

Blog Post

Relief for Employers in the CARES Act

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The Federal Corona Aid, Relief, and Economic Security Act (CARES), approved Friday in the wake of COVID-19 pandemic, provides businesses with a myriad of opportunities for relief, including expansion of unemployment benefits, advance refunding of tax credits for employers that provide expanded FMLA leave and emergency paid sick leave, small business loan programs, debt forgiveness, and more. Summaries of the tax provisions and provisions affecting health and welfare benefit plans are available [here](#) and [here](#). Below are some of the key aspects of this new law and how it impacts employees and certain businesses.

Expansion of Unemployment Benefits

Eligibility. The CARES Act provides additional unemployment compensation benefits to “covered individuals” for unemployment or partial unemployment caused by the COVID-19 pandemic, starting on January 27, 2020 and ending before December 31, 2020. The Act defines “covered individual” broadly to include any individual who is not eligible for unemployment compensation or has exhausted those benefits under state law, and who is available to work, but is unemployed or partially unemployed because:

- The individual, or a member of the individual’s household, is diagnosed with COVID-19 (or

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- The individual is providing care to a family member or member of household who has been diagnosed with COVID-19;
- The individual who is the primary caregiver of a child or other person who is unable to attend school or other facility (e.g., retirement home) because of the COVID-19 outbreak and such school or facility is required for this individual to work;
- The individual cannot commute to his or her work location due to an imposed COVID-19 related quarantine;
- The individual has been ordered by a healthcare provider to self-quarantine due to COVID-19 related concerns;
- The individual had just been hired and scheduled to start working but could not do so due to the COVID-19 outbreak;
- The individual becomes the primary breadwinner after the head of the household died as a result of COVID-19;
- The individual has to quit because of a direct result of COVID-19;
- The individual's place of employment was shut down because of COVID-19; or
- The individual meets other criteria set forth by the Secretary of Labor.

The new law also covers “self-employed” individuals, provided that the individual also experienced or is experiencing the same COVID-19 related issues listed above. Notably, the Act provides unemployment compensation benefits even to

individuals who quit as a “direct result” of COVID-19. Typically, unemployment benefits are reserved for individuals who lose their job through no fault of their own. Until the Secretary of Labor issues more guidance, it is unclear what set of circumstances would fall under this provision.

Individuals who are teleworking with pay or are receiving any form of paid leave are not eligible for unemployment compensation.

Although individuals must be “actively seeking work” to be eligible, the Act gives states the flexibility to relax this requirement in light of COVID-19 concerns. Indeed, several states have already begun to waive this eligibility requirement.

Amount of Benefits. The amount of unemployment benefits includes the amount that would be calculated under the applicable state law for unemployment benefits, which is available until December 31, 2020. In addition to this amount, the Act also provides individuals with \$600 per week—but only through July 31, 2020.

Maximum Limit. The CARES Act provides a maximum total of 39 weeks of unemployment benefits. However, that total includes the total number of weeks in which an individual receives unemployment benefits under state law. Therefore, if a state provides an individual with 26 weeks of unemployment benefits, the CARES Act would provide an additional 13 weeks of unemployment compensation. However, individuals may receive such benefits during any state-required “waiting period” (though several states have already started waiving such periods in light of the COVID-19 pandemic).

Other Provisions. Under the CARES Act, state agencies will need to enter into formal agreements with the Secretary of Labor that will specify the total amount of funds given for assistance and for administrative expenses. The Act provides the states

with the option to terminate the agreement upon providing 30-day notice. The new law tasks the Secretary of Labor with devising instructions and procedures on how to administer these funds, as well as how individuals can apply for such benefits.

The CARES Act also provides payment to states to reimburse nonprofits, government agencies, and Indian tribes for half of the costs they incur through December 31, 2020, to pay unemployment benefits. In addition, temporary financing will be available to states with short-time compensation programs—also known as “work sharing” programs in which employers can opt to participate. The Act also provide grants for these short time compensation programs, and the funds must be used:

- To create and support rapid response teams to advise employers about alternatives to layoffs;
- The provision of education or assistance to employers to enable them to assess the feasibility of participating in short-time compensation programs; and
- The development or enhancement of systems to automate, the submission and approval of plans, the filing and approval of new and on-going short time compensation plans.

Tax Credits and Rehired Employees Under Families First Coronavirus Response Act

The Families First Coronavirus Response Act (FFCRA) provides for expanded leave under the Family and Medical Leave Act and for emergency paid sick leave to certain impacted individuals. See our summary of the FFCRA [here](#). Depending on the reasons for the leave, the pay is capped at different levels. The CARES Act amends the FFCRA to provide for the following:

Advance Refunding of Tax Credits. The CARES Act also codified DOL guidance on how employers can

receive advance refunding of tax credits for providing FFCRA leave. Employers may retain, as their FFCRA credit, otherwise-owed payroll taxes up to an amount equal to the costs they incurred in providing FFCRA leave (i.e., leave pay plus the cost of health insurance for employees on leave), up to the mandated caps. If the retention of payroll taxes is insufficient to cover the costs of FFCRA leave, “employers can seek an expedited advance from the IRS by submitting a streamlined claim form.”

In addition, the Act authorizes the Secretary of the Treasury to waive any penalties for failure to pay sufficient payroll taxes, if the Treasury “determines that such failure was due to the anticipation of the credit allowed” under the FFCRA.

Paid Leave for Rehired Employees. Under the FFCRA, to be eligible for expanded FMLA leave an employee must have worked at least 30 calendar days for the employer. (Pursuant to DOL guidance as of March 30, 2020, employees are eligible for paid sick leave regardless of length of employment.) The CARES Act also expressly includes rehired employees in the definition of “eligible employee” for expanded FMLA leave. “Rehired employees” were laid off on or after March 1, 2020, and worked at least 30 days of the last 60 calendar days prior their lay-off.

Small Business Loan Programs

Under the Paycheck Protection Program created by the CARES Act, new loans under the Small Business Act will be available to business concerns with fewer than 500 employees. Businesses with more than 500 employees may also be eligible where the business (i) employs fewer than 500 employees in each of its physical locations and (ii) the business is assigned a North American Industry Classification System code beginning with a 72. In determining eligibility, affiliation rules will also be waived for companies that operate as a franchise assigned a franchise identifier code by the SBA, and those that receive

financing from companies licensed under Section 301 of the Small Business Investment Act of 1958. For purposes of the new loans, non-profits organized under section 501(c)(3), sole proprietorships, franchises businesses, and self-employed individuals are also eligible.

To obtain a loan under the new law, a business must certify that the uncertainty of the current economic conditions makes the loan necessary to support ongoing business operations. A business will also have to certify that the funds will be used to either (i) maintain payroll, (ii) make mortgage payments; (iii) make lease payments; or (iv) pay utilities. These obligations must have existed prior to February 15, 2020.

The maximum amount of loans are 2.5 times the applicant's average total monthly payments for payroll cost for 12-month period preceding the loan, and are capped at \$10 million dollars. The interest rate for the loans will be capped at a maximum of 4%. Borrowers will have the option of deferring payments for between six (6) months and a year. Unlike other loans under the Small Business Act, businesses are not required to certify that they are unable to obtain credit elsewhere nor are they required to provide collateral or a personal guarantee to obtain a loan.

Loan Forgiveness

There is also a loan forgiveness component for businesses that retain their workers (or rehire employees who have been laid off). The provision allows for forgiveness of loans taken out under the Paycheck Protection Program in an amount equal to the sum incurred by a business related to payroll, mortgage payments, lease payments, or utility payments in the eight weeks following the origination of the loan. Should a business reduce the number of employees it has or reduce their rate of pay, it will also reduce the amount of loan forgiveness for which it is eligible. For businesses

that have already reduced their workforce, the Paycheck Protection Program allows a business to rehire employees prior to June 30, 2020 to avoid a reduction in its eligibility for loan forgiveness. The law provides that any amount forgiven will not be considered taxable income.

Relief and Assistance to Employees in Particular Industries

The CARES Act provides relief in the form of loans to employees of passenger air carriers, cargo air carriers, and businesses important to maintaining national security, including:

- Up to \$500 billion worth of loans and loan guarantees to eligible businesses, states, and municipalities. An “eligible business” means an air carrier or any other U.S. business that has not already “received adequate economic relief in the form of loans or loan guarantees under the Act.”
- Passenger air carriers, air cargo carriers, and businesses important to maintaining national security may only receive a loan or loan guarantee under the Act if no officer or employee whose total compensation exceeded \$425,000 for the calendar year 2019 receives compensation exceeding their 2019 compensation while the loan or loan guarantee is in effect, as well as in the 12 consecutive months after the loan or loan guarantee is no longer outstanding. The same restriction applies to severance payments or other compensation upon termination from the eligible business.
- Businesses that receive loans through the Federal Reserve programs are prohibited from paying dividends or repurchasing any outstanding equity interests while the loan or loan guarantee is outstanding, or for 12 months after. These businesses are subject to the same employee compensation restrictions as listed for air carriers, air cargo carriers, and businesses

important to maintaining national security. The Secretary of the Treasury can waive these restrictions.

- The Secretary of the Treasury will create a program to provide low-interest loans for eligible businesses, including nonprofit organizations, with between 500 and 10,000 employees. These loans will require no repayment for at least six months. Loans require a good-faith certification that:

(a) the recipient intends to maintain at least 90 percent of its workforce;

(b) the recipient will not pay dividends or repurchase equity security;

(c) the recipient will not outsource or offshore jobs during the loan or two years after;

(d) the recipient will not abrogate existing collective bargaining agreements and

(e) the recipient will stay neutral regarding union organizing activity.

In addition to loans, the CARES Act provides direct pandemic relief to the employees of passenger air carriers, cargo air carriers, and airline contractors (e.g., airport security, air plane food suppliers, etc.) For these employees, the Act provides financial assistance for the exclusive use of employee wages, salaries, and benefits in the amounts of up to \$25 billion for passenger air carriers, up to \$4 billion for cargo air carriers, and up to \$3 billion for airline contractors. To be eligible for this financial assistance, recipients must not conduct involuntary furloughs or reduce pay rates and benefits through September 30, 2020, and may not purchase an equity security in the carrier, contractor, or any parent company of the carrier or contractor, or pay any dividends through September 30, 2021. There

are also compensation limitations in order to be eligible for this assistance.

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