

Practice Update

CARES Act Considerations for Small Companies

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CARES Act Objectives

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 loans (including forgivable loans), tax and employment 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 due to the recent COVID-19 outbreak. This article provides a high-level summary of the key provisions of the CARES Act that may be helpful for small companies, and their personnel, as they navigate the COVID-19 crisis.

Support for Businesses

Small Business Act Loans

Paycheck Protection Program Loans

- Provides \$349 billion to the Small Business Administration's (SBA) Section 7(a) loan program through a new "Paycheck Protection Program" that offers certain businesses affected by COVID-

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19 access to immediate financial assistance in the form of forgivable loans.

- Paycheck Protection Program loans will be available to cover payroll costs, costs related to continuation of group health care benefits during periods of paid sick, medical or family leave, insurance premiums, payments of interest on any mortgage obligation, rent, utilities, and interest on existing debt obligations from February 15, 2020 through June 30, 2020.
- Generally available to companies that employ 500 employees or less (whether on a full-time, part-time or other basis). Employees of affiliated companies are aggregated for purposes of determining the number of employees; however, the 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 SBA, and (c) businesses that receive financing from a company licensed under the Small Business Investment Act. 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.
- To be eligible for a Paycheck Protection Program loan, no EIDL loan (described below) may be applied for or obtained through December 31, 2020 for the same purpose.
- Maximum loan amount is (a) the lesser of (i) \$10 million and (ii) 2.5 times the company's average total monthly payments for payroll costs for the 12-month period preceding the loan plus (b) the amount of any EIDL loan made on or after January 31, 2020 that is being refinanced by the Paycheck Protection Program.
- Loans under the Paycheck Protection Program are forgivable in an amount equal to the sum of (a) certain payroll costs, (b) payments of interest on any mortgage of the borrower incurred before

February 15, 2020, (c) payments on rent under previously existing lease agreements prior to February 15, 2020, and (d) payments for electricity, gas, water, transportation, telephone or internet services that began before February 15, 2020. The amount to be forgiven will be subject to certain reductions based on the employer's reduction of salaries or workforce for certain periods of 2020 which can be exempted if the salaries and workforce levels are restored by June 30, 2020. Forgiveness of a loan may not be available if a borrower elects to defer employer payroll social security tax permitted under the CARES Act. Borrowers obtaining loans under the Paycheck Protection Program are not permitted to also receive an employee retention tax credit and, consequently, may be required to offset or repay any employee retention tax credit obtained under the CARES Act prior to receiving the loan. We are waiting on guidance from the IRS on this point.

- If not forgiven, the loan will bear an interest rate of up to 4 percent and maximum maturity of 10 years.
- Other benefits of Paycheck Protection Program loans include:
 - deferment of all payments for 6 months to 1 year;
 - waiver of SBA fees;
 - no personal guarantee or collateral requirements;
 - SBA will not have recourse against any individual owner unless proceeds are used for unauthorized purposes; and
 - waiver of existing requirement that a small business be unable to obtain credit elsewhere.

Economic Injury Disaster Loans

- Provides \$10 billion to, and expands eligibility in, the Economic Injury Disaster Loan (EIDL)

program under the Small Business Act which permits loans of up to \$2 million.

- Until December 31, 2020, the following additional entities will be eligible to participate in the EIDL program: (a) a business with not more than 500 employees; (b) any individual who operates under a sole proprietorship or as an independent contractor; (c) a cooperative with not more than 500 employees; (d) an employee stock ownership plan (ESOP) with not more than 500 employees; or (e) tribal small business concern with not more than 500 employees.
- Applicants must have been in operation since January 31, 2020.
- Allowable uses of funds include provision of paid sick leave to employees unable to work due directly to COVID-19, maintaining payroll during business disruptions or slowdowns, meeting increased costs due to supply chain disruption, making rent or mortgage payments, or repaying obligations that cannot be met due to revenue losses.
- Through December 31, 2020, the SBA will waive personal guarantees on advances of not more than \$200,000 for all applicants, and will waive restrictions on an applicant's ability to obtain credit elsewhere.
- Applicants may request an emergency advance of up to \$10,000, which amount will not be required to be repaid even if the EIDL application is denied. If the applicant subsequently transfers to the Paycheck Protection Program, the advance amount will reduce the loan forgiveness amount under that program.
- Loans under the EIDL program are not forgiven.

Express Loans.

- Increases express loans under the Small Business Act from \$350,000 to \$1,000,000 through December 31, 2020.

Other Loans

- 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 of such amount will be allocated to loans and loan guarantees for air carriers and related service providers, cargo air carriers and businesses critical to maintaining national security.
 - The other \$454 billion is available for loans, loan guarantees and investments to be allocated by the Federal Reserve for eligible businesses, states and municipalities. A portion of this amount will be used in programs to be established by the Secretary of the Treasury specifically for businesses with between 500 and 10,000 employees. Such businesses will need to commit to retaining 90 percent of their workforces.
- These loans are not forgiven and will contain substantial restrictions, including (a) limitations on equity buybacks, dividend payments and other capital distributions, (b) restrictions on the total compensation of executives, and (c) requirements that the borrower be organized, and have a majority of its employees, in the U.S.

Business Tax Provisions

Tax Credits; Tax Deferrals; and Net Operating Losses

- 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” 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. For employers with 100 or fewer full-time employees in 2019, all wages are eligible for the credit.
- 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 an SBA Section 7(a) 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% of the amount to be paid by December 31, 2021, and the other 50 percent by December 31, 2022.
- 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 and 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.

Business Interest; AMT; and Qualified Improvement Property

- The current net interest expense deduction limitation, limiting 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.
- 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.

- 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 depreciation life of the building).

Limitations on PTO Payments

- Employers with 500 or less employees:
 - are not required to pay more than \$511 per day and \$5,110 in the aggregate for an employee taking paid sick leave because the employee is subject to a quarantine order, has been advised to self-quarantine or is experiencing symptoms of COVID-19 and seeking a medical diagnosis; and
 - are not required to pay more than \$200 per day and \$2,000 in the aggregate for an employee taking paid sick leave because the employee is caring for an individual who is subject to a quarantine order, is caring for a child whose school is closed or the child care provider of such child is unavailable or is experiencing substantially similar conditions.

Support for Individuals

Unemployment Benefits

Amount and Duration

- Until July 31, 2020, unemployment benefits include the amount payable under the applicable

state law *plus* \$600 per week.

- Provides a maximum of 39 weeks of unemployment benefits (which includes the total number of weeks an individual receives under state law) for unemployment caused by COVID-19 during the period from January, 27, 2020 to December 31, 2020.
- Individuals are required to first exhaust any available unemployment benefits under state law before being able to receive these new unemployment benefits. However, individuals may receive the new benefits during any state-required “waiting period” (though several states have already started waiving such periods in light of the COVID-19 pandemic).

Eligibility

- 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:
 - the individual, or a member of the individual’s household, is diagnosed with COVID-19 (or experiencing similar symptoms and seeking medical diagnosis);
 - the individual is providing care to a family member or member of household who has been diagnosed with COVID-19;
 - the individual 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 COVID-19 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 as a direct result of COVID-19; or
 - the individual's place of employment was shut down because of COVID-19.
- Extends unemployment benefits to those who may otherwise not be eligible to receive them or who otherwise exhausted the applicable state benefits.
 - Covers “self-employed” individuals, provided that the individual also experiences one of the COVID-19 related issues listed above.
 - Individuals must be “actively seeking work” to be eligible; however, 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.

Rehired Employee PTO Eligibility

- Employers with 500 or less employees must make rehired employees who 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, eligible to receive paid leave upon rehire.

Qualified Plan Withdrawals

- Allows eligible participants of a qualified retirement plan (e.g., a 401k) 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.

- Participants may repay the amount withdrawn within three years and tax on the income from the withdrawal may be paid over a three-year period.

Individual Rebate Checks

- 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 based on income. Taxpayers with adjusted gross incomes in excess of \$99,000 (\$198,000 in the case of a joint return) would not receive the rebate.

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