

THE FEDERAL ECONOMIC SECURITY ACT: WHAT EMPLOYERS AND EMPLOYEES NEED TO KNOW

On March 28, the President signed into law the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), the third piece of legislation in recent weeks designed to address the COVID-19 emergency. The CARES Act provides multi-pronged emergency aid directly to individuals and relief to businesses through a series of loans, grants, and tax credits. The CARES Act also includes a major expansion of unemployment benefits for workers and families impacted by the ongoing pandemic.

Keeping Workers Paid and Employed

The CARES Act provides for a \$350 billion loan guarantee program ("Program") to help small businesses through the Small Business Administration's ("SBA") Business Loan Program. The Program is designed to make funds available to qualifying businesses to ensure their ability to meet operational expenses. These zero percent interest loans can be forgiven if certain conditions are satisfied by the end of the covered period, June 30, 2020.

Qualifying Businesses:

- Businesses with up to 500 employees, or which otherwise satisfy the SBA's existing regulations (which vary by industry and are generally based on average annual receipts or number of employees);
- Nonprofit organizations with up to 500 employees; and
- Businesses in the accommodation and food services industries with more than one physical location, but not more than 500 employees at each location (and certain other conditions).

A qualifying business under the Program can receive one loan which may be used for payroll, paid leave and group health benefits, rent and utilities, and/or other worker protection costs. The loan can be used to help bring

back employees who had been furloughed or whose employment had been terminated as a result of the ongoing economic crisis.

Loan Details

The maximum loan available is the lesser of (1) \$10 million; or (2) 2.5 times the average total monthly payroll costs, as defined in the Act, incurred during the prior year. Calculation of the employers' payroll may be taken as of the outset of the covered period, February 15, 2020, and as such, employers may include the payroll of employees who were furloughed or let go prior to enactment of the CARES Act.

Unlike other small business loans, there is no requirement to post collateral or personally guarantee a loan under the Program. A business need only self-certify that the need to receive funds is a result of the current economic conditions, and that the funds will be used for one or more of the above-listed operating expenses.

There are some limitations on the use of funds received through the Program. Money cannot be used for compensation of individual employees or independent contractors in excess of an annual salary of \$100,000, as prorated for the covered period, or to compensate employees with a principal residence outside the United States. Funds also may not be used to cover qualified sick leave and family leave as recently defined by the Families First Coronavirus Response Act ("FFCRA"), which was passed into law on March 18, 2020. (Tax credits are available to employers needing to cover expenses arising from the expanded definition of paid leave under the FFCRA.)

If the Program loans are not subject to forgiveness, under the Program (see below), interest rates are capped at 4%. Payment of principal, interest, and fees will be automatically deferred for at least six months without

penalty, but cannot be deferred for more than one year. The deadline to apply for paycheck protection loans under the Program is June 30, 2020.

Loan Forgiveness

Loan forgiveness is available for payroll costs and certain additional delineated operating expenses. However, payroll costs will only be forgiven if the funds are used to cover eight weeks of payroll, so long as there is no reduction of the workforce or of more than 25% of wages for any covered employee during that period. This does not include money spent on wages in excess of \$100,000, prorated for the duration of the loan, which is not considered a payroll expense under the Program. As such, any money spent on salaries in excess of \$100,000 will not be forgiven, and employers will not be penalized for a wage reduction for these employees.

The forgiven amount is subject to a reduction if an employer has reduced the number of full-time employees (or their equivalent) or reduced salaries of employees in the eight weeks following the loan origination. Employers who re-hire workers who were laid off as a result of the COVID-19 crisis between February 15, 2020 and April 27, 2020 and return them to pre-termination payroll and benefit status by no later than June 30, 2020 will not be penalized for having a reduced payroll during the covered period, and will remain eligible for full loan forgiveness. For businesses with tipped employees, loan forgiveness is also available if money is used to enhance employee wages.

Business must apply for forgiveness and submit supporting documentation and should expect a decision on that application within 60 days. If there is any remaining balance, the loan will have a maximum maturity period of ten years.

Assistance for Workers, Families, and Businesses Benefits and Credits to Employees, Including Enhanced Unemployment Insurance

Employers should be aware of benefits and assistance available to individuals in addition to the Emergency Paid Sick Leave ("EPSLA") and Emergency Family and Medical Leave ("EFMLA") Acts which became law earlier this month (as well as NY state law). See HNRK's Client Alert, [Recent COVID-19 Laws: What Employers Need to Know](#).

Employees may also have greater access to funds held in qualifying retirement plans. Participants have increased opportunities to request loans and take distributions as

a result of the COVID-19 emergency. If layoffs and/or furloughs become necessary as a result of the global pandemic, the CARES Act has substantially enhanced federal funding for unemployment compensation in terms of eligible workers, the amount of benefits and the length of time to receive benefits. Freelancers and gig-economy workers are eligible to receive unemployment benefits, even if they would not be entitled to such benefits under the applicable state law, or if they have already exhausted those benefits. The CARES Act also provides for an additional \$600/week for up to four months (until July 31, 2020), in addition to unemployment benefits offered by the states. In addition to increasing the amount of unemployment insurance an employee may receive, the Act extends the duration of state-level unemployment benefits by 13 weeks. Accordingly, many workers will be able to receive up to 39 weeks of unemployment compensation. These extended benefits will expire on December 31, 2020.

The law also provides flexibility for meeting the traditional definition of "actively seeking work" in case of individuals unable to search for work because of illness, quarantine, or movement restriction. Workers who are furloughed or placed on an unpaid leave of absence can collect enhanced unemployment benefits while remaining on the books of businesses which have been forced to reduce payroll expenses due to COVID-19 even when state unemployment benefits would not otherwise be afforded to these employees.

Health Benefits for Furloughed Employees

The CARES Act does not address health benefit coverage for employees who are furloughed. It appears that, as before passage of the CARES Act, whether an employee on furlough will receive continued coverage depends on the terms of the applicable group medical plan. Most plans provide that an employee who is on leave, may only continue coverage for a period of time which is designated in the plan document. After that period expires, or if the employee is not entitled to coverage under the plan, the employee would be entitled to continuation coverage under COBRA or its state equivalent. Alternatively, an employee could obtain coverage through the Health Insurance Marketplace as loss of job-based benefits is considered a qualifying event for a Special Enrollment Period.

Employee Retention Tax Credit

Eligible employers may receive a refundable payroll tax credit equal to 50% of the first \$10,000 in wages

per employee, including the value of any health plan benefits. This credit is available to employers in operation during 2020, if (1) their business operations have been fully or partially suspended due to government shut down orders; or (2) their gross receipts have declined by more than 50% compared with the same quarter in 2019, up to a maximum recovery of 80% of gross receipts from that same quarter.

Payroll Tax Delay

The due date for Social Security payroll taxes from the date of enactment through the end of the year will likely be deferred over a two-year period. The first 50% will be due December 31, 2021, and the remainder will be due December 31, 2022.

Pension Plans

The CARES Act also provides employers some relief from their obligations to make minimum periodic contributions to fund pension plans. Ordinarily, employers must make minimum periodic contributions to fund plans. Under the new law, employers can delay those payments until the end of the year.

Economic Stabilization and Assistance to Severely Distressed Sectors

The CARES Act also allocates an additional \$450 billion for loans and investments for mid-size and large business with more than 500 employees that have been impacted by COVID-19 which are not eligible for the economic relief outlined above. The law directs the Treasury Secretary to establish application procedures for loans which have a maximum interest rate of 2%, but no provision for loan forgiveness. Money from these loans must be used to fund ongoing business operations, including continuing payroll and full benefits for at least 90% of employees through September 30, 2020.

In order to receive loans under this statute, businesses must also commit to no dividend payments or stock buybacks for the duration of the loan, and there are caps on executive compensation. The loans will also be conditioned upon a promise not to offshore jobs for the duration of the loan, plus an additional two years following full repayment.

Loans under this section of the CARES Act are intended for businesses domiciled in and whose employees are predominantly located in the United States.

Given that economic and public health conditions continue to fluctuate, and the expediency with which this legislation was passed, we expect further guidance from relevant public authorities and registered SBA lenders as the CARES Act is implemented. We will continue to follow these developments and are available to discuss specific situations as they arise.

For Questions Relating to This Client Alert, Please Contact:



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