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THE CARES ACT EMERGENCY STIMULUS LEGISLATION ENACTED

On Friday, March 27, 2020, President Trump signed into law the third phase of the federal government's response to the COVID-19 pandemic. The legislation is entitled the "Coronavirus Aid, Relief, and Economic Security Act", commonly referred to as the CARES Act (the "Act"). The Act provides large-scale economic stabilization programs and tax relief for states, municipalities, businesses of all sizes, and individuals. This summary focuses on the sections of the newly enacted legislation affecting and providing relief to small businesses.

Our Firm has and continues to advise and assist our clients and businesses of all types in navigating the new legislation and providing guidance on short-term funding and other needs.

RELIEF UNDER THE ACT FOR SMALL BUSINESSES

The small business portion of the Act creates a new business loan program (the Paycheck Protection Loan Program) providing for 100% federally-backed loans equal to 2.5 times a borrower's average monthly payroll costs over a look back period, capped at a maximum amount of $10 million. The loan program is intended to assist eligible businesses in paying operational costs and overhead such as payroll, rent, mortgage interest, health benefits, insurance premiums, and utilities. If the loaned funds are used within the defined covered period (subject to certain conditions) for these permitted uses, the loans may be up to 100% forgivable.

The loans will be provided directly by the Administrator or be made in cooperation with private lenders through agreements to participate on an immediate or deferred (guaranteed) basis.

Lenders under the Act may not require any collateral or personal guarantees for any loan and the maximum interest rate for a loan (to the extent any portion is not forgiven, as detailed below) is four (4%) percent. There will be no subsidy recoupment fee associated with the loans and no prepayment penalty for any payments made. Additionally, the Administrator has no recourse against any individual, shareholder, member, or partner of an eligible loan recipient for non-payment, unless the individual uses the loan proceeds for unauthorized purposes.

Loans made under the SBA's separate Economic Injury Disaster Loan ("EIDL") program on or after January 31, 2020 may be refinanced as part of a covered loan under this Act as soon as these new loans are made available. The Act specifically allows SBA EIDL recipients of loans made since January 31, 2020, but only for purposes other than the permitted loan uses under this program to receive assistance under this program.

Which Companies Are Eligible?

An eligible recipient of a loan under the Act is a "small business concern" as currently defined under the SBA or any business concern, non-profit organization, veterans' organization, or Tribal business if it employs not more than the greater of:

- 500 employees (inclusive of full-time, part-time, and those employed on any other basis); or

- If applicable, the size standard in number of employees established by the Administration for the industry in which the entity operates.

Separate eligibility rules apply for hospitality and dining businesses.

In evaluating the eligibility of an applicant of 500 employees or less, a lender must confirm only that the borrower was operating on February 15, 2020 and had employees or independent contractors for whom the borrower paid.

<u>Requirements to Borrow</u>

In order to obtain a loan under the Act, an eligible recipient must provide a good-faith certification that:

- The loan is needed to support continued operations during the COVID-19 emergency;
- Funds will be used to retain workers and maintain payroll or make mortgage, lease, and utility payments;
- The applicant does not have any other application pending under this program for the same purpose; and
- From February 15, 2020 until December 31, 2020, the applicant has not received duplicative amounts under this program.

<u>How Loan Amounts Available Are Calculated</u>

The maximum loan amount (capped at $10 million) is the lesser of:

(1)

- 2.5 times the average total monthly payroll costs (as defined above and limited by the $100,000 annual compensation threshold per employee exclusion above over which funds will not be included in the calculation) incurred in the one year period before the loan is made (or for seasonal employers the average monthly payroll costs for the 12 weeks beginning on February 15, 2019, or from March 1, 2019 to June 30, 2019);
- <u>Plus</u> the outstanding amount of a loan made under the SBA's Disaster Loan Program between January 31, 2020 and the date on which such loan may be refinanced as part of this new program;

Or

(2) Upon request, for businesses that were not in existence during the period from February 15, 2019 to June 30, 2019

- 2.5 times the average total monthly payroll payments from January 1, 2020 to February 29, 2020;
- <u>Plus</u> the outstanding amount of a loan made under the SBA's Disaster Loan Program between January 31, 2020 and the date on which such loan may be refinanced as part of this new program;

Or

(3) $10 million

<u>Allowable Uses of Loan Proceeds for Forgiveness</u>

Loans taken out under the Act are forgiven, and excluded from gross income, in an amount equal to the permissible costs incurred and payments made during the covered period. <u>For this section, the "covered period" means the eight-week period beginning on the date of the origination of the loan</u>. Businesses may, in addition to uses already allowed under the SBA's Business Loan Program, use the loans for:

- Payroll costs:
    - Including compensation to employees, such as salary, wage, commissions, cash, etc.; paid leave; severance payments; payment for group health benefits, including insurance premiums; retirement benefits; state and local payroll taxes; and compensation to sole proprietors or independent contractors (including commission-based compensation) up to $100,000 in 1 year, prorated for the covered period;
- Group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- Salaries, commissions, or similar compensations;
- Payments of interest on mortgage obligations;
- Rent/lease agreement payments;
- Utilities; and
- Interest on any other debt obligations incurred before the covered period.

a. <u>Exclusions</u>

Loan proceeds may not be used for the following:

- Individual employee compensation above $100,000 per year, pro rated for the defined covered period;
- Certain federal taxes;
- Compensation to employees whose principal place of residence is outside of the US; and
- Sick and family leave wages for which credit is allowed under the Families First Act;

<u>Reductions in Forgiveness Amounts</u>

Forgiveness amounts will be reduced for any reduction in employees or wages.

The reduction formula for fewer employees is:

1. The maximum available forgiveness under the rules described above **multiplied by**:

2. Average number of full-time equivalent employees (FTEEs) per month – calculated by the average number of FTEEs for each pay period falling within a month – during the covered period **divided by**:

Either (at election of the borrower):

1. Average number of FTEEs per month employed from February 15, 2019 to June 30, 2019; or
2. Average number of FTEEs per month employed from January 1, 2020 until February 29, 2020;

Or, for seasonal employers

- Average number of FTEEs per month employed from February 15, 2019 until June 30, 2019.

(Note that this formula will be used to reduce forgiveness amounts, but cannot be used to increase them)

The formula for any reduction in wages is:

- A straight reduction by the amount of any reduction in total salary or wages of any employee during the covered period that is in excess of 25% of the employee's salary/wages during the employee's most recent full quarter of employment before the covered period.
- The definition of an "employee" is limited, for purposes of this subparagraph only, to any employee who did not receive during any single pay period during 2019 a salary or wages at an annualized rate of pay over $100,000.

There is relief from these forgiveness reduction penalties for employers who rehire employees or make up for wage reductions by June 30, 2020.

The Act clarifies that employers with tipped employees (as described in the Fair Labor Standards Act) may receive forgiveness for additional wages paid to those employees. Also, emergency advances received under the expanded SBA EIDL will be excluded from forgiveness amounts.

Within 90 days of determining the ultimate forgiveness amount, the Administrator must remit payment plus interest accrued through the date of payment to the lender. Authorized lenders and secondary market participants (at the discretion of the Administrator) may report expected forgiveness amounts, up to 100% of principal, on program loans or on pools of such loans. The Administrator must authorize the expected forgiveness amounts in these reports within 15 days. The amount of the loan forgiveness may not exceed the principal amount of the loan.

Documentation Required for Loan Forgiveness

Borrowers seeking forgiveness for loans made under this Act must submit to their lender:

- Documentation verifying the FTEE's on payroll and their pay rates;
- Documentation on covered costs and payments (such as documents verifying mortgage, rent, and utility payments);
- Certification from a business representative that the documentation is true and correct and that forgiveness amounts requested were used to retain employees and make other forgiveness-eligible payments; and
- Any other documentation the Administrator may require.

Deferral of Loan Repayment

The Act provides that businesses in operation on or before February 15, 2020 and that have a pending or approved loan application under this program are presumed to qualify for complete payment deferment relief (including principal, interest, and fees). Lenders are required to defer payments for at least six (6) months and as long as one year. The Administrator has 30 days from enactment of the Act to provide guidance to lenders on this process.

SBA Disaster Loans

The Act also expands the SBA's EIDL program. The covered period for this section is January 31, 2020 through December 31, 2020. The following businesses may receive SBA disaster loans:

- A business with 500 or fewer employees;
- Sole proprietorships, with or without employees, and independent contractors;
- Cooperatives with 500 or fewer employees;
- ESOPs with 500 or fewer employees; and
- Tribal small business concerns.

Disaster Loan Requirements Waived Under the Act

During the covered period, the Act waives the following requirements usually applicable loans made under the SBA Disaster Loan programs, provided the loan is being made in response to COVID-19:

- Rules related to personal guarantees on advances and loans of $200,000 or less for all applicants;
- The "1 year in business prior to the disaster" requirement (except the business must have been in operation on January 31, 2020);
- The requirement that an applicant be unable to find credit elsewhere; and
- Allows lenders to approve applicants based solely on credit scores (no tax return submission required) or "alternative appropriate methods to determine an applicant's ability to repay."

Tax Credits Available for Employee Retention

Employers may be eligible for a refundable credit against payroll tax (Social Security and Railroad Retirement) liabilities equal to 50% of the first $10,000 in wages per employee (including value of health plan benefits). Eligible employers must have carried on trade or business during 2020 and satisfy one of the following:

- Have business operations fully or partially suspended operations due to orders from a governmental entity limiting commerce, travel, or group meetings; or
- Experience a year-over-year (comparing calendar quarters) reduction in gross receipts of at least 50% – until gross receipts exceed 80% year-over-year.

For employers with more than 100 full-time employees, only employees who are currently not providing services for the employer due to COVID-19 causes are eligible for the credit. The employee retention credit is effective for wages paid for the period beginning March 12, 2020, and ending December 31, 2020.

Payment of Employer Payroll Taxes Delayed

The Act postpones the due date for depositing employer payroll taxes and 50% of self-employment taxes related to Social Security and Railroad Retirement and attributable to wages paid during 2020. The deferred amounts would be payable over the next two years – half due on December 31, 2021, and half due on December 31, 2022.[1]

[1] Information contained in this alert or newsletter is intended for informational purposes only, does not constitute legal advice or an opinion and should not be relied upon without consulting with counsel. Nor is it a substitute for the professional judgment of an attorney. These issues depend upon, among other things, specific facts and circumstances, and we recommend that you contact us to discuss your matter.