Additional COVID Relief for Nonprofits

The victories of Rafael Warnock and Jon Ossoff in the January 5, 2021 Georgia runoff elections, and the resulting Democratic control over the House, the Senate, and the White House, could mean significant changes to laws affecting nonprofit organizations. In the meantime, on December 27, 2020, President Trump signed the 5,500 page Consolidated Appropriations Act of 2021 (the Act). The Act includes a number of provisions of interest to our nonprofit clients, including the following:

Support for Hospitals and Vaccine Access

The Act adds $3 billion to the existing Provider Relief Fund, providing aid to hospitals and health care providers for reimbursement of health care-related expenses or lost revenue as a result of the COVID-19 pandemic. The Act directs at least 85% of the Provider Relief Fund's unobligated balances (the $3 billion plus any unobligated funds remaining from the $175 billion provided by the March 27, 2020 Coronavirus Aid, Relief, and Economic Security (CARES) Act) to providers claiming financial losses in the second half of 2020 and the first quarter of 2021. The Act allows providers to establish reimbursement for eligible losses using the Frequently Asked Questions guidance released by the U.S. Department of Health and Human Services in June 2020; providers may calculate lost revenue by using a budgeted to actual comparison but only if their budgets were established and approved before March 27, 2020.

Additional Higher Education Emergency Relief Fund (HEERF) Support for Colleges and Universities

The Act adds almost $82 billion to the Education Stabilization Fund (ESF) created earlier this year by the CARES Act. This new funding includes another $22.7 billion for the Higher Education Emergency Relief Fund (HEERF) to assist colleges and universities in covering expenses incurred as a result of the COVID-19 pandemic. Distributions will be made directly to higher education institutions through the system used by the Department of Education (ED) to distribute Title IV federal student financial aid funding. Institutions that previously applied for and received CARES Act HEERF funds need not submit any application to ED to receive the additional HEERF funds under the Act.

- Allocation of New HEERF Funds: ED will determine the amount distributable to each institution very soon, based on a formula that is weighted heavily based on an institution's number of Pell Grant recipients and that takes into account both an institution's full-time equivalent student enrollment and its total enrollment (which was not considered under the CARES Act). A small portion of the formula is based on students exclusively enrolled in distance education courses before the pandemic There are also amounts set aside for Historically Black Colleges and Universities, Minority Serving Institutions and institutions funded through the Strengthening Institutions Program.

- Penalty For Colleges and Universities with Large Endowments. Any institution that was required to pay the endowment tax on net investment income of private colleges and universities under section 4968 of the Internal Revenue Code for tax year 2019 will have its HEERF allocation reduced by 50%, and can only use its additional HEERF funds for certain limited purposes (financial aid grants to students, or expenses related to sanitation, PPE, or other COVID-19 related health and safety expenses). This limitation does not apply to institutions that are designated as eligible institutions under section 448 of the Higher Education Act (the Distance Education Demonstration Program). In addition, an institution subject to the section 4968 tax can avoid this limitation to the extent that it can demonstrate "need (including need for additional funding for financial aid grants to students, payroll expenses, or other expenditures) for the total amount of funds" (see section 314(d)(6)(B) of the Act). We anticipate that the Education Department will issue guidance regarding how to demonstrate need in this regard.

- Using New HEERF Funds Under the Act and Related ED Requirements: Subject to the potential limitations described above for colleges and universities with large endowments, these new HEERF funds can be used for a wider variety of expenses related to the COVID-19 pandemic than had been permitted under the CARES Act—including lost revenue, reimbursement for expenses already incurred, faculty and staff trainings and payroll, technology costs related to transitioning to distance education, student support activities authorized by the Higher Education Act that address coronavirus-related needs, and emergency financial aid grants (including for students exclusively enrolled in distance education). Emergency financial aid grants, which are excluded from students' gross income for tax purposes, may be used for any component of the student's cost of attendance or for emergency costs that arise due to coronavirus, such as tuition, food, housing, health care (including mental health care), or child care. Priority for granting emergency student financial aid is to be given to students with exceptional need, such as Pell Grant recipients.

    - As under the CARES Act, institutions may not use HEERF funds for contractors providing pre-enrollment recruitment activities, endowments, enrollment marketing, capital expenditures for athletic or religious facilities or instruction, or executive compensation. As with the earlier round of HEERF funding, recipients of the new HEERF funding must "to the greatest extent practicable, continue to pay [their] employees and contractors during the period of any disruptions or closures related to coronavirus."

- Reporting: Within six months of receiving new HEERF funds, recipient institutions must provide ED with a detailed report accounting for the use of such funds, although the specific information required and form of report has not yet been announced.

- Additional Resources:
  - Education Department Releases Institutional Portion of CARES Act Higher Education Emergency Relief Fund (4/24/20)
  - Education Department Releases Higher Education Student Relief and Governor's Emergency Education Relief Funds (4/17/20)

Shuttered Venue Operator Grants

The Act provides $15 billion to the Small Business Administration's Office of Disaster Assistance for grants to certain performing arts theaters, independent movie theaters, and some cultural institutions (including certain museums, aquariums, zoos, arboretums, botanical gardens, historic houses and sites, nature centers, planetariums, science centers, and others with both indoor exhibition spaces and regular programming in an auditorium, theater or lecture hall with fixed audience seating). To qualify, a venue must have been operational at the end of February 2020, have seen a 25% or more reduction from 2019 quarterly gross earned revenue in any quarter of 2020, and be operating or intending to resume operations.

Nonprofit organizations (and others) that received 10% or more of 2019 revenue from federal funding are ineligible, as are organizations that receive a PPP loan after December 27, 2020. In addition, organizations that have (or that are controlled by organizations that have) two or more of the following characteristics are ineligible – (i) they operate in more than one country; (ii) they operate in more than 10 states; or (iii) they had more than 500 employees as of February 29, 2020.

Grants will be awarded for up to 45% of 2019 gross earned revenue, with a cap of $10 million in the first disbursement, with a potential second supplemental disbursement in spring 2021 of up to 50% of the original grant award. Grant funds can be used to cover a wide range of operating expenses incurred between March 1, 2020 and December 31, 2021; the funds must be expended within one year of disbursement. If an organization receives a supplemental disbursement, these deadlines are extended to June 30, 2022 and 18 months, respectively.

Grant applicants must submit a good-faith certification that the uncertainty of current economic conditions makes the grant necessary to support ongoing operations. The SBA is required to exercise increased oversight over these grants, which may include requiring recipients to retain records documenting compliance with grant requirements, such as employment records for four years and other records for three years after receiving a grant.

There will be two priority rounds of grant awards during the first disbursement. During the first 14 days grants are available, they will be awarded only to organizations that can demonstrate revenue loss of 90% or greater. During the following 14-day period, grants will be awarded only to organizations that can demonstrate revenue loss of 70% or greater. In both cases, revenue loss for this purpose will be measured by comparing April 1 to

December 31 revenue in 2020 with revenue from the same period in 2019. CARES Act funding, such as a PPP loan, is not considered revenue for this purpose. After the initial 28-day period grants are available, they will be awarded to any eligible entity. The Act reserves at least $2 billion for small organizations (those with not more than 50 employees).

Expanded and Extended Paycheck Protection Program

Before March 31, 2021, eligible borrowers may request a "second draw" forgivable PPP loan. In addition, many of the restrictions and potentially negative tax and other consequences for borrowers of first draw PPP loans have been loosened or eliminated. "Second draw" PPP loans (applications for which may begin on January 13, 2021) are intended for smaller organizations (not more than 300 employees) that can demonstrate at least a 25% reduction in gross receipts in any quarter of 2020, compared to the same quarter in 2019 (or comparing 2019 to 2020 as a whole). Most qualifying nonprofit organizations may borrow up to a maximum of 2.5 times the average monthly payroll costs over the 12 months prior to the loan (or the 2020 calendar year), with a cap of $2 million.

On January 7, 2021, the SBA issued new regulations regarding both new and "second draw" PPP loans. On January 8, 2021, the SBA released application forms for both first draw and second draw borrowers. Hemenway & Barnes is preparing a separate alert, forthcoming soon, outlining the new PPP loan program, in light of the new guidance.

It is important to note that an organization cannot receive both a shuttered venue operator grant and a new PPP loan. Accordingly, an organization that may qualify under both programs should consider carefully how much it could receive under each program, as well as the timing and requirements of each, to determine which program would better serve the needs of the organization.

Economic Injury Disaster Loans (EIDL)

The Act sets aside $20 billion for new $10,000 grants as part of the EIDL program, providing for a new round of EIDL advances for small employers (300 or fewer employees) located in low-income communities and suffering over 30% economic loss.

Employee Retention Tax Credit

The Act extends the credit for wages paid for retaining employees through July 1, 2021, and expands its availability. This includes a decrease in the threshold for eligibility (from a loss of more than 50% of gross receipts to a loss of more than 20% of gross receipts), an increase in the credit rate from 50% to 70% of qualified wages, an increase in the per-employee qualified wages limit from $10,000 per year to $10,000 for each of the first two quarters of 2021, and other adjustments.

The Act also allows employers who received PPP loans to qualify for this credit with respect to any wages not paid with PPP loans that were forgiven. This may provide a viable alternative for those who are not eligible for "second draw" PPP loans, or would prefer to claim this tax credit rather than take out a new PPP loan.

Paid Sick and Family Leave Credits

Although the Act did not extend the requirement for covered employers to offer COVID-related paid sick and family leave under the Families First Coronavirus Response Act (FFCRA), which expired December 31, 2020, the Act extends through March 31, 2021 the refundable payroll tax credits for paid leave meeting FFCRA requirements that employers provide voluntarily. The Act also extends the 12.5% income tax credit for "regular" paid family and medical leave through 2025.

Unemployment Benefit Reimbursements

The Act extends until March 14, 2021 the requirement that the federal government reimburse self-insuring nonprofit employers for half of the costs of unemployment benefits.

Payroll Tax Repayment

Employers deferring payroll taxes under IRS Notice 2020-65 now have until the end of 2021 (instead of until April 30) to increase their employees' withholding and pay back the taxes owed. IRS Notice 2020-65 permitted employers to defer withholding and payment of the employee portion of the Social Security tax on wages paid between September 1 and December 31, 2020 if the employees' wages were below a certain amount.

Charitable Giving Incentives

<u>For individuals:</u>

Itemizers: Under the CARES Act, individuals could give up to 100% of their adjusted gross income for cash gifts in 2020 to public charities (not donor-advised funds or supporting organizations). Those gifts could "stack" on top of other types of gifts (including gifts of appreciated property and gifts to donor advised funds and private foundations, with certain limits).

- The Act now extends that benefit to gifts made in 2021 as well.

For Nonitemizers: The CARES Act introduced an above-the-line deduction of $300 for cash gifts to public charities (not donor-advised funds or supporting organizations), which could be taken in addition to the standard deduction. Married couples filing jointly were limited to $300 per tax return.

- The Act changes the deduction for nonitemizers to a below-the-line deduction, permits it through 2021, and allows joint filers to deduct up to $600 per return.

<u>For corporations</u>:

The CARES Act allowed corporations to deduct up to 25% of their taxable income (rather than the usual limit of 10%) for qualified charitable contributions made in 2020 to public charities (not donor-advised funds or supporting organizations).

- The Act extends this benefit for qualified charitable contributions made in 2021.

The new Act also allows a deduction of up to 100% of a corporation's taxable income for qualified disaster relief gifts made in 2020 or up to 60 days after enactment of the Act (i.e., by February 25, 2021).

- To constitute a qualified disaster relief gift, the gift must be made for relief efforts in one or more qualified disaster areas (other than areas for which a major disaster has been declared due to COVID-19 only), and the taxpayer must obtain from the donee a written acknowledgement that the contribution was used or will be sued for such relief efforts.
- This provision could allow nonprofit corporations with UBTI to deduct 100% of their UBTI in 2021 for qualifying contributions made by February 25, 2021.

The new Act also extends the CARES Act's increased deductibility limit for contributions of food inventory through 2021. The increased limit is 25% (instead of the normal limit of 15%) of taxable income for C corporations (and of aggregated income for other taxpayers) for the taxable year.

Additional Resources:

- Nonprofit 411: Demystifying Mergers
- 2020-2021 Massachusetts Income Tax Charitable Deduction Changes
- The CARES Act and Nonprofits
- The CARES Act: Key Provisions Affecting Colleges and Universities
- Remote Meetings for Members – New COVID-19 Relief for Nonprofit Governance
- Annual Meetings During the COVID-19 Pandemic: Proxy Voting and Use of Communications Equipment

Contact Us

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