CLIENT ALERTS & INSIGHTS

Benesch COVID-19 Resource Center: Key Provisions for Employers in the Coronavirus Aid, Relief, and Economic Security (CARES) Act

MARCH 27, 2020

Authors: W. Eric Baisden

On March 27, 2020, President Trump signed into law a broad economic stimulus bill called the Coronavirus Aid, Relief, and Economic Security Act (referred to herein as the "CARES Act" or the "Act").

The Act covers a wide range of subjects, including payments to individuals and families depending on income, expanded unemployment benefits, and a number of employment, tax, and commercial provisions impacting business. This summary highlights provisions of the CARES Act affecting employers and employee benefits. Separate alerts further address the tax and small business loan provisions in the CARES Act. They can be accessed here:

- **Key Business Tax Provisions Included in the CARES Act**
- **Forgivable Small Business Loans Related to the CARES Act**

Extended Unemployment Benefits

The CARES Act included an unprecedented expansion of unemployment insurance, including the following changes:

- Raises the maximum unemployment insurance benefit by $600 per week. This is supplemental to state funded unemployment insurance which currently vary in length and amount, with the federal enhancement being funded for four months rather than the usual three months at most. A few Senators unsuccessfully argued that $600 per week on top of state benefits would lead to some individuals receiving more than 100% of their previous wages by claiming unemployment. The final Act does not include a cap of unemployment benefits at 100% of previous wages.
- Extends regular unemployment benefits to last an additional 13 weeks.
- Applies to traditional workers for small and large businesses as well as those who are self-employed and workers in the gig economy.
- Contains a funding provision to encourage states to waive a waiting period for payment of unemployment benefits.

Small and Midsize Business Loans

Paycheck Protection Program

The CARES Act amends the Small Business Act (SBA) to create a new Business Loan Program category. For the period from February 15, 2020 to June 30, 2020, the law allows the Small Business Administration to provide 100% federally-backed loans up to a maximum amount to eligible businesses to help pay operational costs like payroll, rent, health benefits, insurance premiums, utilities, etc. Subject to certain conditions, loan amounts are forgivable. These loans, which are referred to as "paycheck protection loans," would incentivize small- and medium-sized businesses to continue paying workers and providing benefits.

In a separate section of the CARES Act, employers with fewer than 500 workers could apply to have a portion of the paycheck protection loans forgiven on a tax-free basis. The amount to be forgiven is the sum of the amounts they put into payroll costs and mortgage/rent/utility payments and interest for eight weeks after loan origination, with some limitations. The forgiveness amount is reduced if the employer either:

- Reduces its workforce during the 8-week covered period when compared to other periods in either 2019 or 2020, or
- Reduces the salary or wages paid to an employee who had earned less than $100,000 in annualized salary by more than 25% during the covered period.

This reduction can be avoided, however, if the employer rehires or increases the employee's pay within an allotted time period.

For purposes of these loans and the loan forgiveness, payroll costs do not include:

- the compensation of any individual employee in excess of an annual salary of $100,000;
- payroll taxes;
- any compensation of an employee whose principal place of residence is outside the U.S.; and
- any qualified sick leave or family medical leave for which a credit is allowed under the new Families First Coronavirus Response Act (FFCRA) passed last week.

Emergency Economic Injury Disaster Loans

The CARES Act also expands access to Economic Injury Disaster Loans under Section 7(b) of the Small Business Act to include not only businesses with fewer than 500 employees, but also sole proprietors, independent contractors and eligible self-employed individuals.

In addition, the Act creates a new Emergency Grant to allow a business that has applied for a disaster loan to get an immediate advance of up to $10,000. The advance can be used to maintain payroll, and is not required to be repaid, even if the borrower's request for a 7(b) loan is denied.

Low Interest Loans for Medium Sized Businesses

The Act also includes loans for medium-size businesses of between 500 and 10,000 employees. Employers should be aware that these loans come with sizable strings. Among the 10 conditions for these loans, eligible businesses must make good-faith certifications that:

- the funds will be used by the recipient to maintain at least 90 percent of its current workforce until September 30, 2020;
- the recipient will not outsource or offshore jobs for the term of the loan and 2 years after completing repayment;
- the recipient will not abrogate existing collective bargaining agreements for the term of the loan and 2 years after completing repayment; and
- the recipient will remain neutral in any union organizing effort for the term of the loan.

This last condition in particular may result in widespread impact on businesses as it welcomes unopposed unionization with long-term financial and operational obligations for exposed businesses if receiving loan assistance brings unionization with it.

For further discussion about the various loans in the CARES Act, see here.

Tax Implications for Employers

Employee Retention Credit

- The CARES Act includes a new employee retention credit against the employer's 6.2% share of Social Security payroll taxes for any business that is forced to suspend or close its operations due to COVID-19, but that continues to pay its employees during the shut-down.
- A business can qualify if:
  - Operations were fully or partially suspended during any calendar quarter during 2020 due to orders from an appropriate government authority resulting from COVID-19, or
  - The business remained open, but during any quarter in 2020, gross receipts for that quarter were less than 50% of what they were for the same quarter in 2019. The business will be entitled to a credit for each quarter, until the business has a quarter where its receipts exceed 80% of what they were for the same quarter in the previous year.
- For each eligible quarter, the business will receive a credit against its 6.2% share of Social Security payroll taxes equal to 50% of the "qualified wages" paid to each employee for that quarter, ending on December 31, 2020.
- For purposes of calculating the credit, "qualified wages" are capped at the first $10,000 of compensation, including health benefits, paid to each employee.
- The determination of what constitutes "qualified wages" further depends on the size of the business with different criteria for those with less than 100 employees and those with more than 100 employees in 2019.

- If an employer takes out a payroll protection loan under Section 7(a) of the Small Business Act as detailed above, no employee retention credit will be available.

Delay of Payment of Employer Payroll Tax

The Act allows employers and self-employed individuals to defer payment of the employer portion of the social security tax (6.2%) that they otherwise would be responsible for paying to the federal government in 2020 with respect to their employees (and themselves, in the case of self-employed individuals). Half of the deferred payroll taxes are due December 31, 2021, and the other half are due on December 31, 2022.

For further discussion about the tax provisions in the CARES Act, see here.

Corrections and Modifications to Families First Coronavirus Response Act

The Act clarifies the payroll tax treatment in the FFCRA, which allows employers to claim a tax credit for wages paid pursuant to that Act's paid leave provisions. The credit is applied against an employer's payroll tax liability on a quarterly basis.

- The CARES Act allows an employer to claim the credit in advance by not depositing payroll taxes in anticipation of the credit.
- If the amount of the expected tax credit exceeds an employer's payroll tax liability for a quarter, then the employer will receive a credit for the excess in that quarter.
- This means that an employer that incurs its 6.2% share of Social Security tax in 2020 may defer payment of that tax (as noted above) but also receive an immediate credit against the payroll taxes via the sum of the emergency medical leave credit, sick leave credit, and new employee retention credit.

The CARES Act also clarifies that an employee who was terminated on or after March 1, 2020 and subsequently re-hired to claim public health emergency leave. In order to be eligible, the employee has to work for the employer for at least 30 of the 60 days before his or her termination date. An employer will not be held liable for the expanded paid leave benefits if they do not re-hire the employee.

Key Takeaway

This is Congress' third effort to address the economic impact of the COVID-19 pandemic. With an estimated $2+ trillion-dollar price tag, this stimulus package is one of the largest and most significant stimulus packages in United States history.

For further information regarding these tax provisions or any other portion of the CARES Act, please contact a member of your Benesch team, including W. Eric Baisden at (216) 363-4676, Corey Clay at (216) 363-4158, or Yelena G. Katz at (216) 363-4405.

***

In addition, Benesch's dedicated COVID-19 task force will continue to provide updates and analysis to help guide its business partners in an effort to navigate the fast-paced and changing legal landscape related to COVID-19. Additional information is available on the Benesch COVID-19 Resource Center.