

Summary of CARES Act for Employers

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Congress has now passed the **Coronavirus Aid, Relief and Economic Security Act or CARES Act** – Federal government's Phase III response to the health and economic impacts related to the COVID-19 pandemic. President Trump has pledged to sign the Act into law immediately.

The Act includes a number of different programs and interventions that provide or intend to provide financial relief to eligible employers and employees alike. We have summarized the key aspects of the law, including:

- Small business loans will be made available to eligible employers and self-employment individuals.
- The act provides enhanced unemployment insurance benefits to employees for total and partial unemployment and to employers for retaining certain employees.
- The act confirms the emergency FMLA and sick leave benefits available to employees and advanced tax credits employers can take in providing these benefits.
- The Federal government will make loans to certain distressed businesses and places limits on compensation paid to executives servicing businesses subject to these loans.
- Employers may make certain non-taxable "qualified disaster relief payment"

The Act runs 880 pages, so we have included the applicable Title and Section numbers to help you navigate through the legislation.

- I. **Small business loans will be made available to eligible employers and self-employment individuals.**

Division A
Keeping Workers Paid and Employed,
Health Care System Enhancement sand Economic Stabilization

Title I -- Keeping American Workers Paid and Employed Act

Section 1102 – Paycheck Protection Program

- The Small Business Administration is authorized to make up to \$349 billion in loans available to eligible employers and self-employed individuals under this program.
- Eligible employers and self-employed individuals are eligible for loans from the Small Business Administration that are generally equal to the lesser of \$10,000,000 and 2.5 times the borrower’s average monthly payroll costs over the one year period preceding the loan.
 - Payroll costs include all wages, tips, vacation, family leave and sick pay, allowances for dismissal or separation, contributions to maintain group health care, payment of retirement benefits, and state and local tax payments.
 - Payroll costs exclude the compensation of individual employees or self-employed individuals in excess of \$100,000 (calculated on a prorate basis), taxes withheld or paid by the borrower for income tax or FICA and paid sick leave or paid family medical leave under the Families First Coronavirus Response Act.
- Loan proceeds may only be used to cover payroll costs, contributions to group health coverage, mortgage payments, rent, utilities and interest on debt incurred prior to the covered period.
- The paycheck protection program extends to small businesses otherwise eligible for loans from the small business administration, any business concern, non-profit, veterans organization or Tribal business concern that employs fewer than 500 employees or if greater, the number of employees determined by the Small Business Administration to be standard for the industry in which the entity operates.

- Independent contractors and sole proprietors are also eligible for loans under this program.
- If the business concern provides accommodations, food service or drinking places, the 500 limit on employees is applied to each physical location of the business concern.
- The number of employees includes employees employed on a full-time, part-time other basis (and not based on full time employees)
- Loans are available during the “covered period” between February 15 and June 30, 2020.
- Loans will have the following terms:
 - 10 year maturity period (to the extent not forgiven under Section 1104)
 - Not greater than 4% interest
 - Personal guarantees are waived
 - No recourse against owners, directors or officers of the borrower
 - Lenders are required to treat every borrower as having been impacted by the COVID-19 and to defer the loan repayment for no less than 6 months and no longer than 1 year if the borrower requests deferral.

Section 1106 – Loan Forgiveness

- An eligible borrower under Section 1102 is eligible for forgiveness on a covered loan under Section 1102 in an amount equal to the amount the borrower paid in the 8 week period following receipt of the loan for the following:
 - payroll costs (calculated under Section 1102);
 - mortgage interest;
 - rent; and
 - utilities.
- The forgiveness amount will be reduced by a fraction, the numerator of which is the average of full time equivalent employees employed during the 8 week period following receipt of the loan and either the average number of full time employees employed by the borrower between February 15 and June 30, 2020 or the average number of full time employees employed by the borrower between January 1 and February 29, 2020. The borrower elects which fraction to use.
- The forgiveness amount will also be reduced by the total reduction in salary or wages of any employee earning less than \$100,000 on an annualized basis that

exceeds 25% of the total salary or wages of the employee during the preceding full quarter in which the employee was employee prior to the date of the loan.

- The borrower does not lose forgiveness of the loan based on employees whose employment is terminated or whose salaries and wages are decreased by more than 25% in the 30 days following February 15 if by June 30 the employer has eliminated the reduction in the workforce and the reduction in salaries and wages.
- The forgiven amounts are not taxable as income to the borrower.

II. **The act provides enhanced unemployment insurance benefits to employees for total and partial unemployment and to employers for retaining certain employees.**

Title II – Assistance for American Workers, Families and Businesses

Subtitle A -- Unemployment Insurance Provisions

Section 2102 – Pandemic Unemployment Assistance

- This section creates a temporary pandemic unemployment system program for those individuals terminated or who are unable to work for a COVID-19 related reason, and who are not eligible for regular compensation or extended benefits, including those individuals who have exhausted all rights to regular unemployment or extended benefits under State or Federal law.
- Individuals who may fall within this category are those who are self-employed and independent contractors.
- The individual must certify that he or she is either:
 - able to work except that he or she is unemployed or partially unemployed, or
 - is unable or unavailable to work because he or she was diagnosed with COVID-19 or is seeking a medical diagnosis, or a member of the individual's household is diagnosed with COVID-19 or meets one of the following factors:
 - the individual is providing care to a family member of member in the individual's household who is diagnosed with COVID-19,
 - a child or another person in the individual's household cannot attend child care or another facility for care that is closed as a direct result of COVID-19,

- the individual is unable to reach his or her place of employment due to a quarantine requirement,
 - the individual can reach his or her place of employment but has been instructed to self-quarantine,
 - the individual was scheduled to start employment but cannot reach his or her new place of employment or no longer has the new employment available due to COVID-19,
 - the individual has become the bread winner or major support for the household due to COVID-19,
 - the individual has quit his or her job due to COVID-19
 - the individual's place of employment is closed due to COVID-19,
 - the individual is self-employed and cannot find work or is unemployed.
- This section does not apply to employees who can telework for pay or those who are receiving paid sick leave or any other type of paid leave benefits.
 - This section is in effect from January 27, 2020 until December 31, 2020. An employee may only receive unemployment compensation under this section for a *maximum* of 39 weeks.
 - Employees will receive the weekly benefit amount authorized by the state in which they are employed. If the state raises the amount of weekly benefits, the employee will be entitled to that amount. For example, the maximum benefit in New York is \$504 per week currently. If New York increased its benefit to \$525, current unemployment benefit recipients will receive the benefit of the increase.

Section 2104 – Emergency Increase in Unemployment Compensation Benefits

- Eligible individuals receive an additional \$600 per week on top of the amount provided by the individual's state under that state's unemployment insurance. For example, the maximum weekly benefit in New York will be \$1,104.

Section 2105 – Temporary Full Federal Funding of the First Week of Compensable Regular Unemployment for States with No Waiting Week

- Section 2105 waives any waiting periods required by state law, which are typically one week. The federal government will provide funding to states that choose to waive the waiting period and pay recipients immediately.

Section 2107 – Pandemic Emergency Unemployment Compensation

- After state unemployment insurance benefits are exhausted (typically 26 weeks), individuals who remain unemployed are eligible for an additional 13 weeks of unemployment benefits at the state rate, plus the enhanced weekly benefit level

Section 2108 – Temporary Financing of Short-Time Compensation Payments in States with Programs in Law

- States are required to enact a short-term compensation programs enacted to assist with partial unemployment.
- The program is designed to assist employees whose working hours are reduced by their employer. This program would provide the employee financial assistance to fill the gap between their original compensation level and their reduced compensation level.

Section 2109 – Temporary Financing of Short-Term Compensation Agreements

- 50% of the costs of the short-term compensation will be paid, and Section 2110 provides a \$110 million grant to assist states with these programs.

Section 2111 – Assistance and Guidance In Implementing Programs

- The Department of Labor is required to provide model legislation for states and to provide the states with technical assistance to states. The DOL will be provided \$25 million to implement this section and carry out audits and oversight.

Section 2301 – Employee Retention Credit for Employers Subject to Closure Due to COVID-19

- Generally, this provision permits an “eligible employer” to offset against the employer’s contribution to social security up to 50% of up to \$10,000 in wages paid to employees who for small businesses continue to work and for larger business continue to be paid by the employer despite the employee’s inability to work. The program imposes a number of limitations, summarized below.
- Limitations:
 - The tax credit only applies to wages paid after March 12, 2020 and before January 1, 2021.
 - **The amount of “qualified wages” that may be taken into account for the credit for all eligible calendar quarters is \$10,000 in wages paid to each employee.**
- An “**eligible employer**” is an employer:

- Whose operations are fully or partially suspended during a calendar quarter due to orders of a government authority limiting travel, commerce or group meetings due to COVID-19; or
- Whose gross receipts, during an eligible calendar quarter beginning with the first quarter 2020, are 50% of the gross receipts the employer earned for the same quarter in the prior calendar year. The employer remains eligible until the employer's gross receipts are 80% of the gross receipts the employer earned for the same quarter in the prior calendar year.
- **Note:** An employer that is an "essential" business exempt from a suspension order or a business that is able to operate substantially through telecommuting likely will not qualify for the first eligibility test, but may qualify for the second test.
- **Tax exempt organizations are eligible for the Credit**
- **"Qualified Wages"** depends on whether the employer's average number of employees during 2019 was greater than 100 employees or 100 or less employees (the number of employees is determined using the existing COBRA rules).
 - For employers with 100 or less employees, "qualified wages" are any wages by the employer with respect to its employees during the period the employer remains an eligible employer, regardless of whether the employees continue to work.
 - For employees with 100 or more employees, "qualified wages" are limited to those employees to whom the employer is still paying wages despite the fact that the employee is unable to work because of full or partial suspension or because of a reduction in gross receipts.
 - "Qualified wages" includes the employer's contributions to maintain a health plan (to the extent such amounts are excluded from the employee's taxable income).
- "Applicable employment taxes" means the employer's contribution to social security paid on all of its employees under Section 3111(a) of the Tax Code (after reduction for emergency paid family medical leave and paid sick leave as permitted under the Families First Coronavirus Response Act and other permissible credits), plus the employer taxes imposed under Section 3221 of the Tax Code that are attributable to the amounts paid under Section 3111(a).
 - An employer may offset without penalty on a dollar for dollar and payroll by payroll basis against the "applicable employment taxes" the amount of the credit the employer is eligible to deduct.

- To the extent that the above deduction exceeds the employer's liability for "applicable withholding taxes", the employer will be eligible for a tax refund for the excess amount.
- There are few additional points to note in the legislation.
 - Employers that avail themselves of the small business interruption loans available under the CARES Act are not eligible for this tax credit.
 - Wages to an employee for which an employer seeks the credit may not exceed the amount the employee would have earned during the 30 days immediately preceding the eligibility period.
 - Employers treated as a single employer for benefit plan purposes are treated as a single employer for purposes of this credit.

Section 2302 -- Delay of Payment of Employer Payroll taxes

- Employers and self-employed individuals may defer payment of the employer share of social security under Section 3111(a) that they are otherwise responsible for paying to the federal government with respect to their employees.
- The Employer or self-employed individual is required to pay the deferred employment tax 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.

III. The act confirms the emergency FMLA and sick leave benefits available to employees and advanced tax credits employers can take in providing these benefits.

Labor Provisions

Section 3601 -- Limitation on paid leave

- Under the FMLA, originally enacted under the Families First Coronavirus Response Act, employees of businesses with fewer than 500 employees are eligible for 12 weeks of family leave if they are unable to work because of a school closure or child care provider closure. The first 10 days are unpaid, and the remainder of the leave is paid. This Act reiterates that an employer is only obligated to pay employees up to a cap of \$200 per day and \$10,000 in the aggregate per employee.

Section 3602 -- Emergency Paid Leave Act Limitation

- Under Emergency Paid Sick Leave, also originally enacted under the Families First Coronavirus Response Act, employees of businesses with fewer than 500 employees are eligible for up to 80 hours of paid sick leave. This Act reiterates that an employer is only obligated to pay employees up to a cap of \$511 per day and \$5,110 in the aggregate per employee for paid sick leave and if an employee is taking care of a child or a quarantined individual, there is a \$200 cap per day and \$2,000 cap in the aggregate per employee.
- The Act also clarifies that an employer's obligation for paid sick leave ends when the employer has either paid the employee for an equivalent of 80 hours or where the employee has returned to work after utilizing leave provided under this section.

Section 3603 – Unemployment Insurance

- Each state is required to make unemployment insurance applications available in person, over the phone, and online.

Section 3605 -- Paid Leave for Rehired Employees

- Employees terminated on or after March 1, 2020 and subsequently rehired by the same employer are eligible to use FMLA leave if they worked for that employer for 30 of the last 60 calendar days prior to their termination.

Section 3606 -- Advance Refunding of Credits

- An employer or a self-employed individual may offset on a dollar for dollar basis and on a payroll by payroll basis the amount the employer or the self-employed individual has paid to its employees for Emergency Paid Sick Leave and paid FMLA against the employer's contribution for social security pursuant to Sections 3111(a) or 3221(a) of the Tax Code. If the amount of benefits paid exceeds the amount of the employer's social security contribution, the IRS will establish a procedure under which the employer can apply for an expedited refund of those amounts.

Section 3608 -- Single-Employer Funding Rules

- An employer sponsoring a single employer pension plans may extend the time to make minimum contributions to the plan through January 1, 2021. When paid, interest will be due, however.

IV. The Federal government will make loans to certain distressed businesses and places limits on compensation paid to executives servicing businesses subject to these loans.

**Title IV – Economic Stabilization and Assistance
to the Severely Depressed Sectors of the American Economy**

Subtitle A – Coronavirus Economic Stabilization Act of 2020

Section 4003 – Emergency Relief and Taxpayer Protections

- The Federal government is making loans, loan guarantees and other investments available to distressed businesses as follows:
 - \$25 Billion for passenger air carriers and related businesses;
 - \$4 Billion to cargo air carriers;
 - \$17 Billion for businesses critical to maintaining national security; and
 - \$454 Billion, plus any amounts not allocated above, are made available to be deployed by the Federal Reserve through its Exchange Stabilization Fund (ESF Loans). Notably, the Federal Reserve will deploy these funds through special purpose vehicles, allowing the Federal Reserve to significantly leverage this lending authority.
- The Act imposes significant conditions on all loans made under Section 4003.
- For loans made to passenger and cargo air carriers to national security businesses the following conditions apply:
 - The business must be an eligible business that has incurred losses as a result of COVID-19 such that the ongoing operation of the business is jeopardized, and for which business credit is not reasonably available at the time of the transaction;
 - The business has to secure the loan with assets;
 - The loan has to bear market interest based on the market prior to the outbreak of the COVID-19 virus;
 - The loan cannot have a term in excess of five years;
 - The business must be created or organized in the US, have substantial US business operations and a majority of its employees employed in the US;
 - The business may not pay dividends or repurchase its stock from shareholders while the loan remains outstanding and for 12 months after the loan is repaid; and

- The business must maintain its employee levels as of March 24, 2020 through September 30, 2020 or at least not reduce employee levels by more than 10%
- For direct ESF Loans the following conditions apply:
 - The business must be created or organized in the US, have substantial US business operations and a majority of its employees employed in the US;
 - The business may not pay dividends or repurchase its stock from shareholders while the loan remains outstanding and for 12 months after the loan is repaid; and
 - The business must comply with the limits on compensation imposed under Section 4004 (summarized below).
- For ESF Loans to “Mid-Sized Businesses”, the following conditions apply:
 - The loan proceeds must be used to maintain 90% of the business’s employees at full compensation and benefits through September 30, 2020;
 - The business must commit to restore terminated employees such that 90% of the business’s employees who were employed as of February 1, 2020 are employed with the business within 4 months after the current public health emergency is terminated;
 - The business must be domiciled in the US and have substantial business operations in the US;
 - The business must not be subject to a bankruptcy proceeding;
 - The business is organized in the US and the majority of its employees are employed in the US;
 - The business may not pay dividends or repurchase its stock from shareholders while the loan remains outstanding;
 - The business may not outsource or off-shore any jobs while the loan is outstanding and for two years thereafter;
 - The business may not abrogate any existing collective bargaining agreement during the term of the loan and for two years thereafter; and
 - The business must remain neutral in any union effort to organize its employees during the term of the loan.
- A “Mid-Sized Business” is defined as businesses, and to the extent “practical” non-profit organizations, that have 500 to 10,000 employees.

- The Federal Reserve also has the right to establish a “Main Street Lending Program” for small to mid-size businesses on terms determined by the Federal Reserve.

Section 4004 – Limitation on Certain Employee Compensation

- No officer or employee whose compensation in 2019 exceeded \$425,000 may receive:
 - in any 12 month period, compensation in excess of the compensation paid in 2019;
 - severance that exceeds two times the compensation the officer or employee received in 2019; and
 - if the officer or employee received compensation in excess of \$3,000,000 in 2019, then in any 12 month period, compensation of \$3,000,000 plus 50% of the officer or employee’s compensation in excess of \$3,000,000 paid in 2019.
- “Compensation” includes salary, bonuses, stock awards and other “financial benefits” paid to the officer or employee.
- The compensation restrictions remain in place while the loan under 4003 remains outstanding and for the 12 month period following repayment of the loan.

V. Employers may make certain non-taxable “qualified disaster relief payment”

Other Federal Programs

Section 139 of the Tax Code

- An employer is permitted to pay its employees “qualified disaster relief payments” because the Administration declared the COVID-19 pandemic a national disaster,
- Qualified disaster relief payment made to an employee during a national disaster are not taxable as income to the recipient employee.
- Such payments can be made to reimburse an employee or pay on an employee’s behalf reasonable and necessary “personal, family, living, or funeral expenses” incurred as a result of a national disaster. Such expenses would include medical expenses and critical care, childcare and tutoring expenses due to school closings, the cost of internet connections and cell phone costs.
- Reimbursements cannot be used, however, to replace income or lost wages.