

TO: NAW Direct Members

FROM: NAW Government Relations Team

RE: NAW Critical Update Number 106 – November 11 at 4:30 PM

1. Latest on the Paycheck Protection Program

Deductibility of expenses: As you know, the IRS ruled earlier this year that otherwise-tax-deductible expenses that are paid with a forgiven PPP loan will not be deductible. This ruling is in direct conflict with the statute, which clearly said PPP loans would not be taxable. NAW and our trade association colleagues have been working with allies in the House and Senate to pass legislation that would reaffirm statutory intent and reverse the IRS ruling. We have also communicated with the SBA and Treasury urging that the IRS ruling be rescinded, but with no success – Secretary Mnuchin has been truly “dug-in” on this issue.

We are still actively lobbying for Congressional action on this and hope Congress will pass a COVID-19 bill in the lame-duck session that includes the Cornyn bill, which would reverse the IRS ruling.

In the interim, however, Treasury and the IRS appear to be moving in the wrong direction on this. As *Tax Notes* reported today (you can read the story [HERE](#)):

Treasury officials told [Edward S. Karl of the American Institute of CPAs] they anticipated issuing additional guidance before the end of the year, and possibly by the end of November, generally stating that if a borrower has a reasonable expectation of loan forgiveness, the expenses can't be deducted to the extent they're paid for with the loan. That's true regardless of when the loan is forgiven ...

Disclosure of details of PPP loans: The issue of whether or not to publicly disclose information about PPP loans and borrowers was heatedly debated this past summer, but the issue seemed to be resolved when the SBA and Treasury released the names of PPP borrowers, but provided information on the size of the loans in ranges rather than specific amounts, and announced that they would treat as confidential more detailed information. Unfortunately, last week the District Court for the District of Columbia ruled that the SBA must release – by November 19th – names and addresses of all PPP and Economic Injury Disaster Loan (EIDL) borrowers and the exact amount of those loans. The SBA said last week that they had not decided whether to appeal that decision. We

have pursued this with the SBA but have not been told whether they have yet made that decision.

You can read a detailed story about this decision [HERE](#), and the actual Court decision is [HERE](#).

SBA form 3509: We reported in earlier updates (specifically Monday, November 2nd) on the SBA's new "economic necessity" form which borrowers of \$2 million or more will have to complete. We are working with trade association colleagues to draft and submit comments to the SBA in response to the new form and will of course share them with you when they are submitted. In the interim, if you have received a PPP loan of more than \$2 million and will have to complete Form 3509, we would greatly appreciate any feedback you can provide about the form, whether and if it fits your business model, whether the information requested is reasonable and relevant, etc. Any feedback you provide will of course be treated as completely anonymous if the information is included in our comments. Form 3509 is [HERE](#).

2. Latest on the Next Congressional Pandemic Relief Package

The Senate returned this week to kick off the last stretch of the 116th Congress, with uncertainty about who will control the chamber beginning in January.

Congress has a long to-do list after punting several items until the end of the year, including funding the government and trying to get a fifth coronavirus deal. NAW continues to work with our trade association allies for passage of a new relief measure that includes liability protection, protects the business tax credits included in the CARES bill, and restarts and/or expands the PPP.

Though both Senate Leader McConnell and House Speaker Pelosi say they want an agreement on coronavirus aid, as cases climb across the country, they remain deeply split over the details of what should be in any deal. Talks have not restarted between Congressional Democrats and the White House, and in a post-election power shift, Senator McConnell rather than Secretary Mnuchin could well be the chief negotiator for the GOP.

Leader McConnell said last week that he hoped that "partisan passions" would recede enough to get something done in the lame-duck session. Leader McConnell acknowledged that his side might have to give a little on aid to states and localities, a big Democratic priority, while Republicans will still push for liability protection for businesses.

3. Latest on the 2020 Election Results

Joe Biden became apparent president-elect this past weekend, though President Trump will not concede pending legal challenges in several states. (For his challenges to succeed, the Trump legal team needs to change or have disqualified tens of thousands of votes in half a dozen states, so it is highly unlikely that they will succeed.)

Democrats' prospects for taking control of the Senate have narrowed today after Senator Dan Sullivan (R) won a second term representing Alaska, securing 50 seats in the Senate for Republicans in the next Congress. The Democrat Party's only winning scenario would require flipping both Georgia Senate seats in the January 5th runoff elections and using Democratic Vice President Kamala Harris as the chamber's tie-breaking vote.

House Democrats fell well short of their election expectations, losing at least 8 incumbents, 7 of whom won 2 years ago and helped the party take control. Further losses are still possible, with incumbents trailing in states such as California and New York where ballot counting is slow. So far, the party breakdown in the House for the next Congress includes 218 Democrats and 201 Republicans with 16 House races still to be called.

Republicans made historic gains with women and minorities on election night with even more wins than expected. Even though Speaker Pelosi will work with a Democratic president next year, she is likely to have less room to maneuver in her ideologically diverse caucus, while possibly still contending with a GOP-led Senate.

4. Latest on Economic Recovery and Re-Opening the Workplace

As the Coronavirus Pandemic continues to impact the United States economy and businesses across the nation, it can be hard to decipher how new regulations and laws may impact your business. To help you manage these issues NAW is providing information about reports, webinars and seminars that you may find useful:

Webinar from *Little Law Firm*:

"Business as Unusual:" Preparing Our Workplaces and Workforces for a Return to Work
Tuesday, November 17, 2020 | 11:00 am-12:00 pm PST

As employers await the conditions required for physical offices to re-open, there are many steps that they can take now to prepare. Numerous federal, state, and local employment law requirements have been added during 2020, some of which will outlast the COVID-19 crisis. Relief legislation and other efforts carry important obligations, and every business can expect medium to long-term changes in almost every area of the employment relationship, including navigating new physical and virtual workplaces. To register, click [HERE](#).

From *Little Law Firm*:

[This Won't Hurt a Bit: Employee Temperature and Health Screenings – A List of Statewide Orders](#)

Employee health screening steps, including temperature checks, are becoming more common as states begin to reopen their economies. This post covers measures that require employers to take employees' temperatures and/or conduct other screening procedures. To read the full report, click [HERE](#).

Webinar from *Little Law Firm*:

EEO-1 Reporting: Get Ready for Double Filing
Friday, November 13, 2020 at 1:00 pm EST

Join Littler attorneys for an educational hour on the ins and outs of EEO-1 reporting, with topics of particular interest to include:

- Issues with two-year filing (and organizational structure changes that occurred between the two years)
- Connecting the dots between EEO-1 filings and federal affirmative action plan audits
- Complex corporate family issues
- The ever-burning question of Type 6 versus Type 8 reports
- Employees of unknown race/ethnicity or sex (including nonbinary employees)
- Filing mechanics
- Potential public access to EEO-1 data
- Voluntary EEO-1 disclosure to shareholders and others

To register, click [HERE](#).

Stateside Associates publishes a daily report about State and Local Government responses to the evolving situation. To read their latest report, click [HERE](#).

We are also providing a link to a spreadsheet that includes state and local COVID-19 response information provided by **MultiState Associates**. To view their spreadsheet, click [HERE](#).

5. Unrelated to COVID-19

Supreme Court Hears Affordable Care Act Case:

The fate of the Affordable Care Act is once again in the hands of the Supreme Court, which on Tuesday heard its first oral arguments in a case over the law's constitutionality.

The Supreme Court case centers around the law's individual mandate that initially required all consumers to have health insurance or pay a penalty, which the Supreme Court in 2012 upheld as within Congress' taxing authority. Congress effectively repealed the penalty in 2017 and a group of states, led by Texas, brought a lawsuit. They argue that without the tax, the mandate — and the entire law — is unconstitutional.

Chief Justice John Roberts and Justice Brett Kavanaugh signaled that they're unlikely to tear down Obamacare as the oral arguments began in a Republican-backed lawsuit challenging the landmark health care law. They both strongly questioned whether the elimination of the mandate penalty made the rest of the law problematic. Justice Kavanaugh appeared to favor leaving the rest of the law intact if the mandate is struck.

Oral arguments are not a perfect indicator of how the justices may eventually rule, but this may provide some reassurance to people who support Obamacare. For Obamacare to survive unscathed, at least two Republican appointees will need to join the court's three liberal justices. Oral arguments in the case are continuing and a court ruling is not expected until next year.

[Click here](#) for links to *Critical Updates sent previously*.

Many thanks—

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