

# HRW CLIENT ALERT

2020



## **Help is Here: CARES Act is Signed Into Law**

On Friday, March 27, 2020, the President signed into law the Coronavirus Aid, Relief and Economic Security Act ("CARES Act"). The CARES Act provides for loans, tax breaks, expanded unemployment benefits, rebates, and other measures to help struggling businesses and workers. It also partially amends the Families First Coronavirus Response Act ("FFCRA"). Some of the key employment-related provisions of the CARES Act include the following:

### **Title I: Keeping American Workers Paid and Employed Act**

Title I amends the Small Business Act to permit a wider range of businesses, including nonprofits and the self-employed, to receive loans that are guaranteed by the federal government. To be eligible for these loans, a business may not employ more than 500 workers, though the Administrator of the Small Business Association (the "Administrator") has the authority to set different standards based on the industry. Special counting rules apply to accommodation and food services, franchises, and nonprofits.

Employers can receive loans in an amount equal to 2.5 times their payroll costs, up to \$10 million. Payroll costs include wages, tips, benefits, and taxes, but exclude compensation of individual employees in excess of \$100,000, and compensation to employees whose primary place of residence is outside the United States. Loans can be used for payroll, benefits, wages, mortgage interest, rent, utilities, and debt interest. Business owners are not required to personally guarantee the loans.

The loans are processed through commercial lenders, who are reimbursed for processing costs, and who are required to provide complete payment deferment relief of not less than six months.

Eligible recipients shall be eligible for forgiveness of indebtedness on a covered loan in an amount equal to the costs incurred and payments made by them, during the eight weeks following the date the loan is originated, for payroll costs, interest payments, rent, and utilities. If there is a reduction in the number of employees working for the employer, the amount of loan forgiveness is reduced according to a formula set forth in the law. Loan forgiveness is also reduced if the employer reduces the total wages of an employee making \$100,000 or less by more than 25%, unless such reduction was between January 15, 2020 and 30 days after the enactment of the law. Loan recipients must provide certain documentation to receive the loan forgiveness. If the lender obtains that documentation, the lender cannot be subject to an enforcement action or penalties by the Administrator.

## **Title II: Assistance for American Workers, Families and Businesses**

### *Unemployment*

This Title provides for expanded unemployment benefits for individuals, including persons who would not ordinarily be eligible for unemployment benefits under their State's law, such as self-employed individuals and persons without sufficient work history.

The individual seeking these unemployment benefits must provide self-certification that they are otherwise able to work and available for work within the meaning of their State's law, unless such inability to work is because:

- they were diagnosed with or experiencing symptoms of COVID-19, and are seeking a medical diagnosis;
- a member of their household has been diagnosed with COVID 19;
- they are providing care for a family member or a member of their household who has been diagnosed with COVID 19;
- a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of COVID-19;
- the individual is unable to reach the place of employment because of a quarantine;
- the individual is unable to reach the place of employment because they have been advised by a health care provider to self-quarantine;
- 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 has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;
- the individual's place of employment is closed as a direct result of the COVID-19 public health emergency; or
- any additional criteria established by the Secretary of Labor.

Individuals may not receive unemployment benefits if they have the ability to telework with pay. Also excluded are individuals receiving paid sick leave or other paid leave benefits, regardless of whether they meet the above criteria.

The unemployment assistance covers weeks of unemployment, partial unemployment, or inability to work caused by COVID-19 starting on January 27, 2020 and ending on or before December 31, 2020.

The total number of weeks of unemployment that an individual can receive is 39 weeks, with such total including any week for which the individual received regular compensation or extended benefits under other federal or State laws. This maximum may be extended in the future.

Employees can receive whatever amount they would be authorized to receive in their State, plus an additional \$600 in "Federal Pandemic Unemployment Compensation."

For a State to take advantage of these federal unemployment dollars, the State will need to enter into an agreement with the Secretary of Labor. If they do, one hundred percent of the amounts paid will be paid by the federal government, plus an additional amount for the cost of administering the program. Such agreements will begin when entered into and end on or before December 31, 2020.

The agreement will cease to apply, however, if the State tries to reduce its benefit levels to an amount that is lower than what was in effect under that State's law as of January 1, 2020.

If an individual commits fraud in connection with an application for benefits, they can be subject to prosecution, and required to repay the amounts they received. Before any repayment is required, the individual must be given notice and an opportunity for a fair hearing, with such decision being subject to review in the same manner and to the same extent as under that State's law.

### *Payroll Tax Credits*

Subtitle C of Title II, entitled Business Provisions, provides for eligible employers to receive a credit against employment taxes in an amount equal to 50% of qualified wages paid with respect to each employee of such employer during the applicable calendar quarter. If the amount of the credit exceeds the employment taxes due, the employer can receive a refund.

To be eligible, an employer must have been carrying on a trade or business during calendar year 2020. The credit applies with respect to any calendar quarter for which:

(I) The operation of the trade or business is fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings due to COVID-19; OR

(II) the employer experienced a "significant decline in gross receipts," meaning that gross receipts beginning after December 31, 2019 are less than 50% of gross receipts for the same calendar quarter in the prior year. (Other provisions apply if the business did not exist then.)

Employers are not eligible for this credit if they are already taking a Small Business Interruption Loan under Title I.

The term qualified wages for employers with more than 100 employees means wages paid with respect to which an employee is not providing services due to the above conditions. For employers with 100 or fewer employees, the term qualified wages refers to all wages paid during such periods, up to \$10,000 per employee for all applicable calendar quarters. If the amount of the credit exceeds the employment taxes due, the employer can receive a refund. Note that employers may not count wages paid pursuant to the FFCRA.

The law provides for transfers from the general fund to the Federal Old-Age and Survivors Insurance Trust Fund to make up for the reduction in revenue to the Treasury due to the application of these credits.

The Secretary of the Treasury is directed to issue forms, instructions, regulations, and guidance as needed to allow for advance payment of these credits. The credits only apply to wages paid after March 12, 2020 and before January 1, 2021.

## **Title III: Supporting America's Health Care System in the Fight Against the Coronavirus**

### *Health Provisions*

Subtitle A of Title III, entitled Health Provisions, includes provisions aimed at addressing medical supply shortages, expanding access to health care for COVID-19 patients, promoting innovation, and training for health care workers.

### *Education Provisions*

Subtitle B, entitled Education Provisions, includes provisions for payment of federal work-study funds, temporary relief for federal student loan borrowers, emergency waivers of certain statutory and regulatory provisions, and other education related measures. Under this Subtitle, institutions of higher learning can award emergency financial aid grants to assist students with unexpected expenses as a result of a qualifying emergency. The Act also suspends the obligations of institutions and students to refund Title IV funds if a student withdraws due to a qualifying emergency, and it adjusts limits on federal grant and loan limits.

### *Changes to FFCRA*

Subtitle C, entitled Labor Provisions, amends the FFCRA to expand the definition of the term eligible employee for the purposes of expanded emergency FMLA leave. Under the expanded emergency FMLA leave provisions, the term eligible employee means an employee who has been employed for at least 30 calendar days. Per the amendment, the term eligible employee now includes an employee who is laid off by the employer not earlier than March 1, 2020, had worked for the employer for not less than 30 of the last 60 calendar days prior to the employee's layoff, and was rehired by the employer.

Subtitle C also enables employers to receive an advance on credits available under the FFCRA, according to forms and instructions to be provided by the Secretary of the Treasury. The penalty for failure to make required deposits of employment taxes is waived if the failure was due to the anticipation of the credit allowed under this section.

Subtitle C includes a variety of minor, technical corrections to the FFCRA, including correcting mistakes made with respect to section numbers. There is however one important substantive change. The non-retaliation provisions of the Emergency Paid Sick Leave Act now state that it shall be unlawful for an employer to discharge, discipline, or in any other manner discriminate against an employee who takes leave in accordance with the Act, or who has filed any complaint or instituted or testified in any proceeding seeking enforcement of the Act. (In the prior version, the word "and" was used instead of "or.")

### *Relaxation of ERISA Requirements*

Subtitle C also includes provisions that relax ERISA requirements and deadlines, and provisions to ease the burden on federal contractors.

## **Title IV: Economic Stabilization and Assistance to Severely Distressed Sectors of the United States Economy**

Title IV authorizes the Secretary of the Treasury to make loans, loan guarantees, and other investments to air carriers and businesses that support them, businesses "critical to maintaining national security," and financial institutions under certain conditions, with application procedures to be published within 10 days.

In a section called Assistance for Mid-Size Businesses, Title IV further directs the Secretary to “endeavor to seek implementation” of programs that provide financing to lending institutions that make direct loans, at a rate of 2% per annum or less, to nonprofits and other businesses with between 500 and 10,000 employees (with the term employee given the same meaning as under the National Labor Relations Act). No principal or interest shall be due on such loans for at least six months, or longer if the Secretary determines.

Borrowers applying for loans under this program are required to make a good-faith certification that, among other things:

- the uncertainty of economic conditions as of the date of the application makes necessary the loan request to support the ongoing operations of the recipient;
- funds received will be used to retain at least 90% of the recipient’s workforce, at full compensation and benefits, until September 30, 2020;
- the recipient intends to restore not less than 90% of the workforce of the recipient that existed as of February 1, 2020, and to restore all compensation and benefits to the workers of the recipient no later than four months after the termination of the public health emergency;
- the recipient is an entity or business that is domiciled in the United States with significant operations and employees located in the United States;
- the recipient is created or organized in the United States or under the laws of the United States and has significant operations in and the majority of its employees based in the United States;
- the recipient is not a debtor in a bankruptcy proceeding;
- the recipient will not pay dividends with respect to common stock or re-purchase an equity security of the recipient or any parent company of the recipient that is listed on a national securities exchange while the loan is outstanding, unless required under a prior contractual obligation;
- the recipient will not outsource or offshore jobs for the term of the loan and for two years after completing repayment;
- the recipient will not abrogate existing collective-bargaining agreements for the term of the loan and two years after completing repayment; and
- the recipient will remain neutral in any union organizing effort for the term of the loan.

Title IV Includes some provisions intended to protect the government’s financial interest, including provisions for the Secretary to receive and sell equity interests in the recipient. The law specifically prohibits forgiveness of the loans made under this Title. The Secretary may hire and compensate third-party vendors to administer the loan program. Loan receipts are treated as indebtedness for income tax purposes.

More information about implementation of the CARES Act will be forthcoming from the Secretary of the Treasury.

## **For Questions/More Information**

For any questions, including compliance assistance, please contact any member of the HRW COVID-19 Team:

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