

BACKGROUNDER – ERA Policy Group

April 1, 2021

**Please note: all ERA Policy Group meetings will be video conferences via RingCentral. [Click here to log-on.](#)*

1. **Welcome (3 minutes: 11:00 a.m. – 11:03 a.m.)**
2. **NSBA’s Top Priorities for the 117th Congress – ERA Purview (20 minutes: 11:03 a.m. – 11:23 a.m.)**

No. 6 – [Close the Partisan Divide and Reform Politics](#)

No. 8 – [Regulatory Reform and Paperwork Reduction](#)

Chair Bill Belknap wants to have a discussion on ways this Policy Group envisions working to advance these priorities this year. He wants to deliberate on specific recommendations and ideas the members of this Group has for solutions to these ongoing problems identified in the two ERA purview priorities. Further, he wants to identify who the members of this Policy Group view as key stakeholders and advocates we can engaged with to advance them.

Questions to ignite conversation: How does this Policy Group foresees working to accomplish these priorities? What should the focus be in order to achieve success in these two priority areas? What are the target goals and how are we measuring success for these two issues?

3. **Ongoing Discussion (20 minutes: 11:23 a.m. –11:43 a.m.)**
 - a. **COVID-19 Reopening for Small Businesses: American Rescue Plan’s Employment-Related Provisions**

Chair Bill Belknap wants to have a discussion around the challenges businesses may face with reopening and gather information from members on what regulatory areas you deem as most concerning for small businesses.

The below information that I’ve crafted for the group is regarding the new American Rescue Plan’s employment-related provisions. Some of the new requirements may help drive the conversation for this agenda item.

On March 12, the American Rescue Plan Act of 2021 (ARPA) was signed into law, providing an estimated \$1.9 trillion stimulus package to address the ongoing COVID-19 pandemic. Some of the ARPA’s key provisions include a number of employment-related sections that build upon prior legislation to create a scaffold of employer obligations and worker entitlements arising from the pandemic’s impact on the U.S. economy.

Background

The ARPA is the latest piece of legislation aimed at addressing the COVID-19 pandemic, and its robust provisions contain a number of extensions and expansions of benefits previously enacted through prior legislative efforts and executive actions.

The first such effort, the Families First Coronavirus Response Act (FFCRA), enacted on March 18, 2020, was an employee-focused aid package that established emergency paid sick leave (EPSL) and emergency paid family leave (EFMLA) for workers who were impacted by COVID-19 and its related closures.

The second such effort, the Coronavirus Aid, Relief and Economic Security (CARES) Act, passed on March 27, 2020 and established a suite of pandemic-related unemployment insurance benefits, including Pandemic Unemployment Assistance (PUA), a benefit available to workers who would not otherwise be eligible for unemployment insurance; Federal Pandemic Unemployment Compensation (FPUC), a supplemental \$600 weekly benefit paid in addition to other unemployment insurance benefits; Pandemic Emergency Unemployment Compensation (PEUC), a 13-week extension on existing eligibility for unemployment insurance benefits; and certain enticements for states to develop short-time compensation (also known as shared work) programs.

FPUC benefits, which expired at the end of the July, were extended in part through the Lost Wage Assistance (LWA) program. The LWA program, authorized pursuant to President Trump's August 2020 executive directive, provided \$300 in supplemental weekly unemployment insurance benefits upon the expiration of the FPUC.

On December 27, 2020, Congress passed the Consolidated Appropriations Act of 2021, which included an 11-week extension of the PUA and PEUC benefits through March 14, 2021. The Act also expanded PUA eligibility to include "mixed earners" whose income is partially derived from self-employed earnings and wages paid by an employer. These benefits are limited to \$100 per week. The Consolidated Appropriations Act also converted FFCRA leave from a mandate to a program in which employers could receive tax credits with respect to wages paid under leave policies that met the FFCRA's requirements.

On February 26, 2021, President Biden's Department of Labor (DOL) issued guidance expanding the eligibility requirements for PUA to those individuals who refused work due to believed violations of coronavirus-related workplace health and safety standards.

Extension of Pandemic-Related Unemployment Insurance Benefits

The ARPA extends the CARES Act unemployment insurance benefits in their various forms through September 6, 2021. Specifically, the FPUC benefits are extended at their current weekly amount of \$300. The PUA benefits – including the expanded eligibility for "mixed earners" and those who have refused work due to health and safety concerns – and the PEUC benefits have been extended, with a new cap at 79 weeks of benefits. The ARPA also waives federal taxes on the first \$10,200 of unemployment benefits that an individual collected in 2020, so long as the taxpayer's adjusted gross income was less than \$150,000 in 2020. As with the CARES Act benefits, the extended ARPA unemployment insurance benefits will not impact an employer's state unemployment insurance rates.

Extension and Expansion of FFCRA Leave Tax Credits

The ARPA continues the voluntary nature of the FFCRA leave program and extends tax credits with respect to wages paid to employees while on FFCRA leave through September 30, 2021. The ARPA expands the reasons for taking FFCRA leave to include: (1) employees who are receiving a COVID-19 immunization, and (2) those who are awaiting confirmation of a COVID-19 test result. The ARPA increases the length of EFMLA leave from 10 weeks to 12 weeks and resets the start date for EPSL leave to March 31, 2021, such that employees who have previously exhausted the 80 hours of EPSL leave under the FFCRA would be newly eligible for emergency paid sick leave.

Employers who have made use of the FFCRA leave tax credits or plan to do so should be cognizant that their existing policies and practices will need to be updated to take into consideration the new changes to the FFCRA leave.

Creation of Six-Month COBRA Subsidy

Effective April 1, 2021, the ARPA establishes a full subsidy on health insurance premiums for continued coverage under COBRA. This subsidy expires on September 30, 2021. The COBRA subsidy is available to employees and their dependents who qualify or would have qualified for COBRA coverage during that timeframe, but had not elected to participate in any COBRA-covered plans. The ARPA's COBRA subsidy is not available to employees who have voluntarily resigned from employment or who are no longer eligible to receive COBRA as a result of the expiration of the coverage period (typically, 18 months) or becoming eligible for health insurance under another employer's plan or Medicare.

Employers, multi-employer plans and insurance plans will be required to initially cover the cost of the subsidies and will be reimbursed through a tax credit for such costs. The Treasury Department has yet to release regulations or guidance with respect to advancing this tax credit. Employers are required to update their COBRA notices or issue stand-alone notices to those individuals who will be eligible for the subsidy. Model notices are expected to be issued by the DOL before April 25, 2021. Employers will need to coordinate with their COBRA providers to prepare and disseminate notices that comply with the ARP's requirements.

4. New Guidance (10 minutes: 11:43 a.m. – 11:53 a.m.)

a. OSHA New COVID [National Emphasis Plan](#) & [Interim Enforcement Response Plan](#)

This is a new guidance update, no action is necessary by the Policy Group. The Occupational Safety and Health Administration (OSHA) issued two new documents on March 12, 2021 concerning COVID-19 and workplace enforcement.

On March 12, 2021, the U.S. Occupational Safety and Health Administration (OSHA) released a new [National Emphasis Program \(NEP\)](#) designed to “significantly reduce or eliminate worker exposures to COVID-19” by targeting specific “high-hazard industries or work tasks” with

greater frequency of close contact between workers for on-site inspections, outreach, and compliance assistance related to COVID-19 prevention and response measures. While federal OSHA's NEP technically does not apply to state plans, OSHA is strongly encouraging them to do so; and state plans must submit within 60 days a notice of intent indicating whether they intend to adopt same or similar initiatives.

The NEP specifically targets certain industries based on public enforcement data, such as complaints, inspections and COVID-19-related violations, where the data reflects that workers are expected to perform tasks associated with exposure to COVID-19. The NEP lists numerous "primary" targets, which are divided up as either healthcare or non-healthcare employers.

Primary healthcare employers include:

- Doctors' and dentists' offices
- Home healthcare services
- Ambulance services
- Hospitals, including psychiatric and substance abuse hospitals
- Nursing care facilities
- Residential intellectual and developmental disability facilities
- Continuing care retirement communities
- Assisted living facilities for the elderly

Primary non-healthcare employers include:

- Meat processing facilities
- Supermarkets and grocery stores
- Discount department stores
- Warehousing and storage facilities
- Temporary help services (if those services occur at healthcare facilities or other high-risk facilities)
- Restaurants
- Correctional facilities

The NEP adopts a phased approach to scheduling inspections. OSHA will give highest priority to fatality inspections related to COVID-19, followed by inspections related to employee exposure to COVID-19-related hazards. Inspections will either be on-site or utilize a combination of on-site and remote methods. The NEP will also include increased follow-up inspections to ensure abatement compliance and additional focus on ensuring workers are protected from retaliation.

On the same day it issued the NEP, OSHA also released an [Updated Interim Enforcement Response Plan for Coronavirus Disease 2019 \(COVID-19\)](#) (ERP), which provides additional guidance to OSHA offices and Compliance Safety and Health Officers (CSHOs) handling COVID-19-related complaints and reports. This ERP "prioritizes enforcement and focuses on employers that are not making good faith efforts to protect workers." The ERP also instructs

CSHOs that “all inspections should be conducted in a manner to achieve expeditious issuance of COVID-19-related citations and abatement.”

What This Means for Employers

Employers in the primary target industries now face a greater likelihood of upcoming inspections. As a result, those employers will need to carefully review all safety measures they have already taken and compare those to measures recommended by federal, state and local authorities. In addition, all employers should keep an eye out for additional guidance from OSHA. It appears likely that OSHA will soon release an emergency temporary standard (ETS) related to COVID-19 pursuant to President Biden’s January 21, 2021, Executive Order; and this ETS will likely define employers’ obligations with respect to COVID-19-related safety measures.

5. **Update – NSBA Letter to the Hill / Policy Group Member Action (5 minutes: 11:53 a.m. – 11:58 a.m.)**

a. [Providing Accountability Through Transparency Act and Guidance Clarity Act](#)
This is a legislative update, no action is required by this Policy Group. NSBA has sent a [letter of support to Reps. Luetkemeyer and Golden for the two bills they recently introduced](#). NSBA encourages members of this Policy Group to craft a similar letter to your own lawmakers asking them to cosponsor the House and Senate bills.

Guidance and rulemaking each have important but separate roles at agencies across the federal government. By law, guidance is merely a suggestion that is in no way enforceable. However, for over a decade, regulators have continually taken punitive actions against the American people who do not comply with their guidance. While the Trump Administration took steps to end that practice, it still threatens our job creators and economy today. These bills would clearly define the purpose and legal use of guidance and provide the utmost transparency between the federal government and the American people.

Ranking Member on the House Small Business Committee Blaine Luetkemeyer (R-Mo.) and Rep. Jared Golden (D-Maine) introduced two regulatory reform bills, the Providing Accountability Through Transparency Act and Guidance Clarity Act. Senator James Lankford (R-Okla.), along with Senator Kyrsten Sinema (D-Ariz.), reintroduced the companion bills, the [Providing Accountability Through Transparency Act \(PATA\)](#) and the [Guidance Clarity Act](#), which will help increase transparency of the federal rulemaking process for small businesses.

The [Providing Accountability Through Transparency Act](#) requires each government agency, in providing notice of a rule making, to include a link to a 100-word plain language summary of the proposed rule. Under this bill, plain language summaries must be made publicly available online and posted to regulations.gov to ensure all Americans have access and understanding of the regulations imposed on them.

The [Guidance Clarity Act](#) requires all federal agencies to include a guidance clarity statement that states the guidance is not issued in accordance with the rule-making process and therefore

is not legally binding. The bill requires a brief statement at the beginning of all federal agency guidance documents that clearly tells the reader the guidance does not have the force and effect of law.

Last Congress, Lankford's PATTA passed the Senate by unanimous consent and [was included as an amendment](#) to the Fiscal Year 2021 National Defense Authorization Act (NDAA) in July 2020, but was not included in the final version enacted into law.

In October 2019, the Trump Administration issued [Executive Order \(EO\) 13891](#) to require transparency in how federal guidance is issued and to ensure federal agencies are not using guidance documents as vehicles for creating law out of thin air. The Trump Administration later clarified how the EO should be implemented including deadlines for agencies in a [follow-up memorandum](#). The Guidance Clarity Act would codify into law the long-held legal principle that guidance is not legally binding, clarifying what guidance is and what it isn't.

6. Other Issues

7. Adjourn (12:00 p.m.)