

COVID-19

YEAR-END STIMULUS LEGISLATION PROVIDES PPP ENHANCEMENTS AND OTHER COVID-19 RELIEF

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Congress has passed, and President Trump is expected to sign, the Consolidated Appropriations Act, 2021, a large year-end appropriations bill that includes COVID-19-related stimulus and relief provisions in several key areas, including the PPP loan program, paid leave tax credits, unemployment benefits, and the Provider Relief Fund. The following summarizes key highlights from the new legislation.

PAYCHECK PROTECTION PROGRAM (PPP)

The legislation contains several provisions impacting the PPP loan program that was established in March 2020 under the CARES Act, including:

- **Allowing PPP borrowers to deduct expenses paid with PPP funds.** This provision reverses the position taken by the IRS earlier this year and allows PPP borrowers to claim a federal income tax deduction for expenses paid with the proceeds of a PPP loan, even if the loan has been (or will be) forgiven. (Expenses must otherwise be deductible under general standards for claiming business expense deductions.)
- **Providing a second round of PPP loans for businesses that have been hit hardest by COVID-19.** Eligibility for the “second draw” loan program is limited to businesses with 300 or fewer employees that have sustained a 25% revenue loss in any quarter of 2020 relative to the same quarter in 2019. The maximum loan amount is the lesser of \$2 million or 2.5 times average monthly payroll in the prior year.
- **Adding eligible organizations to the PPP loan program.** 501(c)(6) organizations, such as local chambers of commerce, economic development organizations, and tourism offices, that have 300 or fewer employees and are not lobbying organizations are now eligible to obtain PPP loans. Certain news and broadcast media

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organizations have been made eligible for PPP loans as well.

- **Expanding the categories of forgivable expenses for which a PPP loan may be used.** Forgivable expenses under the second round loan program are expanded to include covered operation costs (software, cloud computing, and other human resources and accounting needs), property damage costs due to public disturbances that occurred during 2020 but are not covered by insurance, supplier costs, and PPE expenditures for workers. Borrowers must continue to use at least 60% of PPP loan proceeds for payroll costs to be eligible for full forgiveness of the loan.
- **Simplifying the PPP loan forgiveness process for loans of \$150,000 or less.** Under this new simplified process, the borrower signs and submits a one-page certification that requires the borrower to list the loan amount, the number of employees retained, and the estimated total amount of the loan spent on payroll costs. The SBA must provide this form within 24 days of enactment.
- **Eliminating the requirement to deduct an EIDL advance from the PPP loan forgiveness amount.** Under the CARES Act, an Economic Injury Disaster Loan (EIDL) advance (up to \$10,000) was required to be deducted from the PPP loan forgiveness amount.

OTHER TAX RELIEF

In addition to permitting deductions for business expenses paid with PPP loan proceeds, the legislation adds or extends other federal income tax relief, including:

- **Deduction of business expenses for certain meals.** The 2017 Tax Cuts and Jobs Act limited the deductibility of many business meal expenses to 50%. The new legislation partially modifies this provision and allows businesses to fully deduct meals provided by a restaurant during 2021 and 2022.
- **Temporary special rules for health and dependent care flexible spending arrangements.** Many employees participating in flexible spending account plans found themselves unable to use all of the contributions they made for 2020, due to the pandemic. The legislation permits an employer to modify a cafeteria plan to allow employees to carry over any unused amounts in a health or dependent care flexible spending account from the plan year ending in 2020 to the plan year ending in 2021 and from the plan year ending in 2021 to the plan year ending in 2022. There is no dollar limit on the carryover amount. Employers may also do the following: (1) extend the grace period for a plan year ending in 2020 or 2021 for up to 12 months after the end of such plan year, and (2) allow employees to make a mid-year prospective change in contribution amounts (not in excess of statutory limits) for plan years ending in 2021, regardless of whether a qualifying change in status has occurred. These changes are optional and would need to be implemented by plan amendment.
- **Enhancement of the employee retention tax credit.** The employee retention tax credit is a refundable tax credit against certain employment taxes equal to a portion of the qualified wages an eligible employer pays to employees. The credit is available to employers that experience either (1) the full or partial suspension of the operation of their trade or business during any calendar quarter because of governmental orders limiting commerce, travel, or group meetings due to COVID-19, or (2) a significant decline in gross receipts.

As originally enacted, the credit was only available for 50% of up to \$10,000 in qualified wages per employee paid through Dec. 31, 2020. The legislation extends the credit from Jan. 1, 2021 through June 30, 2021 and, for that period, increases the credit rate to 70% of qualified wages, and increases the per-employee limit on creditable wages to \$10,000 in qualifying wages per quarter (not per year).

Example: An eligible employer pays an employee “qualified wages” of \$5,000 per month (\$60,000 per year) during the period from Jan. 1, 2021 through June 30, 2021. Because the employer will be paying at least \$10,000 in qualifying wages per quarter during the first 6 months of 2021, the employer will be able to claim a credit equal to \$7,000 per quarter (70% of \$10,000), for a total credit of \$14,000 for the employee during the period from Jan. 1, 2021 through June 30, 2021.

The legislation also provides that, from Jan. 1, 2021, through June 30, 2021, an employer that has 500 or fewer full-time employees may count as “qualified wages” any wages paid to an employee during the period operations

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were suspended or the period of the decline in gross receipts, regardless of whether the employee is providing services. (Larger employers may only count wages paid to employees who are not providing services.)

Employers that obtain PPP loans will qualify for the employee retention credit with respect to wages that are not paid with forgiven PPP loan proceeds.

FFCRA PAID LEAVE AND TAX CREDITS

The Families First Coronavirus Response Act (FFCRA) mandated that certain employers provide additional paid leave benefits to employees who needed qualifying leave related to COVID-19. This included up to 80 hours of emergency paid sick leave (EPSL) and up to 10 weeks of paid emergency family and medical leave (EFML).

The new legislation does *not* extend the FFCRA paid leave mandates. Both mandates will expire on Dec. 31, 2020, as provided under the FFCRA.

However, the tax credit provisions for both types of leave have been extended through Mar. 31, 2021. Eligible employers (private sector employers with fewer than 500 employees) may *voluntarily* offer EPSL and paid EFML through Mar. 31, 2021, and may obtain a payroll tax credit to be reimbursed for the paid leave.

The criteria for creditable leave are generally unchanged, except for the extension to Mar. 31, 2021. Thus, for example, there is still a maximum of 80 hours of creditable EPSL available and a maximum of 10 weeks of creditable paid EFML available. The maximum creditable leave amounts do not reset at the beginning of 2021. Employees would need to complete appropriate documentation requesting and substantiating the leave, if offered. Governmental employers continue to be ineligible for the tax credits.

An employer could voluntarily offer paid leave that goes beyond the 80 hours of creditable EPSL and 10 weeks of creditable paid EFML, but any such paid leave would be ineligible for the tax credits

INDIVIDUAL STIMULUS PAYMENTS

The legislation authorizes a second round of individual stimulus payments. Households may receive up to \$600 for each adult (maximum of \$1,200) and \$600 for each dependent child. Eligibility for payments would begin to phase out for individuals with adjusted gross income of more than \$75,000 (\$150,000 for married couples), phasing out completely at \$87,000 (\$174,000 for married couples). Eligibility will initially be based on income levels and dependents during 2019, but households with lower income or additional dependents in 2020 may be able to request additional payments when filing their 2020 income tax returns.

SUPPLEMENTAL UNEMPLOYMENT BENEFITS

The legislation provides supplemental federal unemployment benefits of \$300 per week for weeks of unemployment beginning after Dec. 26, 2020, and ending on or before Mar. 14, 2021. This replaces the supplemental federal unemployment benefits of \$600 per week that expired July 31, 2020.

PROVIDER RELIEF FUND

The legislation appropriates additional funds for the Provider Relief Fund (PRF), which assists healthcare providers that have been impacted by the COVID-19 pandemic. The legislation modifies PRF reporting guidelines by clarifying lost revenue calculations to permit determining lost revenues by comparing actual and budgeted revenues, if budgeted revenues were established and approved before Mar. 27, 2020. The legislation further clarifies that PRF dollars can be used for construction of temporary structures, leasing of properties, medical supplies and equipment (including personal protective equipment and testing supplies), increased workforce and trainings, emergency operation centers, retrofitting facilities, and surge capacity.

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SURPRISE MEDICAL BILLING

The legislation includes the “No Surprises Act,” which addresses the issue of balance billing by healthcare providers that are out-of-network with a health plan. In general, this legislation requires the determination of patient deductibles, coinsurance, and other cost-sharing based on in-network payment rates and establishes a process for out-of-network healthcare providers and health plans to determine the amount of reimbursement payable by the health plan, including a “baseball-style” arbitration process to be followed if the reimbursement amount cannot be determined by agreement.

MORE TO COME

The text of this legislation runs more than 5,500 pages and contains detailed provisions addressing funding, stimulus, and relief measures across many industries and sectors of the economy. We expect to learn much more about the details and nuances of the legislation as the provisions are dissected and interpretive guidance is issued in the weeks and months to come.

FOR MORE INFORMATION

If you have questions or want more information about the Consolidated Appropriations Act, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. For more information, contact **Jason Lacey** at 316.291.9756 or jlacey@foulston.com. For more information on the firm, please visit our website at www.foulston.com.

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