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Publications

President Trump Signs Coronavirus Aid, Relief, and Economic Security Act (CARES)

By Matthew Hosford, Melissa Ostrower, Robert R. Perry and John J. Porta

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CARES is expected to infuse approximately $2.2 trillion into the U.S. economy. The Act addresses a multitude of ways in which the federal government seeks to support businesses impacted by the pandemic and employees affected by COVID-19. Key areas of interest for employers relate to business loans, unemployment benefits, retirement plans, tax credits and executive compensation. The Act was passed by the House of Representatives in the early afternoon of March 27, 2020 and the President has signed the measure.

Loan Provisions

Paycheck Protection Program *(Section 1102)*

- Small businesses with not more than 500 employees are eligible to receive loans up to a maximum loan amount equal to the lesser of
  - The sum of
    - 2.5 x the average total monthly payments by the applicant for payroll costs incurred during the one-year period prior to the date on which the loan is made plus
    - Any outstanding amount of a loan made during the period beginning on January 31, 2020
  - Or $10,000,000
- Loan proceeds must be used for allowable purposes including
  - Payroll costs
  - Costs related to the continuation of group health care benefits during period of paid sick, medical or family leave, and insurance premiums
  - Employee salaries, commissions, or similar compensation
  - Payments of interest on any mortgage obligation
  - Rent
  - Utilities
  - Interest on any other debt obligations incurred before the covered period
- Eligibility considerations include whether the business
  - Was in operation on February 15, 2020, and
  - Had employees whom the borrower paid salaries and payroll taxes, or
  - Paid independent contractors
- The eligible recipient is required to make a good faith certification that
  - Due to the uncertainty of the current economic conditions it is necessary to obtain the loan to support ongoing operations of the business
  - The funds will be used to retain workers and maintain payroll or make mortgage, lease or utility payments, and
  - There isn't a duplicative application for the same purposes submitted by the business

Meet the Authors

Matthew Hosford

Of Counsel
Albany 518-512-8700
Email

Melissa Ostrower

Principal
New York Metro
New York City 212-545-4000
Email

Robert R. Perry

Principal
New York Metro
New York City 212-545-4000
Email

- The Small Business Administration (SBA) requires lenders to provide complete payment deferment relief (including payment of principal, interest, and fees) for impacted borrowers with covered loans for a period of at least six months, but not more for one year

Loan Forgiveness (*Section 1106*)

- Loan recipients are eligible for loan forgiveness equal to the lesser of
  - The amount the eligible recipient expended on payroll costs, mortgage or rent obligations, and utility payments during the eight weeks following approval of the loan (the covered period) or
  - The principal amount of loan
- This amount is then reduced by multiplying the sum of total costs by the quotient obtained by dividing
  - The average number of full-time equivalent employees per month employed by the eligible recipient during the covered period, by
  - at the election of the eligible recipient, either
    - The average number of full-time equivalent employees per month employed by the eligible recipient during the period beginning on February 15, 2019 and ending on June 30, 2019
    - Or, the average number of full-time equivalent employees per month employed by the eligible recipient during the period beginning on January 1, 2020 and ending on February 29, 2020
- Eligible recipient with tipped employees may receive loan forgiveness for additional wages paid to those employees
- The amount of loan forgiveness is further reduced by the amount of any reduction in total salary or wages of certain employees during the covered period that is in excess of 25 percent of the total salary or wages of the employee during the most recent full quarter during which the employee was employed prior to the covered period
- Under certain circumstances, loan forgiveness will be determined without regard to a reduction in the number of full-time equivalent employees of an eligible recipient or a reduction in the salary of one or more employees of the eligible recipient during the period beginning on February 15, 2020 and ending on the date that is 30 days after the date of enactment of this statute
  - For a reduction in employees, the eligible employer has eliminated the reduction in the number of full-time equivalent employees by June 30, 2020
  - For a reduction in salary or wages, the eligible employer has eliminated the reduction in the salary or wages by June 30, 2020
- To substantiate an application for loan forgiveness, the loan recipient is required to
  - Provide verifying documentation of the number of full-time equivalent employees on payroll and pay rates
  - Certify that
    - Documentation is true and accurate, and
    - The amount for which forgiveness is requested was used to retain employees or to make mortgage, rent, or utility payments

Emergency EIDC Grants (*Section 1110*)

- The SBA will provide emergency grants in the amount of $10,000 to certain businesses with not more than 500 employees that were in operation on January 1, 2020 who have applied for a SBA economic injury disaster loan. The loan should be provided to the business within three days of applying. The applicant must provide a self-certification that it is an eligible entity to apply. Even if applicants are later not approved for the economic injury disaster loan they are not required to repay this advance payment.
- The grant must be used for allowable purposes including
  - Providing paid sick leave to employees unable to work for COVID-19
  - Maintaining payroll to retain employment during business interruption
  - Meeting increased costs to obtain materials unavailable due to interruption in supply chains

John J. Porta

Principal
New York Metro
New York City 212-545-4043
Email

- Paying rent or mortgage
- Repaying obligations that cannot be met due to revenue loss

Subsidy for Certain Loan Payments *(Section 1112)*

- SBA will pay the principal, interest and fees owed on certain qualifying loan for six months
- Payments will begin within 30 days of the due date
- Payments will be applied in a manner so that the borrower is relieved of the obligation to pay

Unemployment Insurance Provisions

Enhancement of Benefits and Covered Individuals (*Sections 2101-2116*)

Title II, Subtitle A of CARES provides an estimated $260 billion in enhanced and expanded unemployment insurance benefits to millions of workers throughout the country who are unemployed or underemployed because of the COVID-19 pandemic. Below is a summary of the expanded benefits and coverage requirements.

- Extends unemployment insurance by 13 weeks and provides a four-month enhancement of benefits
- Makes unemployment compensation available for those not traditionally eligible for regular unemployment benefits, including those with limited work history or those who have exhausted their state unemployment compensation benefits
- A “covered individual” eligible for benefits includes anyone who provides self-certification that he or she is able and available to work, but is unemployed or partially unemployed due to any of the following:
    - Has been diagnosed with COVID-19 or is experiencing symptoms and seeking a medical diagnosis
    - A member of the individual’s household has been diagnosed with COVID-19
    - The individual is providing care for a family member or household member who has been diagnosed with COVID-19
    - The individual is the primary caregiver for a child or other person in the household who is unable to attend school or another facility as a direct result of COVID-19
    - The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of COVID-19
    - The individual is unable to work because a health care provider has advised the individual to self-quarantine due to COVID-19 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 COVID-19
    - The individual has become the breadwinner or major support for a household because the head of household has died as a direct result of COVID-19
    - The individual has to quit their job as a direct result of COVID-19
    - The individual’s place of employment is closed as a direct result of COVID-19

Individuals are not eligible if they are able to work remotely

- Individuals are not eligible if they are receiving paid sick leave or paid family leave
- State unemployment insurance providers will determine eligibility. However, states may not restrict the coverage to a more limited group of individuals than provided under federal law (Supremacy Clause). Therefore, all states are required to expand eligibility to those affected by COVID-19 as defined by the Act
- Provides an additional $600 per week payment to each recipient of unemployment insurance for up to four months (expires on July 31, 2020)
- The total amount of benefits will be equal to the amount determined under state law, plus an additional amount of $600 per worker per week
- Provides an additional 13 weeks of unemployment benefits to those who remain unemployed after state unemployment benefits are exhausted (expires on December 31, 2020)
- All but eight states (Arkansas, Alabama, Florida, Idaho, Kansas, Missouri, North Carolina, and

South Carolina) offer 26 weeks of unemployment insurance benefits
- Receipt of assistance under the unemployment provisions shall not exceed 39 weeks, unless otherwise extended
- Provides funding to pay the cost of the first week of unemployment benefits for states that choose to pay recipients as soon as they become unemployed instead of waiting one week before the individual is eligible to receive benefits (expires on December 31, 2020)
- Secretary of Labor has the ability to issue operating instructions or other guidance as necessary in order to implement these provisions

Retirement Plans

Greater Access to Distributions *(Section 2202(a))*

- Section 72(t) of the Internal Revenue Code (Code) imposes a 10% excise tax on certain early distributions from retirement plans
- CARES provides that this tax does not apply to COVID-19 related distribution (CRD) up to $100,000 (determined on a control group basis)
- CRD's are defined as
    - Distribution(s) made from eligible retirement plan
    - During 2020
    - To an individual
        - Diagnosed with COVID-19
        - Spouse or dependent diagnosed with COVID-19
        - Furloughed, laid off, or unable to work because of COVID-19

- Plan Administrators can rely on employee's certification that he meets these criteria
- CRD's treated as meeting a plan's distribution requirements
- Eligible Retirement Plan includes
    - IRA
    - Tax-qualified retirement plans
    - Tax-Deferred Annuities
    - Section 457 deferred compensation plans

- Recipient can avoid any income tax by repaying amount of CRD as a rollover within three years of distribution
- To the extent not repaid, taxable ratably over three years

Greater Loan Flexibility (*Section 2202(b)*)

- Section 72(p) of the Code limits non-taxable loans from qualified plans to the lesser of $50,000 or 50% of the employee's vested benefit
- CARES eases these restrictions for loans made to a qualified individual during the 180 day period beginning on the date of enactment by increasing these limitations to $100,000 and 100 percent
- Loan repayments for qualified individuals with loans in effect on and after the date of enactment that would otherwise be due between the date of enactment and December 31, 2020 are suspended for one year
- Extended payments are adjusted for accrued interest
- The statutory repayment period (generally five years) begins to run after this suspension period
- "Qualified individual" is defined in the same manner as used in the distribution provisions in Act Section 2202(a) above

Relaxed Rule on Required Minimum Distributions (*Section 2203*)

- Section 401(a)(9) of the Code requires that distributions from qualified plans generally begin at age 72
- CARES relaxes this rule for certain defined contribution plans and IRA's by creating a waiver of required minimum distributions that would otherwise be required for 2020

Special Business Provisions

Social Security Tax Credit for Employers Subject to Full or Partial Suspension of Business Due to COVID-19 (*Section 2301*)

- Employer tax credit equal to 50 percent of "qualified wages" paid to employees from March 13, 2020 through December 31, 2020
- The tax credit applies against the employer portion of Social Security taxes payable on W-2 wages paid to all employees (after first applying the tax credits for payment of required sick leave and required FMLA leave)

- The tax credit is available to employers who meet either of the following conditions ("eligible employer")
  - The employer's operations are either fully or partially suspended by a government order relating to COVID-19 OR
  - The employer's gross receipts during a calendar quarter are less than 50 percent of the gross receipts for the same calendar quarter during 2019

- The tax credit is based on the qualified wages paid by an eligible employer during the calendar quarter
  - More than 100 average number of full-time employees during 2019 – qualified wages includes ONLY wages that continue to be paid to employees who are NOT providing services due to a COVID-19 suspension of business operations or the greater than 50 percent reduction in gross receipts
  - 100 or less average number of full-time employees during 2019 – qualified wages include ALL wages paid to employees regardless of whether or not the employee is providing services
  - In all cases, the total amount of qualified wages that can be counted for an individual employee during the entire COVID-19 period cannot exceed $10,000
  - Wages refers to W-2 wages used to determine FICA (Social Security and Medicare) taxes BUT NOT counting FFCRA required sick leave payments and FFCRA required FMLA leave payments

Delayed Payment of Employer Social Security Taxes *(Section 2302)*

- ALL employers – whether or not affected by COVID-19 - are permitted to delay payment of 2020 employer Social Security taxes
  - 50 percent of the deferred 2020 employer Social Security tax is payable by 12/31/2021
  - Remaining 50 percent of the deferred tax is payable by 12/31/2022

DOL Authority to Relax Filing Deadlines *(Section 3607)*

- Section 518 of ERISA authorizes the DOL to extend certain filing deadlines under certain circumstances
- CARES extends this authority to include public health emergencies such as the COVID-19 pandemic

Single-Employer Funding Rules *(Section 3608)*

- Single-employer defined benefit plans must generally satisfy minimum funding rules by making certain minimum required contributions
- CARES relaxes this requirements by extending the due date for contributions that would otherwise be due in 2020 until January 1, 2021
- Any extended contributions are adjusted for accrued interest
- For purposes of applying the benefit restrictions imposed by Section 436 of the Code, a plan may use the adjusted funding target attainment percentage (AFTAP) for the last plan year ending before January 1, 2020

Tax-Free Employer Payment of Student Loans *(Section 2206)*

- Amends the special educational assistance rules of Section 127 of the Code to permit an employer pay the principal and/or interest on an employee's qualified education loan tax-free up to $5,250 for a calendar year
  - Applies to payments made after date of enactment and before 1/1/2021
  - The $5,250 annual cap applies to TOTAL of student loan payments PLUS other educational assistance payments made during the calendar year

All of the Section 127 requirements for tax-free payments continue to apply.

Executive Compensation

Executive Compensation Limitations *(Section 4004)*

- If a company accepts certain emergency direct lending relief under CARES, the company must agree to certain limitations on the compensation (including salary, bonuses, equity, and other financial benefits) paid to its officers and employees that remain in effect until one year after the loan or loan guarantee ceases
- These limitations are as follows:
  - No officer or employee whose total compensation in 2019 exceeded $425,000 (excluding certain collectively bargained employees)
    - May receive compensation during any 12-month period greater than the amount received in 2019 or
    - May receive severance pay or benefits upon termination which exceed two times the maximum total compensation received in 2019
- Additionally, no officer or employee whose total compensation in 2019 exceeded $3,000,000 may receive compensation during any 12-month period greater than $2,000,000 plus 50 percent of the amount greater than $3,000,000 received in 2019

Special Executive Compensation Limitations for Officers and Employees of Air Carriers or Contractors *(Section 4016)*

- If an air carrier or contractor receives financial assistance under CARES, the entity must agree to limit executive compensation during the period between March 24, 2020 and March 24, 2022 equivalent to the limitations described above under Section 4004

Please contact a Jackson Lewis attorney with any questions about this or other issues.

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