Cooley

Consolidated Appropriations Act 2021 Provides Further Pandemic Tax Relief

December 31, 2020

On December 27, President Donald Trump signed into law the Consolidated Appropriations Act, 2021. The new legislation includes certain clarifications of and modifications to the tax provisions of the Coronavirus Aid, Relief and Economic Security Act (the CARES Act) as well as other tax relief, including extensions of certain expiring tax provisions.

Deductibility of expenses paid with forgiven PPP loans

The CARES Act provides that forgiveness of a PPP loan is excluded from gross income for US federal income tax purposes. To prevent a double tax benefit, the IRS had taken the position that a deduction would not be allowed for an otherwise deductible expense if payment of the expense was funded with a PPP loan that was or was reasonably expected to be forgiven. Congress rejected that position in the Appropriations Act, which (1) reaffirms that the forgiveness of a PPP loan is not included in gross income for US federal income tax purposes and (2) provides that a deduction shall not be denied by reason of that exclusion. The Appropriations Act similarly provides that no tax attribute shall be reduced and no basis increase shall be denied by reason of the exclusion from gross income. This is the case even if the PPP loan was forgiven before the enactment of the Appropriations Act.

Expansion of the ERTC

Section 2301 of the CARES Act provides an employee retention tax credit (ERTC) to eligible employers for qualified wages paid after March 12, 2020, and before January 1, 2021. To be eligible for the credit, the employer must have experienced a full or partial suspension of operations due to a COVID-19 related governmental order, or a significant decline in gross receipts (as defined under the CARES Act). The CARES Act limited the available credit to 50% of qualified wages of $10,000 paid to each eligible employee for all calendar quarters. Qualified wages for employers that averaged more than 100 full-time employees in 2019 were limited to wages paid to employees who were not providing services due to either a full or partial suspension of operations by a COVID-19 related governmental order or a significant decline in gross receipts.

The Appropriations Act expands the availability of the ERTC on a going forward basis in several ways. For example, it extends the credit to qualified wages paid after December 31, 2020, and before July 1, 2021, increases the credit amount from 50% of qualified wages to 70% of qualified wages and applies the $10,000 per employee wage limit on a quarterly basis rather than on an annual basis. Thus, under the Appropriations Act, the maximum ERTC that an eligible employer can claim in 2021 for qualified wages paid to an eligible employee is $7,000 for ***each*** of the first two calendar quarters, whereas the maximum amount an eligible employer could claim for 2020 for qualified wages paid to an eligible employee is $5,000 for the entire year.

The Appropriations Act further expands eligibility for the ERTC by revising the significant decline in gross receipts test. Under the CARES Act, a significant decline in gross receipts existed beginning with the first calendar quarter in 2020 for which gross receipts were less than 50% of gross receipts for the same quarter in 2019, and ending with the calendar quarter after the first calendar quarter for which gross receipts were greater than 80% of gross receipts for the same quarter in the prior year. Under the Appropriations Act, there has been a significant decline in gross receipts if the gross receipts for the relevant quarter in 2021 is less than 80% of the gross receipts for the same calendar quarter in 2019. If the employer was not in existence as of the beginning of the same calendar quarter in 2019, the employer substitutes 2020 for 2019 in comparing gross receipts. Furthermore, for purposes of determining whether there has been a decline of more than 20% in gross receipts, the Appropriations Act provides employers with the option of comparing the gross receipts in the immediately preceding calendar quarter to the corresponding quarter in 2019.

The Appropriations Act further expands the ERTC by increasing the threshold to be considered a large employer to more than 500 full-time employees. Thus, under the Appropriations Act, qualified wages for an eligible employer that averaged 500 or fewer employees during 2019 include wages paid to all employees regardless of whether they are providing services. The Appropriations Act also strikes the provision in the CARES Act that had limited qualified wages for large employers to amounts that the eligible employee would have been paid during the 30-day period preceding the suspension of operations or the quarter in which there was a significant decline in gross receipts.

The foregoing modifications apply to calendar quarters beginning after December 31, 2020. Thus, an employer will not obtain the benefit of the foregoing changes for the 2020 calendar year.

Coordination between PPP loans and ERTCs

The Appropriations Act strikes the provision of the CARES Act that had prohibited an employer that received a PPP loan from qualifying for the ERTC. Under the Appropriations Act, an employer that receives a PPP loan still may be eligible for the ERTC. However, qualified wages that an employer takes into account in determining the ERTC may not be included in payroll costs for purposes of obtaining PPP loan forgiveness. These amendments take effect as if included in the CARES Act. Accordingly, employers that received PPP loans may be eligible for the ERTC for the 2020 calendar year despite having received a PPP loan.

Extension of FFCRA credits

The Appropriations Act extends until March 31, 2021, the tax credits provided under the Families First Coronavirus Response Act for paid sick and family leave.

Extension of employee social security tax deferral

On August 8, Trump issued a presidential memorandum directing the Secretary of the Treasury to defer the withholding, deposit and payment of the employee share of Social Security taxes imposed on certain wages paid during the period September 1, 2020, through December 31, 2020. IRS Notice 2020-65 provided guidance on the deferral and stated that the due date for the withholding and payment of the applicable taxes was postponed until the period beginning on January 1, 2021, and ending on April 30, 2021. The Appropriations Act extends the deadline to December 31, 2021.

Key Contacts

Eileen Marshall Washington, DC	emarshall@cooley.com +1 202 728 7083