Preliminary Summary of Select Tax-Related Provisions In the Year-End Legislative Package

<u>Tax Credits Related to Paid Leave</u>

1. **Extension of FFCRA Tax Credits (Division N, Title II, Subtitle B, § 286)**

   - Extends the paid sick and family leave credits against employment taxes from the Families First Coronavirus Response Act (FFCRA), which were due to expire on December 31, 2020, for three additional months to March 31, 2021.

   - Does <u>not</u> extend the FFCRA's mandate to provide paid sick leave or paid family and medical leave beyond December 31, 2020.

   - Paid leave tax credits for wages and compensation paid after December 31, 2020 and on or before March 31, 2021 would only be available to the extent that such credits would have been available to an employer had the FFCRA's paid leave mandates been extended through March 31, 2021.

2. **Technical Changes to FFCRA Tax Credits (Division N, Title II, Subtitle B, § 288)**

   - The bill includes technical changes to the definitions of what constitutes "qualified sick leave wages" and "qualified family leave wages" for purposes of the FFCRA paid sick leave and paid family and medical leave credits, respectively.

3. **Extension of Code Section 45S Credit (Division EE, § 119)**

   - Extends the Code section 45S employer credit for paid family and medical leave, which was enacted as part of the 2017 Tax Cuts and Jobs Act, for five additional years to the end of 2025.

<u>Employee Retention Tax Credit (ERTC) Under Section 2301 of CARES Act</u>

1. **<u>Retroactive</u> Modifications to ERTC (Div. EE, § 206).** The following changes would generally take effect as if included in section 2301 of the CARES Act:

   - ***Coordination with PPP loans***. Under the CARES Act, the ERTC is not available if an eligible employer receives a covered loan under the SBA's Paycheck Protection Program (PPP). The bill would repeal the provision denying the ERTC to employers receiving a PPP loan. Instead, mechanisms would be created to prevent the same wages from being used for both PPP loan forgiveness and the ERTC.

- ***Treatment of health plan expenses***. The bill would clarify that certain group health plan expenses are treated as wages and thus may be considered qualified wages for purposes of the ERTC, even if no other wages are paid to the employee. Although this is consistent with revised and current IRS guidance, the language of the CARES Act could be read as providing that an employer would not be eligible for the ERTC if it continued providing group health plan coverage but did not otherwise pay wages to an employee.

- ***Tax-exempt organizations***. Today, ERTC eligibility can be based on a reduction in gross receipts. The bill would clarify that, in the case of a tax-exempt organization, any reference in section 2301 of the CARES Act to "gross receipts" is treated as gross receipts within the meaning of Code section 6033 (returns of exempt organizations).

  Special employment tax reporting rule. The bill would give employers that have already filed an employment tax return with respect to applicable employment taxes before the date of enactment the <u>option</u> of treating "applicable amounts" as an amount paid in the calendar quarter that includes the date of enactment (presumably Q4 2020). For this purpose, "applicable amounts" would mean the amount of wages that are (1) permitted to be treated as qualified wages under guidance coordinating the ERTC with the PPP if such wages were paid in Q1-Q3 2020 and were not already taken into account for purposes of the ERTC for such quarter or (2) health plan expenses treated as "wages" for purposes of the ERTC. *Although this option may allow some employers to avoid having to file an amended Form 941, it may make filing a complete and accurate Form 941 for Q4 2020 more challenging if the bill is enacted prior to January 1, 2021, due to the applicable Form 941 filing deadline.*

2. **<u>Prospective</u> Modifications to ERTC (Division EE, § 207).** Changes to the CARES Act's ERTC that would apply to calendar quarters beginning after December 31, 2020 include the following:

   - ***Extension of credit*****.** The bill would extend the ERTC to apply to wages paid before July 1, 2021 (instead of January 1, 2021).

   - ***Increased credit percentage*****.** The bill would increase the credit percentage from 50% to 70% of applicable wages.

   - ***Increased credit limitation***. The bill would increase the per-employee limitation on applicable wages from $10,000 total to $10,000 per calendar quarter. In combination with the increase in the credit percentage, this would increase the maximum credit per employee from $5,000 total to $7,000 per quarter (up to a total of $14,000 for the first two quarters in 2021 when the increased credit percentage and limitation is in effect).

   - ***Customer liability in third party payor situations*****.** The bill would add the following sentence to the subsection directing the Treasury Secretary to issue certain guidance:

     > *Any forms, instructions, regulations, or guidance described in paragraph (2)* ***shall require the customer to be responsible for the accounting of the credit and for any liability for***

improperly claimed credits *and shall require the certified professional employer organization or other third-party payor to accurately report such tax credits based on the information provided by the customer. [Emphasis added.]*

[Note that this helpful clarification could be read as being subject to the general effective date of calendar quarters beginning after December 31, 2020. If that were the case, there is an argument that it does not apply retroactively, although it is not clear that was the intent.]

- ***Expanded eligibility based on reduction in gross receipts*****.** For employers with a reduction in revenues, the bill would make the ERTC available if the business experienced a decline of at least 20% in gross receipts (instead of a 50% decline) as compared to the same calendar quarter in the prior year. The bill would also give employers the option of measuring the reduction in gross receipts based on the immediately preceding calendar quarter.

- ***Threshold for treatment as small employer***. The bill would modify the more generous small employer definition of qualified wages to apply to employers that have 500 or fewer employees (instead of 100 of fewer employees).

- ***Expansion to public instrumentalities.*** Under the bill, certain public instrumentalities, such as colleges, universities, and entities with a principal purpose or function of providing medical or hospital care would be eligible for the ERTC.

- ***Denial of double benefits.*** The bill would extend the anti-double dip rules to tax credits under Code sections 41 (R&D), 45A (Indian employment), 45P (active duty military), and 1396 (empowerment zone employment). Under the CARES Act, employers are currently only prohibited from double counting the same employee with respect to Code section 51 (work opportunity tax credit) and the same wages with respect to Code section 45S (paid family and medical leave).

- ***Advance payment of credit.*** The bill would place limits on employers' ability to obtain an advance payment of the credit. In general, advance payments would be limited to small employers with up to 500 employees, and the amount of the advance for a quarter may not exceed 70% of the average quarterly wages paid by the employer in calendar year 2019. Special rules would apply to seasonal employers and employers that were not in existence in 2019.

Tax Treatment of Forgiveness of Paycheck Protection Program Loans

1. **Deduction Allowed for Expenses Related to Forgiveness of PPP Loans (Division N, Subtitle B, § 276)**

    - The bill clarifies that 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 of a PPP loan. This change applies retroactively.

<u>New Employee Retention Tax Credit (Disaster Relief)</u>

1. **2020 Qualified Disaster Employee Retention Credit (Division EE § 303)**

   - Adds a new, temporary employee retention credit of 40% of qualified wages up to $6,000 (maximum credit of $2,400 per eligible employee) for eligible employers affected by certain qualified disasters.

   - **This new credit would only apply retroactively to certain 2020 qualified disasters (generally, presidentially declared disasters during the period beginning on January 1, 2020, and ending on the date which is 60 days after the date of the enactment of the Act, BUT NOT including disasters declared only by reason of COVID–19).**

   - This would generally be treated as a general business <u>credit against income taxes</u>.

   - However, a credit would be available <u>against payroll taxes</u> with respect to certain <u>tax-exempt organizations.</u>

     - Excess credits against payroll taxes would be carried forward (and, unlike the CARES Act credits against payroll tax, would not be treated as an overpayment that is refunded).

     - The credit against payroll taxes would be treated as a credit described in Code section 3511(d)(2).

     - The Treasury Secretary would be required to issue such guidance necessary:

       > *with respect to the application of the credit under paragraph (1) to third party payors (including professional employer organizations, certified professional employer organizations, or agents under section 3504 of the Internal Revenue Code of 1986), including regulations or guidance allowing such payors to submit documentation necessary to substantiate the eligible employer status of employers that use such payors.*

       [Note that the above text is nearly identical to the guidance-related directive included in the CARES Act with respect to the CARES Act's ERTC, prior to the amendment related to customer liability as described above, which would not appear to apply to this new disaster credit against payroll tax for tax-exempt employers.]

<u>Work Opportunity Tax Credit</u>

1. **Extension of Work Opportunity Tax Credit (Division EE, § 113)**

   - Extends the work opportunity tax credit in Code section 51 by five years to the end of 2025.