

## The CARES Act: What Employers Need to Know (Part I)

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On March 27, 2020, the U.S. House of Representatives approved the [Coronavirus Aid, Relief, and Economic Security Act](#) (“CARES Act” or “Act”), a \$2+ trillion aid and stimulus package, which includes a broad range of financial assistance and other relief for employers and employees affected by the coronavirus (“COVID-19”) crisis. The Act, which the Senate had unanimously passed two days earlier, has been signed into law by President Trump.

This Advisory highlights provisions of the CARES Act that are particularly relevant to employers as they confront the unprecedented challenges arising from the COVID-19 pandemic, such as:

- measures to help ensure that employers can meet their financial obligations to provide paid family and sick leave benefits pursuant to the Families First Coronavirus Response Act (“FFCRA”);
- a 50-percent tax credit for qualified wages paid during the crisis;
- short-term, enhanced unemployment benefits for affected workers; and
- forgivable loans for qualified employers.

### **Paid Leave Requirements and Tax Credits**

#### *Caps on Benefits*

Effective April 1, 2020, as we previously [reported](#), the FFCRA requires private employers with fewer than 500 employees to provide up to 10 weeks of paid family leave and 10 days of paid sick leave benefits for eligible employees affected by COVID-19.<sup>1</sup> The CARES Act reiterates that the caps on such benefits are as follows:

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<sup>1</sup> The U.S. Department of Labor (“DOL”) so far has published three documents: [guidance for employers](#), [guidance for employees](#), and a set of [frequently asked questions](#) (“FAQs”) on the FFCRA, which, in addition to announcing that the law becomes effective on April 1, provides guidance on such matters as

- Paid Family Leave: The cap is \$200 per day and \$10,000 in the aggregate for each employee.
- Paid Sick Leave: Depending on the allowable reason for which paid sick leave is used, the cap is either \$511 per day per employee (\$5,110 in the aggregate) or \$200 per day per employee (\$2,000 in the aggregate).

### *Rehired Employees*

The CARES Act addresses the rights of rehired employees to paid family leave under the FFCRA. The latter generally requires that employees have been employed for at least 30 calendar days to be eligible for such leave. The Act now mandates that a rehired employee qualifies for paid family benefits if the worker:

- was laid off by that employer on or after March 1, 2020, and
- had worked for the employer for at least 30 of the last 60 calendar days prior to his or her layoff.

### *FFCRA-Related Tax Credits*

The FFCRA provides a 100-percent refundable tax credit, capped at the same amounts as the leave benefits noted above, plus the cost of continuing to provide health insurance for employees on FFCRA leave. Two days after enactment of FFCRA, the U.S. Department of Labor (“DOL”), the U.S. Department of the Treasury (“Treasury”), and the Internal Revenue Service (“IRS”) [issued](#) joint guidance to allow covered employers to “swiftly” recover the costs of FFCRA leave (including health insurance). Employers may take “immediate advantage” of the paid leave credits, by “retain[ing] and access[ing] funds that they would otherwise pay to the IRS in payroll taxes.”<sup>2</sup>

The CARES Act codifies and expands on this process of “advance refunding of credits”:

In anticipation of the credit ... the credit may be advanced, according to forms and instructions provided by the Secretary [of the Treasury], up to an amount calculated ... through the end of the most recent payroll period in the quarter.

Accordingly, employers may simply retain, as their FFCRA credit, otherwise-owed payroll taxes up to an amount equal to the costs they incurred in providing FFCRA leave (i.e., leave pay plus the cost of health insurance for employees on leave), up to the mandated caps.<sup>3</sup> Per the joint guidance, if such retention of payroll taxes is insufficient

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determining if the “fewer than 500 employees” threshold is met and calculating rates of pay for paid leave entitlement (such as for part-time employees). This is just the first round of FAQs; the DOL is [soliciting](#) public comments concerning further guidance on FFCRA compliance.

<sup>2</sup> The guidance clarifies that the payroll taxes available for retention by an employer include “withheld federal income taxes, the employee share of Social Security and Medicare taxes and the employer share of Social Security and Medicare taxes with respect to all employees.”

<sup>3</sup> For a detailed discussion of the caps on tax credits, go [here](#).

to cover the costs of FFCRA leave, “employers can seek an expedited advance from the IRS by submitting a streamlined claim form” (which will be released shortly).

Of note, the joint guidance also advises that the DOL will issue a 30-day “non-enforcement order” to allow employers time to come into compliance with the FFCRA.

Finally, the Act directs the Treasury to waive any penalty an employer may have been subject to for failure to pay sufficient payroll taxes, if the Treasury “determines that such failure was due to the anticipation of the credit allowed” under the FFCRA.

### **Tax Credits Related to Wages**

As of March 13, 2020, through December 31, 2020, eligible employers can receive a 50-percent refundable payroll tax credit on the first \$10,000 of qualified wages (and health benefits) paid to an employee (or incurred) during that time period. An employer is eligible for the credit if:

- business operations were disrupted due to a virus-related total or partial shutdown order, or
- gross receipts fell by 50 percent or more when compared to the same quarter in the previous year.

The CARES Act sets forth discrete criteria, depending on the size of the employer’s workforce, to determine if wages qualify for the tax credit:

- Companies with more than 100 employees may claim the credit for employees who are on the payroll but not currently working due to the crisis.
- Companies with 100 or fewer employees may claim the credit for all employee wages, regardless of whether the employer is fully operating, or partially or fully shut down.

The Act also allows employers and self-employed individuals to defer payment of their share of the Social Security tax on employee wages owed for 2020 until December 31, 2021 (when half of the amount deferred must be paid), and December 31, 2022 (when the remainder is due).

### **Enhanced Unemployment Benefits**

Albeit short-term, the CARES Act provides significantly enhanced unemployment benefits. The most significant unemployment insurance (“UI”) sections are:

- Section 2102, the Pandemic Unemployment Assistance program, which provides up to 39 weeks of UI benefits to people not otherwise eligible for regular

unemployment compensation (including independent contractors and self-employed individuals);

- Section 2104, the Federal Pandemic Unemployment Compensation program, which provides most individuals an emergency increase in traditional UI benefits of \$600 per week—above and beyond those benefits provided under state UI laws (these enhanced benefits are available through July 31, 2020); and
- Section 2107, the Pandemic Emergency Unemployment Compensation program, which provides 13 weeks of emergency UI for people who remain unemployed after they have exhausted their state benefits or are not otherwise eligible for benefits.

### *Traditional Unemployment Benefits*

To understand the enormity of the enhancements created by the CARES Act, it is helpful to have a point of reference. Traditionally, each state determines its own UI eligibility levels, benefit payments, and the duration of benefits, and there is a vast discrepancy amongst the states. For example, the current maximum weekly benefit payment in Connecticut (\$631), New Jersey (\$713), New York (\$504) and Florida (\$275) vary greatly. Further, the duration of the benefits in Connecticut, New Jersey, and New York is 26 weeks, while in Florida, it is 12 weeks. The majority of the states, however, provide average benefits in the range of \$300 to \$500 for a maximum of 26 weeks. Typically, UI is not available to individuals who are self-employed, unable to work, voluntarily quit, were fired for misconduct, or refused to accept a job without good reason.

### *The Unemployment Benefits Available Under the CARES Act*

Under the Act, nearly all individuals receiving unemployment benefits will get a temporary emergency weekly benefit *increase* of \$600.<sup>4</sup> This increased benefit is fully funded by the federal government and available until July 31, 2020. This supplemental benefit will not have a retroactive effect for any unemployment checks already distributed by a particular state.

In practical terms, some UI recipients will receive more than double their normal weekly benefit (and, in some instances, triple) for up to 18 weeks. As a result, during this period, some recipients will likely be receiving more money than they earned when they were employed.

In addition, Section 2102 provides relief for individuals who (i) have exhausted their UI benefits, (ii) are not eligible for emergency UI under Section 2107 (discussed below), and (iii) are not otherwise traditionally eligible to receive UI benefits (i.e., those who are self-employed and independent contractors, as well as individuals who were scheduled to begin working at a job but are now unable to because of COVID-19). Such individuals

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<sup>4</sup> See Section 2104.

who are unemployed between January 27, 2020, and December 31, 2020, because of COVID-19 will receive a weekly benefit equal to the amount that would normally be provided under state law (with a minimum equal to 50 percent of the average weekly payment of regular compensation in the state), plus \$600 (as provided by Section 2104), and any post-enactment additional increase that may be provided.<sup>5</sup> For the self-employed, residents of territories other than Puerto Rico or the District of Columbia, and others who would not normally be eligible, the weekly benefit amount is the weekly minimum (50 percent of the average regular compensation in the state) plus \$600. The result is that many who historically could not obtain unemployment compensation are now eligible to receive up to 39 weeks of benefits fully funded by the federal government.

Finally, the Pandemic Emergency Unemployment Compensation program (Section 2107) provides for an additional 13 weeks of benefits for those individuals who have exhausted the maximum UI benefits available for the benefit year under the state program (for example, 26 weeks in New York, or 12 weeks in Florida), so long as the individual is able to work, available to work, and is actively seeking work. The weekly benefit mirrors Section 2104 (the state amount plus the additional \$600). These additional 13 weeks of benefits are at no cost to employers or the state, as they will be funded by the federal government.

### **The Forgivable Loan Program**

As part of its “paycheck protection” program, the Act provides \$349 billion in assistance through federally guaranteed loans to small businesses and nonprofit organizations. To encourage companies to bring back workers who have already been laid off, the program is retroactive to February 15, 2020, and extends to June 30, 2020. The loan can be used broadly for business purposes, including payroll costs, mortgage and rent payments, or utility payments, as well as:

- payment for vacation, parental, family, medical, or sick leave;
- dismissal or separation payments;
- payment for group health care benefits, including insurance premiums; or
- payment of retirement benefits.

The maximum loan amount is the lesser of (i) \$10 million or (ii) two-and-a-half months’ payroll (salaries, leave, taxes, insurance, etc.), calculated by the business’s average total monthly payments for payroll costs incurred during the previous one-year period.

While, generally, only small businesses that employ fewer than 500 employees (including sole proprietors, independent contractors, and other self-employed

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<sup>5</sup> If there are subsequent federal or state changes in the amount or duration of UI benefits, these current numbers will automatically extend. See 2102(c)(2) and (d)(c)(1).

individuals) are eligible for this program, there are exceptions. For example, restaurants and hotels that employ not more than 500 employees per physical location also are eligible to receive a single loan if they operate under the North American Industry Classification System (“NAICS”) code 72. Further, the loan may be available to other businesses in certain industries that otherwise meet the definition of “small business concern” under the Small Business Administration Act. In certain instances, those businesses can have up to 1,500 employees and still be deemed a “small business concern.”

This program would remove the “credit elsewhere” test. That test can be onerous because it requires a company seeking a loan to establish that it cannot obtain the requested funds from alternative sources without undue hardship.

Significantly, no collateral or personal guarantee will be required for the loan. Companies do not have to prove hardship; they must only provide a good faith certification of economic conditions that make the loan necessary.

As an incentive to bring employees back to work, companies are eligible for loan forgiveness equal to the amount they spend over the eight-week period after the origination date of the loan. Those “forgiven” amounts include payroll costs (up to \$100,000 of wages as prorated for the covered period), utility payments, and rent and mortgage interest payments in force or incurred before February 15, 2020. The amount of loan forgiveness can be reduced if the loan recipient fails to substantially maintain existing employment and compensation levels, according to specific calculations set forth in the Act. Companies that rehire previously laid-off workers will not be penalized for having a reduced payroll at the beginning of the loan period.

Companies will be required to provide documentation to their lenders of their payments during this relevant period.

The loans have a maturity date of a maximum of 10 years from the date loan forgiveness is applied for, and the interest can be no greater than 4 percent (but banks may set lower interest rates).

### **Loans for Midsize Businesses**

The Act also tasks the Treasury Secretary with “endeavor[ing]” to implement a program to help “midsize businesses,” defined as businesses with between 500 and 10,000 employees. The loans will have a maximum interest rate of 2 percent. To be eligible, the business must certify, among other things, that:

- it needs the loan in order to support ongoing operations;
- the loan will be used to retain at least 90 percent of its workforce, at full compensation and benefits, until at least September 30, 2020;

- the business intends to restore at least 90 percent of its workforce that existed on February 1, 2020, and to restore all compensation and benefits to its workers no later than four months after the termination of the COVID-19 public health emergency;
- the business entity was formed under U.S. law and is currently domiciled in the United States, with the majority of its employees based in the United States;
- it will not pay dividends or repurchase equity listed on a stock exchange while the loan is outstanding (except as otherwise required under a contract already in effect as of the date of the CARES Act);
- it will not offshore jobs for the term of the loan and for two years after completing repayment of the loan;
- it will not abrogate existing collective bargaining agreements during the term of the loan and for two years after completing repayment of the loan; and
- it will remain neutral in any union organizing effort that may occur during the term of the loan.

## **Other Provisions of the CARES Act**

### *Retirement Plans*

The CARES Act includes various provisions that will impact the design and administration of tax-qualified retirement plans and certain compensation arrangements. For example, the Act:

- establishes a new in-service distribution, referred to as a “coronavirus related distribution,” which, under certain criteria, entitles an individual to withdraw money from an eligible retirement plan;
- increases the maximum plan loan available to a qualified individual;
- waives minimum required distributions for 2020 for certain plans; and
- delays minimum required contributions to certain single employer plans that would otherwise be due in 2020, to January 1, 2021.

### *Executive Compensation*

The CARES Act restricts executive compensation that may be paid by an eligible business that receives certain loans authorized by the Act for a period of time.

These and related provisions of the CARES Act will be discussed more fully in the forthcoming Epstein Becker Green Act Now Advisory “The CARES Act: What Employers Need to Know (Part II).”

## What Employers Should Do Now

In connection with the CARES Act, employers should do the following:

- Establish procedures for:
  - ensuring compliance with family and sick leave obligations under the FFCRA (as explained [here](#)), and
  - obtaining “reimbursement” through retention of eligible payroll taxes and application for additional reimbursement from the federal government, as necessary and allowable.
- Determine whether, and to what extent, the wage-related tax credit and one of the available loan programs enable your business to retain employees during this crisis.
- If layoffs are unavoidable, understand employees’ rights to UI under both state law and the Act. If seeking a loan, evaluate if such layoffs will impact the amount of any loan eligibility or forgiveness.
- Continue to monitor developments (and Epstein Becker Green’s [Coronavirus Resource Center](#)), particularly with respect to any new regulations that may be issued pursuant to both the FFCRA and the CARES Act.

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