CARES Act Stimulus Will Permit Business Loans To Cover Payroll, Expand Unemployment

Insights
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Businesses struggling with the economic impact of the COVID-19 pandemic crisis received good news late last night when the Senate passed an unprecedented piece of legislation aimed at providing a massive stimulus to workplaces and employees alike. The centerpiece of the Coronavirus Aid, Relief and Economic Security (CARES) Act would allow small- and medium-sized businesses to receive federal loans – in some cases forgivable – to cover payroll and other expenses. It also expands unemployment benefits for workers impacted by the outbreak, while extending unemployment eligibility to many who are otherwise not regularly entitled to receive such benefits. While the bill is not yet law, the House is expected to approve the CARES Act by Friday and President Trump should sign it into law shortly thereafter. What do employers need to know about this significant development?

Small Business "Paycheck Protection" Loans
The most significant provision of the CARES Act for employers establishes new "paycheck protection" loans administered by the Small Business Administration (SBA) to help employers continue to cover payroll costs and other expenses during the COVID-19 crisis. The covered period for loans is February 15, 2020 through June 30, 2020.

Who Is Eligible For Loans?
These loans are available for businesses with not more than 500 employees. However, for businesses in the hospitality industry (those with a NAICS Code of 72) are eligible for a loan as long as they employ not more than 500 employees "per physical location." For example, a restaurant franchisee with 3,000 employees (but no more than 500 employees at any one location) could qualify for the loans.

In addition, the SBA generally has eligibility guidelines ("affiliation rules") to determine whether a business qualifies as "small." Under these provisions of the CARES Act, these "affiliation rules" are waived for (1) NAICS Code 72 businesses that employ not more than 500 employees; (2) franchises; or (3) businesses that receive financial assistance from a small venture investment company licensed under the SBA.

Lenders will determine eligibility for the loans based on whether the business was operational as of February 15, 2020, had employees on payroll, and paid wages and payroll taxes.

What Can The Loans Be Used For?

The loans may be used for payroll costs, healthcare, rent, utilities, and other debts incurred by the business. Notably, the definition of "payroll" costs excludes leave payments made pursuant to the new Families First Coronavirus Response Act (FFCRA). Reimbursement for those leave payments is made through the tax credit process enacted as part of that legislation. These "paycheck protection" loans are available for *other* payroll expenses and other costs.

How Much Are The Loans?

Loan amounts will be available based on a formula. The amounts available will be the *lesser* of:

- Average monthly payroll costs during the prior year x 2.5; or
- $10 million

For example, if the employer had an average monthly payroll of $900,000 over the prior year, it would be eligible for a loan of $2.25 million ($900,000 average monthly payroll times 2.5).

Can The Loans Be Forgiven? How Much And Under What Conditions?

The federal government will forgive the loans in an amount equal to the amount of qualifying costs spent during an eight-week period after the origination of the loan. These qualifying costs include payroll costs (except of wages above $100,000 per employee), interest on secured debt obligations, and rent and utilities in place prior to February 2020.

The amount of the forgiveness for the loans will be reduced if the employer:

- Reduces its workforce during the eight-week period compared to prior periods; or
- Reduces the salary or wages paid to an employee by more than 25% during the 8-week period (compared to the most recent quarter).

In addition, any reduction in the amount of loan forgiveness will be completely avoided if the employer re-hires all employees laid off (going back to February 15, 2020), or increased their previously reduced wages, no later than June 30, 2020. These provisions are designed to provide an incentive to employers to not lay off workers (or rehire them) and instead utilize the loan amounts to pay payroll and other expenses.

What's The Process?

Paycheck protection loans are fully guaranteed by the federal government through December 31, 2020 (previously guaranteed at 85%). The standard fees under section 7 of the Small Business Act are waived and there is no requirement that the loans be personally guaranteed by the borrower. Loans will be available immediately through SBA-certified lenders, which include banks, credit unions, and other financial institutions. The SBA will also be required to streamline the process to include additional lenders into the program and to ensure that funds are dispersed to qualified businesses as soon as possible. The deadline to apply for paycheck protection loans is June 30, 2020.

2020.

Fisher Phillips has quickly developed a team of attorneys to assist with the loan process. For questions or assistance, contact your Fisher Phillips attorney or the head of our SBA Loan Team.

Additional Loans To Mid-Size Businesses

While not eligible for paycheck protection loans, mid-size businesses – those with 500 to 10,000 employees – are also eligible for direct loans under the Emergency Relief and Taxpayer protections portion of the CARES Act. For a business to receive this type of loan under the Act, it must make a "good-faith certification" that it will comply with certain requirements listed in the CARES Act. This certification will likely occur on a form provided as part of the application for the loan and the failure to comply with the certifications could result in the rescission of the loan.

There are several certifications that any business applying for a loan should be aware of and discuss with counsel before accepting such a loan. Among other things, the business must certify that:

1. It intends to re-store at least 90% of its workforce that existed as of February 1, 2020, to include re-storing all compensation and benefits for those employees as of the same date. This restoration must be accomplished no later than 4 months after Health and Human Services declares an end to the public health emergency related to COVID-19;
2. It will not outsource jobs for the term of the loan (which cannot exceed five years) and for two years after repaying the loan;
3. It will not "abrogate" an existing collective bargaining agreement for the term of the loan and for two years after completing repayment of the loan. This language may impede efforts to engage in concessionary bargaining in the midst of such agreements;
4. It will remain "neutral in any union organizing effort for the term of the loan." The term "neutral" in the context of union organizing has traditionally been used to impose significant restrictions on employer conduct beyond those imposed by other federal labor laws and regulations imposed by agencies such as the National Labor Relations Board (NLRB). A business subjecting itself to these terms may therefore limit the extent to which it could otherwise resort to its lawful "free speech" rights under these circumstances.

For additional information on the impact of this new law on these and related labor relations issues, we would encourage you to contact your Fisher Phillips attorney and stay tuned for a more detailed legal alert from our Labor Relations Practice Group.

Employee Retention Tax Credit

The CARES Act also provides a new "employee retention tax credit." It is important to note, however, that this tax credit is not available to employers that receive the small business "paycheck protection" loans discussed above.

The employee retention tax credit provides eligible employers with a refundable payroll tax credit for 50% of the wages paid by employers during the COVID-19 crisis and applies to wages paid between March 13, 2020 and the end of the year. This tax credit is available to employers whose:

between March 13, 2020 and the end of the year. This tax credit is available to employers whose:

- Operations were fully or partially suspended due to a COVID-19 related "shut-down order," or
- Gross receipts declined by more than 50% when compared to the same quarter in the previous year.

The tax credit is provided for the first $10,000 of qualified wages paid to an eligible employee, which may include the employer's contribution to the employees' health insurance costs but will exclude any amounts that the employer already received a tax credit for under EFMLA or EPSL. For employers with more than 100 full-time employees, "qualified wages" will be further limited to wages paid to employees when they are not providing services due to the reasons specified above. For employers with 100 or fewer employees, employee wages may qualify for the credit, whether the employer is open for business or subject to a shut-down order.

Payroll Tax "Holiday"

In order to assist employers with immediate cash-flow issues, the CARES Act also provides that employers may defer payment of their portion of Social Security taxes they would otherwise be obligated to pay. Any deferred payroll taxes would be required to be paid over the next two years – with half of the owed amount being required to be paid by December 31, 2021, and the remaining half by December 31, 2022. This payroll tax "holiday" may provide additional assistance to employers during this period of crisis.

Changes To The New Federal Leave Laws?

The CARES Act also makes several changes to the recently enacted FFCRA. Most employers all already familiar with the provisions of that law, which establishes new paid leave requirements as part of new Emergency Paid Sick Leave and Emergency Paid Family and Medical Leave requirements. The DOL recently announced that those new leave requirements will go into effect on April 1, 2020. Most of the changes to the FFCRA are technical and clarifying in nature.

However, the CARES Act adds new language to the EFMLA to address leave entitlement under that provision for "rehired employees." The new language states that for purposes of the EFMLA, the term "employed for at least 30 calendar days" includes an employee who was laid off on or after March 1, 2020, had worked for the employer for not less than 30 of the last 60 calendar days prior to their layoff, and was rehired. Essentially, this provides that rehired employees who meet those criteria will be eligible for EFMLA without having to "restart the clock" on the 30-day requirement.

The CARES Act also includes language facilitating the ability of employers to obtain an "advance" refunding of tax credits by withholding employment tax deposits (and not being penalized for doing so). The IRS recently announced that it would be issuing guidance on this point to help employers manage cash-flow challenges associated with the new leave requirements.

Unemployment Insurance Provisions

The CARES Act also expands unemployment assistance by creating a Pandemic Unemployment Assistance program through December 31, 2020. For weeks of unemployment, partial

unemployment, or inability to work caused by COVID-19 between January 27 and December 31, the Act provides covered individuals with unemployment benefit assistance when they are not entitled to any other unemployment compensation or waiting period credit. For this, the weekly benefit amount is generally the amount determined under state law plus an additional $600 until July 31st. Although the additional $600 per week is only available for the next four months, the maximum entitlement was expanded to 39 weeks rather than the 26 weeks typical of most states.

Expanded Coverage And Eligibility

Covered individuals under this provision generally include those who provide self-certification the individual is otherwise able to work and available to work and is unemployed, partially unemployed, or unable to work for one of the following reasons:

- The individual is diagnosed with COVID-19 or experiencing COVID-19 symptoms and seeking medical diagnosis;
- A member of the individual's household was diagnosed with COVID-19;
- The individual is caring for a member of their family or household who was diagnosed with COVID-19;
- A child or person for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school/facility is required for the individual to work;
- The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of COVID-19 public health emergency;
- The individual is unable to reach the place of employment because a health care provider advised to self-quarantine due to COVID-19 related concerns;
- The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;
- The individual became the breadwinner or major support because the head of household died from COVID-19;
- The individual has to quit as a direct result of COVID-19;
- The individual's place of employment is closed as a direct result of COVID-19 public health emergency; or
- The individual meets additional criteria established by the Secretary of Labor.

The Act also expands unemployment to also cover those who traditionally are not eligible to receive such benefits. Specifically, this provision also covers those who are self-employed (like independent contractors), who are seeking part-time employment, who do not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits if they meet a qualifying reason above. However, the Act excludes those who would otherwise be a covered individual if they have the ability to telework with pay or if they receive paid sick leave or other paid leave benefits.

Funding and Incentives to States For Unemployment Assistance

To help make this additional unemployment assistance possible, the federal government will be offering various grants and funding to states. The Act also incentivizes states to provide this unemployment compensation without any waiting period that may currently prevent unemployed individuals from getting benefits immediately after their employment is separated. Similarly, the Act waives the seven-day waiting period and enhances benefits under the Railroad Unemployment Insurance Act.

In addition, the Act provides for flexibility in to the actively seeking work requirement in when the individual may be unable to search for work due to COVID-19, whether due to illness, quarantine, or movement restriction.

Direct Financial Assistance To Individuals

Although not necessarily applicable to employers, the Act also provides financial assistance directly to certain U.S. residents. The Act generally provides a tax credit of $1,200 for individual taxpayers or $2,400 for joint taxpayers, plus $500 for each child of the taxpayer. These rebates are not taxable income for the recipients because they are a credit against tax liability.

For most Americans, no action will be required to receive such a rebate. Tax returns from 2019 will generally be used to calculate these rebates, but tax returns from 2018 will be used to calculate these rebates if the individual has not filed a tax return for 2019. Those who may be eligible for a larger rebate based on their 2020 income would receive it in the 2020 tax reason.

These rebates are reduced based on the taxpayer's adjusted gross income. Specifically, the rebates are reduced by 5% per dollar of qualified income when the adjusted gross income exceeds $150,000 for joint taxpayers, $112,500 for a head of household, and $75,000 for all other taxpayers. The rebates would be completely phased out when the adjusted gross income exceeds $198,000 for joint taxpayers with no children, $146,500 for head-of-household taxpayers with one child, and $99,000 for single taxpayers.

In addition to these rebates, individuals may be able to tap into their retirement accounts due to waiver of some early withdrawal penalties for COVID-19 related purposes. Specifically, a provision in the CARES Act waives the 10% early withdrawal penalty for distributions up to $100,000 from qualified retirement accounts for COVID-19 related purposes made on or after January 1, 2020. The income attributable to such distributions may be subject to tax over three years and the taxpayer may recontribute the funds within three years without regard to that year's cap on contributions. The Act also provides flexibility for loans from certain retirement plans for COVID-19 relief.

Benefits/Health Care Issues

The CARES Act also makes some revisions to healthcare coverage for virus testing, preventive services, and benefits. The federal law will still require group health plans and health insurers to cover certain state-developed COVID-19 diagnostic testing (in addition to current federally approved diagnostic testing); diagnostic testing pursuant to developer requested emergency use

diagnostic testing), diagnostic testing pursuant to developer requested emergency use authorizations; and any other test the Secretary determines appropriate in guidance. However, the new law deletes specific language about diagnostic testing performed in qualifying clinical labs.

Federal law will also provide specific guidance on pricing and reimbursement rates for providers of diagnostic testing services. It allows negotiated rates or any amount not exceeding cash price.

- Specifically, it requires COVID-19 diagnostic testing providers to publish their cash price for testing on a public internet site of the provider. The Secretary of HHS can impose a civil monetary penalty up to $300 per day for noncompliance with the posting requirement.
- It also requires the Secretaries of HHS, Labor, and Treasury to require group health plans and health insurers to cover any "qualifying coronavirus preventive service." Items, services and immunizations qualifying as preventive or mitigating must be covered "rapidly," essentially meaning for immunizations within 15 days of recommendation.

Finally, under the CARES Act, high deductible health plans will not be disqualified for failure to have a deductible for telehealth and other remote care services. There will be a safe harbor exemption for telehealth services provided in plan years beginning on or before December 31, 2021.

Conclusion
Fisher Phillips will continue to monitor the rapidly developing COVID-19 situation and provide updates as appropriate. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information. For further information, contact your Fisher Phillips attorney, or any member of our COVID-19 Taskforce. And again, if you need to tap into the Fisher Phillips team of attorneys prepared to assist with the loan process, contact your Fisher Phillips attorney or the head of our SBA Loan Team.

If your business has questions about a designation as an essential business under a local shelter-in-place or shutdown order, contact any member of our Essential Business Taskforce. You can also review our nationwide Comprehensive and Updated FAQs for Employers on the COVID-19 Coronavirus and our FP Resource Center For Employers, maintained by our Taskforce.

This Legal Alert provides an overview of a specific developing situation. It is not intended to be, and should not be construed as, legal advice for any particular fact situation.

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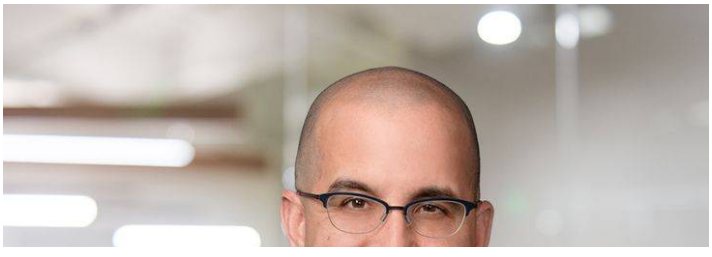

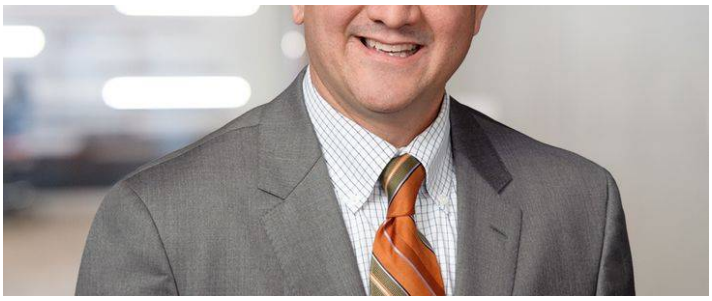

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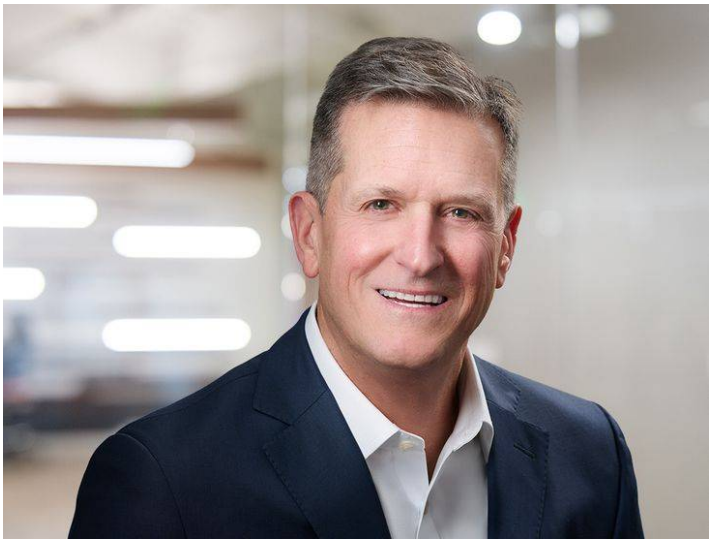

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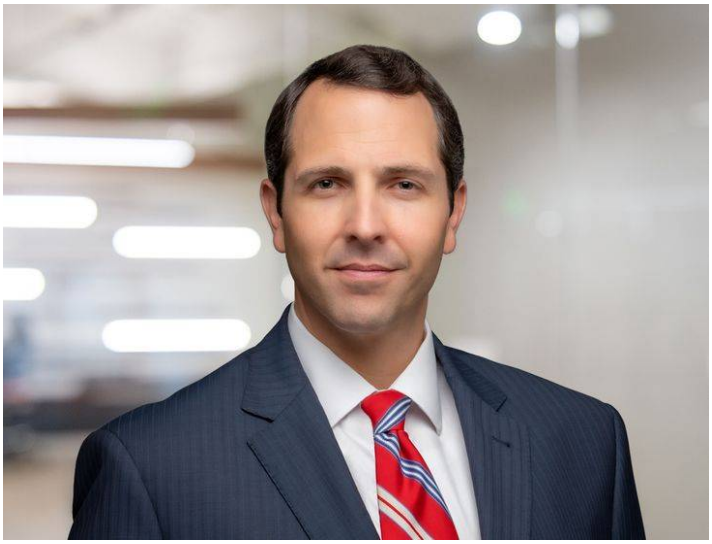

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