

**Coronavirus Aid, Relief, and Economic Security Act (CARES Act)
Information for Businesses and Individuals**

On March 27, 2020, the CARES Act became law providing an unprecedented \$2 trillion in aid and stimulus funding to battle the national threat of the COVID-19 emergency.

The Act itself is some 880 pages with many programs addressed. The programs discussed in this Alert are those that will be of most interest to businesses and individuals. There are dozens upon dozens of additional appropriations for use in programs and departments of the federal government, the branches of the military, the courts, the legislature, and the VA that appear intended to support governmental operations impacted by the COVID-19 outbreak, which are not discussed below. As always, we encourage you to reach out to one of our lawyers if you would like to learn more.

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CARES Act
Alert

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BUSINESS PROGRAMS & TAX ISSUES

Paycheck Protection Loans & Loan Forgiveness

The Act provides for “paycheck protection” loans to be made by Small Business Administration (SBA)-approved lenders and guaranteed by the SBA. \$349 billion is allocated for these loans.

Eligible Recipients

In addition to already qualified “small business concerns” (as defined by the Small Business Act), any business concern, 501(c)(3) nonprofit organization, veterans organization, or Tribal business concern which employs not more than 500 full-time and part-time employees (or the SBA size standard for the industry, whichever is greater) during February 15, 2020, to June 30, 2020, shall be eligible to receive a favorable-term loan made under section 7(a) of the Small Business Act (15 U.S.C. 636(a)) up to \$10 million.

Sole proprietors, independent contractors, and self-employed individuals are eligible to receive a Paycheck Protection loan.

In evaluating eligibility, a Lender will consider whether the borrower was in operation on February 15, 2020, and whether the borrower (i) had employees for whom the borrower paid salaries and payroll taxes, or (ii) paid independent contractors as reported on IRS Form 1099.

Certain hotel and restaurant-type businesses with more than one physical location are eligible if not more than 500 are employed at any physical location. The business must have an NAICS Code beginning with 72, which relates to the Accommodation and Food Services Sector.

Loan Amount and Terms

The maximum Paycheck Protection loan amount shall be the lesser of:

(i) the sum of:

- 1). the outstanding amount of a loan under subsection (b)(2) of Section 7 of the Small Business Act (a disaster loan) made between January 31, 2020, and the date on which Paycheck Protection loans are made available to be refinanced, and
- 2) 2.5 times the average total monthly payroll costs, OR

(ii) \$10,000,000.

For the calculation of the loan amount above, “payroll costs” is the sum of payments of any compensation with respect to employees that is: (A) salary, wages, commission, or similar compensation, (B) cash tip or equivalent, (C) vacation, parental, family, medical, or sick leave, (D) allowance for dismissal or separation, (E) the provisions of group health care benefits, including insurance premiums, (F) any retirement benefit, and (G) State or local tax assessed on the compensation of employees. The average total monthly payroll costs are determined by looking to the applicant’s monthly payments incurred during the 1-year period before the date of the loan application.

For new employers and seasonal employers, the 1-year period used to determine the monthly average of payments is modified. For seasonal employers, the monthly average is determined using the twelve-week period beginning either on February 15, 2019 or March 1, 2019, at the applicant’s election, and ending June 30, 2019. If the employer was not in business during the period from February 15, 2019 to June 30, 2019, then the period from January 1, 2020 to February 29, 2020 is used.

For sole proprietors and independent contractors, “payroll costs” means the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation.

The salary component of payroll costs is capped at \$100,000 per employee, and the compensation of a sole proprietor, self-employed individual or independent contractor is capped at \$100,000 for purposes of determining eligible payroll costs.

Loans shall be for a term of no more than 10 years from the date borrower requests loan forgiveness (described below) and shall bear interest at a rate not to exceed 4%. Personal guaranties and collateral are not required.

Borrowers may defer repayment for a period of 6 months to a year. Prepayment is permitted without penalty.

Allowable Uses of Loan Proceeds

During the covered period (February 15, 2020 to June 30, 2020) a borrower may, in addition to other allowable uses for these types of SBA loans, use the proceeds of the loan for payroll costs (subject to a \$100,000 annualized per employee limit in the definition of payroll costs), costs related to the continuation of group healthcare benefits during periods of leave and insurance premiums, employee salary and commissions and similar compensation, payment of interest (but not principal) on any mortgage obligation, rent, utilities, and interest on any other debt obligations that were incurred before the covered period.

A loan made under Section (b)(2) of Section 7 of the Small Business Act (a disaster loan) on or after January 31, 2020 and until the time when Paycheck Protection loans are made available may be refinanced as part of a Paycheck Protection loan.

Loan Forgiveness

A Paycheck Protection loan recipient shall be eligible for forgiveness of indebtedness on a Paycheck Protection loan in an amount equal to payments made over the course of the 8-week period beginning on the date of the origination of the loan for: (A) payroll costs, (B) interest on covered mortgage obligations, (C) covered rent obligations, and (D) covered utility payments.

Payroll costs eligible for calculating the forgiveness amount are limited to compensation not in excess of \$100,000 annualized per employee, self-employed individual or independent contractor.

The amount of forgiveness cannot exceed the principal amount of the loan.

Loan forgiveness is reduced if the borrower's number of full-time equivalent employees decreases from a prior period and if the borrower reduces total salary or wages of any employee whose annualized compensation during any pay period of 2019 is \$100,000 or less.

If headcount and/or salary or wages are reduced between February 15, 2020 and 30 days after enactment of the CARES Act, the borrower can negate the effect of that reduction on loan forgiveness by eliminating the reduction through hiring and salary increases prior to June 30, 2020.

If a borrower has tipped employees, it may receive forgiveness for additional wages paid to those employees.

The borrower must apply for loan forgiveness and provide supporting documentation. The lender must make a decision on the application within 60 days.

Loan forgiveness shall be excluded from gross income for U.S. federal income tax purposes.

SBA Emergency Economic Injury Disaster Loan (EIDL) Grants

Eligible Recipients

Businesses, cooperatives, ESOPs, and tribal small business concerns with less than 500 employees; sole proprietorships and independent contractors; private nonprofit organizations, and small agricultural cooperatives are eligible for an SBA economic injury disaster loan (EIDL) under Section 7(b)(2) of the Small Business Act (15 U.S.C. 636(b)(2)).

Approval

Certain features of EIDLs are waived during the period from January 31, 2020 until December 31, 2020, which is referred to for EIDL purposes as the "covered period." Those features that are waived include:

- Any rules related to personal guaranties on loans of not more than \$200,000;
- The requirement that the applicant must be in business one year before the disaster (but no waiver for a business that was not in operation on January 31, 2020); and

- The requirement that an applicant must be unable to obtain credit elsewhere.

In addition, the applicant may be approved solely on its credit score, without the need for tax returns; and approval may be based on alternative appropriate methods used to determine the applicant's ability to repay the loan.

\$10,000 Advance Not Requiring Repayment

During the covered period (calendar year 2020), the applicant may request an emergency advance of up to \$10,000 against the loan, which advance is to be paid within 3 days after the application is submitted. The applicant's eligibility has to be verified before issuing the advance. The advance may be used for any purpose for which an EIDL may be used.

An applicant shall not be required to repay any amounts of the emergency advance, even if subsequently denied an EIDL.

If an applicant who receives an advance subsequently obtains a payroll protection loan, as described above, the amount of the advance shall reduce any loan forgiveness amount.

Mid-Size and Larger Industries Subsidized Loans

Loans for Mid-Size Businesses and Non-Profits

Allocations are available for loans to mid-size businesses and non-profit organizations with between 500 and 10,000 employees. Loans are to be made with an annualized interest rate that is not higher than 2% per annum. No principal or interest will be due on the loans for the first 6 months after the loan is made.

There is NO loan forgiveness for this program.

To qualify, the borrower must be a U.S. entity with significant operations in and a majority of its employees in the U.S. Furthermore, amongst other items, the borrower must certify that:

- the loan is required to support the borrower's ongoing operations;
- the funds it receives will be used to retain at least 90% of its workforce until September 30, 2020;
- it intends to restore not less than 90% of its workforce that existed as of February 1, 2020, and to restore all compensation and benefits to its workers no later than 4 months after the termination date of the declared COVID-19 public health emergency;
- it will not pay dividends with respect to its common stock of or repurchase an equity security that is listed on a national securities exchange of the recipient or any parent company of the recipient while the direct loan is outstanding, except to the extent required under a contractual obligation that is in effect as of the date of enactment of the CARES Act;
- it will not outsource or offshore jobs for the term of the loan and 2 years after completing loan repayment;
- it will not abrogate existing collective bargaining agreements for the term of the loan and 2 years after completing loan repayment; and
- it will remain neutral in any union organizing effort for the term of the loan.

Aviation Industry

Of the total dollars allocated, there is a pool of \$25 billion that includes set asides for air carriers, for ticket agents, and for certified repair stations that are approved to perform inspection, repair, replace, or overhaul services. An additional pool of \$4 billion has been allocated for cargo air carriers. Likewise, an additional pool of \$17 billion was designated for businesses critical to maintaining national security.

To participate, air carriers must agree to maintain through March 1, 2022, scheduled air transportation service, as the Secretary of Transportation deems necessary, to ensure services to any point served by that carrier before March 1, 2020.

From the date of enactment of the Act until December 31, 2020, certain aviation excise taxes have been suspended, including on kerosene used in commercial aviation under prescribed circumstances.

Loan Requirements for this Section

To receive a loan, the borrower must agree 1) not to repurchase an equity security that is listed on a national securities exchange of the borrower for a specified period of time, 2) until 12 months after the direct loan is no longer outstanding, not to pay dividends or make other capital distributions with respect to the common stock of the borrower, and 3) to limit the pay of officers and employees making more than \$425,000 annually. The second condition is eligible for waiver by the Federal Reserve if found “necessary to protect the interests of the Federal Government.”

“Employee retention” Tax Credit

In the case of an eligible employer, there shall be allowed as a not-to-exceed credit against applicable employment taxes for each calendar quarter (from March 13, 2020, to December 31, 2020) an amount equal to 50% of the qualified wages with respect to each employee of such employer for such calendar quarter. Qualified wages include group health plan expenses paid by the employer that are excluded from the gross income of employees. An employee’s eligible wages for all quarters claimed is capped at \$10,000.

“Eligible employer” means any employer who with respect to any calendar quarter in 2020 is fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19 or has experienced a significant decline in gross receipts (i.e., less than 50% of gross receipts for the same calendar quarter in the prior year until the next calendar quarter that gross receipts are 80 percent of gross receipts for the same calendar quarter in the prior year). Tax-exempt organizations described in Section 501(c) of the IRS Code are eligible.

For eligible employers with more than 100 employees, the employee must not be providing services for the employer to receive the tax credit. However, employers cannot receive a tax credit for paying employees more than they would have received if they had been working. For employers with less than 100 employees, the employer can receive the tax credit even if the employee is providing services.

Employers that receive a Section 7(a) Small Business Act loan pursuant to the Paycheck Protection Program are NOT eligible for this tax credit.

Employers would also be able to defer payment of applicable employment taxes from the date of the enactment of the Act until December 31, 2021 with respect to 50% of the amounts due and until December 31, 2022 with respect to the remaining amounts due. However, employers that receive loan forgiveness pursuant to the Paycheck Protection Program would not be eligible for such a deferral.

Tax Relief & Changes

Net Operating Losses

Prior to the Act, a net operating loss (“NOL”) could only be carried forward to future tax years (not back) and offset up to 80% of taxable income. The Act now allows NOLs arising in tax years 2018, 2019 and 2020 to be carried back to each of the five tax years preceding the tax year of the loss, and allows the NOL to offset 100% of taxable income.

Excess Business Losses

Prior to the Act, the deduction for excess business losses of non-corporate taxpayers was limited to \$250,000. That limitation has now been limited for tax years 2018, 2019 and 2020.

Limitation on Business Interest

Prior to the Act, business interest deductions were limited to 30% of adjusted taxable income. This limitation has now been increased to 50% for tax years 2019 and 2020, except that for partnerships it only applies for tax year 2020.

Technical Correction of "Retail Glitch"

Under the Tax Cuts and Jobs Act of 2017, "qualified improvement property" (which includes "qualified leasehold improvement property", "qualified restaurant property", and "qualified retail improvement property"), inadvertently fell into the 39-year recovery period for nonresidential rental property, but the Act corrects this error and provides for a recovery period of 15 years.

OF INTEREST TO EMPLOYERS & EMPLOYEES

Expansion of Unemployment Benefits

Before passage of the CARES Act, state unemployment departments had already begun relaxing unemployment obligations and eliminating waiting periods, including in Alabama. The Alabama Department of Labor allows workers affected by the crisis to file for unemployment benefits without having to be "able and available" to work, or to search for work while collecting benefits. In Florida, workers are not required to register for Employ Florida or to search for work in that system to receive benefits, if the application is filed before May 2, 2020. Both states allow for unemployment claims (called "reemployment assistance" claims in Florida) for employees who are underemployed or furloughed, even if temporary.

The Act extends the period of coverage of state unemployment benefits to 39 weeks (approximately to the end of 2020). For four months (through July 31, 2020), the Act also provides an additional \$600 per week in benefits to each individual receiving unemployment compensation. In Alabama and Florida, that will be on top of the normal maximum benefit amount of \$275/week.

For COVID-19-related reasons, the Act also expands coverage to individuals who are otherwise not entitled to unemployment benefits through their normal state programs, such as those who are independent contractors not paying payroll taxes or those who do not work for covered employers. Those qualifying reasons, which must be self-certified, include: a diagnosis or illness from COVID-19 or caregiving responsibilities for someone who has COVID-19, caregiving responsibilities because a child's school or care facility is closed, an employee's inability to reach their place of employment due to a quarantine, individuals whose head of household has passed away from COVID-19, or because an employee's place of employment was closed as result of the COVID-19 public emergency.

For "reimbursing employers" who pay a reimbursement for payment of unemployment benefits (such as governmental employers and non-profits), the amount of the reimbursement will be cut in half.

The Alabama Department of Labor is encouraging employers to file claims of unemployment on behalf of their employees in order to ensure that the employers will not be charged. Of critical importance, the Alabama Department of Labor has stated that claims related to COVID-19 will not adversely affect an employer's experience rating.

Partial Above the Line Deductions for Charitable Contributions

The Act makes a number of changes for cash contributions to charitable organizations described in Section 170(b)(1)(A) (a "qualified contribution"), which generally include churches, schools, hospitals, public charities, private foundations, and state/local governments, but specifically excludes contributions to donor advised funds and supporting organizations.

Beginning with the 2020 tax year, an individual who does not elect to itemize deductions may take an above-the-line deduction for qualified contributions up to \$300.

For taxpayers who itemize deductions, the Act would suspend the limit on charitable contribution deductions for tax year 2020, meaning qualified contributions will be deductible to the extent they do not exceed the taxpayer's adjusted gross income.

The limit on corporate deductions for qualified contributions in tax year 2020 is increased from 10% to 25% of taxable income.

Limits on Residential Foreclosures & Evictions

Federally Backed Mortgage Loans

The Act provides certain protections with respect to properties that are secured by a Federally backed mortgage loan. A “Federally backed mortgage loan” includes any loan which is secured by a first or subordinate lien on residential property (including individual units of condominiums and cooperatives) designed principally for the occupancy of from 1- to 4-families that is insured, guaranteed, or secured by one of the following: the FHA under title II of the National Housing Act (“NHA”), Section 255 of the NHA, section 184 or 184A of the Housing and Community Development Act of 1992, the VA, the Department of Agriculture, the Federal Home Loan Mortgage Corporation, or the Federal National Mortgage Association.

When used with respect to a multifamily borrower, the term applies to residential multifamily real property designed principally for the occupancy of 5 or more families and that is made in whole or in part, or insured, guaranteed, supplemented, or assisted in any way, by any officer or agency of the Federal Government or under or in connection with a housing or urban development program administered by the Secretary of Housing and Urban Development or a housing or related program administered by any other such officer or agency, or is purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.

Forbearances

A borrower with a Federally backed mortgage loan experiencing a financial hardship due, directly or indirectly, to the COVID–19 emergency may request forbearance on the Federally backed mortgage loan for up to 180 days, regardless of delinquency status. During the period of forbearance, no fees, penalties, or interest beyond the amounts scheduled or calculated as if the borrower made all contractual payments on time and in full under the terms of the mortgage contract, shall accrue on the borrower’s account. The borrower can also request that the forbearance be extended for up to an additional 180 days so long as the request is made during the “covered period.” Although there are several references in this section of the Act to the “covered period” with respect to various time limitations, unfortunately, the final version of the bill, which became law, did not include a definition of the “covered period” for this section.

Multifamily borrowers, who were current with their payments as of February 1, 2020, can make a similar request for a forbearance up to 30 days. The forbearance for multifamily borrowers can be extended for up to 2 additional 30 day periods, provided that the borrower’s request for an extension is made before December 31, 2020 (assuming the COVID-19 emergency does not continue past then) and at least 15 days prior to the end of the forbearance period.

Except with respect to a vacant or abandoned property, a servicer of a Federally backed mortgage loan may not initiate any judicial or non-judicial foreclosure process, move for a foreclosure judgment or order of sale, or execute a foreclosure-related eviction or foreclosure sale on or before May 17, 2020.

Evictions

For 120 days from the enactment of the Act, there is an express moratorium on eviction filings for residential property that is occupied by a tenant on or in any property that (A) participates in a covered housing program (as defined in section 41411(a) of the Violence Against Women Act of 1994 (34 U.S.C. 12491(a))), (B) participates in the rural housing voucher program under section 542 of the Housing Act of 1949 (42 U.S.C. 1490r), or (C) has a Federally backed mortgage loan, including in the multifamily context. During this same period for these same properties, a lessor may not charge fees, penalties, or other charges to the tenant related to such non-payment of rent. The lessor of such properties may not require the tenant to vacate the covered dwelling unit before the date that is 30 days after the date on which the lessor provides the tenant with a notice to vacate, and such notice cannot be issued until after the end of the moratorium.

For the duration of a forbearance received by a multifamily borrower pursuant to the CARES Act, the multifamily borrower cannot evict or initiate the eviction of a tenant from a property that is the subject of the forbearance or charge any late fees, penalties, or other charges to the tenant for late payment of rent. Moreover, the multifamily borrower cannot require a tenant to vacate the property that is the subject of a forbearance until 30 days after the service of a notice to vacate, which cannot be served until after the expiration of the forbearance.

Exclusion for Certain Employer Payments of Student Loans

From the effective date of the Act through the end of 2020, employer payments of student loans are excluded from gross income when they are made as a part of an educational assistance program (which must be a written plan and capped at \$5,250).

INDIVIDUAL PROGRAMS & TAX ISSUES

Recovery Rebates for Individuals

The CARES Act grants a U.S. federal income tax credit of \$1,200 to each “eligible individual” or \$2,400 to a couple filing a joint return. Eligible individuals are also entitled to an additional \$500 per qualifying child.

An eligible individual is an individual other than:

- A nonresident alien individual;
- An individual for whom another taxpayer may claim a deduction under Section 151 of the Internal Revenue Code (e.g. a spouse or dependent) (note too that this exclusion is based on eligibility to be claimed as a dependent, regardless of whether a dependency deduction is actually claimed); or
- An estate or trust.

The amount of the credit allowed shall be reduced (but not below zero) by 5 percent of so much of the taxpayer’s adjusted gross income as exceeds \$75,000 (\$150,000 in the case of a joint return and \$112,500 in the case of a head of household). Therefore, an individual with no qualifying children with \$99,000 in adjusted gross income (\$198,000 in the case of a joint return and \$136,500 in the case of a head of household) is not eligible to receive a direct payment.

The amount of the credit is to be paid to the taxpayer as an advance refund that must be paid “as rapidly as possible” and in any event on or before December 31, 2020. Refunds will be made by direct deposit where the taxpayer has authorized that method any time after January 21, 2018 (but this method does not apply to military families). Otherwise, the refund will be in the form of a check mailed to the taxpayer.

The determination of the amount of the credit/refund is made by the Treasury Department based on the taxpayer’s 2019 income tax return (or 2018 if 2019 is not filed), or if neither of such tax returns have been filed, on the taxpayer’s calendar year 2019 social security benefit statement.

Tax-Favored Withdrawals from Retirement Plans

Distributions

The Act permits a coronavirus-related distribution of up to \$100,000 from a retirement plan or IRA without the 10% early withdrawal penalty. Income taxes will be due on the amount of the distribution except to the extent that the employee makes contributions to the plan or IRA during the 3-year period following the distribution (in which case it will be treated as a non-taxable rollover).

Required minimum distributions for tax year 2020 are waived for IRA’s, 403(a) employee annuities, 403(b) tax-sheltered annuities, and 457(b) governmental plans. This waiver does not appear to apply to 401(k) plans.

Borrowing

Rules around retirement-plan loans are relaxed to allow an individual to borrow up to \$100,000 from their qualified employer plan (which is an increase from the ordinary \$50,000), and providing an additional year to repay loans that would have otherwise come due between the effective date of the Act and December 31, 2020.