

## **THE CARES (CORONAVIRUS AID, RECOVERY AND ECONOMIC SECURITY) ACT**

The United States Congress has passed a \$2 trillion emergency aid bill known as the Coronavirus Aid, Recovery and Economic Security ("CARES") Act. President Trump signed the bill on March 27, 2020. This legislation provides significant tax and non-tax stimulus to individuals and businesses. Below is a brief summary of key provisions.

**This memo is only a summary and general overview of key provisions of the new CARES Act. Further, the Act is very lengthy and not entirely clear on all points. We expect that it will be substantially clarified, if not substantively revised, by future regulation or practical application. Accordingly, this summary is based upon the best information currently available.**

### **Title I - Keeping American Workers Paid and Employed Act**

#### **Paycheck Protection Program**

The CARES Act amended the Small Business Act (SBA) to create a new Business Loan Program category - the "Paycheck Protection Program." From February 15, 2020 to June 30, 2020, the Small Business Administration may provide 100% federally-backed loans to eligible businesses to help pay certain costs including payroll, rent, health benefits, insurance premiums and utilities. The loan amounts are forgivable, subject to certain conditions. This program will be administered through authorized banks and other financial institutions. Businesses should check with their usual lender to inquire further.

- **Eligible Loan Recipients.** Any "small business" as currently defined under the SBA is eligible.<sup>1</sup> In addition, any business, nonprofit organization, veteran's organization or Tribal business is eligible if it employs not more than 500 employees (including full and part time) or other applicable size as established by the Small Business Administration for the industry. (There are special rules for counting employees in the hospitality and restaurant industry where employers have more than one location.) Sole proprietors, independent contractors and certain self-employed individuals (as defined in the Families First Coronavirus Response Act) are also eligible. The usual requirement that a small business is unable to obtain credit elsewhere is waived.
- **Loan Maximum.** The maximum loan amount is capped at \$10 million and is determined by the following formula:

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<sup>1</sup> There is no single standard for a "small business." It will depend on your industry, annual sales and number of employees. For many businesses the standard will be fewer than 500 employees. For more information refer to the SBA's Table of Size Standards at <https://www.sba.gov/document/support-table-size-standards>.

- 2.5 times the average total monthly "Payroll Costs" (see definition below) for the one-year period before the loan is made (for seasonal employers, the average payroll costs for 12 weeks beginning February 15, 2019, or from March 1, 2019 to June 30, 2019);
- **Plus** the outstanding balance of any loan made under the SBA's Economic Injury Disaster Loan Program (discussed below) between January 3, 2020 and the date on which such loan may be refinanced as part of the new Paycheck Protection Program.
- If a business was not in existence between February 15, 2019 and June 30, 2019, its average total monthly payroll from January 1, 2020 to February 29, 2020 should be used.
- **"Payroll Costs" Defined.**
  - **Includes** salary, wages, commission, cash tips (or equivalent), paid leave, separation pay, group health benefits, retirement benefits, state or local payroll taxes, and compensation to sole proprietors or independent contractors (up to \$100,000 per recipient) in one year;
  - **Excludes** individual employee compensation exceeding \$100,000 per year, certain federal taxes, compensation to employees residing outside the United States, and sick pay or family leave pay for which credit is allowed under the Families First Coronavirus Response Act. (See our Critical Notice to Employers on March 19, 2020).
- **Borrower Requirements.** There are very few requirements. Instead of determining repayment ability, lenders must simply determine whether a business was operational on February 15, 2020, and had employees for whom it paid salaries and payroll taxes, or a paid independent contractor. The borrower must certify in good faith that:
  - The loan is needed to continue operations during the COVID-19 crisis;
  - The funds will be used to retain or recall workers and/or for mortgage, rent or utility payments;
  - The borrower has not submitted another application to the program for the same purpose; and
  - The borrower has not received duplicative amounts under the program during the period February 15, 2020 to December 31, 2020.
- **Waiver of Personal Guarantees.** No personal guarantees or collateral shall be required for loans under the Paycheck Protection Program.
- **Permissible Uses.** Businesses may use the loan proceeds for any use already permitted under the SBA guidelines and, in addition, for the following purposes:
  - Payroll Costs.
  - Group health benefits.

- Mortgage interest payments.
- Rent/lease payments.
- Utilities.
- Interest on any other debt incurred before the covered period.
- Deferment. Approved borrowers who were operating on February 15, 2020 are presumed to qualify for complete payment deferment relief (for principal, interest and fees) for six months to one year.
- Loan Forgiveness.
  - Loans under this program will be forgiven (and excluded from gross income) in an amount (not to exceed the principal amount of the loan) equal to the following costs incurred and payments made during the 8-week period after the loan origination date:
    - Payroll costs;
    - Interest payments on mortgages;
    - Rent; and
    - Utility payments.
  - Interest will not be forgiven and must be repaid, although it may be deferred.
  - The amount forgiven will be **reduced as follows**:
    - In proportion to any reduction in the number of employees retained by the borrower during the covered 8-week period compared to either (at the election of the borrower): (i) the average number of employees for the period February 15, 2019 to June 30, 2019; or (ii) the average number of employees for the period January 1, 2020 to February 29, 2020; and
    - By the amount of any reduction, during the covered 8-week period, in total salary or wages for any employee in excess of 25% of the employee's salary or wages during the most recent full quarter before the covered 8-week period. For this purpose, only employees that did **not** receive, during any single pay period in 2019, wages or salary at an annualized rate of more than \$100,000 are considered.
  - To encourage employers to rehire any employees who have already been laid off due to the COVID-19 crisis, borrowers that previously laid off or furloughed workers (between February 15, 2020 and 30 days after enactment of the CARES Act) will not be penalized for having a reduced payroll at the beginning of the 8-week period if laid-off and/or furloughed workers are re-hired/called-back by June 30, 2020. (We expect the proportionality rule above to apply to re-hires/call-backs as well.)
  - Portions of loans not forgiven are payable over a maximum of 10 years and interest not to exceed 4%.

- Other Provisions.
  - Certain SBA fees are waived, and lender fees are capped.
  - A borrower receiving assistance under the Economic Injury Disaster Loan Program (see below) related to COVID-19 is not eligible for this program. However, a borrower who has an EIDL loan unrelated to COVID-19 may apply for a Paycheck Protection Program loan, with an option to refinance that loan into the new loan. The emergency EIDL grant award of up to \$10,000 would be subtracted from the amount forgiven under the Paycheck Protection Program.
  - The limit for the SBA's Express Loan Program is increased to \$1 million. An Express Loan is an expedited, amortized government-guaranteed loan but it is **not** forgivable.

### **Expansion of SBA Disaster Loan Program**

The CARES Act expands the Economic Injury Disaster Loan ("EIDL") Program for the period January 31, 2020 to December 31, 2020.

- Eligibility. In addition to currently eligible entities, the following businesses are eligible for EIDL loans: businesses with 500 or fewer employees; sole proprietorships and independent contractors; cooperatives with 500 or fewer employees; and Tribal small businesses. The usual requirement that an applicant is unable to obtain credit elsewhere is waived, as is "1 year in business prior to the disaster" requirement. Lenders may approve applicants based solely on credit scores or "alternate methods to determine an applicant's ability to pay."
- Waiver of Personal Guarantees. Personal guarantees on advances and loans of \$200,000 or less are waived.
- Emergency Grant Payment Distributions.
  - An eligible entity who has applied for an SBA disaster loan due to the COVID-19 crisis may request an advance on that loan, of not more than \$10,000, which the SBA must distribute within three days.
  - This advance does not have to be repaid, even if the applicant is subsequently denied for a disaster loan.
  - The SBA must verify that the entity is an eligible applicant for an EIDL loan. This approval shall take the form of a certification under penalty of perjury by the applicant that they are eligible.
  - The advance payment may be used for providing paid sick leave to employees, maintaining payroll, meeting increased costs to obtain materials, making rent or mortgage payments, and repaying obligations that cannot be met due to revenue losses.

- If the applicant transfers into the Paycheck Protection Program, the advance amount will be deducted from any payroll cost forgiveness amounts.

## **Title II - Assistance for American Workers, Families and Businesses**

### **Subtitle A**

#### **Unemployment Insurance Provisions a/k/a "Relief for Workers Affected by Coronavirus Act"**

- The CARES Act creates a temporary "Pandemic Unemployment Assistance Program" (to be administered through state unemployment programs) through December 31, 2020 to provide payment to those not traditionally eligible for unemployment benefits (self-employed, independent contractors, those with limited work history, and others), or have exhausted regular unemployment benefits, and who are unable to work as a result of the COVID-19 crisis, for up to 39 weeks.
- States may enter into agreements with the federal government to provide enhanced unemployment benefits under an existing state program, such as immediate payments (no waiting period), up to an additional \$600 per week for up to four months (even if the employee currently makes less) and an additional 13 weeks of benefits.
- States may enter into agreements with the federal government to receive funding for "short-time compensation" programs to subsidize employees whose hours are reduced in lieu of a layoff or furlough.
- **NOTE:** The federal government will not be making unemployment insurance payments. Each state administers its own unemployment insurance program and will determine if and how to use the new federal funding to increase unemployment benefits through its program. We are awaiting information as to how this will impact unemployment benefits in Michigan.

### **Subtitle B**

#### **Rebates and Other Individual Provisions**

- Rebates. The CARES Act provides for direct cash payments to taxpayers - up to \$1,200 for each individual (\$2,400 for joint taxpayers), plus \$500 per child. The rebates are not taxable income. The amount of the rebate will phase out starting at \$75,000 for individuals (\$150,000 for joint taxpayers) and is eliminated entirely for individual taxpayers with no children at \$99,000 (or \$198,000 for joint taxpayers with no children). The IRS will use the taxpayer's 2019 (if filed) or 2018 tax return to determine eligibility. Taxpayers with no income are still eligible to receive a rebate check.

- Early Withdrawals from Retirement Plans. The early withdrawal penalty will be waived for certain COVID-19 related withdrawals from qualified retirement plans up to \$100,000. The early withdrawal may be repaid over three years. Income attributable to these withdrawals would be subject to tax over three years.
- Minimum Distribution Threshold. The minimum distribution requirement for certain deferred compensation plans is waived.
- Charitable Contributions. The current limitations on charitable contributions have been relaxed for 2020. A deduction of up to \$300 for cash contributions is allowed, whether or not the taxpayer itemizes deductions. The 50% of adjusted gross income limitations on deductions for charitable contributions is suspended for 2020.
- Treatment of Student Loans. Employers may pay up to \$5,250 of an employee's student loans tax-free.

### Subtitle C Business Provisions

- Employee Retention Credit.
  - Eligible employers will receive a refundable credit against payroll tax liability equal to 50% of the first \$10,000 in wages (including health benefits) per employee.
  - The credit is available to employers whose (1) operations were fully or partially suspended, due to a COVID-19-related government shut-down order, or (2) gross receipts declined by more than 50% compared to the same quarter in the prior year.
  - For employers with more than 100 full-time employees, only wages paid to employees who are not providing services due to COVID-19-related circumstances are eligible for the credit.
  - For eligible employers with 100 or fewer full-time employees, all employee wages qualify for the credit, whether the employer is open for business or subject to a shut-down order.
  - The credit is effective for wages paid March 12, 2020 until January 1, 2021.
- Delay of Employer Payroll Taxes. Employer payroll taxes and 50% of self-employment taxes for wages paid in 2020 may be deferred and paid over the following two years, with half of the amount required to be paid by December 31, 2021 and the other half by December 31, 2022.
- Modifications for Net Operating Losses. The CARES Act temporarily suspends certain provisions of the Tax Cuts and Jobs Act (TCJA) regarding net operating losses so that businesses may utilize greater losses and claim refunds for certain losses.

- The 80% of taxable income limit on net operating loss carryovers is suspended for three years, so the limit would not apply to tax years beginning in 2018, 2019 and 2020;
- Net operating losses arising in 2018, 2019 and 2020 can be carried back five years; and
- Loss limitations for non-corporate taxpayers are also modified, including rules governing excess business losses.
- Corporate ATM Credits. The corporate alternative minimum tax was repealed as part of the TCJA, but corporate ATM credits are allowed as refundable credits until 2021. The ability of companies to recover those credits has been accelerated.
- Net Interest Deduction Limitation. The amount of interest expenses businesses are allowed to deduct is temporarily increased from 30% to 50% of taxable income for 2019 and 2020.
- Excise Tax Exemption for Hand Sanitizer. The excise tax applied to alcohol used to produce hand sanitizer is temporarily suspended for 2020.

**Given the complexity of the CARES Act, the several forms of relief it provides, and the many issues presented by the COVID-19 crisis, it is imperative that each employer work with its legal, accounting and financial advisors to weigh the options available and choose the best course of action. An SBA loan under the Act may not be the best choice for every employer. If you have any questions or would like further guidance regarding the above provisions of the Act or any other employment issue, please contact [David Lawrence](#), [Bruce Lazar](#) or [Sarah Gidley](#).**