



Alerts

CARES Act Provides Massive Financial Relief to Small Businesses and Expands Unemployment Benefits for Workers

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Insights for Employers

Updated on April 10, 2020 to reflect a new [Department of Treasury FAQ](#)

The Coronavirus Aid, Relief and Economic Security (CARES) Act was signed into law on March 27, 2020. It is the largest stimulus package in U.S. history, and provides \$2.2 trillion in relief to individuals, businesses, and hospitals grappling with the rapidly developing and devastating economic effects of the COVID-19 pandemic. At its core, the CARES Act provides a critical injection of financial assistance to businesses, as well as expanded protections for workers. Below we have summarized what employers need to know about this important legislation. Note that the U.S. Department of Labor (DOL) is expected to publish additional guidance in the coming days on the implementation of the programs set forth in the CARES Act and related issues.

"Paycheck Protection" Loans for Small Businesses

The most significant provision of the CARES Act is the Paycheck Protection Program (PPP), which provides nearly \$350 billion in forgivable loans to keep workers employed during the COVID-19 crisis. To be eligible, a business must have been operational as of February 15, 2020. The covered period during which expenses can be forgiven begins on February 15, 2020 and extends to June 30, 2020. The portion of the PPP loan used to cover payroll costs, interest on mortgage obligations, rent payments, and utility payments is eligible for forgiveness, as explained below.

Title I of the CARES Act, named the "Keeping American Workers Paid and Employed Act," amends the Small Business Act, 15 USC § 636(a), through the addition of the PPP. As a result, the PPP loans will be administered by the Small Business Administration (SBA).

PPP Loan Eligibility

An entity is a "small business" and eligible for a PPP loan if it:

1. Meets the applicable North American Industry Classification System (NAICS) Code-based size standard or other applicable 7(a) loan size standard, alone and together with its affiliates; or

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2. Has an employee headcount that is lower than the greater of (i) 500 employees (15 USC § 636(a)(36)(D)(i)(I)), or (ii) the employee size standard, if any, under the applicable NAICS Code (15 USC § 636(a)(36)(D)(i)(II)).

An SBA "size standard," which is usually stated in number of employees or average annual receipts, represents the largest size that a business (including its subsidiaries and affiliates) may be to remain classified as a small business by the SBA. Employers should consult the SBA's [Table of Small Business Size Standards](#) to determine their size standard.

In determining the number of employees, the SBA counts all individuals employed on a full-time, part-time, or other basis. This includes employees obtained from a temporary employee agency, professional employee organization, or leasing concern. Part-time and temporary employees are counted the same as full-time employees. If a concern has not been in business for 12 months, the SBA uses the average number of employees for each of the pay periods during which it has been in business.

Sole proprietorships, independent contractors, gig-economy workers, and self-employed individuals are also eligible for a PPP loan. 15 USC § 636(a)(36)(D)(ii).

There are some limited exceptions to the 500-employee eligibility requirement for certain industries, such as businesses in the hospitality and food sectors that have multiple locations, which can have up to 500 employees per physical location of the business.

Affiliate Businesses Included in Business Size

Under the Small Business Act, the size of a business is measured on an "affiliate" basis. This means that a borrower must include the employees or receipts of all affiliates when determining the size of their business. According to the SBA, affiliation with another business is based on the power to control, whether exercised or not. Control may arise through ownership, management, or other relationships or interactions between the parties. The power to control exists when an external party has 50 percent or more ownership. 13 CFR § 121.103. The SBA determines affiliation in accordance with [13 CFR, Part 121](#), which governs Small Business Size Regulations.

The PPP waives the affiliation requirement for the following applicants:

1. Businesses within NAICS Code 72 with no more than 500 employees (15 USC § 636(a)(36)(D)(iv)(I)), i.e., hospitality businesses like hotels and restaurants;
2. Franchises with codes assigned by the SBA, as reflected on the SBA franchise registry (15 USC § 636(a)(36)(D)(iv)(II)); or
3. Businesses that receive financial assistance from one or more small business investment companies (15 USC § 636(a)(36)(D)(iv)(III)).

Businesses that fall within NAICS Code 72 are eligible for a PPP loan if they employ no more than 500 people *per physical location*. 15 USC § 636(a)(36)(D)(iii).

Loan Forgiveness

The PPP provides loan forgiveness for small businesses in an amount equal to the sum of the following costs incurred and payments made during the covered period (the eight-week period beginning on the date of the origination of a covered loan): (1) payroll costs (up to \$100,000 annually per employee); (2) costs related to group health care benefits during periods of sick leave, medical or family leave, and insurance premiums; (3) employee salaries, commissions, or similar compensations; (4) payments of interest on any mortgage obligation; (5) rent; (6) utilities; and (7) interest on any other debt obligations that were incurred prior to February 15, 2020.

The amount of the loan eligible for forgiveness will be reduced proportionally by any reduction in employees during the covered period as compared to a prior period which, at the borrower's election, can be either: (1) the period beginning on February 15, 2019 and ending on June 30, 2019, or (2) the period beginning on January 1, 2020 and ending on February 29, 2020. Additionally, the amount of the loan eligible for forgiveness will be reduced by any reduction in pay in excess of



25 percent for those employees who make less than \$100,000 annually.

To encourage employers to rehire any employees who have already been laid off (or to increase an employee's salary which was previously reduced) due to the COVID-19 crisis, the PPP provides that employers that re-hire previously laid off employees (or increase an employee's salary which was previously reduced), will not be penalized for having a reduced payroll at the beginning of the covered period. For example, a borrower that reduced, or plans to reduce, the number of full-time employees on its payroll between February 15, 2020, and 30 days after the PPP's enactment, can re-hire those employees prior to June 30, 2020, and receive the full loan forgiveness amount. These provisions are designed to encourage employers to rehire employees who have been laid off prior to the PPP and to otherwise keep employees on the payroll.

Loan Amount

The amount of the loan is an employer's average total monthly payroll costs during the one-year period immediately before the loan multiplied by 2.5, i.e., 250 percent of the employer's average monthly payroll expenses, up to a total of \$10 million.

Allowed Use of Loan Funds

PPP funds may be used for payroll support, such as employee salaries, paid sick or medical leave, insurance premiums, and mortgage, rent, and utility payments. Importantly, the definition of "payroll" costs excludes leave payments made pursuant to the Families First Coronavirus Response Act (FFCRA). Employers can receive reimbursement for leave payments made pursuant to the FFCRA via the tax credit process recently announced in a joint [news release](#) by the IRS and the DOL.

Interest Rates and Terms

The PPP waives the credit-available-elsewhere, personal guaranty, and collateral requirements of the SBA. A borrower does not have to pay any standard 7(a) fees on the loan. Loan payments may be deferred for at least six months and up to one year from the date of origination.

If the full principal of the PPP loan is forgiven, the borrower is not responsible for the interest accrued in the eight-week covered period. Any portion of the loan that is not forgiven will operate according to the specific loan terms agreed upon between the borrower and lender.

However, for any portion of the loan that is not forgiven, the interest rate is capped at 4 percent. 15 USC § 636(a)(36)(L). The maximum loan term is 10 years, 15 USC § 636(a)(36)(K)(ii), and will continue to be guaranteed by the SBA, 15 USC § 636(a)(36)(K)(i).

Importantly, while a discharge of indebtedness, which would include a loan that is forgiven, is normally treated as taxable income by the IRS, this is not the case under the PPP. The amount of the PPP loan which is forgiven will be excluded from gross income.

Application Process

A borrower can immediately apply for a PPP loan at any lending institution that is approved to participate in the program through the existing SBA 7(a) lending program and additional lenders approved by the U.S. Department of the Treasury. Thousands of banks already participate in the SBA's lending programs, including numerous community banks.

Borrowers should review the SBA's [7\(a\) Loan Application Checklist](#) before starting the application process. The deadline to apply for paycheck protection loans is June 30, 2020.



Existing Economic Injury Disaster Loans

The SBA's Economic Injury Disaster Loan program already provides small businesses with working capital loans of up to \$2 million, which can provide vital economic support to small businesses to help overcome the temporary loss of revenue they are experiencing.

Some employers may have applied for, or received, an Economic Injury Disaster Loan (EIDL) related to COVID-19 before the PPP became available. If an employer received an EIDL loan related to COVID-19 between January 31, 2020 and the date upon which the PPP became available, they can refinance the EIDL into the PPP for loan forgiveness purposes. However, an employer may not take out an EIDL and a PPP for the same purposes. Further, remaining portions of the EIDL, for purposes other than those laid out in loan forgiveness terms for a PPP loan, would remain a loan.

If an employer took advantage of an emergency EIDL grant award of up to \$10,000, that amount would be subtracted from the amount forgiven under PPP.

Changes to Expanded FMLA Leave

The FFCRA established new paid leave requirements including the Emergency Paid Sick Leave Act and the Emergency FMLA Leave Act (EFMLA). The DOL recently announced that those new leave requirements will go into effect on April 1, 2020.

The CARES Act expands the EFMLA to provide leave for "rehired employees." Specifically, employees who were laid off by an employer after March 1, 2020, who worked for the employer at least 30 of the prior 60 days before the layoff, and have now been rehired, would be eligible for leave under the EFMLA.

The CARES Act also allows employers to obtain an "advance" on refundable tax credits under the FFCRA by withholding employment tax deposits. The IRS is expected to release guidance on this issue and other tax implications under the FFCRA in the coming weeks.

Possible Loans for Mid-Size Businesses

Under the CARES Act, the Secretary of the Treasury has been tasked with creating a loan program for businesses employing between 500 and 10,000 employees. This program is set to include a 2 percent interest rate on loans and an initial period of at least six months without payments coming due. Employers will need to satisfy a number of requirements to qualify for these loans.

First, the loan will need to be necessary to support ongoing operations. Additionally, the funds need to be used to retain at least 90 percent of the workforce, at full compensation and benefits, until September 30, 2020. The employer also needs to intend to restore not less than 90 percent of its workforce, at full compensation and benefits, no later than four months after the termination of the COVID-19 public health emergency. The employer must agree not to pay dividends with respect to stock of the business, or repurchase an equity security that is listed on a national securities exchange while the loan is outstanding, except to the extent required under previously effective contractual obligations.

Notably, the employer will need to agree not to "outsource or offshore jobs" for the term of the loan and for two years thereafter. If applicable, the employer will also agree not to abrogate existing collective bargaining agreements for the term of the loan and two years thereafter; however, the loan cannot be conditioned on entering into a collective bargaining agreement. Further, the employer must remain neutral in any union organizing effort for the term of the loan.

However, what it means for the employer not to abrogate and to remain "neutral" in union organizing efforts is ambiguous at best under the Act. The term "abrogate" is not defined by the statute. Generally, union "neutrality" refers to the stance a company takes when a union seeks to organize its employees. Under the National Labor Relations Act (NLRA), both employees and employers have various organizing-related rights. The impact on these rights if an employer receives a mid-size employer loan under the CARES Act is not currently clear and is an issue employers should analyze before accepting a loan under this section of the Act.



Economic Assistance to Severely Distressed Sectors

Certain industries and eligible businesses also qualify for loans or loan guarantees under the CARES Act. Section 4002 of the CARES Act defines an "eligible business" as an air carrier or a "business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under this Act." Any business that receives a loan or a loan guarantee pursuant to this provision of the CARES Act is subject to restrictions on employee compensation.

Specifically, the compensation limits apply to officers and employees who received more than \$425,000 in total compensation in calendar year 2019 from a business that received a CARES Act loan or loan guarantee. Total compensation includes salary, bonuses, awards of stock, and other financial benefits provided by a business to an officer or employee of the business. The limits do not apply to independent contractors who are not officers or, generally, to union employees. The limits apply beginning on the date that a business entered into a loan or loan guarantee and ends one year after the date that the loan or loan guarantee is fully paid or no longer outstanding.

The CARES Act limits both the total compensation that an officer or employee may receive during any consecutive 12 months and the severance pay or other benefits that an officer or employee may receive on termination of employment.

For an individual whose total compensation exceeds \$425,000, total compensation during the applicable time limits of the CARES Act cannot exceed their total compensation received in 2019. For an individual whose total compensation exceeds \$3 million, total compensation during the applicable time limits cannot exceed \$3 million plus 50 percent of the excess over \$3 million of the total compensation received by the officer or employee from the eligible business in calendar year 2019.

Similar limitations apply to air carriers or contractors under the Air Carrier Worker Support sections of the CARES Act.

Employee Retention Tax Credit

Section 2301 of the CARES Act provides for a one-year employee retention tax credit for eligible employers impacted by COVID-19. This allows employers to take a tax credit against employment taxes equal to 50 percent of qualified wages for each employee up to \$10,000 total per employee. There are two categories of employer eligibility: (1) employers that were carrying on a trade or business in 2020 and had to fully or partly suspend operations due to government orders limiting commerce, travel, and group meetings because of COVID-19, or (2) employers that were able to remain open, but had gross receipts less than 50 percent of their gross receipts for the same quarter in 2019. In the latter instance, the employer will be entitled to tax credit for each quarter in which its gross receipts are less than 80 percent of what they were for the same quarter in 2019.

If an employer has less than 100 employees, all wages are eligible for the tax credit, not just wages paid to employees unable to work. Thus, wages paid to employees who continue to work also qualify. Such wages include health plan expenses allocable to the wages. The tax credit is refundable if it exceeds the employer's liability for payroll taxes.

Significantly, any wages subject to the tax credit for enhanced family medical leave or paid sick leave under the FFCRA may not be considered when determining qualified wages for this employee retention credit. In other words, no double-dipping is allowed. Additionally, if an employer takes out a payroll protection loan under Section 7(a) of the Small Business Act under the CARES Act, it would not be eligible for this retention tax credit.

This tax credit applies to wages paid between March 12, 2020 and December 31, 2020. This could potentially impact the credit's interplay with the FFCRA.

Social Security Tax Deferment for Employers

The CARES Act allows employers to defer payment of their portion of Social Security taxes they would otherwise be obligated to pay until 2021 and 2022. An employer would be required to pay such deferred payroll taxes over the next two years — with half of the owed amount due by December 31, 2021, and the remaining half due by December 31, 2022.



Expanded Unemployment Benefits Provide Relief for Workers

Title II, Section A of the CARES Act, named the "Relief for Workers Affected by Coronavirus Act" (RWACA), provides for a substantial expansion of existing unemployment insurance and benefits programs for individuals out of work for reasons associated with COVID-19. The RWACA expands eligibility to include the self-employed, independent contractors, gig workers, and other individuals who may otherwise be ineligible for unemployment compensation and cannot work for reasons related to COVID-19.

Unemployment compensation for eligible individuals will be the sum of whatever their weekly benefit would have been at the state level plus an additional \$600 per week. The \$600 increase is referred to as "Federal Pandemic Unemployment Compensation," and is effective through July 31, 2020.

Further, the RWACA provides an additional 13 weeks of unemployment compensation (for a maximum of 39 weeks), even if the individual had otherwise exhausted their unemployment compensation eligibility.

The benefits provided for in the RWACA are available upon a state's written agreement with the U.S. Secretary of Labor to provide the specific benefits, and are administered by each state. Reimbursement will be provided, in whole or in part, to states that enter into such agreements for the cost of the benefits plus administrative expenses. Additional unemployment compensation under the RWACA is not considered "income" for purposes of Medicaid and the Children's Health Insurance Program.

Any attempt to obtain payments through fraud or misrepresentation is criminally punishable and will result in ineligibility for any other unemployment compensation benefits under the RWACA. Overpayments may also be clawed back by the state agencies.

Expanded Eligibility

Section 2102 of the RWACA expands eligibility for unemployment benefits to include individuals otherwise ineligible for federal and state unemployment programs. This expanded eligibility allows individuals who might normally be ineligible because of their occupation, the reason for their inability to work, or their previous exhaustion of benefits to be eligible for benefits.

Specifically, Section 2102 provides unemployment compensation to individuals who are not otherwise eligible for state and federal programs, but who would be able to work were it not for the COVID-19 outbreak. The expanded coverage makes eligible: individuals laid off or furloughed as a direct result of COVID-19, self-employed individuals, gig workers, independent contractors, individuals with limited work history, and individuals who have exhausted their eligibility under existing state and federal unemployment programs. These individuals would now be eligible for unemployment benefits under the CARES Act provided they are able to self-certify that they are unemployed, partially unemployed, or unavailable or unable to work because:

- The individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
- A member of the individual's household has been diagnosed with COVID-19;
- The individual is providing care for a family member or member of the individual's 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 the COVID-19 public health emergency and such school or facility care 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 the COVID-19 public health emergency;
- The individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;



- 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 has to quit his or her job as a direct result of COVID-19; or
- The individual's place of employment is closed as a direct result of the COVID-19 public health emergency.

Section 2102, however, explicitly excludes from coverage individuals who have the ability to work remotely with pay and individuals who are receiving paid sick leave or other benefits (even if they would otherwise qualify for unemployment under the CARES Act).

Section 2107 of the RWACA provides an additional 13 weeks of unemployment compensation, through December 31, 2020, to all individuals who would be otherwise ineligible for unemployment compensation because they have exhausted all rights to regular unemployment compensation under applicable state or federal law with respect to this benefit year. The additional 13 weeks of unemployment compensation apply so long as the individual: (1) has no rights to regular unemployment compensation under any applicable state or federal law, (2) is not receiving unemployment compensation under Canadian law, and (3) is able, available, and actively seeking work.

Expanded Benefits

In conjunction with the expanded eligibility, the RWACA also expanded benefits to further assist individuals unemployed as a result of COVID-19.

Section 2104 of the RWACA provides that unemployment compensation for eligible individuals will be the sum of their weekly benefit at the state level plus an additional \$600 per week. The \$600 increase is referred to as "Federal Pandemic Unemployment Compensation," and is effective through July 31, 2020.

Section 2105 of the RWACA provides funding to fully reimburse states that either do not have the one-week waiting period, or that waive such waiting period, and provide unemployment compensation to individuals for their first week of regular unemployment. All costs associated with waiving the waiting period will be fully covered through December 31, 2020.

The amount of unemployment compensation payable to an individual under Section 2107 of the RWACA is equal to the amount of unemployment compensation the individual would otherwise be entitled to under applicable federal or state law, plus the \$600 Federal Pandemic Unemployment Compensation (Section 2104).

Sections 2112-2114 of the RWACA provide expanded unemployment benefits under the Railroad Unemployment Insurance Act, such as waiver of the seven-day waiting period (Section 2112), enhanced benefits (Section 2113), and extended benefits (Section 2114).

State Administrative Aid

In light of the increased costs that states will incur in implementing the provisions of the RWACA, the Act provides aid to cover the increased costs, in whole or in part.

Section 2103 provides payment from the Federal Treasury to states to reimburse government agencies, nonprofits, and Native American Tribes for half of the costs they incur to pay unemployment benefits through December 31, 2020.

Section 2106 temporarily amends the Emergency Unemployment Stabilization and Access Act of 2020 (Section D of the FFCRA) to provide states with "emergency" flexibility to hire temporary staff, re-hire former staff, or take other "temporary actions to quickly process unemployment claims." The temporary amendment is in effect through December 31, 2020.



Section 2108 provides funding to support "short-time compensation" programs. Under these programs, employers may reduce employee hours instead of laying off workers, and the employees whose hours have been reduced receive prorated unemployment benefits. This provision would pay states for 100 percent of the costs incurred in providing this short-time compensation through December 31, 2020. Reimbursements for benefits paid to individuals who are employed by the participating employer on a seasonal, temporary, or intermittent basis are precluded under Section 2108.

Section 2109 provides for "short-time compensation" programs upon agreement by a state. If states enter into such an agreement, 50 percent of the costs that a state incurs in providing short-time compensation through December 31, 2020 would be paid for by the Treasury. The other 50 percent of costs associated with the "agreements" would be paid by participating employers. If a participating state enacts a short-time compensation law that complies with Section 3306(v) of the Internal Revenue Code, the state would then be disqualified from receiving funding under Section 2109 and would be eligible for full reimbursements under Section 2108.

Section 2110 provides \$100 million for the Secretary of Labor to award in grants to be given to states to assist in the implementation and administration of short-time compensation programs.

Section 2111 requires the DOL to disseminate model legislative language for states, provide technical assistance, and establish reporting requirements related to "short-time compensation."

Section 2115 provides the DOL's Inspector General with \$25 million to carry out audits, investigations, and other oversight activities related to the RWACA.

Section 2116 authorizes the Secretary of Labor to issue any operating instructions or other guidance necessary to carry out the RWACA, and indicates that the Paperwork Reduction Act does not apply to the RWACA.

The remainder of the RWACA includes provisions that address miscellaneous issues.

Direct Financial Assistance to Individuals

In addition to providing assistance to businesses, the CARES Act provides direct assistance to eligible individuals through tax credits. The Act provides up to \$1,200 credit for individuals and \$2,400 for joint returns, plus a \$500 credit for each qualifying child. The amount of credit is subject to limits based on adjusted gross income and is reduced by 5 percent of amounts that exceed \$150,000 for joint returns; \$112,500 in the case of head of household, and \$75,000 for all other eligible individuals. In effect, the credit is unavailable when the adjusted gross income exceeds \$198,000 for joint returns with no children, \$146,500 for head-of-household returns with one child, and \$99,000 for individual returns. The credit is not treated as taxable income and will be distributed as a rebate to most taxpayers based on their 2019 tax filings. For individuals who did not file taxes in 2019, The Act provides for a calculation of the rebate based on 2018 tax filings.

The Act also allows individuals to take COVID-19-related distributions up to \$100,000 from retirement accounts through the end of the year without incurring the 10 percent early withdrawal penalty. Any distribution taken may have the income included as taxable amounts included over a three-year period unless the individual elects otherwise. Individuals who take a distribution are able to refund their retirement plan up the amount distributed. The Act provides that the individual may make one or more contributions up to the distribution amount to eligible retirement plans over three years from the date of distribution, subject to certain beneficiary and rollover requirements. Any repayments made on COVID-19-related distributions are not counted towards annual limits on retirement plan contributions.

The Act further provides the maximum loan amount from a qualified employer plan is increased from \$50,000 to \$100,000, beginning on the effective date of the Act and ending 180 days later. Qualified individuals may borrow up to the lesser of \$100,000 or 100 percent of their accrued benefits. Additionally, current loan plans that requirement payments on or after the Act through the end of 2020 may be delayed for one year without penalty but will still accrue interest.