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CORONAVIRUS RELIEF PROVISIONS CONTAINED IN THE CONSOLIDATED APPROPRIATIONS ACT, 2021

(enacted December 27, 2020)

Note: We are periodically updating all of our public coronavirus materials as new information becomes available. For updated versions and memos on new topics, please visit https://tristerross.com/update/.

The coronavirus relief package enacted on December 27 as part of the 2021 Consolidated Appropriations Act ("2021 CAA") extends and modifies several programs designed to alleviate burdens imposed on organizations by the pandemic. Below is a discussion of the provisions of the new law that are likely most relevant to our clients.

Extension and Expansion of Paycheck Protection Program Loans

The 2021 CAA restarts loans under the Paycheck Protection Program ("PPP"), which had stopped accepting loan applications on August 8:

- Organizations that *did not* receive a PPP loan during that first round will now be able to apply for one. This memorandum refers to an organization's first PPP loan, whenever secured, as a "PPP1" loan.
- Organizations that *did* receive (and spend) a PPP1 loan will be able to apply for a second PPP loan, referenced in this memorandum as a "PPP2" loan.

The date on which lenders may begin accepting new loan applications has not yet been released; the Small Business Administration is expected to provide additional guidance about the revived PPP very soon.

Changes to the PPP instituted by the 2021 CAA are described below.

Eligibility for PPP1 Loan

All organizations previously eligible for PPP1 loans remain eligible, including 501(c)(3) charitable organizations and businesses with up to 500 employees that certify the loan is necessary to support ongoing operations.

501(c)(6) business leagues and trade associations are newly eligible for PPP1 loans so long as:

- They do not receive more than 15% of their receipts from lobbying;
- Lobbying does not comprise more than 15% of their activities; and
- They spent less than $1 million on lobbying during the most recent tax year that ended prior to February 15, 2020.[1]

501(c)(4) social welfare and 501(c)(5) labor organizations remain ineligible for a PPP1 loan.

Eligibility for PPP2 Loan

Any organization that is eligible for a PPP1 loan is eligible for a PPP2 loan, so long as:

- The organization received a PPP1 loan and either spent the entire PPP1 loan or will spend the entire PPP1 loan *before* a PPP2 loan is disbursed.
- The organization has fewer than 300 part- or full-time employees (the PPP1 maximum remains 500 employees).
- The organization can show a decrease of at least 25% in gross receipts during any calendar quarter in 2020 compared to the same quarter in 2019.
- The organization is *not* primarily engaged in political or lobbying activities. This includes any entity that is organized for research or for engaging in advocacy in areas such as public policy or political strategy or otherwise describes itself as a think tank in any public document.

Changes to Permissible Uses of PPP Loan Funds

Additions: The CARES Act provided that PPP loans could be used for payroll costs, rent, mortgage interest and utilities. The 2021 CAA retains these uses and adds the following uses for a PPP1 or PPP2 loan:

- "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;

[1] The 2021 CAA also extends PPP eligibility to "destination marketing organizations," defined as a nonprofit entity described in section 501(c) of the Internal Revenue Code or a state or political subdivision of a state that is engaged in marketing and promoting communities and facilities to businesses and leisure travelers or that is engaged in, and derives the majority of its operating budget from revenue attributable to, providing live events.

- “covered property damage costs”: payments of costs related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that were not covered by insurance or other compensation;
- “covered worker protection expenditures”: payments to comply with federal, state or local requirements or guidance related to the maintenance of standards for sanitation, social distancing, or any other COVID-19-related worker or customer safety requirement, including, but not limited to:
- the purchase of personal protective equipment (PPE);
- ventilation or air filtration systems;
- physical expansion of business space; and
- expenses for onsite or offsite health screening capabilities; and
- “covered supplier costs”: payments for goods that are essential to the operations of the organization at the time the payments are made and that are made pursuant to a contract, order, or purchase order in effect during the covered period of the loan or, with respect to perishable goods, in effect before or during the covered period of the loan.

Prohibition on Lobbying: The 2021 CAA prohibits using a PPP1 loan made *after* December 27 or (likely but not explicit) a PPP2 loan for the following lobbying purposes:

- lobbying activities, as defined in the Lobbying Disclosure Act, 2 U.S.C. 1602);
- lobbying expenditures related to a State or local election; or
- expenditures designed to influence the enactment of legislation, appropriations, regulation, administrative action, or executive order proposed or pending before Congress or any state government, state legislature, local legislature or local legislative body.

PPP Loan Forgiveness Dependent on Using at Least 60% for payroll Costs

PPP1 and PPP2 loan funds used for permissible purposes are eligible for forgiveness. But the full amount of the loan will be forgiven only *if at least 60% of the loan is used for payroll costs*.

Applicability of New Permissible Uses to Existing PP1 Loans

The new permissible uses (covered operations expenditures, property damage costs, worker protection expenditures and supplier costs) apply to both (1) PPP1 loans that have already been disbursed but not yet forgiven and (2) future PPP1 loans. Therefore, it appears that some PPP1 borrowers whose loans were disbursed during the summer have not yet completed the 24-week covered period and may seek forgiveness of loan funds used for the new permissible uses.

Limit on PPP1 Loan Amount

An organization may receive a PPP1 loan of up to the *lesser* of (a) 2.5 times its average monthly payroll costs during the one-year period before the loan is made *or* (b) $10 million (as under CARES).

Limit on PPP2 Loan Amount

An organization may receive a PPP2 loan of up to the *lesser* of (a) 2.5 times its average monthly payroll costs during the one-year period before the loan is made *or* (b) $2 million (so, $8 million *less* than a PPP1 loan).

Extension of $10,000 EIDL Grant Program

The CARES Act directed the Small Business Administration to issue grants of up to $10,000 under the Economic Injury Disaster Loan ("EIDL") program. The 2021 CAA extends for one year the end of the application period for such a grant, from December 31, 2020 to December 31, 2021. The new relief package also repeals the section of the CARES Act that reduced the amount of PPP loan forgiveness by the amount of any EIDL grant received.

Extension of Tax Credit for Wages Paid During Coronavirus-related Leave

The Families First Coronavirus Response Act ("FFCRA") *required* certain employers to provide Emergency Paid Sick Leave ("EPSL") and FMLA leave for coronavirus-related reasons through December 31, 2020. Those employers were then able to take a refundable credit against their payroll taxes equal to the wages paid during the EPSL or FMLA leave. The 2021 CAA does *not* extend this requirement.

However, employers that *voluntarily* provide coronavirus-related EPSL and FMLA leave at any time between January and March 2021 may continue to take that refundable tax credit. Because this extension of EPSL tax credits ends at the one-year anniversary of the FFCRA, the credits can only be used for the wages of employees who have not already used up their EPSL. However, paid FMLA might work differently. Employers that use a calendar year as their FMLA leave year might have employees who are eligible to use a second 12 weeks of FMLA leave for childcare-related absences between January and March 2021.

Extension of Student Loan Assistance Provisions

The CARES Act allowed employees to exclude student loan payment assistance provided by their employer before January 1, 2021 from their gross income. The 2021 CAA extends this benefit until January 1, 2026. The maximum amount of employer assistance that may be excluded by the employee is $5,250 per calendar year.

NOTE: This document does not constitute legal advice. For application of the matters discussed in this document to a particular situation, please consult legal counsel.