

Highlights from 2020 year-end legislation for employers



At the end of 2020, COVID-19 relief legislation — the Consolidated Appropriations Act, 2021(CAA)— was signed into law. The legislation contains a variety of provisions of interest to employers, including economic and tax relief opportunities and new requirements for group health plans. Many of the provisions build on prior COVID-19 relief legislation, including the Families First Coronavirus Relief Act (FFCRA) and the Coronavirus, Aid, Relief and Economic Security (CARES) Act.





Expansion of the Employee Retention Tax Credit

The Employee Retention Tax Credit (ERTC), originally added by the CARES Act, is a refundable tax credit for qualified wages paid by employers whose businesses have been interrupted due to COVID-19. A number of significant changes were made to the ERTC, including the following:

- The new law extends the ERTC through June 30, 2021 (i.e., for the first two calendar quarters of 2021). The ERTC was originally available under the CARES Act for qualifying wages paid after March 12, 2020, and before Jan. 1, 2021.
- Receipt of a Paycheck Protection Program (PPP) loan does not disqualify an employer from claiming the ERTC; however, the ERTC cannot be claimed for wages paid with forgiven PPP loan proceeds. This change applies retroactively to March 12, 2020, as well as to the extended ERTC period in 2021. Employers that would have qualified for the ERTC but for the prohibition on obtaining a PPP loan and the credit may claim the credit for prior periods.



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- For wages paid between Jan. 1, 2021, and June 30, 2021:
 - The credit is increased to 70% of qualified wages, up from 50%.
 - The amount of an employee's wages that may be taken into account per quarter is \$10,000, including health plan costs. Previously, the limit was \$10,000 overall, plus health plan costs.
 - Thus, the maximum per-employee credit for wages paid in 2021 is \$7,000 per quarter, for a total possible per-employee maximum of \$14,000.
 - The provision limiting qualified wages to what the employee had been earning does not apply so that pay increases may be taken into account (subject to the overall dollar limit).
- Eligibility requirements are also relaxed as of Jan. 1, 2021.
 - An employer can qualify for the credit if they have a 20% reduction in gross receipts (previously there had to be a 50% reduction). There is also greater flexibility in determining which quarters are used to determine if the gross receipts test is met. The current quarter is generally compared to the same quarter in 2019; however, employers may instead use the immediately prior quarter's gross receipts to determine eligibility.
- The new law allows more employers to claim the credit for employees who are working. Under the CARES Act, employers with more than on average 100 full-time employees in 2019 could claim the ERTC only for employees who were not working. Employers below this threshold could claim the credit for any employee, whether working or not. Starting Jan. 1, 2021, this more than 100-employee threshold is increased to more than 500, making the credit usable for more employers. Aggregation rules apply in determining the number of employees.
- Although the [IRS ERTC](#) website includes a FAQ and other information, as of this writing, the website was not yet updated to reflect the changes. Check the website for future updates.





Paid leave credits

COVID-19-related tax credits for paid leave provided by small and mid-size employers.

The FFCRA required employers with fewer than 500 employees to provide certain paid sick and family leave and included a refundable tax credit to offset the cost of the required paid leave. [The Aflac FFCRA Required Paid Leave Advisory](#) describes the prior FFCRA provisions. The FFCRA paid leave requirements ended Dec. 31, 2020. The CAA does not extend the paid leave mandate but does extend the refundable paid leave credit through March 31, 2021. Thus, employers who provide paid leave through March 31, 2021, that would have met the FFCRA requirements may be eligible for the tax credit. The [IRS COVID-19 refundable paid sick leave tax credit](#) website provides guidance on the CAA credit.

General tax credit for certain paid family and medical leave.

The CAA also extended the separate nonrefundable credit for employers that provide paid leave meeting certain requirements. This credit is available to employers of all sizes and is described more fully in the [Aflac Paid Leave Credit Advisory](#). This credit was originally added for two years, 2018 and 2019, and was previously extended through 2020. The CAA extends this credit through 2025. [The IRS Section 45S credit for paid family and medical leave](#) website has a FAQ on the credit. As of this writing, the IRS website does not yet reflect the extension of the credit.

Additional tax provisions

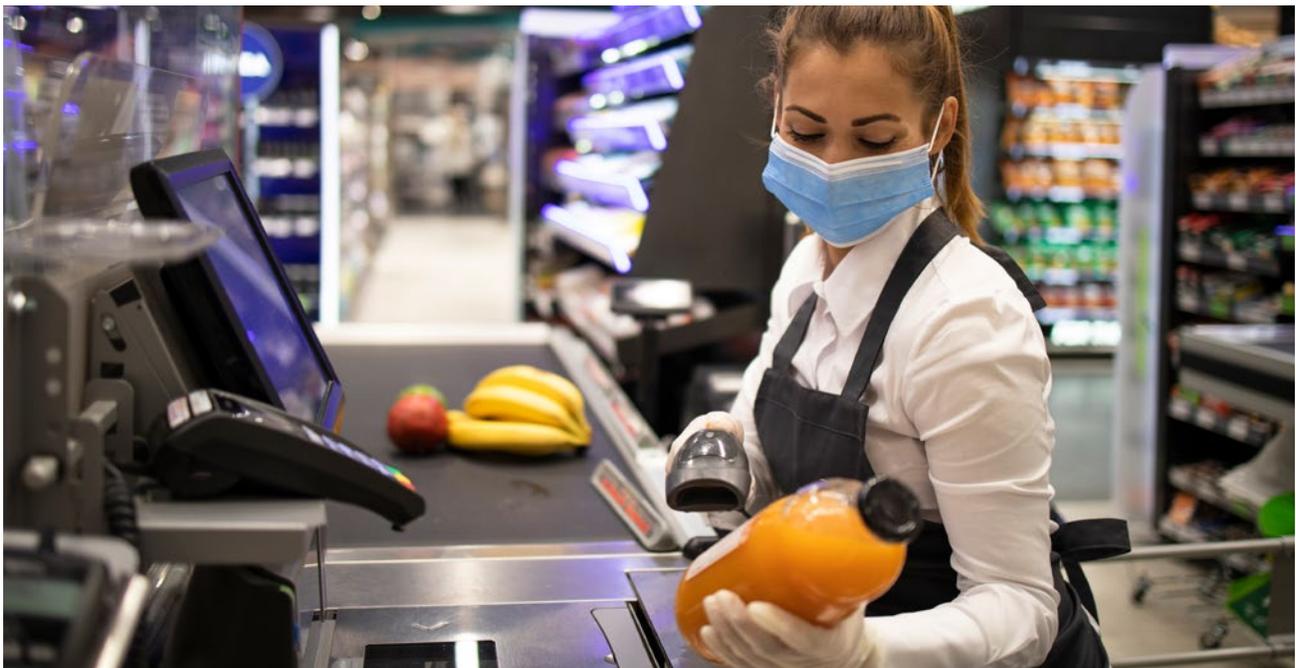
Other tax relief provisions include the following:

- Business food and beverage expenses provided by a restaurant, presumably including take-out and delivery, are 100% deductible for expenses paid or incurred in 2021 and 2020. Normally, the deduction is 50% of qualifying expenses.
- A new disaster-related employee retention tax credit is available for employers impacted by qualified disasters. The credit is 40% of qualifying wages, with a limit of \$6,000 on the per-employee qualified wages that may be counted for the credit.
- The CAA extends through 2025 the CARES Act provision allowing employers to pay employees up to \$5,250 for student loan payments on a tax-free basis to the employee. Before this change, this provision was due to expire at the end of 2020.
- The CAA provides for a second round of economic impact payments. In general, the amount of the payment is \$600 (\$1,200 for joint returns), plus \$600 for qualifying children. The payment phases out for taxpayers with incomes over \$150,000 for joint returns, \$112,500 for heads of households, and \$75,000 for single individuals. More information is on the [IRS Second Economic Impact Payment](#) website.

- The 7.5% of adjusted gross income (AGI) threshold for the itemized deduction for medical expenses is made permanent. Before this change, the threshold was set to increase to 10% starting in 2021.
- In 2021, individuals who do not itemize deductions may claim a deduction of up to \$300, \$600 in the case of joint returns, for cash contributions to charities. This expands on the CARES Act, which allowed a deduction of up to \$300 for cash contributions to charities in 2020.

Unemployment assistance

The CAA modifies and extends a number of CARES Act provisions relating to unemployment compensation, including restoring the Federal Pandemic Unemployment Compensation (FPUC) supplement to state and federal employment benefits at \$300 per week, starting after Dec. 26, 2020, and ending March 14, 2021.



Group health plan requirements

The CAA includes the separately titled “The No Surprises Act.” The provisions in the No Surprises Act apply to group health plans subject to the Affordable Care Act (ACA) health coverage mandates, generally including grandfathered plans. Retiree-only plans and “excepted benefits” (such as stand-alone vision and dental plans and specified disease policies) are not subject to these new requirements. The provisions are effective for plan years beginning on or after Jan. 1, 2022. Many details will need to be provided in regulations. The legislation sets July 1, 2021, as a general date for issuance of regulations. The No Surprises Act:

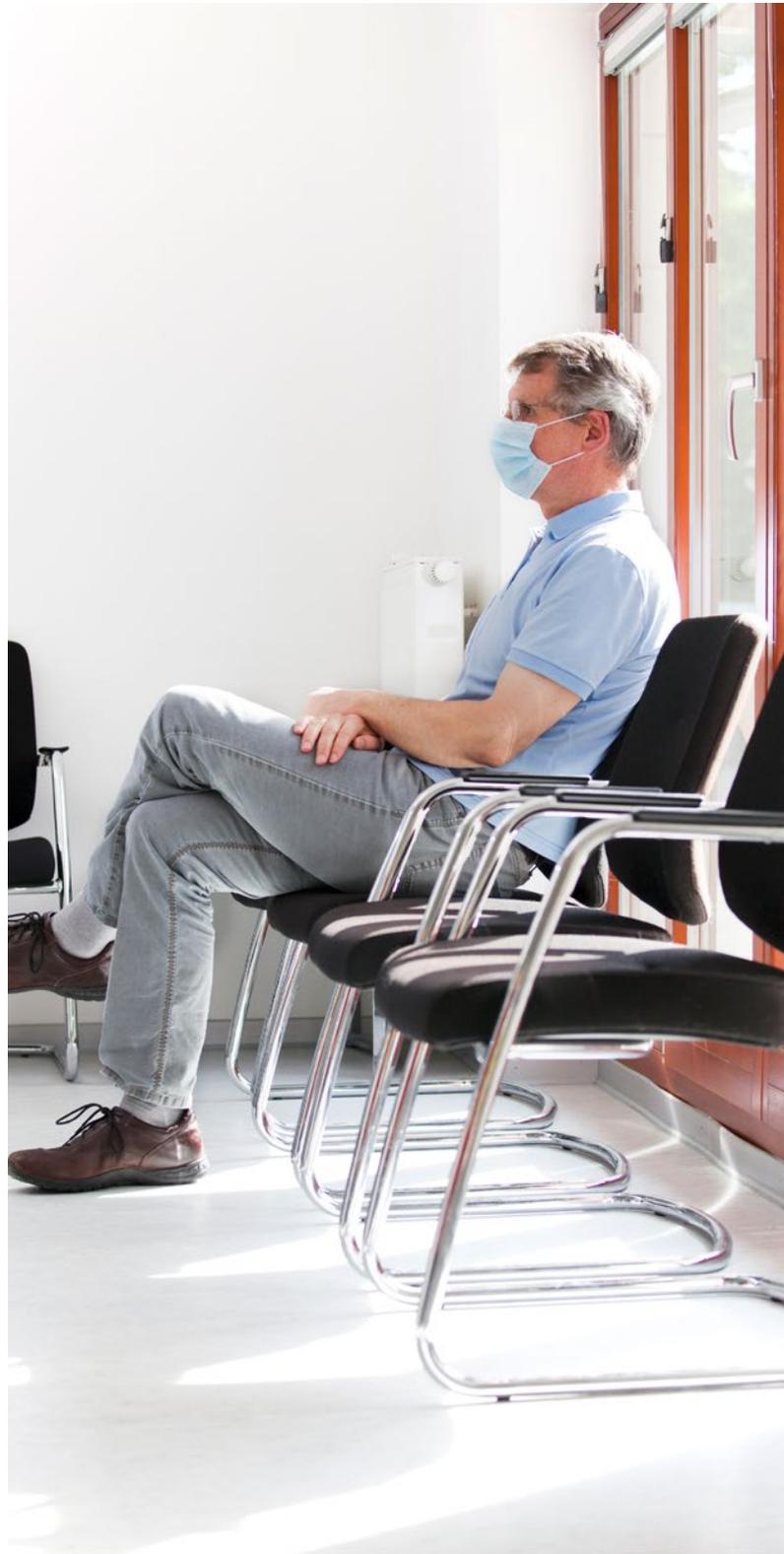
- Protects plan participants from surprise medical bills:
 - Surprise medical bills are balance bills from out-of-network (OON) providers in situations involving: emergency services (including in a hospital or free-standing emergency department); ancillary services at an in-network facility (e.g., anesthesiology, pathology and radiology); nonemergency services performed by OON providers at an in-network facility, unless the provider provides required notification and the individual consents; and air ambulance services by an OON provider.

- In these situations, the participant is required to pay only in-network cost-sharing based on the “recognized amount” for the services as defined in the new law.
- Providers are prohibited from billing the individual for any excess amount.
- Establishes an independent dispute resolution (IDR) arbitration process for resolution of any surprise medical bills between the provider and the health plan.
- Requires group health plans to provide 90 days of continuing care to individuals in certain situations when a provider leaves a plan’s network as if the provider were still in-network.
- Imposes a number of new disclosure and transparency requirements on group health plans, including the requirements to:
 - Provide an advanced explanation of benefits before scheduled care, including information such as the estimates of cost-sharing and the amount the plan will pay for the service and whether the provider is in-network or OON.
 - Maintain price comparison tools available online and over the phone.
 - Maintain up-to-date provider directories.
 - Include in-network and OON deductible amounts and out-of-pocket maximums on health plan member electronic or physical identification cards.
- Imposes new transparency and reporting requirements on providers.

Other requirements for group health plans

A variety of other new significant requirements are included in the CAA, including the following:

- Enhanced compliance requirements under the Mental Health Parity and Addition Equity Act (MHPAEA) relating to nonquantitative treatment limitations (NQTLs), which are broadly defined as nonnumerical/nondollar limits on the duration or scope of benefits, such as medical necessity and prior authorization. Many plans may not currently have a formal analysis that meets the requirements of the new law.



- Group health plans subject to MHPAEA are required to perform and document comparative analyses of the design and application of NQTLs.
- The NQTL analysis is required to identify any NQTLs, the factors used to determine NQTLs, and the evidentiary standards and sources used to develop the factors.
- The analysis must also compare the NQTLs as applied to both mental health and substance-use disorder benefits and medical and surgical benefits and make specific findings as to compliance with the parity rules.
- Federal regulators, including the Department of Labor for plans subject to ERISA, and appropriate state authorities for fully insured and governmental plans, may request the NQTL analysis starting Feb. 10, 2021 (45 days after the date of enactment). Federal agencies are also directed to issue more guidance regarding MHPAEA.



- Prescription drug cost reporting.
 - Starting Dec. 27, 2021, one year after date of enactment, group health plans are required to provide an initial report to federal regulators regarding pharmacy benefits and drug costs, including information regarding the most costly drugs under that plan and drugs with the greatest increase in plan expenditures over the year. After the initial report, the report is to be made by June 1 of each year.
 - This requirement applies to group health plans subject to the ACA coverage mandates and thus does not apply to excepted benefit plans (e.g., dental, vision and specified disease).
- New disclosure requirements for brokers and consultant compensation under ERISA.
 - This provision applies to ERISA-covered group health coverage, so its reach is broader than other provisions impacting only primary medical care subject to the ACA market reforms.
 - Thus, some group supplemental health coverage (e.g., dental or vision coverage) could be impacted where the coverage is health coverage and the coverage is offered through a private employer-sponsored plan that is subject to ERISA (e.g., generally when the coverage is funded through a cafeteria plan with employee pretax salary reduction or is employer-funded).
 - Accident, disability and life coverage are not impacted because these types of coverage are not health coverage.
 - In situations where the provision applies, disclosure regarding direct and indirect compensation must be made to the plan fiduciary for compensation in excess of \$1,000.

- The provision is effective for arrangements entered into (or extended) starting Dec. 27, 2021 (one year after date of enactment of the new law).
- A prohibition on so-called “gag” clauses.
 - This provision prohibits contracts between health plans and third-party administrators, health care providers or other services providers that would prevent the health plan from obtaining certain price and quality of care information.
 - The provision generally applies to plans subject to the ACA market reforms.
 - The provision appears to be effective for contracts or arrangements entered into (or extended) on or after Dec. 27, 2020 (the date of enactment of the law). This effective date may be impractical in many cases, and hopefully guidance on this issue will be forthcoming soon.



Conclusion

This 2020 year-end legislation provides welcome relief in some areas but also imposes many new requirements for group health plans, some of which are effective soon. This article provides a very high-level summary. Many details need clarification, and hopefully guidance will be forthcoming fairly soon, particularly with respect to the new group health plan requirements, because plans will need lead time to adapt to the new rules. Employers will want to watch for new developments and consult with their own advisors as to how the new provisions apply to their circumstances

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