



ACCNJ LEGAL & INSURANCE UPDATE

PPP Loan Forgiveness Will Be Taxable

Are you “reasonably expecting” to receive loan forgiveness for business expenses paid with PPP loan proceeds? If so, then don’t expect an allowable deduction for those expenses in the 2020 tax year. On November 18, the IRS doubled down on its position to deny such deductions – effectively creating a tax liability for amounts forgiven under the PPP program. The IRS previously discussed expense disallowance in April (via [Notice 2020-32](#)) and [Revenue Ruling 2020-27](#) definitively confirms the IRS’s prior position. The ruling establishes the following standard: an expense will not be deductible in the taxable year in which the expense was paid or incurred if, at the end of such taxable year, the taxpayer “reasonably expects” to receive PPP loan forgiveness on the basis of such expense. From a timing perspective, this means that for most PPP borrowers the expense disallowance will apply to the 2020 tax year even if one’s loan forgiveness application is not submitted and/or determined until 2021. Members of congress have voiced their displeasure with the IRS’s ruling as being contrary to congressional intent. AGC of America remains actively involved and is hopeful there will be legislation to correct this issue as part of the spending package currently being negotiated by House and Senate leadership.

The IRS’s ruling was accompanied by the publication of [Revenue Procedure 2020-51](#), which provided borrowers with some solace by creating a safe harbor for borrowers who either: (a) end up being denied forgiveness in 2021 (in whole or in part), or (b) decide not to apply for forgiveness. In each instance, the borrower will have a mechanism for recouping the disallowed expense. The borrower would be able to deduct some or all of the eligible expenses on: (1) their original income tax return or information return for the 2020 taxable year; (2) an amended return or an administrative adjustment request under section 6227 of the Internal Revenue Code for the 2020 taxable year; or (3) the taxpayer’s original income tax return or information return for 2021. Borrowers hoping to take advantage of the safe harbor are encouraged to carefully review the protocols laid out in Revenue Procedure 2020-51.

Legalization of Marijuana

ACCNJ continues to track the progress of legislation related to the legalization of marijuana in New Jersey. The November referendum, which was passed by roughly two-thirds of New Jersey voters, still requires the passage of enabling legislation in order for marijuana to be legal under state law on January 1. As of the date of this writing, the legislature has yet to finalize rules and regulations. ACCNJ has been paying particularly close attention to the legislation’s considerations for drug-free workplaces. The legislation is expected to contain protections for workers from adverse employment action related to recreational use of marijuana. This will have to be balanced against the employer’s legitimate interest in having a drug-free workplace. A key challenge for legislators will be defining what constitutes “under the influence” and procedurally, how such a determination will be made, and by whom. Early drafts of the legislation indicate a desire to create a “Drug Recognition Expert” within the employment setting who will have a corresponding NJ State Police certification. Drug testing is also a key topic. We are hopeful that final legislation will set forth permissible forms of drug testing that include (at a minimum), pre-employment, reasonable suspicion, post-accident and random testing. Even when legislation is final, contractors will have to grapple with the preemptive effect of federal law, which still prohibits use and distribution of marijuana. This is especially true for contractors on federally funded projects. Given the timeliness and complexity of this issue, ACCNJ will be hosting a presentation on marijuana legalization as part of its Legal and Insurance Webinar Series in January. Be sure to stay tuned for more information on

that presentation and further developments with the legalization bills working their way through the legislature.

What Benefits Can Employees Claim If They Have Exhausted FFCRA Leave?

COVID cases are increasing across the country and employee quarantines are on the rise. For some employees, this may not be the first time this year. This can be problematic because leave benefits provided under the Family's First Coronavirus Relief Act (FFCRA) are cumulative and not per occurrence. For example, an employee that received 80 hours of Emergency Paid Sick Leave (EPSL) under the FFCRA in the Spring could not claim EPSL this fall even if they experienced another eligible reason for FFCRA leave.

So what other options are available in New Jersey? The answer depends on the reason for leave, but in many cases, the employee will likely need to pursue Unemployment or Temporary Disability. New Jersey Earned Sick Leave is also an option, but not for individuals employed in the construction industry under a CBA. New Jersey has a few resources that can help employers and employees understand the various programs available for COVID-related leave. The first is the NJ COVID-19 Information Hub: [Benefits Eligibility Tool](#). This tool allows an individual to describe their scenario and see the possible programs that can provide relief. The tool lists the programs in "suggested priority" so that a user can determine the optimal order for the various options. A second resource is the [Dep't of Labor and Workforce Development's Website - "Worker Benefits, Protections and the Coronavirus: What NJ Workers Should Know"](#). On this website, users will find answers to commonly asked questions and links to additional resources like the Department's [COVID-19 Scenarios & Benefits Chart](#). The chart serves as a quick reference tool of benefit options available for a particular scenario. ACCNJ will continue to monitor these resources and bring you the latest updates on leave related issues impacting our state.

ACCNJ'S LEGAL & INSURANCE WEBINAR SERIES

Upcoming installments of ACCNJ's Legal and Insurance Webinar Series include:

- **Bankruptcy Considerations for Construction Contractors** – due to technical difficulties, the original presentation scheduled for Tuesday, November 24, will instead be distributed electronically later this month.
- **Legalization of Marijuana** (January)

As always, we thank all attendees and the associate members who have contributed to the program. We look forward to bringing our membership continued access to invaluable discussions on contemporary issues facing our industry!

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