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Update: On Thursday, January 6th, the Treasury department released its Final Rule on the state and local American Rescue Plan funds. In exciting news, the final rule confirms that creating, expanding, or financially supporting paid sick time, paid family leave, and paid medical leave are permissible uses of these funds. For more information, see here. The below memo was written based on the Interim Final Rule, prior to the issuance of the Final Rule. The Final Rule goes into effect on April 1, 2022.

Using the American Rescue Plan's State and Local Fiscal Recovery Funds to Address the Care Crisis

The American Rescue Plan Act of 2021, H.R. 1319, 117th Cong. (2021) (hereinafter "American Rescue Plan"), a landmark piece of legislation, made a number of important investments aimed at helping Americans recover from the fallout of the COVID-19 pandemic. Among these investments are the American Rescue Plan's State Fiscal Recovery Fund and Local Fiscal Recovery Fund. The pandemic has caused crises in many areas, including, but by no means limited to, housing, unemployment, health care access, and safety, all of which must be addressed. At the same time, the ongoing crisis of care that the pandemic revealed and exacerbated has loomed large during the pandemic and will continue to define the recovery. As states and localities begin to develop plans for these funds and begin to focus on ensuring an equitable recovery, investment in working families is urgently necessary. Workers—especially low-income women of color, who have borne the brunt of both the job loss and the caregiving needs exacerbated by the current crisis—need access to paid sick leave and paid family and medical leave and strong enforcement of workplace protections to enable them to balance the competing demands of work and care. This memo explains the State Fiscal Recovery Fund and the Local Fiscal Recovery Fund program parameters and identifies key policies these funds could support. The American Rescue Plan has created an unprecedented opportunity to support working families; state and local governments should seize it.

Part I: Structure and Amount of American Rescue Plan: State and Local Funds

Coronavirus State Fiscal Recovery Fund: State fund amounts and requirements are at H.R. 1319, 117th Cong. § 9901 (2021).

> Amount and Division of Funds: This fund provides $219,800,000,000 to remain available through December 31, 2024, for making payments under this section to States, territories, and Tribal governments. $195,300,000,000 is allocated for the States and D.C. Of that:

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- $25,500,000,000 is divided equally between the States and D.C.; D.C. also gets up to an additional $1,250,000,000. After that money is apportioned, the remainder is allotted proportionally among the States and D.C. according to the number of unemployed individuals. The Treasury has provided a breakdown of the funding for states.
- $4,500,000,000 to the territories, half to be divided equally, half to be divided proportionally by population. The Treasury has provided a breakdown of the funding for territories.
- $20,000,000,000 for tribal governments, $1,000,000,000 to be divided equally and the rest to be divided in a manner determined by the Secretary of the Treasury (hereinafter "the Secretary").

Timeline and Administration of Funds: In general, each State has to submit a certification that they need the money and will use it for the allowed purposes while abiding by the restrictions. Once that certification is submitted, the Secretary shall make the payment required in 60 days. The Secretary *can* withhold payment of up to 50 percent of the amount allocated to each State and territory (other than payment of the up to $1,250,000,000 for the District of Columbia) for a period of up to 12 months from the date on which the State or territory provides the certification. If the Secretary withholds payment, they must require a second certification before issuing the withheld payment. Eligible entities can request funds here.

Spending Parameters: State fiscal recovery fund payments may *only* be spent for four purposes, of which the first and third are most relevant to state, territorial, and tribal governments that wish to use these funds for paid leave purposes.[1] The four purposes are:

1) "[T]o respond to the public health emergency with respect to the Coronavirus Disease 2019 (COVID–19) or its negative economic impacts, including assistance to households, small businesses, and nonprofits, or aid to impacted industries such as tourism, travel, and hospitality"
2) "[T]o respond to workers performing essential work during the COVID–19 public health emergency by providing premium pay to eligible workers of the State, territory, or Tribal government that are performing such essential work, or by providing grants to eligible employers that have eligible workers who perform essential work"
3) "[F]or the provision of government services to the extent of the reduction in revenue of such State, territory, or Tribal government due to the COVID–19

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public health emergency relative to revenues collected in the most recent full fiscal year of the State, territory, or Tribal government prior to the emergency"

4) "[T]o make necessary investments in water, sewer, or broadband infrastructure"

Spending Restrictions: The text of § 9901 of the American Rescue plan makes clear that these funds cannot be used to "directly or indirectly offset" reductions in net tax revenue "resulting from a change in law, regulation, or administrative interpretation during the covered period that reduces any tax (by providing for a reduction in a rate, a rebate, a deduction, a credit, or otherwise) or delays the imposition of any tax or tax increase."[2] The Treasury's preamble to the Interim Final Rule (hereinafter "Rule") implementing the fiscal recovery fund explains that this *does not* mean that a state cannot reduce taxes at all during this period, just that *these funds* cannot be used to offset the cost of a tax reduction. The preamble to the Rule explains that "[a] recipient government would only be considered to have used Fiscal Recovery Funds to offset a reduction in net tax revenue resulting from changes in law, regulation, or interpretation if, and to the extent that, the recipient government could not identify sufficient funds from sources other than the Fiscal Recovery Funds to offset the reduction in net tax revenue."[3] Moreover, the preamble to the Rule clarifies that, if a state or territory *does* use these funds to offset a reduction in net tax revenue, only "the lesser of (i) the amount of the applicable reduction attributable to the impermissible offset and (ii) the amount received by the State or territory" is subject to recoupment.[4]

Coronavirus Local Fiscal Recovery Fund: Local fund amounts and requirements are at § 9901 (2021). This fund duplicates many of the parameters as the state fund described above.

Amount and Division of Funds: This fund provides $130,200,000,000, to remain available until Dec. 31, 2024, for making payments under this section to metropolitan cities, nonentitlement units of local government—a Department of Housing and Urban Development term meaning "cities with populations of less than 50,000 (except cities that are designated principal cities of Metropolitan Statistical Areas) and counties with populations of less than 200,000"—and counties. The Treasury has provided breakdowns of the money that will go towards metropolitan cities and counties; the Treasury also has aggregate information on the total amount available to nonentitlement units in each state. Timeline and Administration of Funds: In general, the Secretary of the Treasury pays 50% of the allocated funds within 60 days of enactment. The remaining funds will be allocated no earlier than 12 months after the first payment. Payments are made directly to counties and metropolitan cities, who can apply here, but payments to nonentitlement units of local government are distributed to the State, who then distribute the funds to the

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nonentitlement units within 30 days of receiving the funds (subject to some possible extensions).

Spending Parameters: These funds may be spent for only the same four purposes as for the State Fiscal Recovery Fund.

Spending Restrictions: Unlike the State Fiscal Recovery Fund, the Local Fiscal Recovery Fund does not appear to contain a restriction on spending such funds to offset reductions in net tax revenue. While there is no explicit allowance of such spending in the text of the law related to the Local Fiscal Recovery Fund, there is no explicit prohibition on such spending analogous to the explicit prohibition in the text of the law as related to the State Fiscal Recovery Fund.

Part II: Key Paid Leave Policies for Investment of American Rescue Plan Funds

State and local governments should think creatively about how to invest the American Rescue Plan funds described above in ways that will support the health of working families and ensure a just and equitable economic recovery. It is likely, based on the text of the law and on the Treasury's Interim Final Rule, that these funds can be used for a number of vital paid leave purposes. Key priorities that are likely permissible uses of American Rescue Plan funds are discussed below:

Creating and enforcing emergency paid leave rights

- Emergency paid leave protections have made a world of difference during the COVID-19 pandemic, allowing workers to keep their jobs and keep paying their bills in this crisis. Moreover, emergency paid leave laws serve a crucial public health function, ensuring that workers sick with COVID-19 can afford to stay home and that they can do so without risking their livelihoods, thus helping reduce the spread of COVID-19 in workplaces.[5]
- Since the FFCRA expired in at the end of 2020, strong state and local emergency paid leave laws, and strong enforcement of existing state and local emergency paid leave laws, are urgently needed to fill the gap.
- Spending on emergency paid leave—either via payments to businesses or payments directly to individuals, as well as on outreach, education, and enforcement of emergency paid leave laws—falls squarely within the bounds of the first spending purpose described above.
    - The Treasury's Rule states that "[e]xpenditures for the mitigation and prevention of COVID-19," fall within the first spending purpose described above.[6] The preamble to the Treasury's Rule further explains that, in considering whether

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spending meets the first purpose as a response to the public health emergency, "recipients should identify an effect of COVID-19 on public health, including either or both of immediate effects or effects that may manifest over months or years, and assess how the use would respond to or address the identified need."[7] By encouraging workers who contract COVID-19 or have been advised to self-isolate due to concerns related to COVID-19 to stay home rather than go into work, and by ensuring that they are practically able to do so without risking their economic security, emergency paid leave can help to reduce the spread of COVID-19.

- The Treasury's Rule specifically notes, in a non-exhaustive list of spending purposes within the first spending purpose, that the "[e]xpenses of providing paid sick and paid family and medical leave to public employees to enable compliance with COVID-19 public health precautions" would qualify.[8] The same reasoning should equally apply to the cost of providing paid sick leave to employees in the private sector to enable compliance with COVID-19 public health precautions.

- Outreach, education, and enforcement of emergency paid leave laws are a crucial to these laws' ability to serve as crucial public health support, ensuring that workers are informed about their rights and empowered to use the time available to them as needed without fear of retaliation or job loss. Accordingly, outreach, education, and enforcement may also be considered a response to the spread of COVID-19, and so is within the first spending purpose.

- In addition to emergency paid sick leave, American Rescue Plan funds can also likely be spent on paid vaccine leave programs, and associated outreach and enforcement.
  - By ensuring that workers are able to take the time they need to ensure that they and their loved ones are vaccinated without risking their income or their job, paid vaccine leave laws help ensure widespread vaccine uptake. Accordingly, these laws are a clear response to the public health emergency posed by COVID-19 and thus squarely within the first spending purpose laid out above. The Treasury's Rule notes, in explaining the first spending purpose, that "[t]he need for public health measures to respond to COVID-19 will continue in the months and potentially years to come. This includes the continuation of the vaccination campaign for the general public,"[9] and vaccine leave and associated outreach, education, and enforcement may be considered a key part of a vaccination campaign, and thus a key part of the public health response to COVID-19.

Supporting existing paid family and medical leave programs

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- Workers in states and localities that already had paid family and medical leave programs benefited from the critical safety net paid family and medical leave provides.[10]
- The State paid family and medical leave programs currently in effect have remained solvent and stable through the pandemic and continue to provide a critical safety net to workers and their loved ones during the pandemic. Due to the growth in unemployment[11] during the pandemic, however, payroll contributions to paid family and medical leave insurance funds have been lower. ARP funds can be used to restore funds in these programs to the levels they were at prior to the pandemic and its related growth in unemployment.
- Spending to support existing paid family and medical leave funds is within the bounds of the first spending purpose listed above because it both responds to the public health emergency and to the economic consequences of COVID-19.
    - It may be considered a response to the public health emergency because, as the preamble to the Treasury's Rule explains, "our understanding of the potentially serious and long-term effects of the virus is growing, including the potential for symptoms like shortness of breath to continue for weeks or months, for multi-organ impacts from COVID-19, or for post-intensive care syndrome. State and local governments may need to continue to provide care and services to address these near- and longer-term needs."[12] Countless workers will experience ongoing, long-term health and caregiving needs as a result of contracting COVID-19, including those for whom COVID-19 compounds a prior serious medical condition or disability.[13] Paid family and medical leave will support those workers as they balance the competing demands of work and caring for their own health and the health of their loved ones in the years to come.
        - The Treasury's Rule specifically notes, in a non-exhaustive list of spending purposes within the first spending purpose, that the "[e]xpenses of providing paid sick and paid family and medical leave to public employees to enable compliance with COVID-19 public health precautions" would qualify.[14] The same reasoning should apply to the cost of providing paid family and medical leave to employees in the private sector to enable compliance with COVID-19 public health precautions.
    - It may also be considered a response to the economic consequences of COVID-19 because, as those who have been out of work due to the pandemic begin to return to the workforce, they will continue to experience COVID-19- and non-COVID-19-related needs for family and medical leave. Many of these workers, disproportionately people of color and especially women of color, and

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disproportionately low-income, have been struggling financially as a result of the pandemic.[15] If they return to the workforce without paid family and medical leave available to them, and a need for family and medical leave arises, they may be forced to choose between sacrificing their health or the health of their loved ones or slipping further into economic precarity. This is a clear instance in which "economic harm exists and [. . .] this harm was [. . .] made worse by the COVID-19 public health emergency."[16] Paid family and medical leave is crucial to ensure that these workers—and, accordingly, the economy as a whole—are able to recover from the devastating economic effects of the pandemic.

- Moreover, the Treasury's Rule includes, in a non-exhaustive list of permissible spending uses justified under the first spending purpose, "[c]ontributions to an Unemployment Trust Fund up to the level required to restore the Unemployment Trust Fund to its balance on January 27, 2020."[17] The preamble to the Rule explains that "recipients may make deposits into the state account of the Unemployment Trust Fund [. . .] up to the level needed to restore the pre-pandemic balances of such account as of January 27, 2020 [. . .], given the close nexus between Unemployment Trust Fund costs, solvency of Unemployment Trust Fund systems, and pandemic economic impacts. Further, Unemployment Trust Fund deposits can decrease fiscal strain on Unemployment Insurance systems impacted by the pandemic. States facing a sharp increase in Unemployment Insurance claims during the pandemic may have drawn down positive Unemployment Trust Fund balances and, after exhausting the balance, required advances to fund continuing obligations to claimants. Because both of these impacts were driven directly by the need for assistance to unemployed workers during the pandemic, replenishing Unemployment Trust Funds up to the pre-pandemic level responds to the pandemic's negative economic impacts on unemployed workers."[18] Similar reasoning applies to paid family and medical leave funds, which may have seen increased claims during the pandemic and may also have seen decreased contributions during the pandemic due to higher levels of unemployment. Accordingly, spending on shoring up existing paid family and medical leave funds, at least to pre-pandemic levels, should be considered a response to an economic harm caused or exacerbated by the pandemic.

- Note that use of State Fiscal Recovery Funds to support existing paid leave programs may require caution to avoid running afoul of the restriction on using these funds to offset reductions in net tax revenue.

Outreach, education, and enforcement of existing paid leave rights

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- As discussed above, existing paid family and medical leave programs and existing paid sick time laws in the states and localities that have them were a crucial support to workers, to public health efforts, and to the economy during the COVID-19 pandemic.
- Both as the pandemic continues, and as workers begin to balance returning to work with navigating the health and economic fallout from the pandemic, it is crucial that all workers know their rights under these laws and are able to use the time off to which they are entitled without fear of retaliation or job loss.
- Spending on outreach, education, and enforcement of existing paid leave programs falls within the first spending purpose discussed above.
    - As discussed above, paid sick time laws and paid family and medical leave laws are vital public health supports during this time, helping workers care for themselves and their loved ones during the acute and long-term illness brought on by COVID-19 and enable social distancing and thus help to curb the spread of COVID-19—directly responding to the public health emergency.
    - Both paid sick time laws and paid family and medical leave laws also directly respond to the economic consequences of COVID-19, ensuring that, as those who lost work during the pandemic return to the workforce, a doctor's appointment or a family member's serious illness does not compromise their economic stability, and thus directly responding to economic harms caused by the pandemic.

Creating permanent paid leave rights

- As discussed above, in states and localities where such rights exist, permanent, comprehensive paid family and medical leave was a crucial support to workers, families, and the economy during the pandemic. At the same time, those without access to paid leave struggled, forced to make impossible choices among health, family, and work.[19]
- The creation of new paid family and medical leave programs responds directly to many of the most pressing needs created and exacerbated by this pandemic and some types of spending on creation of a new program would arguably fall within the first spending purpose described above.
    - The process of creating a new paid family and medical leave program could entail a number of different costs, including implementation of newly-created programs (including costs of staffing a new division, technology costs, etc.) and studies in advance of the creation of a new paid family and medical leave program (such as actuarial studies of program parameters and startup costs, research by a newly-created paid family and medical leave task force, etc.).
    - Implementation of a new paid family and medical leave program is a response to the public health emergency itself, because countless workers will experience

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long-term health and caregiving needs as a result of COVID-19.[20] Paid family and medical leave will ensure workers can take the time they need to address their own or a loved one's COVID-19-related needs in the years to come.[21] As discussed above, the preamble to the Treasury's Rule describes responding to the long-term health consequences of COVID-19 as part of responding to the public health emergency.

- The implementation of new paid family and medical leave programs will also provide a crucial response to the negative economic impacts of COVID-19. The pandemic has pushed millions of women out of the workforce,[22] disproportionately women of color, while others were forced to reduce work—resulting in an estimated $64.5 billion annually in lost wages and economic activity and potentially setting back women's economic equity by decades.[23] Paid leave is a proven tool for supporting women's labor force attachment and earning potential, giving women in the workforce more support when it is most needed and investing in both the strength and the equity of our economy.[24] As such, this clearly responds to a negative economic effect that was exacerbated by the pandemic.
    - Studies by a State in advance of a new program could potentially also be considered a response to the negative economic impacts of COVID-19, for the same reasons described above. Note, however, that there is less clarity at this time on whether this would satisfy the American Rescue Plan's spending requirements, since studies in advance of a new paid family and medical leave program may not ultimately lead to the creation of a new program, and would then not necessarily be a direct response to the negative economic impacts COVID-19.

Conclusion

Robust paid leave is urgently needed to respond to this unprecedented health and economic crisis and build the safer, more equitable future we need, and the American Rescue Plan's creation of the State Fiscal Recovery Fund and the Local Fiscal Recovery Fund have created unprecedented opportunities take needed action. It is likely that states and localities can use the American Rescue Plan funds to invest in working families by creating new rights to permanent and emergency paid leave, including paid sick time and paid family and medical leave, and by supporting—through funding, outreach, education, and enforcement—existing paid leave rights.

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Please note that this fact sheet does not represent an exhaustive overview of the law described, and it does not constitute legal advice. Failure to comply with restrictions on the use of these funds as set forth in the American Rescue Plan may result in recoupment of funds. Other limitations on spending may apply.

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[1] Note that these rationales for spending American Rescue Plan funds are not clearly exclusive; spending could potentially be justified under multiple rationales. It is possible, for instance, that a State could spend *more* on a government service than the reduction in revenue due to COVID-19 relative to the last full fiscal year if that spending were instead justified as a response to the negative economic impacts of COVID-19.
[2] Note that the legality of this restriction is being challenged by a number of states. *See* Paul Williams, *Texas, Miss., La. Sue Treasury Over Tax Cut Ban For Fed. Aid*, LAW360 (4:46 PM, May 4, 2021), https://www.law360.com/tax-authority/articles/1381316/texas-miss-la-sue-treasury-over-tax-cut-ban-for-fed-aid.
[3] *See* Dep't of the Treasury, Interim Final Rule: Coronavirus State and Local Fiscal Recovery Funds 81, https://home.treasury.gov/system/files/136/FRF-Interim-Final-Rule.pdf [hereinafter "Interim Final Rule"].
[4] *Id.* at 81.
[5] *See* Samantha Fields, *Paid Sick Leave Prevents Thousands of COVID Cases Daily, Study Says*, MARKETPLACE (Nov. 5, 2020), https://www.marketplace.org/2020/11/05/paid-sick-leave-prevents-thousands-covid-cases-daily-study-says/ (reporting that, in states without preexisting paid sick leave laws, the Families First Coronavirus Response Act resulted in 400 fewer cases per day).
[6] 31 C.F.R. § 35.6.
[7] Interim Final Rule, *supra* note 3, at 17.
[8] 31 C.F.R. § 35.6(b)(1)(xiv).
[9] *Id.* at 13.
[10] Chantel Boyens, Urban Institute, State Paid Family and Medical Leave Programs Helped a Surge of Workers Affected by the COVID-19 Pandemic (June 2020), https://www.urban.org/sites/default/files/publication/102325/state-paid-family-and-medical-leave-programs-helped-a-surge-of-workers-affected-by-the-covid-19-pandemic_0.pdf.
[11] *See, e.g.*, CTR. ON BUDGET & POL'Y PRIORITIES, *Tracking the COVID-19 Recession's Effect on Food, Housing, and Employment Hardships* (Apr. 22, 2021), https://www.cbpp.org/research/poverty-and-inequality/tracking-the-covid-19-recessions-effects-on-food-housing-and (noting that the employment rate spiked, during the pandemic, to rates not seen since the 1930s and that it is still at 6% as of March 2021).
[12] Interim Final Rule, *supra* note 3, at 19.
[13] Kimberly Montez et al., *An Opportunity to Promote Health Equity: National Paid Family and Medical Leave*, 146 Pediatrics Perspectives 1 (June 16, 2020).
[14] 31 C.F.R. § 35.6(b)(1)(xiv).
[15] *See* CTR. ON BUDGET & POL'Y PRIORITIES, *supra* note 11; Diana Boesch & Shipla Phadke, *When Women Lose All the Jobs: Essential Actions for a Gender-Equitable Recovery*, CTR. FOR AM. PROGRESS (Feb. 1, 2021), https://www.americanprogress.org/issues/women/reports/2021/02/01/495209/women-lose-jobs-essential-actions-gender-equitable-recovery/.
[16] Interim Final Rule, *supra* note 3 at 31.
[17] 31 C.F.R. § 35.6(b)(5).
[18] Interim Final Rule, *supra* note 3 at 32.

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[19] Kimberly Montez et al., *supra* note 13 and associated text.
[20] Catherine Whelan and Taylor Haney, "What It's Like When COVID-19 Lasts For Months," NPR, August 10, 2020, available https://www.npr.org/2020/08/10/900710151/what-its-like-when-covid-19-lasts-for-months; Letter from the Cystic Fibrosis Foundation et al. to Congress (April 9, 2020), https://www.cff.org/About-Us/Our-Approach-to-Federal-State-and-Local-Policy/Our-Policy-Priorities/Briefings-Testimonies-and-Regulatory-Comments/CF-Foundation-Urges-Congress-to-Expand-Paid-Leave-Policies.pdf.
[21] Rebecka Rosenquist & Caroline La Rochelle, Paid Leave: Will COVID-19 be a Catalyst for This Essential Policy?, Children's Hospital of Philadelphia Policy Lab (Sept. 25, 2020), https://policylab.chop.edu/blog/paid-leave-will-covid-19-be-catalyst-essential-policy.
[22] Recent data show there are over 2 million fewer women in the workforce now than there were in January 2020. Bureau of Labor Statistics (Dec. 2020), https://www.bls.gov/news.release/pdf/empsit.pdf.
[23] Julie Kashen, Sarah Jane Glynn, and Amanda Novello, *How COVID-19 Sent Women's Workforce Progress Backward: Congress' $64.5 Billion Mistake* (Oct. 30, 2020), Center for American Progress, https://www.americanprogress.org/issues/women/reports/2020/10/30/492582/covid-19-sent-womens-workforce-progress-backward/.
[24] Paid Family Leave Increases Mother's Labor Market Attachment (January 2020), Institute for Women's Policy Research, https://iwpr.org/wp-content/uploads/2020/01/B383-Paid-Leave-Fact-Sheet.pdf; Zachary Campell et al., The Impact of Paid Leave: Evidence from Temporary Disability Insurance in Rhode Island (July 2017), 30, https://www.mathematica-mpr.com/-/media/internet/conferences/2017/drc-annual-meeting2017/summaries/hastings.pdf?la=en; Linda Houser & Thomas Vartanian, Pay Matters: The Positive Economic Impacts of Paid Family Leave for Families, Businesses and the Public, Ctr. for Women & Work 2, 6-7 (2012), available at https://www.nationalpartnership.org/researchlibrary/work-family/other/pay-matters.pdf.