

Practice Update

CARES Act Considerations for Mid and Large-Size Companies

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By Kenneth R. Wiggins and Santiago Assalini

The Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) was signed into law on March 27, 2020, with the intent of helping American individuals and businesses navigate the crisis caused by COVID-19.

The CARES Act provides certain tax and loan-related benefits for businesses, and unemployment, qualified plan and tax-related benefits for individuals, in each case to alleviate the economic difficulties businesses and individuals are currently facing. This article provides a high-level summary of the key provisions of the CARES Act that may be helpful for mid and large-size companies with more than 500 employees, and their personnel, as they navigate the COVID-19 crisis.

Business Tax Provisions

Tax Credits, Tax Deferrals, and Net Operating Losses

The CARES Act provides that employers whose (a) operations were fully or partially suspended due to a COVID-19-related governmental order or (b) gross-receipts for the calendar quarter are less than 50 percent when compared to the same quarter in the prior year, are eligible to receive a refundable payroll tax credit equal to 50 percent of qualified wages (including any “qualified health plan expenses”

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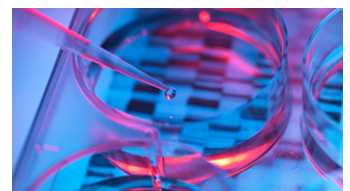
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allocable to the wages) for wages paid or incurred between March 13, 2020 and December 31, 2020. For employers with more than 100 employees in 2019, the credit is generally available only for wages paid to employees that are furloughed (i.e., retained, but are not currently providing services). The amount of qualified wages for each employee for all quarters may not exceed \$10,000. The credit is not available for employers that receive a small business interruption loan.

Employers generally are responsible for paying a 6.2 percent Social Security tax on employee wages. Under the CARES Act, employers and self-employed individuals may delay the employer portion of Social Security tax payments, with 50 percent of the amount to be paid by December 31, 2021, and the other 50 percent by December 31, 2022. This does not apply to the 1.45 percent Medicare tax on earned income.

Net operating losses (NOLs) are currently subject to a taxable-income limitation, and they cannot be carried back to reduce income in a prior tax year. The CARES Act relaxes such limitations, allowing companies to carry back NOLs from 2018, 2019, or 2020 for up to five years. The NOL limit of 80 percent of taxable income is also suspended, allowing companies to use their NOLs to fully offset their taxable income. The legislation also modifies loss limitations for non-corporate taxpayers and makes a technical correction to the treatment of NOLs for the 2017 and 2018 tax years.

Business Interest, AMT, and Qualified Improvement Property

The current net interest expense deduction limitation, which limits the ability of businesses to deduct interest expenses paid on their tax returns to 30 percent of adjusted taxable income, is temporarily increased to 50 percent of adjusted taxable income for 2019 and 2020 to allow the business to increase leverage or at least benefit from

higher deductions. Although such rule does not apply to partnerships for 2019, any interest disallowed at the partnership level will be allocated to the partners, and carried forward at the partner level under the current law. In 2020, 50 percent of the interest will be fully deductible, while the other 50 percent will remain subject to the current law.

The corporate alternative minimum tax was repealed as part of the Tax Cuts and Jobs Act, but corporate alternative minimum tax credits were made available as refundable credits over several years, ending in 2021. The CARES Act allows companies to claim larger refundable tax credits now than they otherwise could.

The CARES Act makes a technical correction to the Tax Cuts and Jobs Act relating to “qualified improvement property” (generally, interior improvements to nonresidential buildings). The correction is retroactive to January 1, 2018, and provides for immediate expensing of certain improvements to real property through bonus depreciation. Additionally, to the extent not immediately expensed, it allows for a 15 year recovery period (as opposed to the current 39-year deprecation life of the building).

Loans

The CARES Act provides up to \$500 billion of loans, loan guarantees, and investments to states, municipalities, air carriers, cargo air carriers, businesses critical to maintaining national security and other U.S. businesses that have not already received adequate economic relief in the form of loans or loan guarantees. Up to \$46 billion (the Air and National Security Loan Amount) of such amount will be allocated to loans and loan guarantees for air carriers and certain businesses providing related services, cargo air carriers and businesses critical to maintaining national security.

The other \$454 billion, and any amount of the Air and National Security Loan Amount that is not otherwise allocated, is available for loans, loan guarantees and investments to be allocated by the Federal Reserve for eligible businesses, states and municipalities. These programs and related loans will contain substantial restrictions for direct loans, including, (a) an agreement by the borrower that until one year after the loan is paid off, the borrower will not engage in buybacks of equity, pay dividends or otherwise make capital distributions, (b) an agreement by the borrower that until one year after the loan is paid off, the borrower will restrict and limit the total compensation of certain executives, and (c) that the borrower is created or organized, and have a majority of its employees, in the United States. A portion of the \$454 billion will be used in programs to be established by the Secretary of the Treasury specifically for mid-sized businesses with between 500 and 10,000 employees. Such mid-sized businesses will need to commit to retaining 90 percent of their workforces.

The CARES Act also provides for new loans of up to \$10 million under Section 7(a) of the Small Business Act to businesses with 500 or fewer employees, subject to certain exceptions. While most mid and large-sized companies may not at first sight qualify for Section 7(a) loans, it is important to note that affiliation rules are waived for (a) businesses with NAICS codes beginning with 72 (the accommodation and food services industries) with less than 500 employees, (b) franchises that are assigned a franchise identifier code by the Small Business Administration, and (c) businesses that receive financing from a company licensed under the Small Business Investment Act of 1958 (e.g., SBIC), such that certain of those mid and large-sized companies, or divisions thereof, may in fact be eligible. The CARES Act also permits accommodation and food service companies with a NAICS code beginning with 72 to apply the 500 employee test on a per physical location basis.

Unemployment Benefits

Eligibility

The CARES Act provides unemployment compensation benefits for unemployment or partial unemployment caused by COVID-19 from January 27, 2020 to December 30, 2020. Covered individuals are broadly defined to include any individual who is available to work but is unemployed or partially unemployed because of COVID-19-related reasons, including the following: (a) the individual, or a member of the individual's household, is diagnosed with COVID-19 (or experiencing similar symptoms and seeking medical diagnosis); (b) the individual is providing care to a family member or member of household who has been diagnosed with COVID-19; (c) 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) is unable to work because of COVID-19 and such school or facility is required for this individual to work; (d) the individual cannot commute to his or her work location due to an imposed COVID-19-related quarantine; (e) the individual has been ordered by a healthcare provider to self-quarantine due to COVID-19-related concerns; (f) the individual had just been hired and scheduled to start working but could not do so due to the COVID-19 outbreak; (g) the individual becomes the primary breadwinner after the head of the household died as a result of COVID-19; (h) the individual has to quit as a direct result of COVID-19; (i) the individual's place of employment was shut down because of COVID-19; or (j) the individual meets other criteria set forth by the Secretary of Labor. Notably, the CARES Act extends unemployment benefits to those who may otherwise not be eligible to receive them or who otherwise exhausted the applicable state benefits. The CARES Act also covers "self-employed" individuals, provided that the individual also experienced or is experiencing the same COVID-19 related issues listed in items (a) through (j) above.

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

Amount and Duration

The unemployment benefit includes the amount payable under the applicable state law plus \$600 per week. However, the additional weekly \$600 is only available through July 31, 2020. In addition, the CARES Act provides a maximum of 39 weeks of unemployment benefits (inclusive of the total amount of weeks during which an individual has received 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. Individuals are required to first exhaust any available unemployment benefits under state law before being able to receive unemployment benefits under this new law. 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).

Qualified Plan Withdrawals

The CARES Act allows eligible participants of a qualified retirement plan to request penalty-free distributions of up to \$100,000 for qualifying COVID-19-related reasons, including adverse financial consequences due to being quarantined, furloughed, laid off, having work hours reduced, being unable to work due to a lack of childcare, or closing or reducing hours of a business owned or operated by the individual. The CARES Act provides that: (a) tax on the income from the withdrawal may be paid over a three-year period; (b) participants may repay the amount withdrawn to an eligible retirement plan within three years; (c) repayments will not be subject to the retirement plan

contribution limits; and (d) all contributions (including 401(k) deferrals) will be available. In addition, the CARES Act allows certain defined contribution plans and IRAs to suspend required distributions in 2020 so that such participants are not forced to receive distributions based on 2019 year-end account valuations.

Individual Rebate Checks

The CARES Act provides individuals a \$1,200 (\$2,400 in the case of a joint return) rebate check, with an additional \$500 rebate per qualifying child. The rebate is subject to a phase-out and taxpayers with adjusted gross incomes in excess of \$99,000 (\$198,000 in the case of a joint return) would not receive such rebate. These amounts are to be paid directly to individuals as soon as possible by the government.

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