

THE CONSOLIDATED APPROPRIATIONS ACT – ANOTHER COVID-19 RELIEF PACKAGE FOR EMPLOYERS TO FOLLOW



By Bob Dunlevey and Nadia A. Lampton

With the Families First Coronavirus Response Act expiration and other federal coronavirus relief packages and incentives nearing termination, people and

businesses alike have been eagerly awaiting Congress to extend these expiration dates or offer additional guidance with respect to COVID-19-related issues. In typical last-minute fashion, Congress passed another stimulus bill providing for a second round of direct payments to individuals, but also addressing several other soon-to-expire programs, incentives, and tax issues employers should be following. President Trump raised several concerns over the bill related to excessive spending and deficient individual stimulus payment amounts, but ultimately signed the bill – H.R. 133, the Consolidated Appropriations Act, 2021 (the CAA) – into law on December 27, 2020. Here is what employers need to know about the new CAA.

PPP Loans

Under the original Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), Congress provided forgivable loans administered by the Small Business Administration (SBA) under the Paycheck Protection Program (PPP). The recent legislation passed by Congress extends this program, but makes a few changes. Under the CAA, businesses may be eligible for a Second Draw PPP loan if the business has (1) 300 or fewer employees, (2) used or will use the full amount provided by its first PPP loan, and (3) shown a 25% gross revenue reduction in any 2020 quarter as compared to the same quarter in 2019. If an application is submitted on or after January 1, 2021, the business may use the fourth quarter of 2020 to meet the gross revenue reduction element.

Under the CARES Act, the IRS ruled that employers were not able to deduct certain expenses if paid with PPP loans. But the CAA clarifies that employers are permitted to deduct certain employment expenses even when they are paid with the PPP loan. It also expands qualifying expenses to include the following:

- Costs to operate software, cloud computing, human resources, and accounting needs;
- Costs paid to suppliers for expenditures essential to business operations;

- Expenditures for covered worker protection, including expenditures made in order to comply with relevant federal, state, and local law regarding health and safety; and
- Property damage costs caused by disturbances which occurred during 2020 and are not otherwise covered by insurance.

Eligible businesses may also receive up to 2.5 times their average monthly payroll costs using either a 12-month look-back period or the year 2019. However, businesses in the restaurant and hospitality industries are eligible to 3.5 times their average payroll costs. Loans given this time around will not exceed \$2 million.

The Families First Coronavirus Response Act

The CAA also provides that certain paid leave obligations are no longer mandatory, but may continue at the employer's option. Specifically, the FFCRA required employers to provide Emergency Paid Sick Leave ("E-PSL") and Expanded Family and Medical Leave ("E-FMLA") to employees affected by the virus. To recap, an employee qualifies for paid leave under the FFCRA if the employee is unable to work (or telework) due to a need for leave because the employee:

- is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- has been advised by a health care provider to self-quarantine due to COVID-19;
- is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
- is caring for a child whose school or place of care is closed (or child care provider is unavailable) for reasons related to COVID-19; or
- is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

The FFCRA expires on December 31, 2020. The CAA does not extend the FFCRA's expiration date, but gives employers the option to continue to provide E-PSL and E-FMLA in accordance with the FFCRA framework. Employers who elect to continue providing this paid leave after December 31, 2020 can claim the tax credit until March 31, 2021. Employers should be mindful that even if they do not exercise the option to continue to provide E-PSL or E-FMLA, employers continue to have job restoration, documentation and lengthy recordkeeping obligations related to leave requests made prior to the FFCRA's expiration.

Individual Provisions and Other Tax Incentives

The highly-anticipated CAA provides for a second round of direct payments to individuals, which is modeled closely after the first round of stimulus funds distributed under the CARES Act. The CAA provides for direct payments up to \$600 per individual and per qualified child, with no cap on household size. The direct payments may be reduced or eliminated for certain individuals based on higher income levels.

The CAA also expanded the deduction businesses can take for business meals to 100% for 2021 and 2022. The Employee Retention Tax Credit has also been extended through July 1, 2021 and increased the refundable payroll tax credit from a maximum of \$5,000 to \$14,000 by altering the calculation method to 70% of wages paid up to \$10,000 for any quarter. The CAA also clarified that businesses will be able to take the Employee Retention Tax Credit and participate in the PPP. The CAA addressed flexible savings accounts, too, by permitting balances to roll from the 2020 tax year into the 2021 tax year and 2021 balances to roll into 2022. The CAA also extended the repayment deadline from April 2021 to December 21, 2021, for those participating in the employee-side payroll tax deferral program.

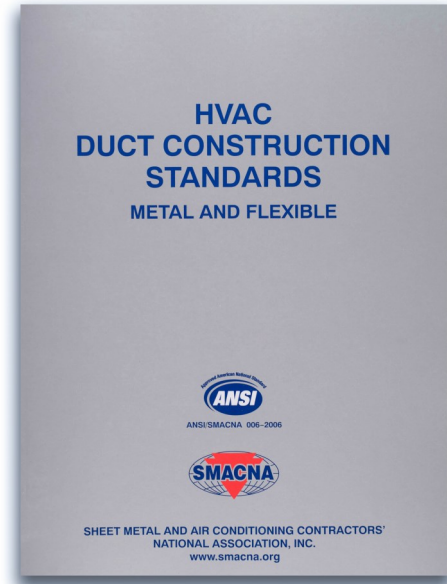
Unemployment and haredWork Programs

The 5,593-page CAA also addresses various other relief packages and programs, including SharedWork and unemployment programs. Recall that the CARES Act provided for federal funding of SharedWork programs until December 31, 2020, which are layoff aversion programs that allow for employees to work a reduced schedule and receive unemployment benefits proportionate to their reduced hours as an alternative to implementing layoffs. Under the CAA, the federal funding for SharedWork programs is extended until March 14, 2021. The CAA also extends the Pandemic Unemployment Assistance, the Pandemic Emergency Unemployment Compensation and the Federal Pandemic Unemployment Compensation programs until March 14, 2021. However, this federally-funded additional unemployment amount has been reduced from an additional \$600 per week to \$300 per week.

While the above guidance will assist employers in dealing with these complicated issues, please be reminded that this is an overview of developing legal issues and is not intended to be and should not be construed as legal advice. For more specific information, please contact Nadia A. Lampton, Board Certified Specialist in Labor and Employment Law, at (937) 641-2055.

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