

# Locke Lord QuickStudy: CARES Act II – Independent Contractors Gain 11-Week Extension of Unemployment Assistance and Paid Sick and Family Leave Benefits

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The Senate and House have passed another stimulus package that extends unemployment assistance for independent contractors and other self-employed individuals for 11 weeks. President Trump is likely to sign the bill shortly in the form passed by Congress or with changes to other parts of the bill unrelated to the subject of this QuickStudy. The bill includes the “Continued Assistance for Unemployed Workers Act of 2020,” which provides for an extension of the CARES Act unemployment provisions from December 31, 2020 until March 14, 2021, including the provisions that created a new form of benefits for all self-employed individuals: pandemic unemployment assistance. As detailed in a prior [QuickStudy](#), the original CARES Act provided PUA benefits for up to \$600 a week for as many as 39 weeks, retroactive to January 27, 2020. The new stimulus bill, CARES Act II, limits to \$300/week the amount of PUA benefits. Those eligible for PUA also will receive an additional \$300/week through the end of the extension period – unlike CARES Act I, which added \$600/week in federal stimulus payments. Finally, the new stimulus bill provides independent contractors with paid sick and paid family leave benefits through March 14, 2021.

### *How does an independent contractor apply for extended PUA benefits?*

It does not appear that independent contractors need to apply for additional PUA if currently receiving that benefit; it appears PUA II benefits will simply be tacked onto PUA I benefits. But for those independent contractors who have never received, or are yet to receive PUA benefits, or if their 39 weeks of PUA have ended due to a retroactive commencement of benefits, it is expected that an application will be required.

Under CARES Act II, unemployed or underemployed independent contractors who have an income mix from self-employment and wages paid by an employer are still eligible for PUA. Under CARES Act I, any such worker was typically eligible only for a state-issued benefit based on their wages. But under CARES Act II, the individual now is eligible for an additional weekly benefit of \$100 if he/she earned at least \$5,000 a year in self-employment income. The \$100 weekly payment, which would be added to the \$300 weekly benefit, also will expire on March 14.

### *What does this CARES Act II mean for businesses using independent contractors?*

Many new applications for PUA by independent contractors are likely to be filed without a designation that the claimant is self-employed, as was often the case under the original CARES Act. This aspect of CARES II could

cause legal challenges for companies as it may create a false record that a contractor is a company employee. Businesses should timely contest such applications to avoid erroneous assessments of unpaid unemployment taxes, which could also prompt audits by their state workforce agency of the classification status of other workers treated as independent contractors.

An effective response strategy should include:

- immediate transmittal of claim notices to a single person in the company's Legal or Human Resources Department;
- a quick gathering of the applicable independent contractor agreement;
- identifying the legal test for independent contractor status in the applicable state;
- securing the necessary information from corporate employees and/or the claimant that supports independent contractor status;
- drafting and submitting expeditiously a concise and persuasive response to the notice demonstrating the claimant is not an employee of the company;
- but expressly recognizing the independent contractor's right to PUA benefits *as a self-employed individual* under the CARES Act if he/she meets the qualifying circumstances whereby his/her loss of income or self-employed opportunities is due to the Coronavirus.

All too often the initial eligibility determination is made by a claims officer who has limited time to read an entire submission and may be predisposed to finding the claimant is an employee and not an independent contractor. So knowing what statements are most likely to resonate with the initial reviewer at the unemployment agency and how to present those factors in a compelling summary of the response can make the difference between a determination favorable or adverse to the business.

Where the initial determination finds the claimant is not an independent contractor but rather an employee, or simply notifies the claimant and the company that the worker is eligible for unemployment benefits, it is imperative to request a hearing and/or file an appeal on a timely basis. Failure to do so may cause a company to lose the right to challenge a determination that the claimant is an employee, and may result in a final adverse ruling that all workers classified by the business as independent contractors have been misclassified. In anticipation of the hearing, which is typically conducted telephonically, steps can be taken to strengthen the argument that the contractor has been properly classified under applicable state law.

#### *The FFCRA Affords Paid Sick and Family Leave Benefits to Independent Contractors*

The Families First Coronavirus Response Act enacted last March provides both paid sick time under the Emergency Paid Sick Time Act and expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act. Congress originally made available such benefits not only to employees but also to "eligible self-employed individuals." Such an individual is defined as a person who "regularly carries on a trade or business . . . , and would be entitled to receive paid leave . . . if the individual were an employee of an employer (other than himself or herself)." The new stimulus bill extends the independent contractor provisions of the FFCRA to the same date that the CARES Act was extended, March 14, 2021.

Paid sick leave is available under FFCRA to independent contractors for up to ten days when unable to work or telework because the individual is subject to a government quarantine or order of isolation related to COVID-19;

has been advised by a health care provider to self-quarantine; or is experiencing symptoms of Coronavirus and is seeking medical attention. The amount of paid sick leave available to an eligible independent contractor is the *lesser of* (a) \$511 per day up to a maximum of \$5,110 for ten days or (b) 100% of the individual's average daily self-employment income for the taxable year. If the leave is occasioned by the independent contractor's need to care for another individual subject to an order of quarantine or isolation or advised to self-quarantine, or to care for a child whose school had been closed or whose childcare provider is unavailable due to COVID-19 precautions, then the *lesser of* (a) \$200 per day up to a maximum of \$2,000 for ten days or (b) 67% of the average daily self-employment income for the taxable year.

Paid family leave is available to an eligible independent contractor who is unable to work or telework because of a need to care for a family member subject to a government order of quarantine or isolation or advice by a health care provider to self-quarantine, or to care for a son or daughter whose school has been closed or whose childcare provider is unavailable due to COVID-19. The maximum number of days of this paid family leave is 50, and the paid benefit available is the *lesser of* \$200 per day or 67% of the average daily self-employment income for the taxable year.

Average daily self-employment income is defined in the FFCRA as the net earnings for the taxable year from self-employment of the individual divided by 260. The amount payable to the self-employed individual may be taken by the independent contractor as a 100% tax credit.

### *Takeaway*

Those who utilize independent contractors are concerned that some state workforce agencies may later use this temporary pandemic relief legislation to create a record of independent contractors working in such states and seek to re-characterize them as employees under unemployment, workers' compensation, and wage and hour laws. Companies that have used independent contractors in the past and plan to continue doing so in the future should consider enhancing their compliance with applicable independent contractor laws. Many businesses have already done so by using a process such as [IC Diagnostics™](#), which can serve to minimize exposure to independent contractor misclassification claims by creating sustainable independent contractor relationships.

Visit our [COVID-19 Resource Center](#) often for up-to-date information to help you stay informed of the legal issues related to COVID-19.

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