



Employment Law Note

March 2020 – “CARES Act” Edition

Congress Showers Employers with Loan Programs, Tax Credits, and Other Incentives to Retain Employees



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Just nine days ago, Congress enacted a massive expansion of emergency employee leave benefits in response to the COVID-19 pandemic. Congress has now followed this up with the largest spending bill in world history.

On Friday, March 27, 2020, President Trump signed into law the “Coronavirus Aid, Relief, and Economic Security Act,” or the “CARES Act.” The CARES Act provides for an unprecedented \$2.2 *trillion* in economic stimulus across a wide range of sectors.

While the popular press is primarily focused on the Act’s call for direct payments to taxpayers, there are many provisions of the CARES Act that will be of interest to employers whose operations are seriously disrupted by the pandemic and are searching for ways to meet payroll obligations.

Loans for Small Businesses

The CARES Act allocates \$349 billion to a “Paycheck Protection” loan program for businesses and non-profits with 500 or fewer employees—as well as to independent contractors, sole proprietors, and self-employed persons. Loans will be available through the Small Business Association in amounts of up to \$10 million. These loans can be used to cover:

- Employee compensation expenses (up to \$100,000 per year per employee)
- Paying for vacation and for family, medical, or sick leave benefits (except if the employer is taking the tax credit under the emergency sick leave laws passed last week)

- Paying for group health insurance benefits, including during periods of leave
- Paying mortgage interest (but not principal)
- Making rent payments
- Paying utilities
- Paying interest on debt obligations incurred before February 15.

When making loan decisions, SBA lenders will be permitted to consider only whether the business was in operation on February 15, 2020 and meets the employer size requirements. Lenders will not be permitted to require personal guarantees, or deny loans based upon the availability of credit elsewhere.

The Act provides for the possibility of forgiveness of these loans—up to the amount of payroll costs, utility expenses, rent and mortgage interest payments. But the amount of forgiveness will be reduced if the employer has reduced its employee headcount or cut employees’ wages. Employers who have already done those things (after February 15, 2020) have until April 26, 2020, to undo those actions if they would like to take full advantage of the loan forgiveness option.

Interested small businesses must apply directly to their SBA lenders and will be required to provide documentation of their payroll and unemployment insurance filings as well as other proof of payment of the above items. Lenders are required to act on applications within 60 days of their submission.

Loans for Mid-Sized Businesses

The CARES Act also provides a facility for loans to be made available to mid-sized businesses—but there are significant strings attached.

The CARES Act includes an authorization for the Treasury Department to provide up to \$454 billion in economic stabilization assistance, including direct loans to mid-sized businesses and non-profits (defined as those with “between 500 and 10,000 employees”) who require a loan to support their ongoing operations.

Unlike with the small business loans, however, prospective recipients of *this* type of loan will be required to adhere to limits on their operations:

- They must retain at least 90% of their workforce “at full compensation and benefits” until at least September 30, 2020
- They must restore at least 90% of their workforce as it existed on February 1, 2020—and also restore their compensation and benefits within four months after the public health emergency is declared over
- They cannot pay dividends on common stock until 12 months after the loan is repaid
- They cannot repurchase any of their stock listed on any national exchange (including, in most cases, the stock of a corporate parent)
- While the loan is outstanding and for two years after it is repaid, they cannot “outsource or offshore jobs” or “abrogate” any “existing collective bargaining agreements”
- They must “remain neutral in any union organizing effort for the term of the loan”

Unlike with the small business loans described above, there is no provision for loan forgiveness of these types of loans.

Employee Retention Tax Credits

The CARES Act also offers a tax credit to distressed employers to encourage them to keep employees on their payroll.

The credit is equal to 50% of the employer’s “qualified” wages and is taken against the employer’s quarterly employment tax payments. It is potentially available to businesses whose operations have been “fully or partially suspended ... due to orders from an appropriate governmental authority,” or whose

quarterly gross receipts have dropped at least 50% year-over-year.

The amount of “qualified” wages against which the credit can be taken depends upon the size of the employer. Employers with 100 or fewer employees can take the credit for *any* wages they pay while the above conditions persist—including wages paid to employees who are able to work. Employers with more than 100 employees can take the credit only for the wages they pay to employees who are “not providing services” because of the reasons noted above.

An employer’s “qualified” wages include qualified health plan expenses—but they *exclude* wages for which the employer is already claiming a credit under the emergency leave laws passed last week. The credit remains available until the public closure orders are lifted, or until the employer’s year-over-year gross receipts have stabilized (according to a very complicated formula set forth in the law).

Changes to Last Week’s New Sick Leave Laws

It’s been barely a week since the Families First Coronavirus Response Act (FFCRA) was signed into law—and the sick leave requirements of that law have not even taken effect yet. But the CARES Act is already making changes to those requirements.

The expanded FMLA leave for employees with children stuck at home will now apply to employees that an employer chooses to rehire. This is likely due to the many incentives in the CARES Act for employers to rehire people. Rehired employees will be able to take this leave, even without 30 days of service, so long as their layoff was no earlier than March 1 and they had worked for at least “30 of the last 60 calendar days” before their layoff.

The FFCRA’s refundable tax credits for providing Emergency Paid Sick Leave and Public Health Emergency Leave may now be “advanced.” The IRS has been directed to provide “forms and instructions” for claiming that advance, but the CARES Act otherwise provides little guidance on when employers might receive the advance.

Enhanced Unemployment Benefits

The CARES Act also provides significant boosts to unemployment benefits.

Among other things, it creates a procedure for the states to add \$600 to each recipient's weekly benefit through July 31, 2020.

It provides for up to 39 weeks of unemployment benefits (through December 31, 2020) to individuals who are affected by disruption related to COVID-19, unable to work, but who have exhausted their ordinary unemployment benefits or who are otherwise "not eligible" for them.

The Act also provides federal funding for states to eliminate the "waiting week" before unemployment benefits begin. Washington's Employment Security Department has already eliminated that requirement.

Other Provisions of the CARES Act

The CARES Act does many other things that will be of interest to employers. For example, it defers the deadline to make certain employment tax payments until December 31, 2021. It also requires group health plan and health insurers to cover the cost of

"qualifying coronavirus preventive service" without requiring any cost-sharing. It provides special loan facilities to certain distressed sectors, such as passenger air carriers—but subjects them to even more onerous restrictions, such as limits on executive compensation and requirements to issue warrants or equity interests to the federal government.

And, for employees who ask about the CARES Act's direct payment provisions: those payments will be \$1,200 per taxpayer (\$2,400 for joint filers) plus \$500 for each of the taxpayer's "qualifying children." The payments begin to phase out for taxpayers with adjusted gross income above \$75,000 and phase out completely for individuals with adjusted gross income of more than \$99,000. The payments are treated as immediately refundable tax credits against the taxpayer's 2020 federal tax obligations. They are supposed to be made "as rapidly as possible"—but no firm deadline is given in the Act (apart from the expiration of the direct payment program at the end of 2020).

Please reach out to us if you have any questions about how the CARES Act might be able to help your business.

For more information about this month's Employment Law Note
contact us at 425-454-4233



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