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## **Expanded Economic Relief For Employers Under The CARES Act**

Many businesses have been impacted by the COVID-19 pandemic crisis. Recently, Congress passed the Coronavirus Aid, Relief and Economic Security (CARES) Act which enables small and medium-sized businesses to receive federal loans to cover payroll costs as defined in the Act. These loans can be forgiven for amounts expended during the 8-week period prescribed in the Act. All employers should be apprised of the changes enacted by the CARES Act and the portion of the Act designed to Keeping American Workers Paid and Employed. The following will address the changes anticipated to be enacted into law under the CARES Act and what employers should know about the significant employment developments afforded thereunder.

Note: The purpose of this summary is to highlight certain aspects of the CARES Act that have big picture, practical implication for employers. The CARES Act addresses additional aspects of government stimulus beyond which is covered here. Also, seasonal employers have different provisions applicable to them and, if you are a seasonal employer, consult with counsel on specifics.

### **I. KEEPING AMERICAN WORKERS PAID AND EMPLOYED.**

The Keeping American Workers Paid and Employed Act is designed to keep workers from losing their jobs and maintaining small businesses due to the coronavirus pandemic. It enables cash-flow assistance through federally guaranteed loans to employers who maintain their payroll during the coronavirus crisis. Loans would be immediately available through existing Small Business Administration-certified and approved lenders, including banks, credit unions, and other financial institutions, and other lenders approved by the Small Business Administration (“Administrator”). The Secretary of Treasury (“Secretary”) would be authorized to expedite the addition of new lenders and make further enhancements to expedite delivery of capital to small employers. A business with 500 employees or less may be eligible for loan assistance. The loan will assist in covering an applicant’s payroll, mortgage, rent, utility payments and other defined debt obligations. The maximum loan amount authorized is \$10 million. Conditioned upon a business enterprise retaining its employees and payroll levels during the covered period (February 15, 2020 through June 30, 2020), and using the proceeds as directed, the portion of the loan used to cover payroll and payments on defined pre-existing debt and other expenses may be forgiven for the covered period.

### ***Who Is Covered?***

Any business concern, nonprofit organization, veterans organization, or Tribal business concern described in section 31(b)(2)(C) of the Act shall be eligible to receive a covered loan if the business concern, nonprofit organization, veterans organization, or Tribal business concern employs not more than the greater of 500 employees or the size standard in number of employees established by the Small Business Administration for the industry in which the business concern, nonprofit organization, veterans organization, or Tribal business concern operates. For purposes of determining whether a business concern, nonprofit organization, veterans organization, or Tribal business concern described in section 31(b)(2)(C) of the Act employs not more than 500 employees, the term ‘employee’ includes individuals employed on a full-time, part-time, or other basis.

### ***What Is The Period Of Coverage?***

The Act is designed to ensure that an employer’s payroll is protected; the Covered Period as defined in the Act is the period beginning on February 15, 2020 and ending on June 30, 2020.

### ***What Costs Are Covered?***

The Act defines the term ‘payroll costs’ as the sum of payments of any compensation with respect to employees that is a salary, wage, commission, or similar compensation, payment of cash tip or equivalent; payment for vacation, parental, family, medical, or sick leave; allowance for dismissal or separation; payment required for the provisions of group health care benefits, including insurance premiums; payment of any retirement benefit; or payment of State or local tax assessed on the compensation of employees; and the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount that is not more than \$100,000 in 1 year, as prorated for the covered period.

### ***What Costs Are Not Covered?***

The term ‘payroll costs’ shall not include compensation of an individual employee in excess of an annual salary of \$100,000, as prorated for the covered period; taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code of 1986 during the covered period; any compensation of an employee whose principal place of residence is outside of the United States; qualified sick leave wages for which a credit is allowed under section 7001 of the Families First Coronavirus Response Act (Public Law 116– 6 127); or qualified family leave wages for which a credit is allowed under section 7003 of the Families First Coronavirus Response Act (Public Law 116– 12 127).

### ***Are Sole Proprietors, Independent Contractors, And Eligible Self-Employed Individuals Covered?***

Yes. During the covered period, individuals who operate under a sole proprietorship or as an independent contractor and eligible self-employed individuals shall be eligible to receive a covered loan. An eligible self-employed individual, independent contractor, or sole proprietorship seeking a covered loan shall submit such documentation as is necessary to establish such individual qualifies, including payroll tax filings reported to the Internal Revenue Service, Forms 1099–MISC, and income and expenses from the sole proprietorship, as determined by the Administrator and the Secretary.

### ***Are Franchises Eligible?***

During the covered period, the provisions applicable to affiliations under section 121.103 of title 13, Code of Federal Regulations, or any successor regulation, are waived with respect to eligibility for a covered loan for (a) any business concern with not more than 500 employees that, as of the date on which the covered loan is disbursed, is assigned a North American Industry Classification System code beginning with 72, (b) any business concern operating as a franchise that is assigned a franchise identifier code by the Administration; and (c) any business concern that receives financial assistance from a small venture investment company licensed under section 301 of the Small Business Investment Act of 1958 (15 U.S.C. 681).

### ***Are Businesses With More Than One Physical Location Covered?***

Yes, in part. During the covered period, any business that employs not more than 500 employees per physical location of the business and that is assigned a North American Industry Classification System code beginning with “72” at the time of disbursement shall be eligible to receive a covered loan. This classification usually applies to accommodation and food service establishments including hotels and restaurants.

### ***How Much Are The Loan Amounts?***

During the covered period, with respect to a covered loan, the maximum loan amount shall be the lesser of:

- a) the sum of the product obtained by multiplying the average total monthly payments by the applicant for payroll costs incurred during the 1-year period before the date on which the loan is made<sup>1</sup> by 2.5, or \$10,000,000.
- b) Certain loans made during the period beginning on January 31, 2020 and ending on the date on which covered loans are made available may be refinanced as part of a covered loan.

### ***What Are Allowable Uses For The Loan?***

During the covered period, an eligible recipient may use the proceeds of the covered loan for payroll costs, costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums; employee salaries, commissions, or similar compensations; payments of interest on any mortgage obligation (which shall not include any prepayment of or payment of principal on a mortgage obligation); rent (including rent under a lease agreement) or lease costs; utilities; and interest incurred before the covered period (February 15, 2020) on any other debt obligations. Certain loans made during the period beginning on January 31, 2020 and ending on the date on which covered loans are made available may be refinanced as part of a covered loan.

### ***Are There Credit Standing, Collateral And Personal Guarantee Requirements?***

No. In evaluating the eligibility of a borrower for a covered loan, a lender will consider whether the borrower was in operation on February 15, 2020 and had employees for whom the borrower paid salaries and payroll taxes; or paid independent contractors, as reported on a Form 1099. During the covered period, the requirement that a small business concern is unable to obtain credit elsewhere shall not apply to a covered loan. During the covered period, with respect to a covered loan no personal guarantee or collateral shall be required for the covered loan. Notwithstanding the waiver of the personal guarantee requirement or collateral, the SBA (Administrator) shall have no recourse against any individual shareholder, member, or partner of an eligible recipient of a covered loan for nonpayment

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<sup>1</sup> (except that, in the case of an applicant that is seasonal employer, as determined by the Administrator, the average total monthly payments for payroll shall be for the 12-week period beginning February 15, 2019, or at the election of the eligible recipient, March 1, 2019 and ending June 30, 2019)

of any covered loan, except to the extent that such shareholder, member, or partner uses the covered loan proceeds for a purpose not authorized as an allowable use.

***Do Loan Applications Require Certification?***

Yes. An eligible recipient applying for a covered loan shall make a good faith certification that:

- i. the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient acknowledging that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments;
- ii. the eligible recipient does not have an application pending for a loan for the same purpose and duplicative of amounts applied for or received under a covered loan;
- iii. during the period beginning on February 15, 2020 and ending on December 31, 2020, that the eligible recipient has not received amounts for the same purpose and duplicative of amounts applied for or received under a covered loan.

***What Is The Maturity Date Of Loans And Interest Rate For Unforgiven Loan Amounts?***

With respect to a covered loan that has a remaining balance after reduction based on the loan forgiveness amount under section 1106 of the Act, the remaining balance shall continue to be guaranteed by the Administration; and the covered loan shall have a maximum maturity of 10 years from the date on which the borrower applies for loan forgiveness. A covered loan shall bear an interest rate not to exceed 4 percent. During the covered period, the Administrator shall also consider each eligible recipient that applies for a covered loan to be an impacted borrower and require lenders to provide complete payment deferment relief for impacted borrowers with covered loans for a period of not less than 6 months, including payment of principal, interest, and fees, and not more than 1 year.

### ***Will The Federal Government Forgive The Loans?***

Yes, in part. An eligible recipient shall be eligible for forgiveness of indebtedness on a covered loan in an amount equal to the sum of the following costs incurred and payments made during an 8-week period after the origination of the loan. The costs forgiven shall be:

- i. Payroll costs as defined above,
- ii. Any payment of interest on any covered mortgage obligation (which shall not include any repayment of or payment of principal on a covered mortgage obligation) - generally for debt incurred on real or personal property before February 15, 2020,
- iii. Any payment on any covered rent obligation (under a lease in effect before February 15, 2020), and
- iv. Any covered utility payment which generally are for utility payments for services which began before February 15, 2020.

### ***Are There Limits On The Amount Of Forgiveness?***

Yes. The amount of loan forgiveness shall not exceed the principal amount of the financing made available under the applicable covered loan. The amount of the loan forgiven may also be reduced based on certain circumstances such as a (1) reduction of employees during the covered period and (2) reduction to salary and wages during the covered period. However, additional wages provided to Tipped employees and wages paid to employees re-hired during the period beginning on February 15, 2020 and ending on the date that is 30 days after the date of enactment of this Act may be subject to forgiveness.

### ***What Is Required For Loan Forgiveness?***

An eligible recipient seeking loan forgiveness shall submit to the lender that is servicing the covered loan an application, which shall include:

- i. documentation verifying the number of full-time equivalent employees on payroll and pay rates for the covered 8-week period including—(a) payroll tax filings reported to the Internal Revenue Service; and (b) state income, payroll, and unemployment insurance filings; (c) documentation, including cancelled checks, payment receipts, transcripts of accounts, or other documents verifying payments on covered mortgage obligations, payments on covered lease obligations, and covered utility payments;

- ii. a certification from a representative of the eligible recipient authorized to make such certifications that (a) the documentation presented is true and correct; and (b) the amount for which forgiveness is requested was used to retain employees, make interest payments on a covered mortgage obligation, make payments on a covered rent obligation, or make covered utility payments; and (c) any other documentation the Administrator determines necessary.

### ***How And When Will A Decision Be Made?***

Not later than 60 days after the date on which a lender receives an application for loan forgiveness from an eligible recipient, the lender shall issue a decision on the application.

### ***What Are The Tax Implications Of Forgiveness?***

For purposes of the Internal Revenue Code of 1986, any amount which would be includible in gross income of the eligible recipient by reason of forgiveness shall be excluded from gross income.

## **II. EXPANDED ECONOMIC RELIEF UNDER THE CARES ACT**

The CARES Act creates a Pandemic Unemployment Assistance program to expand unemployment assistance for employees who had any weeks of unemployment, partial unemployment, or inability to work cause by COVID-19 between January 27, 2020 and December 31, 2020. It also provides for certain tax credits and loan relief for larger businesses.

### ***How About Mid-Size Businesses With 500 To 10,000 Employees?***

Businesses with 500 to 10,000 employees are not eligible for Paycheck Protection loans but are eligible for loans under the Emergency Relief and Taxpayer protections under the CARES Act. A qualifying business will be required to make certain certifications. For example, it shall be required to certify that no later than 4 months after an official declaration ending the COVID-19 health crises it will re-store at least 90% of its workforce as of February 1, 2020 including all compensation and benefits for those employees as of the same date. It may also have to certify that it will not outsource jobs for the term of the loan (which may not exceed five years) and for two years after repaying the loan. It may also be required to certify that it will not “abrogate” an existing collective bargaining agreement for the term of the loan (and for two years after repayment of the loan) and that it will maintain a neutral position in any union organizing for the loan term.



### ***What Are The Expanded Unemployment Benefits Under The CARES Act?***

Eligible individuals can receive the weekly benefit amount generally determined under state law plus an additional \$600 per week for up to 39 weeks (which is longer than the typical 26-week limitation in most states). The CARES Act also authorizes up to 13 weeks of additional emergency unemployment benefits for eligible individuals who have exhausted the 39 weeks of benefits and remain unemployed.

### ***What Are The Eligibility Criteria?***

Eligibility is provided via self-certification for individuals who are otherwise able and available to work but are unemployed, partially unemployed (pay cut or hours cut), or unable to work for the following reasons:

- The individual is diagnosed with COVID-19 or experiencing COVID-19 symptoms and seeking medical diagnosis;
- A member of the individual's household was diagnosed with COVID-19;
- The individual is caring for a member of their family or household who was diagnosed with COVID-19;
- A child or person for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school/facility is required for the individual to work;
- The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of COVID-19 public health emergency;
- The individual is unable to reach the place of employment because a health care provider advised to self-quarantine due to COVID-19 related concerns;
- The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;
- The individual became the breadwinner or major support because the head of household died from COVID-19;
- The individual quit as a direct result of COVID-19;
- The individual's place of employment is closed as a direct result of COVID-19 public health emergency; or
- The individual meets additional criteria established by the Secretary of Labor.

*The Act includes* benefit coverage for self-employed individuals and independent contractors, gig economy employees (like Uber drivers), those who are seeking part time employment, and those who would not otherwise have sufficient work history to qualify so long as they meet a qualifying reason above.

*The Act excludes* individuals who have the ability to telework with pay or employees receiving paid sick leave or other paid leave benefits.



***Does The Act Provide For Partial Unemployment Compensation Programs?***

Yes. In addition to expanded unemployment compensation benefits, the CARES Act is temporarily providing full funding for states with *Short Time Compensation* or *Work Sharing* programs. These programs currently exist whereby an employer agrees to reduce an employee's hours instead of laying off the employee and the state unemployment office provides partial unemployment compensation benefits to the employee. States typically bear the full cost for these programs. There is \$100M in federal funds allocated for promotion of the program, enrollment of employers, and implementation and improved administration of such programs.

***Does The Act Provide An Employee Retention Tax Credit?***

Yes, in part. The CARES Act provides an employee retention tax credit (employer portion) but it is not available to employers that receive the paycheck protection loans as discussed above. The tax credit provides eligible recipients with a refundable payroll tax credit subject to the Act's provisions for 50% of the wages paid by employers during the COVID-19 crisis for wages paid between March 13, 2020 and December 31, 2020. This tax credit is available to employers whose business was fully or partially suspended as a result of a COVID-19 related shut-down order or whose gross receipts declined by more than 50% in comparison to the same quarter the previous year. The tax credit is applied as follows:

“(a) IN GENERAL.—In the case of an eligible employer, there shall be allowed as a credit against applicable employment taxes for each calendar quarter an amount equal to 50 percent of the qualified wages with respect to each employee of such employer for such calendar quarter.

(b) LIMITATIONS AND REFUNDABILITY.— (1) WAGES TAKEN INTO ACCOUNT.— The amount of qualified wages with respect to any employee which may be taken into account under subsection (a) by the eligible employer for all calendar quarters shall not exceed \$10,000.”  
Section 2301

Health benefits paid to an eligible employee are included in the qualified wages. It is based on qualified wages paid to the employee during the time the employee was not providing employment services as result of the crisis. For businesses with 100 or less employees, all employee wages may qualify for the credit, regardless of whether the employer continued to operate or was subject to a shut-down order. For employers with more than 100 full-time employees, the credit may be subject to other tax relief received and, accordingly, it advisable to consult with a tax and accounting professional on what amounts may be included and excluded for purposes of the tax credit.

***Does The Act Provide For A Payroll Tax Holiday?***

Yes. Employers may be able to defer payment of Social Security taxes due for the period beginning on the date of enactment of the bill which is the date the President signed the bill (March 27, 2020) through December 31, 2020 under certain restrictions but it is not available to employers that receive the paycheck protection loans with indebtedness forgiven discussed above. The deferred amounts must be satisfied over the next two years with half of the deferred amount paid by December 31, 2021, and the remaining deferred amount by December 31, 2022.

**III. CHANGES TO FAMILIES FIRST CORONAVIRUS RESPONSE ACT (FFCRA)**

Following the passing by the Senate of the CARES Act, the final bill incorporated several changes or clarifications to the paid leave portions for employees found in the FFCRA including the following:

- Workers who are laid off after March 1, 2020 but then rehired are eligible for expanded FMLA leave. If they met the 30-day payroll requirement prior to their layoff, were laid off after March 1 and were rehired, they do not need to meet the 30-day requirement a second time. An employer can rehire the employee and immediately place the employee on the expanded FMLA leave (April 1, 2020 or later).
- Employers can keep money they would have deposited for payroll taxes in anticipation of being refunded tax credits from the Treasury for paid sick and paid FMLA leave provided to employees. Employers will not be penalized for withholding such deposits. The IRS will be issuing additional guidance to help employers manage the process.
- Employers are only required to provide Emergency Paid Sick Leave (pursuant to FFCRA) one time for each employee. The obligation with respect to each employee expires when the employer has paid the employee for his/her leave or upon the employee's return to work after taking the paid leave.

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*Disclaimer. Important - consult with tax and accounting professionals to assess the impact and application of the relief afforded under the CARES Act to the business. Subsequent to the date of this document, the content may change and businesses are further advised to seek counsel for legal opinions as to those changes.*