

BARKLEY

RISK MANAGEMENT & INSURANCE

THE CARES ACT - CORONAVIRUS AID, RELIEF AND ECONOMIC SECURITY FOR EMPLOYERS

A SUMMARY REPORT
APRIL 1, 2020

INTRODUCTION

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act – the Federal government’s third aid package intended to help keep businesses and individuals afloat during this unprecedented crisis – the Coronavirus pandemic.

In this report, we will provide guidance on the key areas of concern for employers, including unemployment benefits, business loans, retirement plans, tax credits and executive compensation. Please keep in mind, this information is just that, guidance, and you should always consult your legal counsel to assist you with such important topics as those discussed in this article.

LOAN PROVISIONS

WHO IS ELIGIBLE?

- Small businesses otherwise eligible for loans from the Small Business Administration (“SBA”), and any business (including independent contractors and sole proprietors), non-profit, veterans organization or Tribal businesses that employ fewer than 500 employees or if greater, the number of employees determined by the SBA to be standard for the industry in which the entity operates.
 - If the business provides accommodations, food service or drink/beverage service, the 500 limit on employees is applied to each physical location of the business.
 - The number of employees includes employees employed on a full-time, part-time, and other basis. In other words, not just full-time employees are counted in determining whether the employer has fewer than 500 employees.
- Other 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

LOAN PROVISIONS

WHAT IS THE MAXIMUM LOAN AMOUNT?

- Eligible businesses and self-employed individuals are eligible to receive loans up to a maximum loan amount equal to the lesser of \$10,000,000, or 2.5 times the borrower's average monthly payroll costs over the one-year period preceding the date on which the loan is made, plus any outstanding amount of a loan made during the period beginning on January 31, 2020.
 - Payroll costs include all wages, tips, vacation, family leave and sick pay, allowances for dismissal or separation, contributions to maintain group health care, payment of retirement benefits, and state and local tax payments.
 - Payroll costs exclude the compensation of individual employees or self-employed individuals in excess of \$100,000 (calculated on a prorated basis), taxes withheld or paid by the borrower for income tax, FICA, paid sick leave, or paid family medical leave under the Families First Coronavirus Response Act.

ARE THERE ANY RESTRICTIONS ON HOW A BORROWER MAY USE THE LOAN PROCEEDS?

- 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

WHEN ARE THE LOANS AVAILABLE?

- Loans are available during the "covered period" between February 15, 2020 and June 30, 2020.

LOAN PROVISIONS

WHAT WILL SOME OF THE LOAN TERMS BE?

- 10 year maturity period (to the extent not forgiven under Section 1104)
- Not greater than 4% interest
- Personal guarantees are waived
- No recourse against owners, directors or officers of the borrower
 - Lenders are required to treat every borrower as having been impacted by the COVID-19 and to defer the loan repayment for no less than six (6) months and no longer than one (1) year if the borrower requests deferral.

LOAN FORGIVENESS (SECTION 1106)

- Loan borrowers are eligible for loan forgiveness equal to the amount the eligible recipient expended on payroll costs (calculated under Section 1102), mortgage or rent obligations, and utility payments during the eight (8) weeks following receipt of the 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 employed during the eight (8) week period following receipt of the loan, by, at the election of the borrower, either (1) the average number of full-time employees employed by the borrower between February 15, 2020 and June 30, 2020 or (2) the average number of full-time employees employed by the borrower between January 1, 2020 and February 29, 2020.
 - The forgiveness amount will be further reduced by the total reduction in salary or wages of any employee earning less than \$100,000 on an annualized basis that exceeds 25% of the total salary or wages of the employee during the preceding full quarter in which the employee was employed prior to the date of the loan.
 - Loan forgiveness will be determined without regard to employees whose employment is terminated or whose salaries and wages are decreased by more than 25% in the 30 days following February 15, 2020 if by June 30, 2020 the employer has eliminated the reduction in the workforce and the reduction in salaries and wages.
- The forgiven amounts are not taxable as income to the borrower.

LOAN PROVISIONS

EMERGENCY EIDC GRANTS (SECTION 1110)

- The SBA will provide emergency grants in the amount of \$10,000 to certain businesses with less 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.
- The grant must be used for allowable purposes including:
 - Providing paid sick leave to employees unable to work due to COVID-19
 - Maintaining payroll to retain employment during business interruption
 - Meeting increased costs to obtain materials unavailable due to interruption in supply chains
 - 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.

SUBSIDY FOR CERTAIN LOAN PAYMENTS (SECTION 1112)

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UNEMPLOYMENT INSURANCE PROVISIONS

ENHANCEMENT OF BENEFITS AND COVERED INDIVIDUALS (SECTIONS 2101-2116)

- 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. For example, the maximum weekly benefit in New York will be \$1,104 instead of \$504.
- 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.
- 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.
- Individuals who may fall within this category are those who are self-employed and independent contractors.
- A “covered individual” eligible for benefits includes anyone who provides self-certification that s/he is unable or unavailable to work because s/he was diagnosed with COVID-19, or is seeking a medical diagnosis, or is able to work except that s/he is:
 - unemployed or partially unemployed because of one or more of the following factors:
 - the individual is providing care to a family member in the individual’s household who is diagnosed with COVID-19
 - a child or another person in the individual’s household cannot attend child care or another facility for care that is closed as a direct result of COVID-19
 - the individual is unable to reach his or her place of employment due to a quarantine requirement
 - the individual can reach his or her place of employment but has been instructed to self-quarantine

UNEMPLOYMENT INSURANCE PROVISIONS

ENHANCEMENT OF BENEFITS AND COVERED INDIVIDUALS (SECTIONS 2101-2116) - CONTINUED

- the individual was scheduled to start employment but cannot reach his or her new place of employment, or no longer has the new employment available, due to COVID-19
- the individual has become the bread winner or major support for the household due to COVID-19
- the individual has quit his or her job due to COVID-19
- the individual's place of employment is closed due to COVID-19
- the individual is self-employed and cannot find work, or is unemployed.
- Employees who can telework for pay, or those who are receiving paid sick leave or any other type of paid leave benefits, are not eligible.
- 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.
- 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 employed instead of waiting one week before the individual is eligible to receive benefits (expires on December 31, 2020).
- The U.S. Department of Labor will issue model legislation for states, or provide the states with technical assistance.

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 Act 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 s/he meets these criteria.
- CRD's are 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.

TAX CREDITS/SPECIAL BUSINESS PROVISIONS

SOCIAL SECURITY TAX CREDIT FOR EMPLOYERS SUBJECT TO FULL OR PARTIAL CLOSURE DUE TO COVID-19 (SECTION 2301)

- Permits an “eligible employer” to offset against the employer’s contribution to social security up to 50% of up to \$10,000 in wages paid to employees who, for small businesses continue to work, and for larger businesses continue to be paid by the employer despite the employee’s inability to work.
- The amount of “qualified wages” that may be taken into account for the credit for all eligible calendar quarters is \$10,000 in wages paid to each employee.
- 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 only applies to wages paid from March 13, 2020 through December 31, 2020.
- 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% of the gross receipts for the same calendar quarter during 2019. The employer remains eligible until the employer’s gross receipts are 80% of the gross receipts the employer earned for the same quarter in the prior calendar year.
- Note: An employer that is an “essential” business exempt from a suspension order or a business that is able to operate substantially through telecommuting likely will not qualify for the first eligibility test, but may qualify for the second test.
- Tax exempt organizations are eligible for the credit.
- “Qualified Wages” depend on whether the employer’s average number of employees during 2019 was greater than 100 employees or 100 or less employees (the number of employees is determined using the existing COBRA rules).

TAX CREDITS/SPECIAL BUSINESS PROVISIONS

SOCIAL SECURITY TAX CREDIT FOR EMPLOYERS SUBJECT TO FULL OR PARTIAL CLOSURE DUE TO COVID-19 (SECTION 2301) CONTINUED

- For employers with 100 or less employees, “qualified wages” include ALL wages paid to employees regardless of whether or not the employees continue to work.
- For employees with 100 or more employees, “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.
- “Qualified 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.

DELAY OF PAYMENT OF EMPLOYER PAYROLL TAXES (SECTION 2302)

- All employers and self-employed individuals - whether or not affected by COVID-19 - may defer payment of the employer share of Social Security taxes that they are otherwise responsible for paying to the federal government with respect to their employees.
- The employer or self-employed individual is required to pay the deferred employment tax over the following two years, with 50% of the deferred 2020 employer Social Security tax payable by December 31, 2021, and the remaining 50% payable by December 31, 2022.

SINGLE-EMPLOYER FUNDING RULES (SECTION 3608)

- An employer sponsoring a single employer pension plan may extend the time to make minimum contributions to the plan through January 1, 2021. However, any extended contributions must be adjusted to include accrued interest.

EXECUTIVE COMPENSATION

LIMITATION ON EXECUTIVE COMPENSATION (SECTION 4004)

- If a company accepts certain emergency direct lending relief under CARES (under Section 4003), the company must agree to certain limitations on the compensation (including salary, bonuses, stock awards, and other financial benefits) paid to its officers and employees. The limitations are as follows:
 - No officer or employee whose total compensation in 2019 exceeded \$425,000 (excluding certain collectively bargained employees) may receive:
 - in any 12 month period, compensation in excess of the compensation paid in 2019;
 - severance that exceeds two times the compensation the officer or employee received in 2019; and
 - if the officer or employee received compensation in excess of \$3,000,000 in 2019, then in any 12-month period, compensation of \$3,000,000 plus 50% of the officer or employee's compensation in excess of \$3,000,000 paid in 2019.
- The compensation restrictions remain in place while the loan under Section 4003 of the CARES Act remains outstanding and for the 12-month period following repayment of the loan.

[For more information, please visit our COVID-19 Resources page](#)

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