Gesmer Updegrove LLP

ClientUpdate
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$2 Trillion CARES Act Provides Sweeping COVID-19 Help

On Friday, March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief and Economic Security Act ("CARES Act"). The third federal law passed in response to the COVID-19 pandemic provides approximately $2 trillion in assistance to individuals and businesses. While the law is large and complex, the most salient provisions for our clients include:

Paycheck Protection Program

Under the Keeping Workers Paid and Employed Act section of the new law, businesses with 500 employees or less (including sole proprietors, independent contractors and other self-employed individuals) may apply for SBA loans to cover a variety of qualified costs related to employee compensation and benefits, including (i) payroll costs, (ii) continuation of health care benefits, (iii) employee compensation for those making less than $100,000, (iv) mortgage interest obligations, (v) rent, (vi) utilities and (vii) interest on debt incurred before the covered period. This is known as the Paycheck Protection Program ("PPP").

Eligibility and Terms

There are few borrower requirements to qualify for a loan under the PPP. They include a good-faith certification that the loan is needed to continue operations during the COVID-19 emergency, and that loan proceeds will be used to retain workers and maintain payroll, or to make mortgage, lease, and utility payments.

The total loan amount may not exceed the lesser of $10 million or two and a half times the monthly payroll costs for the twelve month period preceeding the loan date (excluding compensation for employees making in excess of $100,000 annually or any compensation paid outside the United States).

The loan does not require any personal guarantees or collateral. The interest rate may not exceed 4% and the loan has a maximum term of 10 years.* Loan repayment can normally be deferred 6 to 12 months.

* Current guidance sets the interest rate at 1% and the loan term at 2 years.

Employers will generally obtain these loans from their local banks or financial institutions, but they are 100% backed by the federal government.

Loan Forgiveness

The loans are intended to encourage employers to retain as many workers as possible during the current downturn at or near current compensation rates, and the program incorporates a broad loan forgiveness provision tied to that goal. Specifically, loan proceeds used for payroll costs, interest on certain mortgage obligations, and rent and utility costs during the eight weeks following the loan origination date will be forgiven, and ***not*** taxed for federal income tax purposes, to the extent employers maintain existing payroll and employee levels.

The amount of loan forgiveness drops if the number of full time employees is reduced or if total salaries and wages fall by more than 25%.

Reductions triggered by employee cuts are calculated as follows:

- ✦ The numerator of a fraction used to determine the degree of loan forgiveness is the average number of full-time equivalent employees per month, calculated on a "per pay period" basis ("Average FTEEs"), from February 15, 2020 through June 30, 2020.
- ✦ The denominator of that fraction is the Average FTEEs from (a) February 15, 2019 through June 30, 2019 or (b) January 1, 2020 through February 29, 2020, whichever is smaller.

This reduction does not apply with respect to an employer who has reduced the number of FTEEs between February 15, 2020 and April 26, 2020 but restores the number of FTEEs by June 30, 2020. That is, there is an incentive for employers to re-hire terminated or furloughed workers, to achieve the loan forgiveness benefit.

A decrease in loan forgiveness triggered by payroll reductions is calculated by totaling the reduction in wages for any employee whose annualized salary never exceeded $100,000 during any pay period in 2019, and whose wages dropped by at least 25% compared to the most recent full quarter of employment prior to February 15, 2020.

However, this loan forgiveness reduction does not apply if a payroll reduction is eliminated by June 30, 2020.

Business Tax Provisions

The new law also make a number of changes in existing tax law:

- It provides certain businesses required to close or significantly curtail operations due to the COVID-19 crisis with for a refundable payroll tax credit with respect to payroll taxes paid on employees that are retained;
- The employer portion of payroll taxes (6.2%) are delayed for the remainder of 2020. Half the delayed amount is payable by December 31, 2021 and the remainder by December 31, 2022;
- It increases the ability to deduct certain business interest (from 30% to 50% of adjusted taxable income); and
- It renews the ability to carry back certain net operating losses, after a repeal of the carry-back in 2017.

Individual Refundable Tax Credits

The law also provides for $1,200 in refundable tax credits *in the form of direct rebate checks* to adults making $75,000 or less ($2,400 for couples filing jointly making $150,000 or less), plus $500 per child. Credits are determined on a sliding scale after that income threshold; once income level reaches approximately $200,000 for married couples, the rebate amount is reduced to $0.

These rebates are not available to nonresident aliens or taxpayers who are claimed as a dependent by another.

Unemployment Insurance Provisions

The law expands eligibility for those seeking unemployment benefits, to include those who are furloughed or out of work as a direct result of COVID-19, self-employed or gig workers, and those who have exhausted existing state and federal unemployment benefit provisions. Workers working from home with pay are not eligible.

The law also increases the amount to which an employee would otherwise be entitled under state law by $600 per week. This increase applies for unemployment payments made from the date of the law's enactment through July 31, 2020.

Other Significant Changes

- The law eliminates the non-federal match requirement under the Women's Business Centers Program during a three-month period.
- Emergency Economic Injury Disaster Loans ("EIDLs") are expanded, to include any business with up to 500 employees, sole proprietorships, and independent contractors applying for an SBA disaster loan. The CARES Act loosens or waives many of the requirements for businesses applying for these loans, and allows for a $10,000 advance within three days of applying that is not subject to repayment. In other words, this is a fully-forgiven, interest-free loan from the federal government, provided the loan proceeds are used by the business for providing sick leave to employees, maintaining payroll, meeting increased costs due to supply chain interruptions, making rent or mortgage payments, or repaying obligations that cannot otherwise be met due to revenue losses.
- Recognizing that all small business borrowers are adversely impacted by COVID-19, the law also subsidizes certain loan repayments under the Small Business Act. The subsidy covers SBA loans made prior to the crisis or within the next six months. The subsidies generally cover a time period of approximately six months from the date of the next payment due date on the loan.

This advisory is for information purposes only, and does not constitute legal advice. If you would like to discuss the impact of COVID-19 on you or your business, please contact Joe Laferrera, Aaron Kriss, or Sean Gilligan at (617) 350-6800, or email them at joe.laferrera@gesmer.com, aaron.kriss@gesmer.com, or sean.gilligan@gesmer.com.

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