

The Consolidated Appropriations Act, 2021 (the CAA, 2021) was signed into law on December 27, 2020 and is a further legislative response to the coronavirus (COVID-19) pandemic. The more than 5,500 page law contains numerous provisions that relate to payroll. These provisions are primarily found in the following areas of the CAA, 2021: (1) Division N – Additional Coronavirus Response and Relief (ACRR); (2) Division O – Extensions and Technical Corrections (ETC); and (3) Division EE – Taxpayer Certainty and Disaster Tax Relief (TCDTR) Act of 2020.

These areas of the CAA generally extend and expand previous provisions found in the Families First Coronavirus Relief Act (FFCRA) and Coronavirus Aid, Relief and Economic Security (CARES) Act, which were signed into law in March of 2020 .

### **Extension of Paid Sick and Family Leave Credits**

Section 286 of the ACRR extends the refundable tax credits available to employers who provide paid sick and family leave related to the COVID-19 pandemic as enacted in the FFCRA through March 31, 2021, and extends the corresponding employer mandates through the end of March 2021.

*Adjustments to provisions for self-employed individuals.* Section 287 similarly extends the credits available to self-employed individuals, and allows them to use their reported wages from tax year 2019 instead of tax year 2020 to compute the credit.

*Technical adjustments to definitions and taxability for paid sick and family leave.* Section 288 aligns the definitions of qualified wages for paid sick and family leave with the IRC and excludes leave payments from employer Social Security employment taxes.

### **Extension of Certain Deferred Payroll Taxes**

On August 8, 2020, President Trump signed a Presidential Memorandum directing Treasury Secretary Mnuchin to permit the postponement of the withholding, deposit, and payment of the employee's share of Social Security tax (6.2%), as well as the employee's share of Railroad Retirement Tax Act (RRTA) Tier 1 taxes on wages and compensation paid from September 1, 2020 through December 31, 2020 for employees whose amount of wages or compensation, payable during any biweekly pay period generally is less than \$4,000, or the equivalent amount with respect to other pay periods.

Section 274 of the TCDTR extends the repayment period of the deferred employee taxes through December 31, 2021. It also provides that penalties and interest will not begin to accrue on the deferred amounts until January 1, 2022.

### **Employee Retention Credit Expansion and Extension**

Under the CARES Act, the employee retention credit (ERC) provides a refundable payroll tax credit for 50% of qualified wages of up to \$10,000 per employee for a maximum credit of \$5,000 per employee.

Section 206 and 207 of the TCDTR extends and expands the following ERC provisions from January 1, 2021 through June 30, 2021: (1) increases the ERC rate from 50% to 70% of qualified wages; (2) expands the eligibility for the credit by reducing the required year-over-year gross receipts decline from 50% to 20% and provides a safe harbor allowing employers to use prior quarter gross receipts to determine eligibility; (3) increases the limit on per-employee creditable wages from \$10,000 for the year to \$10,000 for each quarter; (4) increases the 100-employee delineation for determining the relevant qualified wage base to employers with 500 or fewer employees; (5) allows certain public instrumentalities to claim the credit; (6) removes the 30-day wage limitation, allowing employers to, for example, claim the credit for bonus pay to essential workers; (6) allows businesses with 500 or fewer employees to advance the credit at any point during the quarter based on wages paid in the same quarter in a previous year; and (7) provides rules to allow new employers who were not in existence for all or part of 2019 to be able to claim the credit.

### **Unemployment Extensions**

The FFCRA and CARES Act both contained unemployment-related provisions. Most notably, COVID-19 relief included the addition of \$600 per week in pandemic unemployment compensation through July 31, 2020. This was partially extended by an August 8, 2020 Presidential Memorandum that created a "Lost Wages Assistance" program from August 1, 2020 through December 27, 2020. The ACRR extends and expands on several of the unemployment provisions from the FFCRA and CARES Act.

*Extension of pandemic unemployment compensation.* Section 203 of the ACRR restores the Federal Pandemic Unemployment Compensation (FPUC) supplement to all state and federal unemployment benefits at \$300 per week, starting after December 26, 2020 and ending March 14, 2021.

*Pandemic Unemployment Assistance.* Section 201 of the bill extends Pandemic Unemployment Assistance (PUA) to March 14, 2021 and allows individuals receiving benefits as of March 14, 2021 to continue through April 5, 2021, as long as the individual has not reached the maximum number of weeks. It also increases the number of weeks of benefits an individual may claim from 39 to 50.

*Extension of relief to reimbursing employers (i.e., governmental entities and nonprofit organizations).* Section 202 extends through March 14, 2021, a provision in the CARES Act which amended the Families First Coronavirus Response Act to provide federal support to cover 50% of the costs of unemployment benefits for employees of state and local governments and non-profit organizations.

*Extension of no waiting week for benefits.* Section 204 extends through March 14, 2021 the CARES Act provision which reimbursed states for the cost of waiving the "waiting week" for regular unemployment compensation. It sets the reimbursement percentage for weeks ending after December 26, 2020 at 50%.

*Extension of short-time compensation.* Section 207 extends through March 14, 2021 the CARES Act provision that provided temporary 100% federal financing for short-time compensation ("worksharing") programs which are established in state law. Section 208 of the bill extends through March 14, 2021 the CARES Act provision that provided a 50% subsidy to nonstatutory, temporary state short-time compensation programs.

*Return to work reporting.* Section 251 requires states (30 days after enactment) to have methods in place to address situations when claimants of unemployment compensation refuse to return to work or refuse to accept an offer of suitable work without good cause.

*Temporary assistance for states with advances.* Section 221 extends through March 14, 2021 the accumulation of interest on federal loans states have taken in order to pay state unemployment benefits. The loans allow states with low balances in their unemployment trust funds to delay employer tax increases or other employer surcharges while the economy is struggling.

### **Paycheck Protection Program Second Draw Loans**

The ACRR allows certain small businesses who received a Paycheck Protection Program (PPP) loan ) and experienced a 25% reduction in gross receipts to take a second PPP loan of up to \$2 million. These prior PPP borrowers must meet the following conditions to be eligible: (1) employ

no more than 300 employees per physical location, (2) have or will use the full amount of their first PPP loan; and (3) show at least a 25% reduction in gross receipts in the first through third quarters of 2020 relative to the same 2019 quarter. Applications submitted on or after January 1, 2021 are eligible to use gross receipts from the fourth quarter of 2020.

Eligible entities for the loans include for-profit businesses, certain non-profit organizations, housing cooperatives, veterans' organizations, tribal businesses, self-employed individuals, sole proprietors, independent contractors, and small agricultural co-operatives.

*Loan forgiveness.* As with the first PPP loan, the second loan can be 100% forgivable if it is used for payroll costs (with some exceptions) of up to 60% and nonpayroll costs (i.e., rent, mortgage, interest and utilities) of up to 40%.

*Application of exemption based on employee availability.* The ACRR extends current safe harbors on restoring full-time employees and salaries and wages. Specifically, it applies the rule of reducing loan forgiveness for the borrower by reducing the number of employees retained and reducing employees' salaries in excess of 25%.

### **Paycheck Protection Program Continuation**

Under the CARES Act, a PPP loan is generally 100% forgivable if the loan is used to pay certain payroll and nonpayroll costs. PPP loan forgiveness doesn't give rise to taxable income and the Internal Revenue Code generally doesn't allow a taxpayer to deduct expenses that are paid with tax exempt income.

Section 276 of the CAA makes a clarification that gross income does not include any amount that would otherwise arise from the forgiveness of a PPP loan. This provision also says that deductions are allowed for otherwise deductible expenses paid with the proceeds of a PPP loan that is forgiven and that the tax basis and other attributes of the borrower's assets will not be reduced as a result of the loan forgiveness. This is true as well for the second draw PPP loans.

*Additional PPP loan expenses.* Section 304 provides additional allowable and forgivable uses for PPP funds such as covered: operations expenditures, property damage costs, supplier costs, and worker protection expenditures.

*Definition of seasonal employer.* Section 315 defines a seasonal employer to be an eligible recipient which: (1) operates for no more than seven months in a year and (2) earned no more than 1/3 of its receipts in any six months in the prior calendar year.

*News organization eligibility* Section 317 makes eligible FCC license holders and newspapers with more than one physical location, as long as the business has no more than 500 employees per physical location or the applicable SBA size standard; and makes eligible section 511 public colleges and universities that have a public broadcasting station if the organization certifies that the loan will support locally-focused or emergency information. It also waives affiliation rules for newspapers, TV and radio broadcasters, and public broadcasters, as long as the organization has no more than 500 employees per physical location or the applicable SBA size standard.

### **Other Provisions Related to Payroll**

*Airline worker support extension.* Section 4113 of the CARES Act authorizes the Treasury Department to provide payments to passenger air carriers, cargo air carriers, and certain contractors exclusively for the continuation of payments of employee wages, salaries, and benefits, known as the Payroll Support Program (PSP).

The CAA includes an extension of the PSP for a four-month period, from December 1, 2020 through March 31, 2021. The financial assistance for employee wages, salaries and benefits is an aggregate amount of \$15 billion for passenger air carriers and \$1 billion in aggregate for contractors.

*Immigration extension.* The CAA also includes a provision regarding the H-2B visa program, which permits employers to temporarily hire non-immigrants to perform non-agricultural labor or services in the United States . The increase may not be more than the highest number of H-2B non-immigrants who participated in the H-2B returning worker program in any fiscal year in which returning workers were exempt from such numerical limitation.

*Minimum age for distributions during working retirement.* Section 208 of the TCDTR discusses the minimum age for distributions during working retirement. Specifically, it reduces the age from 59 and one-half to 55 for certain employees in the building and construction industry in the case of a multi-employer plan described in Code Sec. 4203(b)(1)(B)(i) of the Employee Retirement Income Security Act of 1974.

### **Payroll-Related Tax Extenders**

*Work Opportunity Tax Credit.* Section 113 of the TCDTR extends the work opportunity tax credit through 2025. The amendment applies to individuals who begin work for their employer after December 31, 2020.

*Employer tax credit for paid family and medical leave.* Section 119 of the TCDTR extends the credit allowing eligible employers to claim a general business credit on their 2018 and 2019 income tax returns based on wages paid to qualifying employees while they are on family and medical leave through 2025, applying to wages paid in tax years beginning after December 31, 2020.

*Exclusion for certain employer payments of student loans.* Section 120 of the TCDTR extends the up to \$5,250 exclusion from employee income for educational assistance provided for under an employer's qualified educational assistance program through 2025.

*Indian employment credit.* Section 135 of the TCDTR extends the credit on the first \$20,000 of qualified wages and qualified employee health insurance costs paid to or incurred by the employer with respect to each qualified employee who works on an Indian reservation by one year, through December 31, 2021, applicable to tax years beginning after December 31, 2020.

*Temporary allowance of full deduction for business meals.* Section 210 of the TCDTR amends Code Sec. 274(n)(2) to allow for full deduction of expenses for food and beverages paid or incurred to a restaurant after December 31, 2020 and prior to January 1, 2023. The credit was limited to 50% from December 31, 2017 through December 31, 2025.