget includes \$212 billion in State funding, with \$12.6 billion coming from the federal government under the American Rescue Plan Act of 2021. Highlights of the Budget are listed below:

- The final state budget includes amendments to the Fiscal Intermediary (FI) contractor provisions, including a two-part process for selecting new FI contractors. The Department of Health will first conduct a survey amongst qualified applicants who were previously not awarded a contract under the RFO. The survey will ask:
 - whether the entity is a charitable corporation or a not-for profit corporation;
 - whether the applicant was performing services as a fiscal intermediary prior to January 1, 2012 and has continuously provided such services since that date;
 - the applicant's address;
 - whether the applicant is currently authorized, funded, approved or certified to deliver state plan or home and community based waiver supports and services to individuals with intellectual and developmental disabilities;
 - whether the applicant has historically provided fiscal intermediary services to racial and ethnic minority residents or new Americans, in the consumer's primary language, to be demonstrated by information and materials provided to the consumer in their primary language or

- languages; and
- whether the applicant is verified as a minority or woman-owned business enterprise (MWBE).

To be considered, applicants must respond to the survey within 30 days.

- Once the survey period concludes, the Department will then make additional awards to qualified applicants consistent with the following guidelines:
 - one or two additional applicants that are located in a county with a population of more than 200,000 but less than 500,000;
 - one or two additional applicants that are located in each county with a population of 500,000 or more;
 - at least two additional applicants who are either not-for-profit organizations or have provided FI services prior to January 1, 2012 and that are currently authorized to deliver state plan or home and community-based waiver services to individuals with developmental disabilities;
 - at least two applicants who are either not-for-profit organizations or have provided FI services prior to January 1, 2012 and that serve racial and ethnic minority residents, religious minority residents, or new Americans, as evidenced by information and materials provided to consumers in their primary language; and
 - at least two applicants verified as a MWBE. In awarding new contracts, the Commissioner will not rescore offers based on the results of the survey. Instead, contracts will be awarded to the next highest scoring applicant or applicants that meet the criteria listed above.

Importantly, the final budget includes language that states that the consumer and personal assistant transition guidance will apply to FI's in the event of an acquisition, sale of assets, or similar transaction. Please contact our office for additional details.

- Additionally, the final state budget rejected the 1% across-the-board cuts to Medicaid services and programs that were proposed, but left intact, and still in effect, the 1.5% reduction from FY 2021.
- The final budget extends the Global Cap through FY 2022-2023, and reporting is now required on a quarterly, rather than monthly basis.
- The final budget restores \$60 million in Medicaid Managed Care (MMC) and Managed Long Term Care (MLTC) Quality Pool payments and \$51.75 million in MLTC Quality Pool payments.
- The final budget also removes all limitations on the location of a telehealth provider and patients. The budget amends the definitions of “distant site” and “originating site” to largely remove limitations on Medicaid coverage for telehealth services. A "distant site" is now defined as any site within the United States at which a telehealth provider is located while delivering telehealth services. An “originating site” is now any site at which an individual is located when telehealth services are delivered. Providers now able to deliver telehealth services include care managers employed by or under contract with a health home program, patient centered medical homes, Care Coordination Organizations (CCO), and hospices.

Community Based Long Term Care Services 30-Month

Asset Transfer Lookback

On April 7, 2021, the Centers for Medicare & Medicaid Services (CMS) approved the State's application to amend MRT Waiver 1115 regarding the lookback period for the transfer of assets of certain community based long-term care (CBLTC) providers.

This amendment, if ultimately approved, will implement a 30-month lookback period for the transfer of assets of certain community based long-term care providers, and will also exclude certain enrollees from these rules. Under the federal statute, the transfer of assets lookback period is sixty (60) months prior to the month that the individual is applying for Medicaid. This amendment then would cut the relevant lookback period in half.

Providers and programs that are expected to be impacted by this rule include: (1) Adult day health care, (2) Assisted living programs (ALP), (3) Certified home health agencies (CHHA), (4) Personal care services, (5) the Consumer directed personal assistance program, (6) Limited licensed home care services, (7) Private duty nursing services, and (viii) Managed long-term care in the community.

This amendment is subject to a modified phase-in, and the State is aiming to begin applying these rules on January 1, 2022. Because transfer of asset rules for CBLTC services are effective October 1, 2020, applications for CBLTC services submitted on or after January 1, 2022 would be assessed for any transfers made on or after October 1, 2020.

U.S. Department of Labor Model Notices and FAQ's on COBRA Premium Assistance

The U.S. Department of Labor (DOL) has issued model notices and FAQ's on COBRA premium assistance under the American Rescue Plan Act of 2021. Under the Act, qualifying individuals, known as "Assistance Eligible Individuals" or "AEIs" may be eligible for assistance with COBRA premium payments from April 1 and September 30, 2021.

Under the law, employers must give notice of the availability of premium assistance to their employees. Specifically, employers must provide a notice to any AEI who has a qualifying event between April 1 and September 30, 2021. The notice must advise the AEI of the availability of the COBRA Subsidies, and whether the employer permits the AEI to enroll in other, less expensive coverage. Employers may provide this notice with the regular COBRA notice an employee would receive after a qualifying event, or they may provide it separately. The model notice incorporates the subsidy notification language into an updated general notice.

For qualifying events that occurred before April 1, 2021, employers must provide a "second chance" notice to any AEI who experienced a qualifying event after October 1, 2019 but before April 1, 2021, and who is currently enrolled in COBRA Coverage, or who declined to elect COBRA coverage. This notice must advise the AEI that he or she has the opportunity to enroll in COBRA coverage notwithstanding an earlier election against coverage. Employers must provide this notice no later than May 31, 2021.

Additionally, employers must provide a notice to the AEI stating the date on which the subsidy will expire. Notices must be given to employees between 15-45 days before the expiration date. Employers do not have to provide notice when a subsidy expires

because the AEI became covered under another group health plan or Medicare.

Qualifying events include: (1) a reduction in hours, “such as reduced hours due to change in a business’s hours of operations, a change from full-time to part-time status, taking of a temporary leave of absence, or an individual’s participation in a lawful labor strike, as long as the individual remains an employee at the time that hours are reduced, or (2) an involuntary termination of employment, “not including a voluntary termination.”

With the delivery of the model notices and FAQ’s, employers are advised to update their current notices to include the required subsidy language, and begin the notification process for impacted employees. As a reminder, “second-chance” notices must be sent to employees no later than May 31, 2021.

U.S. Department of Justice COVID-19 Related Fraud Enforcement Update

In March, the U.S. Department of Justice released an update on its criminal and civil enforcement efforts to combat COVID-19 related fraud, including schemes to defraud the Paycheck Protection Program (PPP), Economic Injury Disaster Loan (EIDL) program and Unemployment Insurance (UI) programs. Highlights are listed below:

- As of the date of the press release, the department publicly charged at least 474 defendants with criminal offenses based on fraud connected to the COVID-19 pandemic. These cases have been brought in fifty six federal districts around the country, two cases have been filed in the Western District of New York, and together these cases represent attempts to obtain over \$569 million from the U.S. government.
- The department is utilizing a multifaceted and multi-district approach to enforcement and is expected to add additional criminal and civil enforcement actions in the coming months.
- Paycheck Protection Program fraud cases involve a range of conduct; from business owners inflating their payroll expenses to obtain larger loans than they otherwise would have qualified for, to others who revived dormant corporations and purchased shell companies and then applied for loans with falsified payroll documents. Most of the Defendants who have been charged misappropriated loan proceeds for prohibited purposes, such as the purchase of houses, cars, jewelry, and other luxury items.
- Economic Injury Disaster Loan (EIDL) fraud cases have so far involved situations where individuals applied for advances and loans on behalf of ineligible newly-created, shell, or non-existent businesses, and then diverted the funds for illegal purposes.
- Unemployment Insurance (UI) fraud is being committed by international and domestic actors. Early investigation revealed that international organized criminal groups target funds using stolen identities to file for UI benefits. In response, the department has established the National Unemployment Insurance Fraud Task Force, a prosecutor-led multi-agency task force with representatives from more than eight different federal law enforcement agencies.
- The department is also using civil channels to fight COVID-19 related fraud. In the Eastern District of California, the department obtained the first civil

settlement for fraud involving the PPP program under the Financial Institutions Reform, Recovery and Enforcement Act (FIRREA) and the False Claims Act (FCA). FIRREA allows the government to impose civil penalties for violations of enumerated federal criminal statutes, including those that affect federally-insured financial institutions. The FCA is the government's primary civil tool to redress false claims for federal funds and property involving a multitude of government operations and functions. The FCA permits private citizens to bring a lawsuit on behalf of the United States and to share in any recovery.

- The department is also targeting fraud committed against American consumers. So far, the department has prosecuted or secured civil injunctions against dozens of defendants who have sold products attempting to cure, treat and/or prevent COVID-19 infections.

Personal Care Manual Update

An updated version of the Personal Care Policy and Procedure Codes Manual has been updated on eMedNY. The updated version can be accessed [here](#).

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