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Small and Mid-Sized Businesses Must Be Cognizant of the Requirements that Accompany CARES Act Relief

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On March 27, 2020, the president signed into law the much anticipated Coronavirus Aid, Relief and Economic Security Act (CARES Act). At a price tag of $2 trillion, the legislation is by far the largest relief package ever enacted—more than twice that of the 2009 Recovery Act. The purpose of the act is to bolster the United States' economy, health care system and individuals through the COVID-19 pandemic.

Much of the media and public attention on the CARES Act has focused on the cash payments to taxpayers and the $500 billion stimulus package to particular industries severely impacted by the pandemic. In addition to those relief measures, the CARES Act also contains numerous provisions applicable to small and medium-sized businesses. Of note, the act provides:

- An employee retention tax credit
- Payroll tax deferral
- Expansion of unemployment benefits
- Changes regarding the application of the Families First Coronavirus Response Act (FFCRA) to re-hired employees

The act also provides loans aimed at helping small and medium-sized employers, however, these loans come with fairly strict conditions and employers should be careful in weighing the costs and benefits of these options before applying for them.

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Employee Retention Credit and Payroll Tax Delay

The CARES Act creates a tax credit against applicable employment taxes in an amount equal to 50% of qualified wages paid to employees during the COVID-19 pandemic.

- The tax credit is capped at $10,000 per employee and is only available to employers whose operations were fully or partially suspended due to a government shut-down order or the employer's gross receipts declined by more than 50% compared to the same quarter in the prior year.
- The tax credit is not available if the employer is a borrower under the Payroll Protection Program, described more fully below. Likewise, the amount of the credit is reduced by any credits provided to the employer under the FFCRA.
- In addition to the employee retention tax credit, the CARES Act also allows employers to defer payment of their share of social security payroll tax with half of the share owed by December 31, 2021 and the other half by December 31, 2022.

Expansion of Unemployment Insurance Benefits

- A temporary Pandemic Unemployment Assistance program is established to provide unemployment insurance payments to workers who are not typically eligible for such benefits (self-employed, independent contractors, etc.).
- Through July 2020, individuals who are otherwise eligible for unemployment benefits will receive an additional $600 per week over what they receive from regular unemployment compensation under their applicable state law.
- Further, if individuals remain unemployed after their state employment benefits are exhausted, the federal government will fund, through December 31, 2020, up to 13 weeks of additional unemployment benefits at a weekly rate of $600.

Clarification on the 30 Day Employment Requirement for Employees Under the Emergency FMLA Expansion

Qualified employees, for the purpose of the expansion of FMLA benefits under the FFCRA, are employees who have been employed for at least 30 calendar days by the employer.

- The CARES Act clarifies this requirement for employees who were laid off and re-hired as a result of the pandemic crisis.
- In particular, the act clarifies that the phrase "employed for at least 30 calendar days," in the FFCRA includes a re-hired employee, who was laid off by the employer after March 1, 2020, and had worked for

the employer for not less than 30 of the last 60 calendar days prior to the employee's layoff.

This change becomes particularly important in light of some of the re-hire loan requirements under the CARES Act and may encourage employers to re-hire their employees so that they may take advantage of the benefits.

Small Business Paycheck Protection Program

The CARES Act creates a $349 billion Paycheck Protection Program whereby businesses with fewer than five hundred employees can receive a loan to cover payroll, health care premiums, mortgage interest, rent, utility payments and interest on pre-existing debt obligations.

- Such loans can be 2.5 times the business's average monthly payroll cost (capped at $10 million) and do not require any personal guaranty or collateral.
- Payments are deferred for at least six months.
- The most significant feature of the loan program is that it may be forgivable, as amounts expended on payroll, mortgage interest, rent and utilities during the eight-week period following loan origination are eligible for forgiveness.

With that being said, small businesses must be cognizant of requirements for the loan to be forgivable:

- The amount forgiven is reduced if the business does not maintain prior levels of full-time equivalent employees or significantly reduces (more than 25%) wages during the covered time period.
- Companies that laid off employees or reduced salaries prior to the enactment of the act (and for 30 days thereafter) can avoid this forgiveness reduction penalty by re-hiring employees and raising salaries by June 30, 2020.
- Amounts paid to employees in excess of $100,000, as prorated for the covered period, are also not eligible for loan forgiveness.
- Amounts received under the Paycheck Protection Program cannot be used to pay employee sick pay or family leave benefits provided under the FFCRA.
- Amounts not forgiven will accrue interest at a maximum rate of 4% and are payable over a term of 10 years.

Federal Loans to Medium-Sized Businesses

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Businesses with 500-10,000 employees are not eligible to receive loans under the Paycheck Protection Program. Instead, such medium-sized businesses can only apply for direct loans under Title IV of the CARES Act. These loans do not provide for any forgiveness but do allow for deferment of principal and interest payments for at least the first six months. Additionally, the loans can have up to a five-year term with a 2% interest rate. Significantly though, in receiving such loans, companies are required to certify and abide by the following restrictions:

- The funds the employer receives will be used to retain at least 90% of the recipient's workforce, at full compensation and benefits until September 30, 2020.
- If the employer has already laid off employees, it will restore not less than 90% of its workforce that existed as of February 1, 2020 with full compensation and benefits no later than four months after the termination of the public health emergency.
- The employer is domiciled in the United States with significant operations and employees located in the United States.
- The employer will not outsource or offshore jobs for the term of the loan and two years after completing repayment of the loan.
- The employer will remain neutral in any union organizing effort for the term of the loan.
- The employer will not "abrogate" existing collective bargaining agreements for the term of the loan and for the two years after completing repayment.

Further, in entering into such loan agreements, medium-sized employers must agree to certain limitations for highly-compensated employees and officers:

- During the term of the loan and for one year thereafter, no officer or employee of a recipient business whose total compensation exceeded $425,000 in 2019 (other than an employee whose compensation is determined through an existing collective bargaining agreement entered into prior to March 1, 2020) will receive total compensation greater than what the employee received in 2019.
- Further, the same officer or employee cannot receive severance pay or other benefits upon termination exceeding twice the maximum total compensation received from the employee from the business in 2019.
- Any officer or employee whose total compensation exceeded $3 million in 2019 may not receive in excess of $3 million, plus 50% of the excess over $3 million received by the officer or employee in 2019.

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As demonstrated above, small and medium-sized employers must be cognizant of these and other requirements associated with such loans and consider all available options.

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