January 2021

ACCNJ LEGAL & INSURANCE UPDATE

Consolidated Appropriations Act of 2021

The Consolidated Appropriations Act of 2021 (the "Act"), which was enacted December 27, 2020, provided close to $900 billion for COVID-related relief. This issue of ACCNJ's Legal and Insurance Update will focus on three aspects of that relief package: (1) Eligibility Criteria for Second Draw PPP Loans; (2) Changes to the Employee Retention Tax Credit; and (3) Expiration of Mandatory FFCRA Leave.

1. Eligibility Criteria for Second Draw PPP Loans

The Act provides approximately $285 billion to fund additional loans under the Paycheck Protection Program ("PPP"). Borrowers under the initial program are eligible for a second loan but subject to stricter criteria. Below are main considerations impacting one's eligibility for a second loan.

- ***You must exhaust your first loan.*** As a starting point, borrowers seeking a second loan must use the full amount of the initial PPP loan on or before the date the second loan is disbursed.
- ***300 or fewer employees.*** The employee headcount has been reduced to 300 (down from 500). As with the first PPP, publicly traded companies are ineligible.
- ***25% decline in gross receipts.*** Arguably the most notable change is a requirement that the borrower demonstrate a 25% decline in gross receipts in 1Q, 2Q, 3Q or 4Q of 2020 when compared to the same quarter in 2019. Initial PPP loans require the now infamous "economic uncertainty" certification. This new approach of assessing gross receipts, while more stringent, at least provides a more objective way of assessing one's need and eligibility for the second loan.
- ***The second loan will be capped at the lesser of $2 million or 2.5X the average monthly payroll costs.*** Borrowers have two options when determining the applicable time period for calculating its average monthly payroll costs. They can choose between: (1) 2019 or (2) the 1-year period preceding the date the loan is to be disbursed. Seasonal employers may use any 12-week period between February 15, 2019, and February 15, 2020, for their average monthly payroll costs.
- ***Limited to one draw.*** Similar to the first program, a second draw loan will be issued as a single disbursement.

Other points of emphasis (which apply to the PPP generally and not just second draw loans) include:

- ***Application deadline.*** March 31, 2021, is the deadline for applying.
- ***Tax treatment.*** Forgiven PPP loans are excluded from gross income and the expenses paid with those loans are deductible (which is a reversal of the IRS's prior revenue rulings).
- ***Length of covered period.*** The Act provides borrowers with the flexibility of setting the length of the "Covered Period" at any length between 8 and 24 weeks.
- ***Expansion of eligible non-payroll expenses.*** The 60/40 split still exists in that 60% of loan proceeds must be spent on payroll and 40% can be spent on non-payroll. However, eligible non-

payroll expenses now include: (1) certain operational expenditures related to software, cloud computing, HR and accounting services; (2) safety and compliance expenditures related to COVID-related guidance and safety requirements issued by governmental authorities and/or public health authorities; (3) property damage caused by public disturbances (which was not covered by insurance or another source of compensation); and (4) certain supplier expenditures for goods that are essential to operations and were acquired pursuant to a contract that was in effect prior to the Covered Period.

- ***Simplified process for smaller loans***. Borrowers who receive a PPP loan of $150,000 or less will be able to apply for loan forgiveness using a simplified loan application, which will require borrowers to state the total loan amount, the number of employees retained as a result of the loan, and the estimated amount of the loan used on payroll.

The items highlighted above are not an exhaustive summary of all the PPP changes in the Act. Members are encouraged to visit the **SBA's website** for the most comprehensive details regarding the PPP. This will eventually include new SBA regulations, which the Act expressly requires within 10 days after enactment (although the Act also grants the SBA with longer time periods for certain aspects of the program). ACCNJ will regularly monitor new SBA publications and bring you the latest information as it becomes available.

2. Changes to the Employee Retention Tax Credit

The Act also extends and expands the Employee Retention Tax Credit ("ERTC") originally enacted under the CARES Act. As a refresher, the ERTC provided a 50% tax credit for businesses that continued paying employees during shutdowns or substantial declines in gross receipts due to COVID. The Act made several key changes to the ERTC program. Some of the most notable including the following: (i) the credit can now be claimed for qualified wages paid between March 12, 2020, and July 1, 2021 (previously January 1, 2021); (ii) the amount of the credit has been increased to 70% of qualified wages (previously 50%); (iii) the aggregate per employee maximum credit was increased to $14,000 (up from $5,000) for the first two quarters of 2021; and (iv) eligibility criteria has been relaxed as companies can now qualify if (1) business operations were fully or partially suspended due to a COVID lockdown order, or (2) the business can demonstrate at least a 20% (down from 50%) decline in gross receipts for a quarter in 2021 when compared to the same quarter in 2019. Another notable change involves PPP loans. Previously, a company that received a PPP loan was not eligible for the ERTC. Now, a company that receives a PPP loan is no longer prohibited from claiming the ERTC so long as the wages were not paid with forgiven PPP loan proceeds. This change is retroactive to March 12, 2020, which means companies that previously received a PPP loan in 2020 can now qualify for the ERTC.

3. Expiration of Mandatory FFCRA Leave

Not included in the Act was an extension of mandated paid leave under the Families First Coronavirus Response Act ("FFCRA"). The FFCRA's provisions, which **required mandatory paid leave for six enumerated scenarios**, expired on December 31, 2020. Therefore, employers are no longer legally obligated to pay FFCRA leave. Despite this, the Act provides an incentive to employers who choose to voluntarily pay leave under the prior FFCRA framework by allowing them to receive a tax credit for leave payments made through March 31, 2021. IRS guidance on the eligible tax credits can be found **here**. In addition, the U.S. Department of Labor ("DOL") published two new FAQs related to expiration issues. **FAQ 104** explains that a worker is no longer entitled to FFCRA leave in 2021 (even if they did not use FFCRA leave in 2020) and **FAQ 105** explains that the expiration of mandatory FFCRA leave does not inhibit the DOL's enforcement authority over leave obligations that existed in 2020 while the FFCRA's paid leave requirements were in effect.

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

- **Legalization of Marijuana; and**
- **Vaccinations – Labor & Employment Considerations**

ACCNJ is targeting late January and/or early February for each topic. Stay tuned for final dates!

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