

## What Employers Need To Know About Latest Federal COVID-19 Stimulus Package

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Federal lawmakers agreed to a second round of stimulus legislation late last night, sending a nearly 6,000-page bill to President Trump for his expected signature. The proposal allocates \$900 billion in economic relief to businesses and workers across the country. Of the many provisions tucked within the mammoth bill are several key provisions of interest to employers. Specifically, the proposal continues the popular small business loan program, provides new options for unemployed workers, extends tax credits for continued paid sick leave, and offers a variety of other tax- and benefit-related provisions. It does not, however, create a liability shield for COVID-19 litigation. What do you need to know about the critical workplace-related portions of Stimulus 2.0? Here are summaries of the most significant employment-related provisions and recommendations for actions you should consider as a result of each.

### Continuation Of The Paycheck Protection Program

Foremost in the eyes of many businesses, Stimulus 2.0 apportions approximately \$284 billion to a revamped Paycheck Protection Program (PPP). It provides small businesses with much-needed financial support in the form of potentially forgivable loans equal to the total money spent on payroll and other specified costs during an eight or 24-week period after the disbursement of the loan. However, the Stimulus 2.0 program makes many critical changes from the previous PPP, including lowering the employee threshold for businesses to 300 employees or fewer (down from 500), and the loan maximum to \$2 million (down from \$10 million). What do potential borrowers need to know?

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## What Employers Need To Know About Latest Federal COVID-19 Stimulus Package

### ***Tax Deductibility of Expenses***

The first PPP iteration provided that the forgiven amount was tax-free, but the Internal Revenue Service (IRS) ruled that the expenses paid with forgiven PPP loan proceeds were not deductible. Thus, before Stimulus 2.0, the amount of loan proceeds used to cover payroll, if forgiven, would not be deductible.

Stimulus 2.0 changes that, clarifying that gross income does not include any amount that would otherwise arise from the forgiveness of the PPP loan. The bill states:

*no deduction shall be denied or reduced, no tax attribute shall be reduced, and no basis increase shall be denied, by reason of the exclusion from gross income provided by [the loan forgiveness provision that says forgiven PPP loans will not count as income].*

This means that deductions are allowed for deductible expenses paid with forgiven PPP loan proceeds. This provision is effective as of the date of enactment of the CARES Act and applies to second draw PPP loans.

### ***New Allowable Expenses***

Stimulus 2.0 expands qualifying expenses for new borrowers and those who have not yet applied for forgiveness, including the following:

- Payment for any software, cloud computing, and other human resources and accounting needs;
- Covered property damage costs, including costs for property damage due to public disturbances that occurred during 2020 that are not covered by insurance;
- Covered supplier costs for expenditures supplier according to a contract, purchase order, or order for goods in effect before taking out the loan that are essential to the recipient's operations when the expenditure was made (supplier costs of perishable goods can be made before or during the life of the loan); and
- Covered worker protection expenditures for personal protective equipment (PPE) and help for compliance with federal health and safety guidelines or any equivalent State and local guidance related to COVID-19 during the period between March 1, 2020, and the end of the national emergency declaration.

The bill also allows loans made under PPP before, on, or after enacting Stimulus 2.0 to be eligible to utilize the expanded forgivable expenses except for borrowers who have already received loan forgiveness.



## What Employers Need To Know About Latest Federal COVID-19 Stimulus Package

### ***Second Draw PPP Loans***

Section 311 of Stimulus 2.0 provides for second draws of PPP loans for smaller businesses, capping the loan amount at \$2 million. Under this section, eligible borrowers must (1) employ not more than 300 employees; (2) have used or will use the full amount of their first PPP; and (3) demonstrate at least a 25% reduction in gross receipts in the first, second, or third quarter of 2020 relative to the same 2019 quarter. Borrower applications submitted on or after January 1, 2021, are eligible to utilize the gross receipts from the fourth quarter of 2020. Eligible second draw borrowers also include non-profit organizations, housing co-operatives, veterans' organizations, tribal businesses, self-employed individuals, sole proprietors, independent contractors, and small agricultural co-operatives.

Second draw loan terms are reduced and calculated up to 2.5X the average monthly payroll costs in the 12 months before the loan application or the calendar year (2019), with maximum loan amounts capped at \$2 million. However, Stimulus 2.0 maximizes benefits for borrowers in the restaurant and hospitality industries by calculating loans up to 3.5X average monthly payroll costs. Additionally, the bill reinstates the waiver of affiliation rules that applied during initial PPP loans for second loan borrowers with multiple locations employing not more than 300 employees per location.

Second draw loan recipients are eligible for loan forgiveness equal to the sum of their payroll costs and expanded allowable expenses, subject to the previous program's 60%/40% allocation between payroll and non-payroll costs.

### ***Streamlined Applications For Borrowers Under \$150K***

Stimulus 2.0 provides a streamlined process for loans under \$150,000. In fact, such borrowers will not be subject to the required reductions in forgiveness amounts generally imposed by reductions in salaries or headcount by simply certifying that the borrower meets the revenue loss requirements described above on or before the date the entity submits the loan forgiveness application.

**What You Should Do Next: If you are considering seeking financial assistance, regardless of whether or not you've previously received any, you should determine your eligibility for this second round of PPP loans. Additionally, you should continue to follow this rapidly developing situation, especially given the fluidity of the previous Paycheck Protection Program. For further information or assistance in preparing a PPP loan application, contact your Fisher Phillips attorney or and SBA Loan Taskforce Attorney.**

### **Continued Assistance For Unemployed Workers**

The CARES Act previously expanded unemployment assistance for countless Americans whose employment was impacted by the COVID-19 pandemic. Among other things, the CARES Act provided a \$600 weekly supplement to state unemployment benefits until the end of July and expanded



## What Employers Need To Know About Latest Federal COVID-19 Stimulus Package

eligibility to cover COVID-19 related reasons as well as many workers not traditionally covered by unemployment benefits. However, many of the unemployment benefits provided by the CARES Act were set to expire December 31. In light of the ongoing COVID-19 pandemic, Stimulus 2.0 provides for further unemployment benefits in an attempt to bring cash flow to millions of Americans whose employment was adversely impacted.

### ***Pandemic Unemployment Assistance***

Stimulus 2.0 expands the Pandemic Unemployment Assistance (PUA) created by the CARES Act to March 17, 2021 and allows those who have not yet exhausted their rights under PUA to continue to receive such assistance until April 5, 2021. The stimulus package also expands the number of weeks for these PUA unemployment benefits from a 39-week period to a 50-week period.

While providing these additional benefits, Stimulus 2.0 adds a documentation requirement starting January 31, 2021 for both new applicants as well as those receiving PUA. Specifically, new applicants must submit documentation to substantiate employment or self-employment within 21 days although this deadline may be extended for good cause. Similarly, individuals receiving PUA as of January 31, 2021 must submit documentation to substantiate employment or self-employment within 90 days.

### ***Federal Pandemic Unemployment Compensation***

Stimulus 2.0 restores the Federal Pandemic Unemployment Compensation (FPUC) supplement to all state and federal unemployment benefits. While lower than its predecessor under the CARES Act, this stimulus package provides a \$300 weekly boost from December 26, 2020 to March 14, 2021.

### ***Pandemic Emergency Unemployment Compensation***

Like the PUA, the Pandemic Emergency Unemployment Compensation (PEUC) permits individuals receiving benefits as of March 14, 2021 to continue to receive such assistance through April 5, 2021 as long as they have not reached the maximum number of weeks. The new stimulus also increases the number of benefit weeks under the PEUC from 13 weeks to 24 weeks.

### ***Mixed Earner Unemployment Compensation***

Stimulus 2.0 provides \$100 per week additional benefit to individuals who have at least \$5,000 a year in self-employment income but are disqualified from PUA because they are eligible for regular state unemployment benefits.

### ***Rail Workers Assistance***



## What Employers Need To Know About Latest Federal COVID-19 Stimulus Package

Stimulus 2.0 restores the federal supplement benefit for unemployed railroad workers at \$600 per registration period between December 26 through March 14, 2021. This stimulus package also provides up to 11 additional weeks of unemployment benefits under the Railroad Unemployment Insurance Act (RUIA) for qualifying railroad workers, as well as extending the availability of the 13 weeks of additional unemployment benefits provided under the CARES Act until April 5, 2021 for those who have benefit periods start before March 14, 2021.

### ***Federal Support To Governments And Non-Profit Organizations***

To help make these expanded benefits possible, Stimulus 2.0 extends the unemployment relief for government entities and non-profits from December 31 to March 14, 2021. Similarly, this stimulus package extends several CARES Act provisions originally created to incentivize states to provide the unemployment benefits by aiding with the expense and burdens created by these unemployment programs.

### ***Return-To-Work Reporting Requirement***

Stimulus 2.0 requires states to implement methods within 30 days to address situations where claimants refuse to return to work or accept an offer of suitable work without good cause. This must include a reporting method for employers to notify the state when an individual refuses employment and a notice to claimants informing of return-to-work laws, their rights to refuse work, and what constitutes suitable work.

***What You Should Do Next – You should ensure you provide information on the additional unemployment benefits to those employees impacted by your staffing decisions. In addition, you should continue to monitor your obligations to report when individuals refuse employment, as states will likely change these over the next 30 days.***

### **No Extension Of FFCRA Paid Leave (Yet) – But Tax Credit Period Extended Through March**

The compromise agreement does not extend the paid sick leave and paid family and medical leave requirements of the Families First Coronavirus Response Act (FFCRA), which expires on December 31. Therefore, an employer's obligation to provide paid leave under the FFCRA will cease at the end of the year.

However, the final legislation does extend the tax credit for both the Emergency Paid Sick Leave and the Emergency Family and Medical Leave under the FFCRA until March 31, 2021. This means that you are not required to provide paid leave under the FFCRA after December 31, 2020. If you choose to voluntarily do so (assuming the employee still has eligible leave remaining), you will be able to obtain a tax credit for those payments until the end of March under the compromise agreement contained in Stimulus 2.0.



## What Employers Need To Know About Latest Federal COVID-19 Stimulus Package

In addition, depending on the circumstances of an employee's leave, it is possible that the employee could be entitled to normal unpaid leave under the FMLA even after the FFCRA expires, if they still have weeks available under the FMLA. You should work with counsel to determine whether any employees out on FFCRA leave may be entitled to regular FMLA unpaid leave after the end of the year.

Moreover, you should pay close attention to developments in Congress after the new year. There is already talk about a larger stimulus package after Congress returns and President-elect Biden is inaugurated. Congress could very well pass legislation early in the new year that extends (or even expands) the paid leave requirements of the FFCRA, and they could make it retroactive to the expiration of the prior law.

In addition, you need to be aware of state and local laws passed in recent months that require the payment of sick leave to employees for a variety of COVID-19-related reasons. Some of these local laws expire at the end of the year, some are tied to the expiration of the FFCRA, and some do not expire. We could also see state and local lawmakers extend these paid sick leave requirements into the future. You should work closely with counsel to determine any applicable state and local mandates, and to continue to monitor developments on this front into 2021.

***What You Should Do Next – Decide whether you will voluntarily extend paid leave benefits into the new year in order to gain a tax credit for those payments through March 2021. Work with counsel to determine whether any employees out on FFCRA leave may be entitled to regular FMLA unpaid leave, or some other form of leave under state law, after the end of the year.***

### Tax And Benefit-Related Provisions

The bill also contains the following tax and benefit related provisions:

- ***PPP Forgiven Loan Amounts*** – The IRS had argued that expenses incurred using forgiven PPP funds were not deductible. For example, wages paid with those funds could not be deducted. With Stimulus 2.0, Congress overruled the IRS and decreed that expenses incurred using forgiven PPP funds are deductible.
- ***2019 income may be used for the earned income tax credit*** – If 2020 earned income is less than 2019 earned income, 2019 income can be used when calculating the earned income tax credit. A lower 2020 income (for example, due to loss of employment during the year) may reduce the amount of credit available. Using a higher 2019 income amount may mean a higher credit for those who otherwise qualify.
- ***Deductibility of business meals*** – Derided by some as the “three martini lunch” deduction, business meals after December 31 and before January 1, 2023 will be fully tax deductible. The current administration believes this provision will aid in reviving the ailing restaurant industry.



## What Employers Need To Know About Latest Federal COVID-19 Stimulus Package

- **The Employee Retention Tax Credit** – The employee retention tax credit is a credit for wages paid to certain employees during: i) a full or partial suspension of operations; or ii) a significant decline in gross receipts. The stimulus package enacts several technical clarifications but more importantly extends the credit’s availability from January 1, 2021 until June 30, 2021.
- **Flexible Spending Accounts** – The law has several provisions which increase employer flexibility in administering health and dependent care flexible spending accounts. Usually subject to the “use it or lose it rule” (unused amounts at the end of the year are forfeited) the act makes available expanded carryover, grace period, and election change rules.

***What You Should Do Next – Work with your counsel and your tax preparers to ensure you understand the new tax and benefit provisions and work them into your planning for 2021 and beyond.***

### **No Federal Liability Shield In Stimulus 2.0**

It is often said that the result of a good mediation leaves both sides a little bit unhappy. The negotiations for the stimulus bill could be said to have done that with the Democrats not getting aid to state and local governments, and Republicans not getting liability protection for business owners.

Republicans had sought through various bills, such as the Safe to Work Act, to offer a liability protection for business owners. These efforts were criticized by organized labor and safety advocates as potentially diminishing employee safety measures. The proposal also sought to preempt state laws that conflicted with it. While the liability shield did not survive the sausage making process of Congress, some states have already taken measures to implement similar shields.

Roughly a dozen states have instituted some form of liability shield through either legislation or executive order. The types of protection vary from broad to narrow. Some states provide immunity for businesses as long as the owner attempted in good faith to comply with guidance from public health agencies. This protection may be in the form of an affirmative defense where the burden is on the business to demonstrate that it made good faith efforts to at least attempt to comply with public health guidance. Other states provide broader protections: as long as the owner did not act with willful misconduct or gross negligence, the burden will be on plaintiffs to prove that the business acted with willful misconduct or gross negligence. At least one state, North Carolina, has limited these protections to “essential businesses.” While some of the states provide immunity from civil liability, others focus on limiting what types of damages can be recovered.

The majority of states have not implemented any COVID-19-specific protections – or at least not yet. This has led to a cottage industry of COVID-19 litigation springing up in workplaces across the country, as detailed in our Fisher Phillips COVID-19 Employment Litigation Tracker (with over 1,200 such lawsuits having been filed against employers through date of publication).



## What Employers Need To Know About Latest Federal COVID-19 Stimulus Package

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***What You Should Do Next – You should determine whether the states in which you operate are providing any form of liability protections, and if so how is it limited. The best thing employers and businesses can do, even in state that are providing liability shields, is to make best efforts to comply with the ever-changing guidance from health departments, the CDC, and state and federal OSHA.***

### **Conclusion**

We will continue to monitor further developments and provide updates, so make sure you are subscribed to Fisher Phillips' alert system to gather the most up-to-date information. If you have questions, please contact your Fisher Phillips attorney or visit our COVID-19 Resource Center For Employers.

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*This Legal Alert provides an overview of a specific development. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.*