This article presents general guidelines for Georgia nonprofit organizations as of the date written and should not be construed as legal advice. Always consult an attorney to address your particular situation.

"Covid Relief" at the End of 2020: What Small Community-Based §501(c)(3) Nonprofits Need to Know

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On December 27, 2020, the Consolidated Appropriations Act ("CAA") was signed into law. As the law's title suggests, it includes a wide variety of new programs, additional programs and changes to existing law. This article will cover many of the important programs and changes applicable to small, community-based §501(c)(3) nonprofit organizations. Please note, however, this information applies as of the date of this article and may change based on future rules. In addition, it is highly likely that Treasury will put out FAQs over the next several months further clarifying the CAA provisions.

Paycheck Protection Program ("PPP") – Forgiveness Changes, Initial PPP Extended and Expanded and Round 2

Initial PPP Loan Forgiveness Change – Loans $150,000 or Less

The CAA creates a simplified loan forgiveness application process for initial PPP loans not greater than $150,000. Borrowers will receive forgiveness if they provide their lender with a one-page certification that includes (a) a description of the number of employees the borrower was able to retain because of the PPP loan, (b) the estimated total amount of the loan spent on payroll costs, and (c) the total loan value. As part of the certification, borrowers must sign an attestation that they accurately provided information, complied with the applicable requirements, and plan to retain records for the required period. Records related to employment must be retained for four years and other records for three years.

The Small Business Administration ("SBA") may review and audit these loans to check for fraud, ineligibility, or other material noncompliance with applicable loan or loan forgiveness requirements. This Form should be available before the end of January. The SBA may not require additional materials beyond the certification form, unless necessary for evidence of revenue loss or to satisfy other requirements. So, if you obtained an initial PPP loan for $150,000 or less and have not filed your loan forgiveness paperwork, you should wait until this new form is released.

Initial PPP – Extensions and Application Changes

Initial PPP loan applications have been extended and may be filed through March 31, 2021. In addition, the CAA is requiring the SBA to establish a one-page application for initial PPP loans under $150,000.

Changes to the General Requirements for All Initial PPP Loans (and Second Draw PPP Loans) that have not been Forgiven

The main aspects of the initial PPP remain intact and information involving the initial PPP can be found here. The changes are described below.

- While the 60/40 split on paying payroll expenses and non-payroll expenses continues, what is included as payroll expenses and non-payroll expenses has expanded.

- "Payroll Costs" is expanded to include group life, disability, vision, and dental insurance.

- "Non-payroll Costs" is expanded to include:
  - Covered Operations Expenditures. Payments for any business software or cloud computing service that facilitates business operations, product or service delivery, the processing, payment, or tracking of payroll expenses, human resources, sales and billing functions, or accounting or tracking of supplies, inventory, records and expenses.
  - Covered Worker Protection and Facility Modification Expenditures. Operating or capital expenditures to help adapt business activities to comply with COVID-19 federal health and safety guidelines, such as expenses related to sanitation, social distancing, personal protective equipment, physical barriers such as sneeze guards, an expansion of indoor, outdoor, or combined business space, or an onsite or offsite health screening capability.
  - Covered Property Damage Costs. Costs related to property damage and vandalism that occurred during 2020 that were not covered by insurance or other compensation.
  - Covered Supplier Costs. Expenditures made to a supplier that were a) essential to the operations of the entity at the time the expenditures was made, and b) made pursuant to a contract or purchase order in effect any time before the covered period or, for perishable goods, any time during the covered period.

- These cost changes apply to all PPP loans where forgiveness has not been applied for. So initial PPP loan funds and Second Draw loan funds (see below) can be spent on these additional expenditures.

- Borrowers may elect a covered period, which begins on the loan origination date and ends on a date that falls between eight and twenty-four weeks after the date of origination instead of choosing either an eight- or twenty-four-week period. Borrowers may now effectively choose their own covered period and calculate loan forgiveness amounts based on it.

- The safe harbors for restoring full-time equivalency (FTE) employee headcount and reduced compensation are extended to allow borrowers to comply with these safe harbors prior to the end of their covered period.

Second Round – PPP

The CAA includes an additional $284.45 billion for a "second round" of PPP loans. The CAA sets aside a minimum of $35 billion towards loans for eligible recipients who have not previously applied for a PPP loan. It also sets aside $25 billion for second PPP loans for hard-hit small businesses that meet the Second Draw criteria described below and that employ 10 or fewer employees.

In addition, businesses that received an initial PPP loan may be able to receive an increase in funds over the amount received in the first PPP loan. The CAA permits borrowers to increase the PPP loan amounts if either (i) the borrower returned certain funds or (ii) the borrower did not accept the maximum funds offered under its successful PPP loan application. Such borrowers are eligible to receive the difference between such amounts and the maximum loan amounts previously approved by the SBA and lenders.

Borrowers who may be eligible for an increased loan amount due to any interim final rule released by the SBA may request such an increase. Businesses may request an increased amount even if the first PPP loan has been fully disbursed.

What are the specific requirements for Second Draw loans?

- Applicants must:
  - Have used or will use the full amount of their first PPP loan,
  - Be able to show a 25% or greater reduction in revenue (excluding loans) in the first, second, third or fourth quarter of 2020 relative to the same quarter in 2019, and
  - Employ 300 or fewer people.

- The loan maximum is $2 million for Second Draw loans. The amount of the loan is based on two-and-a-half months of average annual payroll. The measurement period for the payroll can either be 2019 or the one-year period before the date the Second Draw loan is made.

- The changes described above to the initial PPP loan general requirements also apply to Second Draw loans.

- Second Draw loan applications are due by March 31, 2021.

Charitable Contribution Deductions

The CARES Act allowed individuals who normally do not itemize deductions to take up to a $300 above-the-line deduction for cash contributions to qualified charitable organizations in 2020 and also allows individuals to take itemized charitable deductions of up to 100% of their adjusted gross income. The prior amount was 60%. See our article for details here. The CAA extends these provisions through 2021.

Economic Injury Disaster Relief Loan ("EIDL") Grants

The CAA provides an additional $20 billion in EIDL grants, administered by the SBA. As provided under the CARES Act, businesses in low-income communities may now be able to receive additional EIDL funding through December 31, 2021. For more details about EIDL grants under the CARES Act, see our article here.

In addition, under the CAA, the $10,000 EIDL advance provided by the SBA will no longer reduce the amount of PPP loan forgiveness.

Employee Retention Credit

The Employee Retention Credit ("ERC") was established in the CARES Act. It provided another option for small nonprofits that did not receive funding through the PPP or the EIDL programs. The ERC was designed to encourage eligible employers to keep employees on their payroll through the use of payroll tax credits. The amount of the tax credit under the CARES Act was 50% of qualifying wages paid up to $10,000 per employee per year in total. Wages eligible for the credit were those paid after March 12, 2020, and before January 1, 2021 to employees that were not providing services because operations were suspended or because of a decline in gross receipts due to COVID-19. Wages taken into account were not limited to cash payments, but also included a portion of the cost of employer provided health care. Employers that obtain tax credits under the FFCRA could not apply the ERC to the same wages. See our article on the ERC here.

Revised and Expanded ERC

The CAA makes significant changes to the ERC making it a much better option for small nonprofits. The CAA:

- Amends the CARES Act to allow for the use of the ERC in conjunction with the PPP as long as the ERC is used for wages **not** paid with PPP funds. This change is effective retroactively to the enactment date of the CARES Act (March 27, 2020). So, organizations can amend 2020 returns and take the credit if it now applies. The 50% credit and $10,000 maximum for 2020 per employee still applies for 2020.

- Extends and expands the availability of the ERC through June 30, 2021, however, certain changes to the ERC in the CAA apply only after December 31, 2020.

- Changes the “substantial reduction of gross income” requirement that is needed to take the ERC to a 20% reduction (down from a 50% reduction) and allows organizations to use prior-quarter gross receipts in determining eligibility or comparing to the same quarter in 2019. If the organization was not in existence on the first day of a calendar quarter in 2019, the comparison is to the gross receipts for the same calendar quarter in 2020.
    - Defines gross receipts for tax-exempt organizations to include the following: contributions, gifts, grants, dues or assessments, sales or receipts from unrelated business activities, sale of assets, and investment income (e.g., interest, dividends, rents, and royalties). Gross receipts are not reduced for any associated costs or expenses.
- Increases eligible wages for the credit from 100 employees to 500 employees; and new organizations (those not in existence for all or part of tax year 2019) are permitted to receive the credit.
- Amends the ERC to be equal to 70% of qualified wages paid to employees after December 31, 2020, and before July 1, 2021 (which is an increase from 50%).
    - During the first two quarters of 2021, a maximum of $10,000 in qualified wages for each employee **per calendar quarter** may be counted in determining the 70% credit. Therefore, the maximum tax credit that can be claimed by an eligible employer in 2021 is $7,000 per employee per calendar quarter. (This is a huge increase from the $10,000 maximum per employee per year in 2020.) Further, qualified wages taken into account in calculating the 2021 credits are not limited to what the employer paid to the employees in any specific prior period.
- For small nonprofits with 500 or fewer full-time employees (up from 100), the tax credit available in 2021 is based on the qualified wages paid to all employees after December 31, 2020, and before July 1, 2021, regardless of whether the wages were paid for services performed.
- Advance payment of credits to small nonprofits are permitted, provided that such advance payments do not exceed 70% of the average quarterly wages paid by the employer in 2019.

For a chart comparing the original ERC and the revisions under the CAA by Clifton Larson Allen, click here.

Small nonprofits should review their employee counts, operations and PPP loan usage to determine the extent to which they may be eligible for enhanced and/or increased credits.

Shuttered Venue Operator Grants

The CAA establishes and provides $15 billion for a Shuttered Venue Operator Grant program through the SBA to provide financial assistance to live venue operators or promoters, theatrical producers, live performing arts organizations, museum operators, motion picture theatre operators, and talent representatives that meet certain requirements. The requirements include that an organization: (a) was fully operational on or before February 29, 2020, (b) can show a 25% or greater reduction in revenue in the first, second, third or fourth quarter of 2020 relative to the same quarter in 2019, and (c) must intend to resume operations substantially similar to those conducted prior to COVID-19. In addition, the organization must not have received more than 10% of its gross revenue from federal funding during 2019 or received a PPP loan on or after December 27, 2020.

Two definitions that are relevant to our nonprofit clients regarding these grants:

1. Live Venue Operator. A live venue operator, theatrical producer or live performing arts organization operator means organizations that (i) as a principal business activity, organize, promote, produce, manage or host live events and charge admission and pay performers and (ii) an entity for which at least 70% of its revenue is generated from live events.
2. Museums. Museums includes aquariums, arboretums, botanical gardens, art museums, children's museums, historic houses and sites, history museums, nature centers, natural history and anthropology museums, planetariums, science and technology centers, specialized museums and zoological parks.

For more details on this grant, see this Duane Morris article.

Low Income Housing Tax Credit

Minimum Tax Credit Rate

The amount of the annual low-income housing credit for certain buildings is a percentage determined by the IRS that is based on annual interest rates. While there was a 4% floor for the credit, it was still tied to interest rates, Interest rates have been at historical lows for many years, and thus they have not generated the 4% credit. The CAA provides an actual 4% per year credit floor assuring that certain low-income housing owners receive the full 4% credit.

Increased Tax Credit Ceiling

A low-income housing tax credit (LIHTC) is allowed annually over a 10-year credit period beginning with the tax year a qualified building is placed in service, or, under an irrevocable election, the next tax year. There is a limit on the total amount of 9% credits available for such buildings not financed with tax-exempt bonds (subject to certain state volume limitations). The

CAA added $1.2 billion dollars to be made available to states for more 9% low-income housing tax credits.

New Market Tax Credits

The CAA extended the $5 billion allocation of available credits for 2021 through 2025.

Opportunity Zone Tax Credits

The CAA extended the tax incentives through the end of 2025 for the period the designation of an empowerment zone is in effect.

Employer Paid Student Loans – Educational Assistance Programs ("EAP")

Under the Internal Revenue Code, nonprofit organizations can establish Educational Assistance Programs which are plans set in place by organizations for the "exclusive benefit of its employees to provide such employees with educational assistance." Under an EAP, organizations may make periodic contributions of up to $5,250 in educational assistance per year, per employee, toward qualified tuition, fees, and expenses. These payments do not constitute taxable income for the employee. However, any contributions over $5,250 counted as taxable income for the employee.

With the CARES Act, organization contributions toward principal **or interest** on an employee's qualifying student loan of up to $5,250 per year are tax-free **for both employer for payroll purposes and the employee for income tax purposes** when these contributions are made any time after March 27, 2020, through December 31, 2020.The CAA extended this CARES Act provision through December 30, 2025 (subject to applicable limits under the Internal Revenue Code).

Flexible Spending Accounts ("FSA")

In the past, money put in a flexible spending account was lost if not used by the end of the calendar year. The CAA allows money leftover in an FSA to roll over from 2020 to 2021 and any balances at the end of 2021 to be rolled over to 2022.