Congress Passes Major New Relief/Stimulus Legislation

Includes Significant Modifications to Paycheck Protection Program, Employee Retention Credit, and Other Tax Provisions

By Mike Batts, CPA

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Congress has passed and President Trump signed into law major new legislation that includes new economic stimulus and relief measures as well as significant tax provisions. The legislation, given the title "Consolidated Appropriations Act, 2021" (which we will refer to hereinafter as "the CAA"), includes significant modifications to and extensions of the Paycheck Protection Program and the Employee Retention Credit – two provisions in current law of great interest to the nonprofit sector.

Below is a very high-level and greatly abbreviated summary of key provisions of the CAA relevant to nonprofits…as we currently understand them. (*Note that our understanding of the provisions could change as more guidance becomes available.*)

Paycheck Protection Program

- **Congress appropriated** a total of $284 billion for new PPP loans (both "first-draw" (PPP1) and second-draw" (PPP2) in total) which are available through March 31, subject to funds availability.

- **Churches and religious organizations.** Expresses the sense of Congress that the SBA's guidance clarifying the eligibility of churches and religious organizations was proper and prohibits the application of regulations otherwise rendering ineligible businesses principally engaged in teaching, instructing, counseling, or indoctrinating religion or religious beliefs. Codifies that the prohibition on eligibility for religious organizations that normally applies to SBA lending does not apply for PPP1 and PPP2 loans.

- **Affiliation rules are waived** for PPP1 and PPP2 loans **for nonprofit organizations that are radio and television broadcasting organizations** (organizations assigned a NAICS code beginning with 5151).

- **The SBA allowed lenders to begin accepting applications on January 11, 2021.** Per SBA guidance, during a brief initial period, applications are accepted only from borrowers from underserved communities and groups. Also, a certain portion of funds appropriated by Congress for new PPP loan funding is set aside for such groups.

- **The requirement that at least 60% of the loan forgiveness amount must consist of "payroll costs" continues to apply to PPP1 and PPP2 loans.**

Original Paycheck Protection Program (PPP1) Loans

- New loan application Form 2483 – click here.
- New consolidated SBA rules – click here.
- **Maximum loan amount is still $10 million.**
- **Retroactively defines a "seasonal employer"** to be an eligible recipient which: (1) operates for no more than seven months in a calendar year, or (2) had gross receipts in any six months in the prior calendar year that were no more than one third of the gross receipts for the other six months of that year.
  - Expands the period during which seasonal employers may calculate their average monthly payroll costs to any 12-week period beginning February 15, 2019, and ending February 15, 2020. (Allows a seasonal employer borrower to apply for an increase in its existing PPP loan if the new rules would permit a larger loan than the amount it originally obtained. [Presumably, the initial PPP loan must still be outstanding.])
  - It is unclear to us at this point how or to what extent this retroactive definition might affect borrowers who:
    - reasonably deemed themselves to be seasonal employers when originally applying for a PPP loan or applying for forgiveness of a PPP loan in the absence of a legal definition, and
    - do not meet the definition under the new rules.
- **Adds the following types of expenses** to the list of allowable and forgivable expenses for Paycheck Protection Program loans:

  (Note – the CAA allows borrowers of PPP1 loans made before, on, or after the enactment of the CAA to utilize funds for forgivable expenses as expanded by the CAA, except for borrowers who have already had their loans forgiven.)

  - **Other employer-paid group insurance costs.** Payroll costs now include group life, disability, vision, and dental insurance costs paid by the employer in addition to group health insurance costs.

  - **Covered operations expenditures.** Payments for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment, or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records, and expenses

  - **Covered property damage costs.** Costs related to property damage or looting due to public disturbances that occurred during 2020 that are not covered by insurance

  - **Covered supplier costs.** Expenditures to a supplier pursuant to a contract, purchase order, or order for goods in effect prior to taking out the loan that are essential to the recipient's operations at the time which the expenditure was made. Supplier costs of perishable goods can be made before or during the life of the loan.

  - **Covered worker protection expenditures.** Personal protective equipment and adaptive investments to help a loan recipient comply with federal health and safety guidelines or any equivalent state and local guidance related to COVID-19 (as defined in the rules) during the period beginning on March 1, 2020, and continuing through the end of the national emergency declaration

- **Allows a borrower to elect a Covered Period** beginning on the loan funding date and ending on any date of the borrower's choosing that occurs at least 8 weeks and no more than 24 weeks after the loan funding date.

- Creates a **simplified application process for loans under $150,000** such that a borrower shall receive forgiveness if a borrower signs and submits to the lender a certification that is not more than one page in length, and includes a description of the number of employees the borrower was able to retain because of the covered loan, the estimated total amount of the loan spent on payroll costs, and the total loan amount. The borrower must also attest that the borrower accurately provided the required certification and complied with Paycheck Protection Program loan requirements. The SBA must establish this form within 24 days of enactment and may not require additional materials with the application unless necessary to substantiate revenue loss requirements or to satisfy relevant statutory or regulatory requirements. Such borrowers will be required to provide substantiation information in connection with their loan forgiveness applications. Additionally, borrowers are required to retain relevant records related to employment for four years and other records for three years. The SBA may review and audit these loans to ensure against fraud.

- Prohibits eligible entities that receive a grant under the Shuttered Venue Operator Grants (see below) from obtaining a PPP loan.

- **Expands eligibility to** receive a PPP loan to include **certain 501(c)(6) organizations.** (Generally, business leagues, trade and professional associations, etc., subject to certain limitations unique to such organizations.)

- Borrowers who previously returned or did not accept all or part of their PPP loans may reapply for the maximum amount applicable.

- Continues to require a good faith certification about current economic uncertainty making the loan necessary to support ongoing operations.

- All loans not forgiven mature in five years and bear interest at a rate of 1% annually.

"Second Draw" Paycheck Protection Program (PPP2) Loans

- New loan application Form 2483-SD – click here.

- New consolidated SBA rules – click here.

- **Creates a second loan from the Paycheck Protection Program, called a "PPP Second Draw"** loan for smaller and harder-hit organizations, with a maximum loan amount of $2 million. Loans are available through March 31, 2021, subject to the funding capacity included in the legislation. (We refer to these loans herein as "PPP2 loans.")

- **The same rules that apply to PPP1 loans generally apply to PPP2 loans, including provisions for forgiveness, except as noted below.**

- **Eligibility.** In order to receive a PPP2 loan, eligible entities must:
    - Employ not more than 300 employees;
    - Have obtained an original PPP loan and used the full amount of it only for eligible expenses; and
    - Demonstrate at least a 25% reduction in **gross receipts** in any completed calendar quarter of 2020 relative to the same 2019 quarter. Provides applicable timelines for businesses that were not in operation in Q1, Q2, Q3, and Q4 of 2019. (Rules allow a borrower to report at least a 25% reduction in gross receipts annually for 2020 as compared to 2019 for simplicity if the borrower prefers to use an annual comparison.)
        - The law and rules define the term "gross receipts" for nonprofit organizations by referencing a provision of the Internal Revenue Code (Section 6033), which is interpreted by Treasury Regulations (Reg. §1.6033-2(g)(4)).

          The term "gross receipts" means the gross amount received by the organization during its annual accounting period from all sources without reduction for any costs or expenses including, for example, cost of goods or assets sold, cost of operations, or expenses of earning, raising, or collecting such amounts. Thus "gross receipts" includes, but is not limited to, (i) the gross amount received as contributions, gifts, grants, and similar amounts without reduction for the expenses of raising and collecting such amounts, (ii) the gross amount received as dues or assessments from members or affiliated organizations without reduction for expenses attributable to the receipt of such amounts, (iii) gross sales or receipts from business activities (including business activities unrelated to the purpose for which the organization qualifies for exemption, the net income or loss from which may be required to be reported on Form 990-T), (iv) the gross amount received from the sale of assets without reduction for cost or other basis and expenses of sale, and (v) the gross amount received as investment income, such as interest, dividends, rents, and royalties.

The rules do not appear to make a distinction between restricted and unrestricted contributions with respect to nonprofit organizations.

- **PPP1 loan forgiveness is not included in gross receipts.**

- **Good faith certification.** In addition to the requirement for a decline in gross receipts, PPP2 loan applications continue to require a good faith certification about current economic uncertainty making the loan necessary to support ongoing operations – as was the case with PPP1 loans.

- **Loan terms.** In general, borrowers may receive a loan amount of up to 2.5× the average monthly payroll costs in the one year prior to the loan or the calendar year 2019 or 2020. SBA prefers borrowers use the calendar year but will allow use of the 12-month period ending prior to the date the loan is made for borrowers who wish to do so. No loan can be greater than $2 million.

- **Seasonal employers** (as defined above) may calculate their maximum loan amount based on any consecutive 12-week period beginning February 15, 2019, and ending February 15, 2020.

- **New entities** (that were in operation on February 15, 2020) may receive loans of up to 2.5× the average monthly payroll costs for periods as noted in the rules.

- **Organizations with multiple locations** that are eligible entities under the PPP1 requirements may employ not more than 300 employees per physical location.

- An eligible entity **may receive only one PPP2 loan.**

- **Loan forgiveness.** Borrowers of a PPP2 loan are eligible for loan forgiveness equal to the sum of their payroll costs, as well as covered mortgage, rent, and utility payments, covered operations expenditures, covered property damage costs, covered supplier costs, and covered worker protection expenditures incurred during the covered period. The 60/40 cost allocation between payroll and non-payroll costs in order to receive full forgiveness continues to apply.

- **Lender eligibility.** A lender approved to make loans under initial PPP loans may make covered loans under the same terms and conditions as the initial loans.

Recap of Permissible Costs for Paycheck Protection Program Loans (PPP1 or PPP2)

- **Payroll costs** for the applicable Covered Period, which include (only as applicable to employees whose principal place of residence is in the United States):
  - Cash compensation…including gross wages (before deducting employee deferrals such as 401(k) or 403(b) contributions, health insurance premiums, etc.), but not more than the annual compensation limit of $100,000 prorated for the Covered Period.
    - Clergy housing allowances are considered cash compensation for this purpose.
    - Do not include in cash compensation any emergency sick leave or emergency family leave payments that qualify for a credit under the Families First Coronavirus Response Act.
  - Employer-paid group health care, life, disability, vision, and dental benefits
  - Employer-paid retirement benefits
  - Employer-paid state and local taxes assessed on employee compensation (generally, unemployment taxes)
- **Interest** (but not principal) on business real estate mortgages (or their equivalent) or interest on other collateralized business loans incurred before February 15, 2020
- **Business lease or rent payments** on real or personal property where such rent or lease obligations were incurred before February 15, 2020
- **Utility costs** for utility services that began before February 15, 2020 (electricity, gas, water, telephone, or internet access)
- **Covered operations expenditures.** Payments for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment, or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records, and expenses
- **Covered property damage costs.** Costs related to property damage or looting due to public disturbances that occurred during 2020 that are not covered by insurance
- **Covered supplier costs.** Expenditures to a supplier pursuant to a contract, purchase order, or order for goods in effect prior to taking out the loan that are essential to the recipient's operations at the time at which the expenditure was made. Supplier costs of perishable goods can be made before or during the life of the loan.

- **Covered worker protection expenditures.** Personal protective equipment and adaptive investments to help a loan recipient comply with federal health and safety guidelines or any equivalent state and local guidance related to COVID-19 (as defined in the rules) during the period beginning on March 1, 2020, and the end of the national emergency declaration

- **The requirement that at least 60% of the loan forgiveness amount must consist of "payroll costs" as defined above continues to apply to PPP1 and PPP2 loans.**

Employee Retention Credit

The CAA made significant changes to the Employee Retention Credit (ERC). The most significant change is that it is **now available to PPP borrowers**, subject to other eligibility requirements, and with the proviso that wages funded by forgiven PPP loan proceeds cannot be used as a basis for the ERC.

Additionally, the credit…originally set to expire December 31, 2020…was extended through June 30, 2021. The size and scope of the credit were also increased for the first two quarters of 2021.

Following is a summary of the Employee Retention Credit requirements and rules, as affected by the CAA, as we understand them. (*Note that additional guidance is expected from the IRS and SBA further clarifying the rules for applying the credit. Additional guidance may render portions of the information provided below inaccurate.*)

For the Period March 13, 2020 through December 31, 2020

1. Provides eligible employers – including tax-exempt organizations – a refundable credit against the employer's share of Social Security tax [the 6.2% portion – not the 1.45% Medicare tax]. (As described below, the fact that it is a refundable credit means that it is simply money from the government – if the amount of the credit exceeds the employer's share of Social Security tax against which it is a credit, the organization can reduce the amount that it deposits to cover other payroll tax obligations. If the credit exceeds all such taxes owed by the employer, the employer receives a refund of the excess credit amount.) [The IRS has published special guidance to address coordination of the ERC with the employer Social Security tax payment deferral also available under the CARES Act.]

    a. Eligible employers must have carried on a trade or business during 2020 and satisfy one of two tests (for tax-exempt organizations described in Section 501(c) of the Internal Revenue Code, all operations of the organization are considered a trade or business for this purpose):

i. Have fully or partially suspended business operations during any calendar quarter of 2020 due to **orders** from a governmental entity limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes)

or

ii. Experience a reduction in **gross receipts** of at least 50% in any calendar quarter of 2020 as compared to the same calendar quarter of 2019 and continuing through the end of the first subsequent calendar quarter of 2020 for which gross receipts exceed 80% of the amount for the corresponding quarter of 2019. (If, after declining by more than 50% in a quarter, gross receipts do not increase for any subsequent quarter in 2020 to more than 80% of the amount for the corresponding quarter in 2019, the credit continues through the end of 2020.) Gross receipts are defined in the same manner as for PPP2 loans as described above. *The rules do not appear to make a distinction between restricted and unrestricted contributions with respect to nonprofit organizations.*

Example: Employer A's gross receipts were $100,000, $190,000, $230,000 and $250,000 in the first, second, third, and fourth calendar quarters of 2020, respectively. Its gross receipts were $210,000, $230,000, $250,000, and $250,000 in the corresponding calendar quarters of 2019. Thus, Employer A's 2020 first, second, third, and fourth quarter gross receipts were approximately 48%, 83%, 92% and 100% of its 2019 corresponding quarterly gross receipts. Accordingly, Employer A had a significant decline in gross receipts commencing on the first day of the first calendar quarter of 2020 (the calendar quarter in which gross receipts were less than 50% of the same quarter in 2019) and ending on the last day of the second calendar quarter of 2020 (the first subsequent quarter in 2020 for which the gross receipts were more than 80% of the amount in the same quarter in 2019). Thus, Employer A is entitled to a retention credit with respect to the first and second calendar quarters.

2. The credit is 50% of the first $10,000 in wages per employee (including the value of qualified group health plan benefits). [Note, however, that wages paid with PPP loan funds that are forgiven may not be used as a basis for the ERC.]

Note – Wages for purposes of the ERC are generally FICA wages…clergy compensation is not ordinarily considered FICA wages.

3. The credit is reduced by any credits claimed for emergency sick pay or emergency family leave pay under the Families First Coronavirus Response Act (FFCRA) or for other credits applicable to the same wages.

4. To the extent the credit exceeds the employer's Social Security tax due, the excess is considered a refundable overpayment.

5. For employers with an average of more than 100 full-time employees in 2019, only wages paid to employees for periods during which they are not currently providing services due to an economic hardship (either (1) a full or partial suspension of operations by order of a

governmental authority due to COVID-19 or (2) a significant decline in gross receipts) are eligible for the credit. For eligible employers with an average of 100 or fewer full-time employees in 2019, **all wages** paid to employees during a period of economic hardship (as defined above) are eligible for the credit.

a. Aggregation of employee counts of affiliated entities may be required.

b. Employee counts are made using the methods applicable under the Affordable Care Act in determining whether an employer is an "applicable large employer." (Note that only the counting method is applicable…the employee count thresholds for the Employee Retention Credit are unrelated to the thresholds for the Affordable Care Act.)

6. The Employee Retention Credit as described in this section of this article is effective for wages paid after March 12, 2020, and before January 1, 2021.

The Internal Revenue Service provides a list of FAQs related to the Employee Retention Credit. (As of the date this article was written, the IRS's FAQs did not reflect changes to the ERC made by the CAA.)

Observations for Churches, Schools, and Other Organizations Subject to Mandatory Suspension of Group Meetings

Thankfully, few churches, schools, and charities have experienced revenue declines in a calendar quarter of 2020 in excess of 50% of that in 2019 – so that aspect of ERC eligibility has limited application. We note, however, that churches, schools, and other organizations that were subject to **mandatory** full or partial suspension of operations or group meetings seem to be eligible for the Employee Retention Credit regardless of whether they were able to continue carrying on certain of their activities via remote participation. While available IRS guidance does not specifically address this scenario, a straight reading of the law seems to support such an interpretation.

Applying this interpretation would require the organization to evaluate whether it had "operations that were **fully or partially suspended** during any calendar quarter in 2020 due to **orders** from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19." Such a determination may not be easy to make in every instance, since certain safety protocol communications made by government officials or agencies may not have reached the level of authority of "**orders**." Additionally, language in the IRS FAQ document (FAQ #33) states that if the "employer is able to continue operations comparable to its operations prior to the closure by requiring its employees to telework, the employer's operations are not considered to have been fully or partially suspended as a consequence of a governmental order."

While it may be tempting to assume that such language means that churches that offered virtual worship services were able to "continue operations comparable to its operation prior to the closure," we would argue strongly that such is not the case. Not only are virtual worship services not comparable to regular in-person worship meetings, most churches stopped other significant aspects of their operations in addition to in-person worship services…such as children's ministries, Sunday Schools, fellowship events, and more. Similarly, even though schools may have continued conducting classes online, many other school functions were stopped…including athletics and other extracurricular activities. Our firm believes that, until and unless additional official contrary guidance is published, the position we have described herein with respect to churches and schools is reasonable.

Assuming the IRS agrees with the interpretation described in the preceding paragraph, the Employee Retention Credit could represent a significant financial benefit to churches, schools, and other entities required to suspend group meetings – particularly those with 100 or fewer full-time employees in 2019. The reason is that for such organizations, the credit is half of the first $10,000 in wages paid to **<u>all</u>** employees during the applicable period, regardless of whether such employees are providing services for the organization or not. That treatment contrasts dramatically with the treatment of organizations with more than 100 full-time employees in 2019. For those organizations, the credit is half of the first $10,000 in wages paid during the applicable period **only to employees while they are not currently providing services to the organization.**

<u>Example – Church with 85 Full-Time Employees in 2019 and 2020</u>

Note – The IRS and/or SBA are expected to publish guidance on the interaction between the ERC and PPP loan rules as they relate to identifying the wages applicable to each. The ERC cannot be claimed with respect to wages paid with PPP loan funds that are forgiven. This example assumes that the rules allow the organization to ignore wages paid with PPP loan funds in calculating the ERC, notwithstanding the general requirement that the ERC applies to the "first" qualifying wages paid to employees.

Oak Church obtained a PPP1 loan that was fully forgiven in 2020. It does not qualify for any wage-related credits other than the ERC. Oak Church had 85 full-time non-clergy employees in 2019 and 2020 and no part-time employees. On March 15, 2020, Oak Church was ordered by government officials to stop holding in-person worship services. That mandate continued through May 31, 2020, at which time government officials permitted the church to hold limited-capacity worship services. The mandate for limited capacity worship services continued through December 31, 2020, and included a prohibition against conducting certain of the church's other activities involving gatherings. Oak Church continued to pay all of its employees for the entire time during which in-person worship services were prohibited or limited.

Ten of its employees (other than clergy) performed no services for Oak Church during the period from March 15 through May 31, 2020 (due to government orders to cease holding worship services), but were paid, nonetheless. During the period from March 15, 2020 through December 31, 2020, Oak Church paid its 85 non-clergy employees $42,000 each in wages (including qualified health plan benefits). Oak Church ignored the wages it paid employees with PPP loan funds. Half of the first $10,000 of non-PPP wages paid to each of its employees during the applicable period is $5,000 per employee. Oak Church is entitled to an Employee Retention Credit of $425,000 (85 x $5,000). The credit is refundable. To the extent that the credit exceeds Oak Church's employer Social Security tax due on its Form 941s for the applicable quarters of 2020, Oak Church will receive a refund of the excess in the form of a reduction in required deposits for other payroll taxes owed.

[Note that if Oak Church had an average of more than 100 employees in 2019, the credit would apply only with respect to the wages paid to the 10 employees who did not provide services and only during the period in which they were paid while not providing services. As mentioned above, we note that churches, schools, and other organizations that were subject to mandatory full <u>or partial</u> suspension of operations or group meetings seem to be eligible for the Employee Retention Credit regardless of whether they were able to continue carrying on certain of their activities via remote participation. While available IRS guidance does not specifically address this scenario, a straight reading of the law seems to support such an interpretation. Assuming the IRS agrees with the interpretation described in the preceding paragraph, the Employee Retention Credit could represent a significant financial benefit to churches, schools, and other entities required to suspend group meetings – particularly those with 100 or fewer full-time employees in 2019.]

<u>For the Period January 1, 2021 through June 30, 2021</u>

1. Provides eligible employers – including tax-exempt organizations – a refundable credit against the employer's share of Social Security tax [the 6.2% portion - not the 1.45% Medicare tax]. (As described below, the fact that it is a refundable credit means that it is simply money from the government – if the amount of the credit exceeds the employer's share of Social Security tax against which it is a credit, the organization can reduce the amount that it deposits to cover other payroll tax obligations. If the credit exceeds all such taxes owed by the employer, the employer receives a refund of the excess credit amount.) [The IRS has published special guidance to address coordination of the ERC with the employer Social Security tax payment deferral also available under the CARES Act.]

    a. Eligible employers must have carried on a trade or business during 2020 and satisfy <u>one of two tests</u> (for tax-exempt organizations described in Section 501(c) of the Internal Revenue Code, all operations of the organization are considered a trade or business for this purpose):

        i. Have fully or partially suspended business operations during either the **first or second quarter of 2021** due to **<u>orders</u>** from a governmental entity limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes)

        or

        ii. Experience a reduction in **gross receipts** of at least **20%** in either the **first or second quarter of 2021** as compared to the same calendar quarter of **2019**. (Special rules apply for organizations not in operation during the applicable quarter of 2019 and for seasonal employers.) Gross receipts are defined in the same manner as for PPP2 loans as described above. *The rules do not appear to make a distinction between restricted and unrestricted contributions with respect to nonprofit organizations.*

Example: Employer A's gross receipts were $150,000 and $190,000 in the first and second calendar quarters of 2021, respectively. Its gross receipts were $210,000 and $230,000 in the first and second calendar quarters of 2019, respectively. Thus, Employer A's 2021 first and second quarter gross receipts were approximately 71% and 83% of its 2019 first and second quarter gross receipts, respectively. Accordingly, Employer A had a qualifying decline in gross receipts for first calendar quarter of 2021 (the calendar quarter in which gross receipts were less than 80% of the amount in the same quarter in 2019) but not for the second quarter of 2021 (because gross receipts for that quarter were not less than 80% of the amount in the same quarter of 2019). Thus, Employer A is entitled to an Employer Retention Credit with respect to the first quarter of 2021.

2. The credit is 70% of the first $10,000 in wages per employee (including the value of qualified health plan benefits) paid during **each of the first two calendar quarters of 2021** during which the employer qualifies.

   Note – Wages for purposes of the ERC are generally FICA wages…clergy compensation is not ordinarily considered FICA wages.

3. The credit is reduced by any credits claimed for emergency sick pay or emergency family leave pay under the Families First Coronavirus Response Act (FFCRA) or for other credits applicable to the same wages.

4. To the extent the credit exceeds the employer's Social Security tax due, the excess is considered a refundable overpayment.

5. For employers with an average of more than **500** full-time employees in 2019, only wages paid to employees for periods during which they are not currently providing services due to an economic hardship (either (1) a full or partial suspension of operations by order of a governmental authority due to COVID-19 or (2) a significant decline in gross receipts) are eligible for the credit. For eligible employers with an average of 500 or fewer full-time employees in 2019, **all wages** paid to employees during a period of economic hardship (as defined above) are eligible for the credit.

   a. Aggregation of employee counts of affiliated entities may be required.

   b. Employee counts are made using the methods applicable under the Affordable Care Act in determining whether an employer is an "applicable large employer." (Note that only the counting method is applicable…the employee count thresholds for the Employee Retention Credit are unrelated to the thresholds for the Affordable Care Act.)

The Internal Revenue Service provides a list of FAQs related to the Employee Retention Credit. (As of the date this article was written, the IRS's FAQs did not reflect changes to the ERC made by the CAA.)

Observations for Churches, Schools, and Other Organizations Subject to Mandatory Suspension of Group Meetings

Some churches, schools, and charities may experience revenue declines in the first or second calendar quarter of 2021 in excess of 20% as compared to the same quarter of 2019 and may qualify for the credit accordingly. Additionally, churches, schools, and other organizations that were subject to **<u>mandatory</u>** full or partial suspension of operations or group meetings seem to be eligible for the Employee Retention Credit regardless of whether they were able to continue carrying on certain of their activities via remote participation. While available IRS guidance does not specifically address this scenario, a straight reading of the law seems to support such an interpretation.

Applying this interpretation would require the organization to evaluate whether it had "operations that were **fully <u>or partially</u> suspended** during any applicable calendar quarter due to **<u>orders</u>** from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19." Such a determination may not be easy to make in every instance, since certain safety protocol communications made by government officials or agencies may not have reached the level of authority of "**orders**." Additionally, language in the IRS FAQ document (FAQ #33) states that if the "employer is able to continue operations comparable to its operations prior to the closure by requiring its employees to telework, the employer's operations are not considered to have been fully or partially suspended as a consequence of a governmental order."

While it may be tempting to assume that such language means that churches that offered virtual worship services were able to "continue operations comparable to its operation prior to the closure," we would argue strongly that such is not the case. Not only are virtual worship services not comparable to regular in-person worship meetings, most churches stopped other significant aspects of their operations in addition to in-person worship services…such as children's ministries, Sunday Schools, fellowship events, and more. Similarly, even though schools may have continued conducting classes online, many other school functions were stopped…including athletics and other extracurricular activities. Our firm believes that, until and unless additional official contrary guidance is published, the position we have described herein with respect to churches and schools is reasonable.

Assuming the IRS agrees with the interpretation described in the preceding paragraph, the Employee Retention Credit could represent a significant financial benefit to churches, schools, and other entities required to suspend group meetings – particularly those with 500 or fewer full-time employees in 2019. The reason is that for such organizations, the credit is 70% of the first $10,000 in wages paid to **<u>all</u>** employees during the applicable quarter, regardless of whether such employees are providing services for the organization or not. That treatment contrasts dramatically with the treatment of organizations with more than 500 full-time employees in 2019. For those organizations, the credit is 70% of the first $10,000 in wages paid during the applicable quarter **only to employees while they are not currently providing services to the organization.**

Example – Church with 285 Full-Time Employees in 2019 and 2021

Oak Church obtained and fully spent a PPP1 loan in 2020. It did not obtain a PPP2 loan. It does not qualify for any wage-related credits other than the ERC. Oak Church had 285 full-time non-clergy employees in 2019, 2020, and 2021 and no part-time employees. On March 15, 2020, Oak Church was ordered by government officials to stop holding in-person worship services. That mandate continued through May 31, 2020, at which time government officials permitted the church to hold limited-capacity worship services. The mandate for limited capacity worship services continued through March 31, 2021, and included a prohibition against conducting certain of the church's other activities involving gatherings. Oak Church continued to pay all of its employees for the entire time during which in-person worship services were prohibited or limited.

80 of its employees (other than clergy) performed no services for Oak Church during the period from March 15 through May 31, 2020 (due to government orders to cease holding worship services), but were paid, nonetheless. During the period from January 1, 2021 through March 31, 2021, Oak Church paid its 285 non-clergy employees $12,000 each in wages (including qualified health plan benefits). 70% of the first $10,000 of wages paid to each of its employees during the first quarter of 2021 is $7,000 per employee. Oak Church is entitled to an Employee Retention Credit of $1,995,000 (285 x $7,000). The credit is refundable. To the extent that the credit exceeds Oak Church's employer Social Security tax due on its Form 941s for the first quarter of 2021, Oak Church will receive a refund of the excess in the form of a reduction in required deposits for other payroll taxes owed.

[Note that if Oak Church had an average of more than 500 employees in 2019, the credit would not apply. For employers of that size, the credit would apply only with respect to the wages paid to employees who did not provide services and only during the period in which they were paid while not providing services. Oak Church did not have employees who were paid while not providing services during the first quarter of 2021. As mentioned above, we note that churches, schools, and other organizations that were subject to mandatory full <u>or partial</u> suspension of operations or group meetings seem to be eligible for the Employee Retention Credit regardless of whether they were able to continue carrying on certain of their activities via remote participation. While available IRS guidance does not specifically address this scenario, a straight reading of the law seems to support such an interpretation. Assuming the IRS agrees with the interpretation described in the preceding paragraph, the Employee Retention Credit could represent a significant financial benefit to churches, schools, and other entities required to suspend group meetings – particularly those with 500 or fewer full-time employees in 2019 (with respect to the 2021 version of the credit).]

For more information, go to https://www.irs.gov/coronavirus/employee-retention-credit (At the time this article was written, the IRS's information page on the Employee Retention Credit had not yet been updated to reflect changes made by the CAA.)

Grants for Shuttered Venue Operators

- Authorizes $15 billion for the SBA to make grants to eligible live venue operators or promoters, theatrical producers, live performing arts organization operators, museum operators, motion picture theatre operators, or talent representatives who demonstrate a 25% reduction in revenues.

- There is a set-aside of $2 billion for eligible entities that employ not more than 50 full-time employees, and any amounts from this set-aside remaining after sixty days from the date of implementation of this program shall become available to all eligible applicants under this section.

- The SBA may make an initial grant of up to $10 million dollars to an eligible person or entity and a supplemental grant that is equal to 50% of the initial grant.

- In the initial 14-day period of implementation of the program, grants shall only be awarded to eligible entities that have faced 90% or greater revenue loss. In the 14-day period following the initial 14-day period, grants shall only be awarded to eligible entities that have faced 70% or greater revenue loss. After these two periods, grants shall be awarded to all other eligible entities.

- Such grants shall be used for specified expenses such as payroll costs, rent, utilities, and personal protective equipment.

- Recipients of these grants are not eligible for PPP loans.

Other Key Provisions Relevant to Nonprofits

- Provides a **separate employee retention credit for employers affected by "qualified disasters."** The credit is 40% of qualified wages (up to $6,000 of wages per employee) paid by a qualified employer to a qualified employee. Generally, the employer must have conducted operations in a "**qualified disaster zone**." Applicable period appears to be 2020.

- **Extends certain federal unemployment assistance** generally through March 14, 2021, including assistance for nonprofit organizations paying their state unemployment obligations under the reimbursement method.

- **Extension of certain deferred payroll taxes.** On August 8, 2020, President Trump issued a memorandum to allow employers to defer withholding employees' share of Social Security taxes from September 1, 2020 through December 31, 2020, and required employers to increase withholding and pay the deferred amounts ratably from wages paid between January 1, 2021 and April 30, 2021. Beginning on May 1, 2021, penalties and interest on any deferred unpaid tax liability will begin to accrue.

  - The provision extends the repayment period **through December 31, 2021**. Penalties and interest on any deferred unpaid tax liability will not begin to accrue until January 1, 2022.

- Gross income does not include any amount that would otherwise arise from the forgiveness of a PPP loan. **Deductions are allowed for otherwise deductible expenses paid with the proceeds of a PPP loan that is forgiven**, and the tax basis and other attributes of the borrower's assets will not be reduced as a result of the loan forgiveness. The provision is effective as of the original date of enactment of the CARES Act. The provision provides similar treatment for PPP2 loans, effective for tax years ending after the date of enactment of the provision.

- **Extends the refundable payroll tax credits for paid sick and family leave**, enacted in the Families First Coronavirus Response Act (FFCRA), through the end of March 2021. **Payment of sick and family leave required during 2020 under FFCRA is not required after December 31, 2020**, but for employers who voluntarily make such payments in 2021, the credit is available through March of 2021.

- **Charitable contributions** to qualifying organizations are **deductible** in **2021** by individual taxpayers who **do not itemize** deductions up to $300 per person and **$600 for a married couple filing jointly**. (Does not change the limit of $300 for a single person or married couple for 2020.)

- **The increased limits on charitable contribution deductions that apply to individual taxpayers who itemize deductions and corporations for 2020 are extended through 2021.**

- **Business meals provided by restaurants are fully tax-deductible as business expenses for 2021 and 2022.**