SULLIVAN & CROMWELL LLP

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COVID-19 Phase IV Stimulus Package—Key Employer Takeaways

The Consolidated Appropriations Act, 2021 Includes Provisions Extending COVID-19-Related Unemployment Benefits and Certain Tax Incentives for Employers

SUMMARY

The Consolidated Appropriations Act, 2021 ("CAA"), signed into law on December 27, 2020, contains several provisions that may be of interest to employers. Among other things, the CAA extends and modifies the following employment-related provisions of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"): (a) several key unemployment compensation programs; (b) the refundable Employee Retention Tax Credit ("ERTC"); and (c) the period for repayment of deferred payroll taxes through December 31, 2021. The CAA also extends the refundable payroll tax credits established by the Families First Coronavirus Response Act ("FFCRA") for paid sick and paid family leave wages paid through March 31, 2021; allows a full deduction for business meals at restaurants paid or incurred between December 31, 2020 and January 1, 2023 where the deductions were previously limited to 50% of such expenses; and allows participants in health or dependent care flexible spending arrangements to carry over unused amounts from 2020 to 2021 and from 2021 to 2022. The CAA also contains revisions to the existing Paycheck Protection Program ("PPP"), which will be addressed in a separate memorandum to clients. Significantly, the CAA does not extend the mandatory paid sick and family leave programs created by the FFCRA, which expire on December 31, 2020.

Our memorandum to clients covering unemployment programs established by the CARES Act is available here, and our memorandum to clients addressing the FFCRA leave provisions is available here.

UNEMPLOYMENT INSURANCE

The CARES Act created an unprecedented pandemic-related unemployment compensation program that, among other things, (i) expanded the provision of unemployment compensation to certain individuals who did not traditionally qualify for unemployment compensation; (ii) provided an additional fixed amount of unemployment compensation on top of regular unemployment compensation; and (iii) extended the duration of certain unemployment benefits. The CAA extends and modifies certain unemployment provisions created by the CARES Act. These changes are discussed below.

Pandemic Unemployment Assistance. The Pandemic Unemployment Assistance program provides extended unemployment compensation to certain individuals who are not eligible for regular unemployment compensation, including, for example, self-employed workers or "gig" workers such as rideshare drivers. The CAA modifies the Pandemic Unemployment Assistance program as follows:

- **Duration.** The Pandemic Unemployment Assistance program coverage period for unemployment, partial unemployment, or inability to work caused by COVID-19 is extended from December 31, 2020 to March 14, 2021. The total number of weeks for which a covered individual may receive Pandemic Unemployment Assistance is increased from a maximum of 39 weeks (including any weeks for which the covered individual received regular unemployment benefits under federal or state law) to 50 weeks.[1]
- **Transition Rule for Individuals Remaining Entitled to Pandemic Unemployment Assistance.** In the case of individuals who have not yet exhausted their rights to Pandemic Unemployment Assistance as of March 14, 2021, Pandemic Unemployment Assistance will continue through the week of April 5, 2021.[2]
- **Appeals Process.** An appeals process is established for individuals to contest the determination or redetermination of their rights to Pandemic Unemployment Assistance, using the same process applicable at the state level for appeals of determinations or redeterminations of rights to regular unemployment compensation.[3]
- **Waiver Authority.** States shall require individuals who have received amounts of Pandemic Unemployment Assistance to which they were not entitled to repay any amounts improperly received, but a state may waive repayment if it determines that (i) the payment of such pandemic unemployment assistance was without fault on the part of any such individual; and (ii) such repayment "would be contrary to equity and good conscience."[4]
- **Additional Documentation Requirement.** On or after January 31, 2021, new applicants for Pandemic Unemployment Assistance must additionally provide "documentation to substantiate employment or self-employment or the planned commencement of employment or self-employment not later than 21 days after the later of the date on which the individual submits an application for pandemic unemployment assistance . . . or the date on which an individual is directed by the [state] to submit such documentation." Individuals who received Pandemic Unemployment Assistance prior to January 31, 2021, and who continue to receive such assistance, will have 90 days to submit this documentation.[5]
- **Continuing Eligibility Certification.** As a condition of continued receipt of Pandemic Unemployment Assistance, individuals shall submit a weekly eligibility recertification to the state for each week after the individual's first week of eligibility. This requirement will begin 30 days after the enactment of the CAA.[6]

Federal Pandemic Unemployment Compensation. The Federal Pandemic Unemployment Compensation program previously provided for payment of an additional $600 weekly payment to certain eligible individuals who were receiving other unemployment benefits through July 31, 2020. The CAA modifies the Federal Pandemic Unemployment Compensation program as follows:

- **Duration.** Federal Pandemic Unemployment Compensation payments will be available for weeks of unemployment beginning after December 26, 2020 and ending on or before March 14, 2021, subject to a state's agreement to participate in the program.[7]
- **Amount.** For weeks of unemployment during the additional time period specified above, the Federal Pandemic Unemployment Compensation amount will be $300 per week.[8]
- **Mixed Earner Unemployment Compensation.** Individuals who received at least $5,000 of self-employment income in the most recent taxable year prior to the individual's application for regular unemployment compensation will receive an additional $100 per week.[9]

Pandemic Emergency Unemployment Compensation. The Pandemic Emergency Unemployment Compensation program allows states to enter into agreements with the federal government to provide extended unemployment benefits to individuals who have exhausted the unemployment benefits available to them. The CAA modifies the Pandemic Emergency Unemployment Compensation program as follows:

- **Duration.** Pandemic Emergency Unemployment Compensation agreements may now be entered into for weeks of unemployment ending on or before March 14, 2021. The end date was previously December 31, 2020. The total number of weeks for which a covered individual may receive Pandemic Emergency Unemployment Compensation is increased from a maximum of 13 weeks (including any weeks for which the covered individual received regular unemployment benefits under federal or state law) to 24 weeks.[10]
- **Transition Rule for Individuals Remaining Entitled to Pandemic Emergency Unemployment Compensation.** In the case of individuals who have not yet exhausted their rights to Pandemic Emergency Unemployment Compensation as of March 14, 2021, Pandemic Emergency Unemployment Compensation will continue through the week of April 5, 2021.[11]

Short-Time Compensation Payments. The CARES Act provided funding for short-time compensation programs, which allow employers to preserve trained employees by allowing employers to reduce the hours of all employees as an alternative to layoffs. These CARES Act provisions provided that any state with an existing short-time compensation program was eligible for reimbursement of the full amount of any short-time compensation paid and that any state that did not have a short-time compensation program would be reimbursed for up to 50 percent of the costs of starting such a program. The CAA extends this funding through March 14, 2021.[12]

Return to Work Reporting Requirement. The CAA creates a requirement for participating states to implement reporting requirements with regard to claimants of unemployment compensation who (i) refuse to return to work; or (ii) refuse to accept an offer of suitable work without good cause. These requirements take effect 30 days from the date of enactment of the CAA.[13]

- **Reporting.** States must provide a method for employers to notify the relevant state agency when an individual refuses an offer of employment, for example, a phone line, an email address, or an online portal.[14]
- **Notice.** States must provide unemployment compensation claimants with a plain-language notice regarding return to work requirements. The notice must include information about state return to work laws, rights to refuse to return to work or to refuse suitable work, including what constitutes suitable work, and a claimant's right to refuse work that poses a risk to the claimant's health or safety. The notice must also include information on contesting the denial of a claim that has been denied due to a report by an employer that the claimant refused to return to work or refused suitable work.[15]

PAID SICK & FAMILY LEAVE

The FFCRA, among other things, expanded mandatory family and medical leave and created the first-ever federal sick time mandate for certain employers. The CAA does not extend these mandatory leave provisions, which will expire on December 31, 2020. The CAA does, however, extend through March 31, 2021 the refundable payroll tax credits established by the FFCRA for paid sick and paid family leave wages paid through March 31, 2021 (extended from December 31, 2020) for employers who choose to continue to provide such paid sick and family leave to their employees.[16] The CAA also permits self-employed individuals to use their average daily self-employment income from the prior taxable year for purposes of computing credits for paid sick and family leave (*i.e.*, self-employed individuals may refer to their self-employment income from 2019 when calculating their credit for 2020).[17]

CERTAIN EMPLOYER TAX PROVISIONS

Extension and Expansion of the Employee Retention Tax Credit. The CAA extends and expands the refundable ERTC established by the CARES Act. Specifically, the CAA, among other changes:

- Extends availability of the ERTC to the first two quarters of 2021;
- For employers whose operations are not fully or partially suspended by a government order due to COVID-19, expands eligibility for the ERTC by reducing the required year-over-year decline in gross receipts from 50% to 20% (a "Gross Receipts Decline");
- Increases the credit rate, from 50% to 70% of qualified wages, and raises the limit on per-employee creditable wages from $10,000 per year to $10,000 per quarter (in effect, raising the cap on the ERTC from $5,000 for all wages paid during 2020 to $14,000 for the first two quarters in 2021 combined); and
- Allows a greater number of employers to be eligible for the ERTC with respect to wages paid to an employee who is providing services (as opposed to an employee who is not providing services because of a government order suspending the employer's operations due to COVID-19 or the employer's Gross Receipts Decline), by extending the ERTC to those employers with 500 or fewer employees after applying certain aggregation rules (increased from 100 or fewer employees under the CARES Act).[18]

Retroactive to the effective date included in the original CARES Act provisions, the CAA provides that employers who receive PPP loans may still qualify for the ERTC with respect to wages that are not paid for with forgiven PPP proceeds. Under the CARES Act, a company that received a PPP loan was previously not eligible for the credit.[19]

Employers with an average of 500 or fewer employees in 2019 may elect to receive an advance payment of the credit in an amount up to 70 percent of the average quarterly wages paid by the employer in calendar year 2019. If the advance payment for the ERTC exceeds the employer's allowable ERTC, the employer will have to repay the excess as additional payroll taxes.[20]

Temporary Allowance of Full Deduction for Business Meals. Deductions for food and beverage expenses otherwise limited to 50% of such expenses are now fully allowed if paid or incurred after December 31, 2020 and before January 1, 2023 for food and beverage provided by a restaurant.[21]

Payroll Tax Deferral. Guidance issued by the Treasury Department allows employers to defer the withholding and payment of payroll taxes on wages paid to an employee during the period beginning on September 1, 2020 and ending on December 31, 2020 if such wages were less than $4,000 for a biweekly period (or equivalent amount with respect to other pay periods).[22] The CAA extends the repayment period of such deferred taxes through December 31, 2021 (extended from April 30, 2021). Penalties and interest on deferred unpaid tax liability will not accrue until January 1, 2022 (extended from May 1, 2021).[23]

Changes to Flexible Spending Accounts. The CAA allows participants in health or dependent care flexible spending arrangements ("FSAs") to carry over unused amounts from 2020 to 2021 and from 2021 to 2022. Employers may also allow employees to change their future contribution amounts mid-year.[24] For an employee enrolled in a dependent care FSA for which the regular enrollment period ended on or before January 31, 2020 and who has a dependent turning 13 years old during the plan year or, if the employee has unused balance for the plan year (determined as of the close of the last day on which claims may be made for the plan year), in the subsequent plan year, the cut-off for the age of dependents for whom eligible dependent care FSA expenses may be incurred and reimbursed is increased from 13 to 14 years old. In the case of an employee who has unused balance for the plan year and the dependent turns 13 years old during the subsequent year, the increased age cut-off applies only to the extent of such unused balance.[25]

ADDITIONAL INFORMATION

To stay informed of litigation and regulatory developments that affect the workplace, click here to subscribe to our *Legal Developments Affecting the Workplace* blog.

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ENDNOTES

[1] Consolidated Appropriations Act, 2021, Div. N. H.R. 133 (2020) (hereinafter "CAA"), § 201.

[2] *Id.* § 201(a)(3).

[3] *Id.* § 201(c).

[4] *Id.* § 262(b).

[5] *Id.* § 241(a); (b)(3).

[6] *Id.* § 263(a)-(b)(1).

[7] *Id.* § 203(a).

[8] *Id.* § 203(b)(1).

[9] *Id.* § 261(a)(1).

[10] *Id.* § 206(a)-(b).

[11] *Id.* § 206(a).

[12] *Id.* § 207.

[13] *Id.* § 251(a)-(b).

[14] *Id.* § 251(a).

[15] *Id.* § 251(a).

[16] *Id.* § 286.

[17] *Id.* § 287.

[18] CAA Div. EE § 207.

[19] *Id.* § 206.

[20] *Id.* § 207.

[21] *Id.* § 210.

[22] I.R.S. Notice 2020-65, 2020-38 I.R.B. 567 (September 14, 2020).

[23] CAA Div. N. § 274.

[24] CAA Div. EE § 214.

[25] *Id*.

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