

CLIENT ALERT SERIES
PART 1

CONSOLIDATED APPROPRIATIONS ACT, 2021
PAYCHECK PROTECTION PROGRAM UPDATES

Authors: Ben Lund, Kevin Haley, Jamie Szal
January 8, 2021

On December 21, 2020, Congress passed the Consolidated Appropriations Act, 2021, which includes further economic stimulus to respond to the COVID-19 pandemic in the form of three acts: the COVID-Related Tax Relief Act of 2020; the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act; and the Taxpayer Certainty and Disaster Tax Relief Act of 2020. President Trump signed the Act into law on December 27, 2020. In addition, on January 6, 2021, the SBA issued two interim final rules governing the Paycheck Protection Program, which are also covered in this Alert.

The Act renews and expands the Paycheck Protection Program and Economic Injury Disaster Loan program that were part of the 2020 CARES Act, and includes several tax measures, some of which echo those of the CARES Act, and others which expand tax relief.

The Act appropriates \$137 billion for “Second Draw” loans. The Act also reopens and extends the original PPP until March 31, 2021, appropriating \$147.45 billion of additional funding for the original program. Of the \$325 billion in aid for small businesses, \$20 billion in EIDL grants have been set aside for vendors in low-income communities; and \$12 billion in PPP funds are set aside for businesses in low-income and minority communities.

Given the length and complexity of the portions of the Act of greatest interest to businesses, we will analyze it in three parts. In this first installment, we outline the changes to the Paycheck Protection Program and Economic Injury Disaster Loans. The team at Brann & Isaacson would be happy to answer any questions you may have about the Act and how it may benefit your business.

Second Draw Loans

Eligible businesses may receive one “second draw” PPP loan of 2.5 times the borrower’s average monthly payroll costs, capped at \$2 million. Businesses that previously received a PPP loan may be eligible for a second draw loan if they have or will have used the full amount of their first PPP loan before their second draw, and meet the following criteria:

1. Businesses that employ not more than 300 employees; or
2. Sole proprietors, independent contractors, and eligible self-employed individuals; *and*

3. Show a 25% gross revenue decline in any 2020 quarter compared with the same quarter in 2019.

The second draw PPP adopts the loan forgiveness from under the original program, but also includes alternate forgiveness criteria. As with the original program, the amount of the loan may be reduced as a result in a reduction in the number of full-time employees during the covered period compared to the applicable periods in 2019

To receive full forgiveness, at least 60% of the funds must still be used on payroll for the covered period. If a borrower uses less than 60% of the loan on payroll costs, the total amount eligible for forgiveness will be:

$$\text{Total Amount Forgiven} = \frac{\text{Total Actual Payroll During Covered Period}}{0.60}$$

The Original PPP Program – Reopened

The original PPP loan program has reopened for businesses that have not yet participated, and will remain open until March 31, 2021, or so long as funds remain available. Businesses with up to 500 employees, or businesses that qualify under the alternative size standards based on NAICS code, who otherwise are eligible under the original program may apply for loans up to the original limit of \$10 million per eligible entity.

Businesses that returned any part of a previous PPP loan may reapply for the returned funds. Businesses which received loans may also apply for increased funding based on changes to the PPP criteria.

Previous guidance from the SBA indicated that borrowers which received loans with an original principal amount of less than \$2 million would be deemed to have made the required certification concerning the necessity of the loan request in good faith. Businesses that received less than \$2 million in funding in the original PPP program will want to consider whether an application for additional funding should be limited to less than \$2 million to benefit from this safe harbor. Brann & Isaacson is happy to discuss the benefits of the safe harbor.

Changes to the PPP

The Act also included several changes from the original PPP. These are retroactive, and apply to funding under both the original and second draw programs, but do not apply to those loans which have already been forgiven.

Changes to Eligibility. The bill changes the criteria for seasonal businesses, allowing them to elect to identify any 12-week period between February 15, 2019 and February 15, 2020 as the base period for calculation purposes. The Act also provides that businesses publicly listed on a national securities exchange are not eligible to receive funding. Businesses that were not in operation on or before February 15, 2020 are not eligible for PPP loans under either program.

Changes to the “Covered Period.” The so-called “covered period” during which the loan must be used has been expanded. It now begins when the loan is originated, and ends on any date selected by the borrower during a period that is between 8 and 24 weeks after the origination date.

Allowable and Forgivable Expenses. The Act expands the type of expenses for which PPP loan proceeds may be used and still qualify for loan forgiveness. Proceeds can be used for rent; payroll (which now is defined to include specific group insurance payments); mortgage interest; utilities; covered worker protection; facility modification expenditures (including PPE) to comply with federal health and safety guidelines; expenditures essential to current operations (notably including software, cloud computing services, and accounting); and costs related to certain identified property damage not covered by insurance.

Exclusion from Income and Deduction of Expenses. In a departure from earlier IRS guidance, expenses paid with forgiven PPP loan funds are now deductible for federal tax purposes. It is important to note that several states (including California, Massachusetts, and New York) have issued guidance that expenses paid with PPP loan proceeds may not be deducted as businesses expenses for purposes of state income taxes.

Loan Forgiveness Application. Borrowers which receive loans of \$150,000 or less will be able to use streamlined forgiveness procedures, with a new, single-page loan forgiveness application to be developed by SBA.

EIDL Revisions. Applicants for the PPP loan program are no longer required to deduct any EIDL loan received to determine the maximum amount of PPP funding.

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On December 21, 2020, Congress passed the Consolidated Appropriations Act, 2021, which includes further economic stimulus to respond to the COVID-19 pandemic in the form of three acts: the COVID-Related Tax Relief Act of 2020; the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act; and the Taxpayer Certainty and Disaster Tax Relief Act of 2020. President Trump signed the Act into law on December 27, 2020. In addition, on January 6, 2021, the SBA issued two interim final rules governing the Paycheck Protection Program, which are also covered in this Alert.

The Act renews and expands the Paycheck Protection Program and Economic Injury Disaster Loan program that were part of the 2020 CARES Act, and includes several tax measures, some of which echo those of the CARES Act, and others which expand tax relief.

In this second installment, we describe some of the provisions of the Act of interest to employers. The team at Brann & Isaacson would be happy to answer any questions you may have about the Act and how it may benefit your business.

Employee Payroll Tax Withholding

In August 2020, the President issued an executive order permitting employers to defer employee payroll tax withholding during the period from September 1 through December 31, 2020. The executive order provided that employers would withhold the deferred taxes ratably between January 1, 2021 and April 31, 2021. The Act extends the time for repayment until December 31, 2021.

Employer Tax Credits

The Families First Coronavirus Response Act provided refundable tax credits for employers who provide paid sick and family leave related to the pandemic. The Act extends these benefits through the end of March, 2021. The Act does not extend the obligation of employers to provide the paid leave through March, 2021, but the Act allows employers to take advantage of FFCRA tax credits on any wages paid through March 31, 2021 in connection with leave that was taken prior to the December 31 expiration date. Self-employed individuals may use their average daily self-employment income from 2019 to compute the credit for which they are eligible.

The Act also expands the CARES Act Employee Retention Tax Credit in the following ways:

- Extends the covered period through June 30, 2021.
- Increases the percentage of credit allowable, from 50% to 70%, effectively increasing the total allowable per employee credit from \$5,000 to \$14,000.
- Increases the per-employee limitation from \$10,000 (total, aggregating all calendar quarters) to \$10,000 per calendar quarter.
- Increases the threshold of business loss that allows a business to be deemed an “eligible employer” by reducing business loss from a 50% reduction to a 20% reduction.
- Increases the threshold for employers to be treated as a large employer from 100 or more full time employees, to 500 or more full time employees.

For 2021, employers may elect to compare business losses to the immediately preceding calendar quarter, rather than the same quarter in the previous calendar year.

Small employers (less than 500 full time employees) may be eligible to elect an advance payment of the credit up to 70% of the average quarterly wages paid in 2019. To the extent of any advance payment, the credit allowed shall be reduced. Seasonal employers may elect to calculate eligible wages based on the average quarterly wages paid by the employer in calendar 2019. Regulations will be published on the procedures for these elections by small employers.

Amounts paid by eligible employers to provide and maintain group health plans are eligible for the credit, to the extent that the amounts are excluded from the gross income of employees.

Finally, the Act clarifies that borrowers who receive PPP funds remain eligible to claim the Employee Retention Credit, but qualifying wages for the PPP loan forgiveness and the ERC must be tracked separately.

CLIENT ALERT

CONSOLIDATED APPROPRIATIONS ACT, 2021

Authors: Ben Lund, Kevin Haley, Jamie Szal
January 27, 2021

On December 21, 2020, Congress passed the Consolidated Appropriations Act, 2021, which includes further economic stimulus to respond to the COVID-19 pandemic in the form of three acts: the COVID-Related Tax Relief Act of 2020; the Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act; and the Taxpayer Certainty and Disaster Tax Relief Act of 2020. The President signed the Act into law on December 27, 2020. In addition, on January 6, 2021, the SBA issued two interim final rules governing the Paycheck Protection Program.

The Act renews and expands the Paycheck Protection Program and Economic Injury Disaster Loan program that were part of the 2020 CARES Act, and includes several tax measures, some of which echo those of the CARES Act, and others of which expand tax relief.

Given the length and complexity of the portions of the Act of greatest interest to businesses, we have analyzed it in three parts. In this third installment, we outline the miscellaneous tax provisions included in the Act not directly related to the PPP or employee retention provisions. The team at Brann & Isaacson would be happy to answer any questions you may have about the Act and how it may benefit your business.

Other Tax Provisions

The Act extends the unemployment insurance compensation benefits from the CARES Act (currently due to expire December 26) for a further 11 weeks. The benefits are now due to expire March 14, 2021.

Business expenses for food and beverage provided at a restaurant, incurred between January 1, 2021 – December 31, 2022, will be fully deductible. These expenses will not be subject to the 50% limitation otherwise applicable to meals and entertainment expenses. Business expenses for meals provided by vendors other than a restaurant are not eligible for the expanded deduction; they remain subject to the 50% limitation.

Health and dependent care Flexible Savings Account balances can be rolled from 2020 into 2021, and 2021 balances can be rolled into 2022.

Personal protective equipment purchases paid or incurred after March 12, 2020 qualify for purposes of the Internal Revenue Code § 62(a)(2)(D)(ii) educator expense deduction.

The CARES Act permitted employers to contribute up to \$5,250 annually toward student loans without having those payments included in the employee's income. This benefit, which was set to expire on December 31, 2020, has been extended through December 31, 2025. The Act extends the phaseout limits on the lifetime learning credit, but eliminates the deduction under Internal Revenue Code § 222 for qualified tuition and related expenses.

Individual taxpayers who do not itemize their income tax deductions are nonetheless able to deduct cash charitable contributions in the amount of \$300 per individual (\$600 per joint return). The Act extends the temporary modifications to the limitation on charitable contributions of individuals who itemize through 2021.

For more information about changes to work opportunity credit, empowerment zone tax incentives, low-income housing tax credits, and renewable energy extensions, please reach out to the team at B&I.