

Coronavirus Aid, Relief and Economic Security (CARES) Act

On March 27, 2020 President Trump signed the Coronavirus Aid, Relief and Economic Security (CARES) Act, a piece of legislation aimed at providing a massive stimulus to workplaces and employees alike. The 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.

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 20, 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.

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:

- 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 are 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.

This summary 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.