President Signs the Coronavirus Aid, Relief, and Economic Security "CARES" Act

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On March 27, 2020, President Trump signed $2.2 trillion stimulus package known as the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act. The update below focuses on provisions in the CARES Act that are employment-related. We do not comment upon tax issues or how to apply for loans. If you have such a question, please contact your financial or tax advisor or we can put you in the very capable hands of our strategic partners who practice in the area at issue.

Here’s what employers should know about the CARES Act:

SMALL BUSINESS LOANS

Employers Covered:

The CARES Act provides emergency business loans during the covered period (February 15 through June 30, 2020) to most business concerns, nonprofit organizations, veterans organizations, or Tribal business concerns with less than 500 employees.

Amount of the Loan:

The maximum amount of the emergency loan would be either: (1) 2.5 times the average monthly payments the employer made for payroll costs during the year prior to the loan disbursement plus certain outstanding loan amounts; or (2) $10,000,000, whichever is less.

Definition of Payroll Costs:

Payroll costs are broadly defined to include:

salary, wages, commissions, and similar compensation; payment of cash tips or their equivalent; payment for vacation, parental, family, medical, and sick leave; allowance for dismissal or separation; payment required for group healthcare, including benefits; payment of retirement benefits; payment of tax on compensation; and payments of compensation to or income of a sole proprietor or independent contractor.

Payroll costs do not include the compensation of or payments to any individual in excess of $100,000 as prorated for the covered period; certain taxes; compensation of employees outside of the United States; or qualified sick leave or family leave wages for which a credit is allowed under the Families First Coronavirus Response Act (“FFCRA”).

The allowable uses for the emergency loan under the CARES Act would be payroll costs, costs related to the continuation of group healthcare benefits, salaries, commissions, payment of interest on mortgage obligations, rent, utilities, and interest on specified debt obligations.

All defined employers who are in operation on February 15, 2020 and had employees for whom the borrower paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC would be eligible for emergency loans. Borrowers must make a good faith certification as to, among other things, the need for and intended uses of the emergency loan.

Finally, portions of the emergency loans may be forgiven, though the forgiveness amount may be reduced based on reductions in the number or pay of employees.

UNEMPLOYMENT INSURANCE EXPANSION

The CARES Act greatly expands the situations in which an individual would be eligible to receive unemployment compensation from States. The Federal Government will be funding much of the expansion of unemployment benefits. In addition, to any unemployment received by individuals through State programs, an individual would be entitled to an additional $600.00 per week through Federal Pandemic Unemployment Compensation.

Additional Eligibility Factors:

The CARES Act provides additional funds to States that permit individuals to receive unemployment benefits who are able to work, but are unemployed or unavailable to work because the individual:

has COVID-19 or has symptoms of COVID-19 and is seeking a medical diagnosis; has a family member who has tested positive for COVID-19; is providing care for a child whose school or childcare facility has closed or because the individual's childcare has been interrupted by COVID-19; is unable to reach their place of employment due to a quarantine; is scheduled to start work but cannot because of a quarantine; has become the breadwinner by virtue of the former head of household dying from COVID-19; has to quit their job due to COVID-19; has their place of employment closed due to COVID-19; is self-employed, looking for work part-time work, does not have sufficient work history or otherwise would not normally be eligible for unemployment benefits; or for any additional criteria established by the Secretary of Labor.

Individuals not eligible for unemployment benefits include those with the ability telework with pay or anyone receiving paid sick leave or other paid leave benefits.

Individuals may receive unemployment benefits for up to 39 weeks due to partial or full unemployment caused by COVID-19 from January 27, 2020 to December 31, 2020. Individuals may be eligible to receive unemployment benefits retroactively prior to the passage of the CARES Act.

2020 RECOVERY REBATES FOR ELIGIBLE INDIVIDUALS

Eligibility for the Rebate:

Subject to the exclusions and phase-outs below, anyone who filed a tax return in 2019 or 2018, or who received a 2019 Form SSA-1099, Social Security Statement, or Form RRB-1099, Social Security Equivalent Benefit Statement, will be eligible to receive a rebate. The rebates are available even if the eligible individual has no income, and no action is generally required to claim the rebates. The rebates are treated as an advance refundable tax credit on the eligible individual's 2020 tax return. If the individual did file a tax return in 2018 or 2019, they may be eligible for the rebate when completing their tax return for 2020.

Amount of the Rebate:

The CARES Act provides a $1,200 rebate payment for eligible individuals ($2,400 for joint taxpayers). Additionally, eligible individuals with children will receive a flat $500 for each child.

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Rebate is Phased Out Based on Income:

The rebate phases out at $75,000 for singles, $112,500 for heads of household, and $150,000 for joint taxpayers at 5% per dollar of qualified income, or $50 per $1,000 earned. It phases out entirely at $99,000 for single taxpayers with no children and $198,000 for joint taxpayers with no children.

Exclusions from the Rebate:

The following eligible individuals will not be eligible for a rebate: individuals and their spouses and dependents who did not provide a valid identification number on their tax return; nonresident aliens; individuals who are claimed as a dependent on another person's tax return; as well as estates and trusts.

Timing and Method of Rebate Payments:

Generally, the rebates will be made between now and December 31, 2020. In most cases, the rebate will be paid electronically if the eligible individual provided their direct deposit information to the IRS on their 2018 or 2019 tax returns.

EMPLOYEE BENEFITS

Impact on Retirement Plans:

Penalty-Free In-Service Distributions Up to $100,000 Related to Coronavirus:

The CARES Act waives the 10% excise tax for ineligible in-service distributions for "coronavirus-related distributions" for amounts not to exceed $100,000 from all plans maintained by an employer (and any member of any controlled group which includes the employer). This provision applies to employer-sponsored qualified retirement plans and IRAs. The following rules apply to this penalty-free distribution:

- **Eligibility for a distribution:** Individuals will be eligible for a coronavirus-related distribution if: (1) the individual, their spouse or dependent has been diagnosed with SARS-CoV-2 or COVID-19 by a test approved by the Centers for Disease Control ("CDC"), or (2) the individual experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off or having work hours reduced due to coronavirus, being unable to work due to lack of child care due to coronavirus, closing or reducing hours of a business owned or operated by the individual due to coronavirus. Plan administrators may rely on an employee's certification for determining whether any distribution is a coronavirus-related distribution.

- **Distribution timing:** The distribution must occur on or after January 1, 2020, and before December 31, 2020.
- **Repayments allowed:** In order to replenish the individual's retirement account, the amounts that were distributed may be repaid at any time over the three-year period beginning on the date the distribution was received. Repayments may be made in any multiples (e.g., multiple payments over the three-year period or a single lump sum repayment). Repayments are subject to the qualified plan or IRA accepting rollover contributions.
- **Income inclusion for amounts not repaid:** Any coronavirus-related distribution that is not repaid can be included ratably over the three taxable year period beginning with the taxable year in which the distribution was received.
- **Hardship distribution requirements:** Coronavirus-related distributions will be deemed to meet the hardship distribution requirements applicable to 401(k) plans.

Expansion of Qualified Plan Loans:

The CARES Act increases the dollar amount available for qualified plan loans from $50,000 to $100,000. The individuals eligible for the expanded plan loans are the same individuals who are eligible for coronavirus-related distributions as set forth above. Also, the plan loan limit test is expanded based on the individual's entire account balance instead of half of the account balance. Any due date for the repayment of a loan under this provisions that is due between the date of the CARES Act's enactment and before December 31, 2020, shall be delayed for one year. The five-year limit on loan repayments disregards this one-year delay.

Delay in Required Minimum Distribution Payments:

The CARES Act permits a one-year delay in required minimum distributions (RMDs) for defined contribution plans described in Tax Code sections 401(a), 403(a) and (b), IRAs, and section 457 plans. The delay does not appear to apply to defined benefit plans. The delay applies to both 2019 RMDs that needed to be distributed by April 1, 2020 and 2020 RMDs. Similar to the financial crisis in 2008, the CARES Act allows 2020 RMDs to be eligible for rollovers in the same manner as 2009 RMDs.

Delay in Minimum Contribution Payments for Single-Employer Qualified Plans:

The CARES Act delays any minimum funding contributions that would otherwise be due in 2020 for single-employer qualified plans (including quarterly contributions) until January 1, 2021. The amount of each such minimum required contribution must be adjusted for interest accruing for the period between the original due date and the payment date, at the effective rate of interest for the plan for the plan year in which the payment is made.

Effective Dates and Due Dates for Conforming Amendments:

The provisions impacting retirement plans under the CARES Act are effective for calendar years beginning after December 31, 2019, which means that participants already impacted by the coronavirus in 2020 may take advantage of these provisions. The CARES Act delays the due date for amendments to plans related to the provisions of the CARES Act so long as the plan is operated as if the amendment were in effect. Plan amendments are due by the last day of the plan year beginning on or after January 1, 2022.

For governmental plans, the due date is the last day of the plan year beginning on or after January 1, 2024.

The Secretary of Treasury may extend these due dates. Also, the anti-cutback provisions under the Employee Retirement Income Security Act (“ERISA”) do not apply to these retroactive amendments.

Impact on Group Health Plans:

Expanded COVID-19 Testing Group Health Plan Coverage:

The CARES Act expands the testing coverage that would be covered under group health plans without cost sharing beyond the coverage set forth by the Families First Coronavirus Response Act (FFCRA). The expanded coverage includes COVID-19 diagnostic testing approved by the Food and Drug Administration (FDA), as well as diagnostic testing for which a developer has requested, or intends to request, emergency use authorization from the FDA or that a state has authorized.

Under the CARES Act, group health plans must reimburse a provider for either the negotiated rate of the testing or if there is no negotiated rate in effect between the group health plan (or insurer) and the provider, then the plan would pay for the cash price of the diagnostic testing as reflected on the provider’s public website. If a provider fails to publicize the price of the testing on its public website, the provider is subject to a fine not to exceed $300 per day.

Finally, similar to the mandated preventive care coverage provision under the Affordable Care Act ("ACA"), the CARES Act provides that as preventive measures described as an "item, service, or immunization that is intended to prevent or mitigate coronavirus disease 2019" become available, then a group health plan must also cover such preventive measures with no cost-sharing obligation. The preventive measure must meet the applicable requirements of the United States Preventive Services Task Force or must have a recommendation from the CDC.

Expansion of Coverage for Over-the-Counter Medications:

The CARES Act repeals the ACA rule prohibiting over-the-counter medications (i.e., medications without a prescription) from being "qualified medical expenses." As such, participants of health savings accounts ("HSAs"), health reimbursement arrangements, ("HRAs") or health flexible spending accounts ("FSAs") would be able to be reimbursed from those accounts to pay for over-the-counter medications, without a prescription. The CARES Act also adds menstrual products to the definition of qualified medical expenses. Based on this change, over-the-counter medications purchased after December 31, 2019, will be eligible for reimbursement.

Telehealth Benefits and Health Savings Accounts:

For plan years beginning on or before December 31, 2021, a group health plan will not fail to be a high deductible health plan by reason of failing to have a deductible for telehealth and other remote care services.

MISCELLANEOUS TAX CHANGES

Expanded Tax Deductions for 2020 Charitable Contributions:

The CARES Act encourages charitable contributions from individual taxpayers in 2020 by allowing an "above-the line" deduction of up to $300 of cash contributions, regardless of whether the taxpayer itemizes deductions. The corporate donor limit is increased to 25% from 10% of adjusted taxable income.

Tax Treatment of Student Loans:

Student loan repayments made by an employer in 2020 may be excluded from gross income up to $5,250. This provision is subject to the limits and provisions already in place under Section 127 of the Tax Code.

Tax Credits:

The CARES Act also provides certain employers tax credits equal to 50% of qualified wages paid to each employee that quarter, not to exceed $10,000 per employee. To be eligible for these tax credits the employer must have experienced a significant decline in gross receipts. The CARES Act also delays when payroll tax payments are due and changes how net operating losses are calculated under the tax code.

CHANGES TO THE FAMILIES FIRST CORONAVIRUS RELIEF ACT

Changes to the FMLA Expansion Act:

Eligibility for Recalled/Rehired Employees:

The most significant change to the FMLA Expansion Act is allowing *rehired* employees to take paid leave. Employees who are rehired are eligible for paid leave under the FMLA Expansion Act if the employee was laid off on or after March 1, 2020, worked for the employer for at least 30 days out of the last 60 days prior to the layoff and was rehired. There is no timeframe by which an employee must be rehired. Therefore, an employee who was hired in February, laid off in March and rehired in April would be eligible.

Notably, this expanded benefit does not apply to the Emergency Paid Sick Leave Act.

Another change to the FMLA Expansion Act is to exclude federal government employees.

Clarifying How Monetary Caps Apply:

The CARES Act contains a technical change to the FMLA Expansion Act by clarifying that the monetary caps of $ $200 per day and total of $10,000 apply to each employee.

Changes to the Emergency Paid Sick Leave Act:

The CARES Act contains the same technical change to the Emergency Paid Sick Leave Act clarifying that the monetary caps of $511 per and total of $5,110 apply to each employee.

Federal agencies would have authority to amend their agreements with federal contractors to provide for paid sick leave up to 40 hours per week for employees of federal contractors who cannot work at a government site due to facility closures and if their work cannot be performed remotely.

Advancements on Tax Credits for Paid Leave:

The CARES Act gives employers some relief by allowing them to take advances on anticipated tax credits for employers' paid leave payments under the Emergency Paid Sick Leave Act and the FMLA Expansion Act, subject to some limitations. Employers would not be penalized for failing to deposit tax amounts in anticipation of future tax credits. The U.S. Department of Labor will provide details of the process to obtain these advances at a later date.

ECONOMIC AID TO INDUSTRIES

Title IV of the CARES Act, the "Coronavirus Economic Stabilization Act of 2020" ("CESA") provides economic relief to the airline industry and other "United States business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under [the CARES Act]." Businesses must have incurred or expected to incur "covered losses such that the continued operations of the business are jeopardized." The following is a summary of various aid provisions under CESA.

Amount of Aid Available:

Up to $500 Billion dollars will be made available combined under the entire program. CESA provides caps on amounts available to certain sectors of the airline industry. These amounts are provided in the form of loans and loan guarantees. Procedures for application for this program and minimum requirements are expected within ten days of the passage of the CARES Act.

Payback Period and Restrictions on Certain Stock Related Activities:

Loans made pursuant to CESA would have a maximum five-year payback period. Business who take loans under CESA would have a one-year moratorium on stock buybacks and dividend issuance from the date the last amount was repaid.

Employment Level Requirements:

Companies who take loans under CESA shall maintain employment levels through September 30, 2020, at no less than 90% of their March 24, 2020 employment level.

Loans for Employers with between 500 and 1,000 Employees:

CESA also provides for loans to certain eligible businesses, including nonprofit organizations, with between 500 and 1,000 employees. The loans would require among other things that:

- The organization certify that the loan is needed for the on-going operation of the business;
- The funds will be used to maintain at least 90 percent of the organization's workforce at full compensation and benefits through September 24, 2020;
- The organization "intends to restore not less than 90 percent of the workforce…that existed as of February 1, 2020 and to restore all compensation and benefits to the workers…no later than 4 months after the termination" of the current public health emergency;
- The organization "is domiciled in the United States with significant operations and employees located in the United States";
- The organization is not in bankruptcy;
- The organization will not outsource jobs outside the U.S. for the term of the loan and two years after repayment; and
- The organization will not abrogate any existing collective bargaining agreement for the term of the loan and for two years thereafter; and
- The organization will remain neutral in any union organizing effort for the term of the loan.

Executive Compensation Restrictions:

The CARES Act further places restrictions on executive compensation in order to participate in the loan program. An executive who made in excess of $425,000 in 2019 may not exceed such compensation during the term of the loan and for one year after the loan is fully repaid. If an executive received over $3 million dollars in total compensation in 2019, then during the term of the loan and for 12 months after the loan was repaid in full, the total compensation during that period cannot be more than $3 million, plus 50% of the amount over $3 million.

Any severance pay given to such executive during the aforementioned period cannot exceed twice the executive's compensation paid in 2019.