January 20, 2021

Client Letter: New COVID-19 Law – Consolidated Appropriations Act, 2021

Dear Valued LattaHarris Client:

The Consolidated Appropriations Act, 2021 (the CAA, 2021) was signed into law on December 27, 2020 and is a further legislative response to the coronavirus (COVID-19) pandemic. The more than 5,500 page law contains numerous provisions that relate either directly or indirectly to payroll. The CAA generally extends and expands previous provisions found in the Families First Coronavirus Relief Act (FFCRA) and Coronavirus Aid, Relief and Economic Security (CARES) Act, which were signed into law in March of 2020. Below I have tried to recap some of the more commonly applicable or interesting items:

Paycheck Protection Program Second Draw Loans

Certain small businesses who received a Paycheck Protection Program (PPP) loan and experienced a 25% reduction in gross receipts can take a second PPP loan of up to $2 million (was $10 million Draw-1). The purpose is to inspire business owners to continue to pay payroll. If a business was not in operation before 2/15/2020, they are not considered eligible for PPP 1st or 2nd draw loans. You must have received a Draw-1 loan to qualify for this new 2nd draw. Draw-1 has also opened back up if you either did not apply or circumstances are that you could have received a larger loan, you can now apply for a new or adjusted Draw-1 loan (if you've already received forgiveness from the SBA, you are not eligible to file for an adjusted draw-1 loan amount). For these 2nd draw loans, prior PPP borrowers must meet the following conditions to be eligible: (1) employ no more than 300 employees per physical location (was 500 in Draw-1), (2) have or will use the full amount of their first PPP loan; and (3) show at least a 25% reduction in gross receipts in any quarters of 2020 relative to the same 2019 quarter or you can show an overall reduction of 25% or more for the entire year 2020 compared to 2019.

Eligible entities for the loans include for-profit businesses, certain non-profit organizations, veterans' organizations, tribal businesses, self-employed individuals, sole proprietors, independent contractors, and small agricultural co-operatives. Eligibility was also extended to housing cooperatives, news organizations, 501c6s and marketing organizations. You are not eligible for the PPP if you have or will receive a Shuttered Venue Operator grant from the SBA.

Loan amount. The same 2.5x average monthly payroll costs applies for all 1st draw applicants and most 2nd draws. If you are a NAICS 72 code employer (accommodation and food services), you are allowed 3.5x average monthly payroll cost for a second draw loan. Loan limits are $10 million and $2 million for the 1st and 2nd draws respectively.

Employee Retention Credit (ERC). A great change to the PPP and ERC is that they are no longer mutually exclusive (prior to now, if you had either of these, you were disqualified for the other). This change is for 2021 as well as is retroactive for 2020. It is imperative that you do not use the same payroll dollars for ERC and PPP forgiveness – no double-dipping. More on the ERC later in this mailing.

Loan forgiveness. As with the first PPP loan, the second loan can be 100% forgivable if it is used for payroll costs (with some exceptions) of up to 60% and non-payroll costs (i.e., rent, mortgage, interest and utilities) of up to 40%. There is a welcoming change to the covered period - originally either an 8 week period or 24 week period. Now the covered period can be any period between the 8 and 24 week mark. Other big news is that an EIDL Grant is no longer a reduction from forgiveness (if you've already filed for forgiveness, guidance on a refund is still forthcoming). There is also a new streamlined form for loans equal to or less than $150,000.

Taxability: The big news from this legislation is that we finally received clarification on the complete tax treatment of forgiveness (same for both the original round and this new round of PPP). We have known for months that the actual income from the debt forgiveness was not taxable but the IRS was holding strong to current tax law that the associated expenses that were used in receiving non-taxable debt forgiveness could not then be used as an expense for tax purposes. Within the CAA it has been addressed that both the debt forgiveness would not be treated as taxable income and the related expenses used in the forgiveness calculation will also remain tax deductible expenses.

Additional PPP loan expenses. Allowable payroll expenses now include premiums for group life, disability, vision and dental insurance. Allowable non-payroll cost now include "covered": operation expenditures, property damage costs, supply costs and work protection expenditures.

Definition of seasonal employer. The definition of a seasonal employer was also better clarified. A seasonal employer eligible recipient must: (1) operate for no more than seven months in a year and (2) earn no more than 1/3 of its receipts in any six months in the prior calendar year.

PPP and Farms/Agribusiness. The SBA issued Interim Final Rules (IFR) last week that for the first time addresses farmers regarding the PPP (9 months later). Originally for self-employed Schedule F farmers, the same rules applied to all 1040 Schedule C & F self-employed filers regarding using <u>net income</u> for your qualified loan amount. With this IFR, Schedule-F farmers can now use <u>Gross Income</u> (line 9 of Schedule-F) in calculating the self-employee share up to $20,833 allowed maximum. If there are also W2 employees, these employees are then also included using the same 2.5x rules and limitations as prior. Thus any 1040 farms with net income less than $100,000 can benefit from this new change. It is still unclear if a farmer that did not originally apply for the first draw can now apply for draw-1 under this new guidance (actual wording sounds like you cannot but still waiting on clarification from the SBA). If you have already received formal forgiveness from the SBA, you are not eligible to update the first draw loan.

Risk Factors: It has been a heightened part of conversation that the SBA is going to put efforts towards making certain this new round of funding is being requested and used by businesses for the intended purpose of keeping employees employed in business where: "current economic uncertainly makes this loan request necessary to support ongoing operations of the Applicant". In October the SBA released a loan necessity questionnaire for draw-1 loans >$2 million that looked at both (1) condition at time of application and (2) actual experience after received loan. The CAA also funded the SBA $50 million for PPP auditing and fraud mitigation purposes. It is actually recommended that a new applicant first reads the Representations, Authorizations, and Certifications section of the application to ensure they are comfortable attesting to the items on this page prior to putting time into gathering data, making calculations, etc. for the front page.

Employee Retention Credit Expansion and Extension

Under the CARES Act, the Employee Retention Credit (ERC) provides a refundable payroll tax credit for 50% of qualified wages of up to $10,000 per employee for a maximum credit of $5,000 per employee. Qualifications included full or partial suspension of business due to government order; or significant decline (50%) in gross receipts compared to same quarter in 2019.

The CAA extends and expands the following ERC provisions from January 1, 2021 through June 30, 2021: (1) increases the ERC rate from 50% to 70% of qualified wages; (2) expands the eligibility for the credit by reducing the required year-over-year gross receipts decline from 50% to 20% and provides a safe harbor allowing employers to use prior quarter gross receipts to determine eligibility; (3) increases the limit on per-employee creditable wages from $10,000 for the year to $10,000 for <u>each quarter</u>; (4) increases the 100-employee delineation for determining the relevant qualified wage base to employers with 500 or fewer employees; (5) allows certain public instrumentalities to claim the credit; (6) removes the 30-day wage limitation, allowing employers to, for example, claim the credit for bonus pay to essential workers; (6) allows businesses with 500 or fewer employees to advance the credit at any point during the quarter based on wages paid in the same quarter in a previous year; and (7) provides rules to allow new employers who were not in existence for all or part of 2019 to be able to claim the credit.

The new clarifications allow for group health expense to be treated as qualified wages. The most significant change for 2020 (as well now for 2021) is that you are now eligible to have both a PPP and ERC and you are allowed to retroactively claim a 2020 credit. As mentioned earlier, you cannot use the same payroll dollars (same period) for both programs so this definitely becomes a qualifying factor. Note, there are several very specific frequently asked questions that the IRS has answered that are directed mostly to the point that this credit was intended to help business that COVID significantly impacted – did COVID have only a “nominal” effect. A good example is that a government order to fully or partially close or modify operations does NOT guarantee eligibility - i.e. Restaurant required to space tables out and modify business operations; large enough to still accommodate all customers; NOT qualified as government order did not have more than a “nominal” effect on its operation

Economic Injury Disaster Loan (EIDL)

As mentioned above, the biggest news on the EIDL is that the grant portion is no longer a deduction from your PPP forgiveness amount. If you already filed for forgiveness, direction for getting this amount refunded are forthcoming. The grant amount is also treated the same as the PPP in that it has no adverse tax implications.

The EIDL is opening back up for new funding with a $20 billion budget. The grants are being referred to as “targeted” EIDL grants (or at least that is where the initial focus is). If you qualified earlier in the year but did not receive the full $10,000 grant, you may be eligible to reapply now and receive up to the $10,000 cumulatively. As of now, it appears that only businesses that previously applied for an EIDL advance (didn't receive full $10,000 or funds were no longer available when you applied) and meet both the original CARES Act qualification and the new targeted criteria will be eligible for this latest funding. The new targeted criteria are: be located in a low-income community; and suffered greater than 30% loss in an 8-week period; and employ not more than 300 employees. Currently, the SBA is saying they will reach out to you if eligible.

This one seems to be changing rapidly and still has some conflicting guidance and interpretations so likely will continue to evolve with time. I wanted to just give a general acknowledgement that there is something new regarding the EIDL.

Extension of Paid Sick and Family Leave Credits

The CAA extends the refundable tax credits available to employers who provide paid sick and family leave related to the COVID-19 pandemic as enacted in the FFCRA through March 31, 2021, and extends the corresponding employer mandates through the end of March 2021. The maximum payment amounts per employee do not restart with the carryover.

Adjustments to provisions for self-employed individuals. Section 287 similarly extends the credits available to self-employed individuals, and allows them to use their reported wages from tax year 2019 instead of tax year 2020 to compute the credit.

Technical adjustments to definitions and taxability for paid sick and family leave. Section 288 aligns the definitions of qualified wages for paid sick and family leave with the IRC and excludes leave payments from employer Social Security employment taxes.

Extension of Certain Deferred Payroll Taxes

On August 8, 2020, President Trump signed a Presidential Memorandum directing Treasury Secretary Mnuchin to permit the postponement of the withholding, deposit, and payment of the employee's share of Social Security tax (6.2%), as well as the employee's share of Railroad Retirement Tax Act (RRTA) Tier 1 taxes on wages and compensation paid from September 1, 2020 through December 31, 2020 for employees whose amount of wages or compensation, payable during any biweekly pay period generally is less than $4,000, or the equivalent amount with respect to other pay periods. If you participated in this program, the repayment period of the deferred employee taxes is now extended through December 31, 2021. It also provides that penalties and interest will not begin to accrue on the deferred amounts until January 1, 2022.

Unemployment Extensions

The FFCRA and CARES Act both contained unemployment-related provisions. Most notably, COVID-19 relief included the addition of $600 per week in pandemic unemployment compensation through July 31, 2020. This was partially extended by an August 8, 2020 Presidential Memorandum that created a "Lost Wages Assistance" program from August 1, 2020 through December 27, 2020. The ACRR extends and expands on several of the unemployment provisions from the FFCRA and CARES Act.

Extension of pandemic unemployment compensation. Section 203 of the ACRR restores the Federal Pandemic Unemployment Compensation (FPUC) supplement to all state and federal unemployment benefits at $300 per week, starting after December 26, 2020 and ending March 14, 2021.

Pandemic Unemployment Assistance. Section 201 of the bill extends Pandemic Unemployment Assistance (PUA) to March 14, 2021 and allows individuals receiving benefits as of March 14, 2021 to continue through April 5, 2021, as long as the individual has not reached the maximum number of weeks. It also increases the number of weeks of benefits an individual may claim from 39 to 50.

Extension of relief to reimbursing employers (i.e., governmental entities and nonprofit organizations). Section 202 extends through March 14, 2021, a provision in the CARES Act which amended the Families First Coronavirus Response Act to provide federal support to cover 50% of the costs of unemployment benefits for employees of state and local governments and non-profit organizations.

Extension of no waiting week for benefits. Section 204 extends through March 14, 2021 the CARES Act provision which reimbursed states for the cost of waiving the "waiting week" for regular unemployment compensation. It sets the reimbursement percentage for weeks ending after December 26, 2020 at 50%.

Return to work reporting. Section 251 requires states (30 days after enactment) to have methods in place to address situations when claimants of unemployment compensation refuse to return to work or refuse to accept an offer of suitable work without good cause.

Temporary assistance for states with advances. Section 221 extends through March 14, 2021 the accumulation of interest on federal loans states have taken in order to pay state unemployment benefits. The loans allow states with low balances in their unemployment trust funds to delay employer tax increases or other employer surcharges while the economy is struggling.

Other Provisions Related to Payroll

Airline worker support extension. Section 4113 of the CARES Act authorizes the Treasury Department to provide payments to passenger air carriers, cargo air carriers, and certain contractors exclusively for the continuation of payments of employee wages, salaries, and benefits, known as the Payroll Support Program (PSP).

The CAA includes an extension of the PSP for a four-month period, from December 1, 2020 through March 31, 2021. The financial assistance for employee wages, salaries and benefits is an aggregate amount of $15 billion for passenger air carriers and $1 billion in aggregate for contractors.

Immigration extension. The CAA also includes a provision regarding the H-2B visa program, which permits employers to temporarily hire non-immigrants to perform non-agricultural labor or services in the United States. The increase may not be more than the highest number of H-2B non-immigrants who participated in the H-2B returning worker program in any fiscal year in which returning workers were exempt from such numerical limitation.

Minimum age for distributions during working retirement. Section 208 of the TCDTR discusses the minimum age for distributions during working retirement. Specifically, it reduces the age from 59 and one-half to 55 for certain employees in the building and construction industry in the case of a multi-employer plan described in Code Sec. 4203(b)(1)(B)(i) of the Employee Retirement Income Security Act of 1974.

Payroll-Related Tax Extenders

Work Opportunity Tax Credit. Section 113 of the TCDTR extends the work opportunity tax credit through 2025. The amendment applies to individuals who begin work for their employer after December 31, 2020.

Employer tax credit for paid family and medical leave. Section 119 of the TCDTR extends the credit allowing eligible employers to claim a general business credit on their 2018 and 2019 income tax returns based on wages paid to qualifying employees while they are on family and medical leave through 2025, applying to wages paid in tax years beginning after December 31, 2020. Note, this is different from the COVID related paid leave programs.

Exclusion for certain employer payments of student loans. Section 120 of the TCDTR extends the up to $5,250 exclusion from employee income for educational assistance provided for under an employer's qualified educational assistance program through 2025.

Indian employment credit. Section 135 of the TCDTR extends the credit on the first $20,000 of qualified wages and qualified employee health insurance costs paid to or incurred by the employer with respect to each qualified employee who works on an Indian reservation by one year, through December 31, 2021, applicable to tax years beginning after December 31, 2020.

Temporary allowance of full deduction for business meals. Section 210 of the TCDTR amends Code Sec. 274(n)(2) to allow for full deduction of expenses for food and beverages paid or incurred to a restaurant after December 31, 2020 and prior to January 1, 2023. The credit was limited to 50% from December 31, 2017 through December 31, 2025.

The above recaps are made with the intentions of trying to highlight some of the more common items from the new Consolidated Appropriations Act, 2021 – Not all items and topics within the Act were addressed. Each individual program has several additional qualifying and limiting components that were not addressed in this summary. Some of this information and interpretations may end up as inaccurate or incomplete as we receive updated guidance and final interpretations from the Treasury, IRS and SBA. The information contained within this writing is provided for informational purposes only, and should not be construed as tax advice on any subject matter. You should not act or refrain from acting on the basis of any content included in this writing.

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FOCUSED ON YOUR SUCCESS,

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