Consolidated Appropriations Act of 2021

The Consolidated Appropriations Act of 2021 (the "CAA") was signed into law on December 27, 2020, which may be best known to many as the second stimulus bill. Although the CAA includes $900 billion in stimulus relief, it also includes $1.4 trillion in omnibus spending for fiscal year 2021.

This alert addresses only select portions of the "stimulus" portion of the CAA.

Tax Developments:

The CAA contains several key tax developments. It reverses the Treasury and IRS position which held that proceeds from loans received under the Paycheck Protection Program (the "PPP") could not qualify as deductible business expenses where the taxpayer receives loan forgiveness. This provision of the CAA is very significant in that it reverses the longstanding "no double dipping" rule which pervades United States Federal tax law. This is good news for taxpayers receiving PPP loan forgiveness, as deductions for payroll costs and certain other expenses will help to offset net income and potentially lessen the income tax burden.

The CAA extends the paid sick and family leave tax credits under the Families First Coronavirus Response Act ("FFCRA") through March 31, 2021. Eligible employers providing FFCRA leave during the period of January 1, 2021 and March 31, 2021 are eligible for such tax credits for wages paid. Additionally, the CAA provides for changes to the Employee Retention Tax Credit under the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"). Under the CARES Act, eligible employers engaged in a trade or business during 2020 may take a refundable payroll tax credit equal to 50% of qualified wages paid to employees during the period of March 13, 2020 through December 31, 2020 so long as the wages are paid (i) while the trade or business is fully or partially suspended due to a COVID-19-related governmental order or (ii) during a period beginning in the first quarter where gross receipts are below 50% of gross receipts for the same quarter during year 2019 and ending after the first subsequent quarter where gross receipts exceed 80% of gross receipts for the same quarter during 2019. The CAA extends the Employee Retention Tax Credit through the end of year 2021 and increases the credit to 70% of qualified wages.

It also replaces the $5,000 per employee cap with an increased cap of $7,000 per employee, per quarter, essentially providing up to $28,000 of relief per employee for year 2021. Perhaps most importantly, the CAA provides that taxpayers receiving a PPP loan may also qualify for the Employee Retention Tax Credit, reversing the restriction contained in the CARES Act.

Taxpayers may now deduct 100% of business meals for years 2021 and 2022. The Tax Cuts and Jobs Act of 2017 capped the deduction of business meals at 50%. The CAA also extends the repayment period for the employee portion of payroll tax through December 31, 2021. This deferral was originally enacted by President Trump via a memorandum permitting employers to defer payment of the employee portion of payroll taxes for employees with pre-tax wages of less than $4,000 during any biweekly pay period.

PPP Continuation and Developments

The CAA effectively continued the PPP and added several additional provisions.

The CAA creates a second draw loan for smaller businesses to receive a loan amount up to 2.5 times the average monthly payroll costs in the one year prior to the loan or calendar year, with a maximum amount of $2 million ($3 million for certain entities, including hotels and restaurants). Eligible businesses may not have more than 300 employees, whereas eligible businesses for the first draw loans could have up to 500 employees. Such eligible businesses must have used or will use the full amount of their first PPP loan and must demonstrated at least a 25 percent reduction in gross receipts in any quarter of 2020 compared to the same quarter in 2019. Eligible businesses include certain nonprofits, housing cooperatives, veteran organizations, tribal businesses, sole proprietorships, and independent contractors. Ineligible types of businesses include financial businesses primarily engaged in lending, political and lobbying entities, entities affiliated with entities in China, private clubs and businesses which limit membership for reasons other than capacity, government-owned entities, and businesses primarily engaged in teaching, instructing, counseling, or indoctrinating religion.

The CAA requires borrowers to use at least 60 percent of PPP loan proceeds for payroll costs and 40 percent of the proceeds on eligible non-payroll costs to receive full loan forgiveness and expands the types of expenses that are considered eligible payroll and non-payroll costs. Among other types of payroll costs, the CAA clarifies that payroll costs include payments for employer-provided benefits, including group life insurance, disability, vision, and dental. Non-payroll costs include covered operations expenditures, covered property damages costs, and covered supplier costs.

Among borrowers with a PPP loan of under $150,000, the CAA also provides a more simplified loan forgiveness application. In this application, loans are forgiven in full if the borrower submits a signed certification to the lender that describes the number of employees the employer was able to retain due to the loan, give an estimate of the total loan amount spent on payroll expenses, and state the loan total. Borrowers are also required to retain employment records for four years and other records for 3 years after submitting the application.

The CAA further clarifies that businesses are not eligible for the initial and second draw PPP loans if they were not in operation as of February 15, 2020.

Economic Injury Disaster Loan Program

The Economic Injury Disaster Loan Program ("EIDL") now offers grant monies for small businesses and nonprofits that meet certain criteria. The CAA provided an additional $20 billion in funding to the EIDL, on top of what was already provided under the CARES Act. Section 331 defines a "covered entity" as one that (a) applied for an EIDL loan during the covered period in the CARES Act, (b) is located in a low income community, (c) has suffered an economic loss greater than 30 percent, and (d) employs not more than 300 employees. "Economic loss" is defined in section 331 as "the amount by which the gross receipts of the covered entity declined during an eight week period between March 2, 2020 and December 30, 2021 relative to a comparable 8-week period immediately preceding March 2, 2020, or during 2019 …." Seasonal enterprises are subject to an alternative determination by the Administrator of the Small Business Administration ("SBA").

The SBA Administrator will review each application and make a decision within 21 days of filing the application. The 21 day period is a change from the CARES Act, under the which the timeline was previously three days.

Each small business is eligible for up to $10,000 in advance grant monies. Grant monies received are not considered taxable income. Grant monies are available until the $20 billion is exhausted, or until December 31, 2021.

EIDL loans are also available. The SBA application page can be found here, along with loan terms. https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/covid-19-economic-injury-disaster-loans. Small businesses, agricultural cooperatives, and most private nonprofit organizations are eligible to apply. However, loan proceeds cannot be used to refinance long-term debt, expand facilities, pay dividends, pay bonuses, or relocate. For loans exceeding $25,000, the SBA will require collateral.

COVID-19 Provisions

The CAA includes specific health provisions aimed at combating the COVID-19 pandemic. These health provisions center around the development and wide distribution of vaccines and direct assistance to states in their efforts to fight the disease.

The CAA provides $30 billion to the federal government to assist with the purchase and development of COVID-19 vaccines and COVID-19 therapeutics. Of that $30 billion, $8.75 billion is earmarked to the Center for Disease Control (CDC) to plan, prepare for, administer, monitor, and track the various coronavirus vaccines. The CDC is also tasked with ensuring that the vaccines are broadly distributed and that there is access to the vaccines. In addition to the CDC's efforts, the CAA also earmarks a portion of the $30 billion directly to states and localities to also assist with distribution and access to the vaccines.

A smaller amount of the $30 billion is allocated to ensuring distribution and access to the vaccines to high risk and underserved populations, including racial and ethnic minorities and rural communities. The CAA also provides $19.7 billion to the Biomedical Advanced Research and Development Authority (BARDA) to manufacture and procure vaccines, therapeutics, and diagnostics.

In addition to vaccine access and distribution, the CAA includes $22 billion that will be sent directly to the states to assist with testing, tracing, and other COVID-19 mitigation programs. A portion of the $22 billion is specifically dedicated to improving testing and contact tracing in underserved populations, including racial and ethnic minorities and rural communities. The National Institutes of Health (NIH) is also provided with $1.25 billion under the CAA to assist with research into the long-term effect of COVID-19. Additionally, as part of direct assistance to the states in their efforts to combat the pandemic, the CAA extends the availability of funds to states and localities through December 2021.

Finally, the CAA provides $10 billion for childcare providers through the Child Care and Developmental Block Grant program. The program's express purpose is to ensure that childcare providers around the nation continue to remain open and to ensure the provision of care for dependents of essential workers.

Unemployment Compensation

The CAA extends three unemployment benefits programs that were originally created under the Cares Act and creates a new program for “mixed earners.” The first of the unemployment benefits programs is the Federal Pandemic Unemployment Compensation (FPUC) program. Under the FPUC, anyone who received state unemployment benefits was also entitled to an additional $600 per week. The FPUC, however, expired in July 2020. The CAA reintroduces the FPUC program but reduces the weekly benefit to $300 per week. The new FPUC program runs from December 26, 2020 to March 14, 2021.

The second unemployment benefits program is the Pandemic Emergency Unemployment Compensation (PEUC) program. The PEUC provided applicants who had exhausted their state unemployment benefits with an additional 13 weeks of benefits through December 31, 2020. Under the new PEUC, applicants are provided with an additional 11 weeks of unemployment benefits. However, there are some restrictions to the new PEUC program. First, an individual is not eligible for the program if that individual’s unemployment benefits expired before the end of 2020. Second, to receive benefits under the new PEUC program, an applicant must become eligible before March 14, 2021.

The third of the unemployment benefits programs is the Pandemic Unemployment Assistance (PUA) program which was targeted at workers who did not meet the traditional unemployment eligibility requirements. These affected workers were usually gig-economy workers and independent contractors. Like the PEUC program, applicants can receive benefits under the program only if they become eligible before March 14, 2021. The fourth program, the Mixed Earner Unemployment Compensation (MEUC) program, is a newly created program under the CAA to provide unemployment benefits to mixed earners who were not covered under the Cares Act. A mixed earner is a worker who receives part of their income via a W-2 and the other part via a 1099.

An example of a mixed earner is an Uber driver who earns a majority of his or her income via a 1099 and often supplements that income by working for a traditional employer. There are two requirements for a mixed earner to qualify for unemployment benefits under MEUC. First, the mixed earner must have reported at least $5,000 of self-employment income in the last taxable year. Second, the mixed earner must qualify for unemployment benefits in any program other than the PUA. An eligible mixed earner may receive a benefit of up to $400 per week under the MEUC.

UKS will continue to monitor this developing issue and provide updates as necessary. The UKS COVID-19 Response Team is standing by, ready to help you and your business with questions or concerns regarding a wide range of legal issues relating to the COVID-19 pandemic. For further information on the Paycheck Protection Program, please contact Attorney John F. (Jef) Wolter, Attorney Gregg J. Lallier, or Attorney John J. Alissi.

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