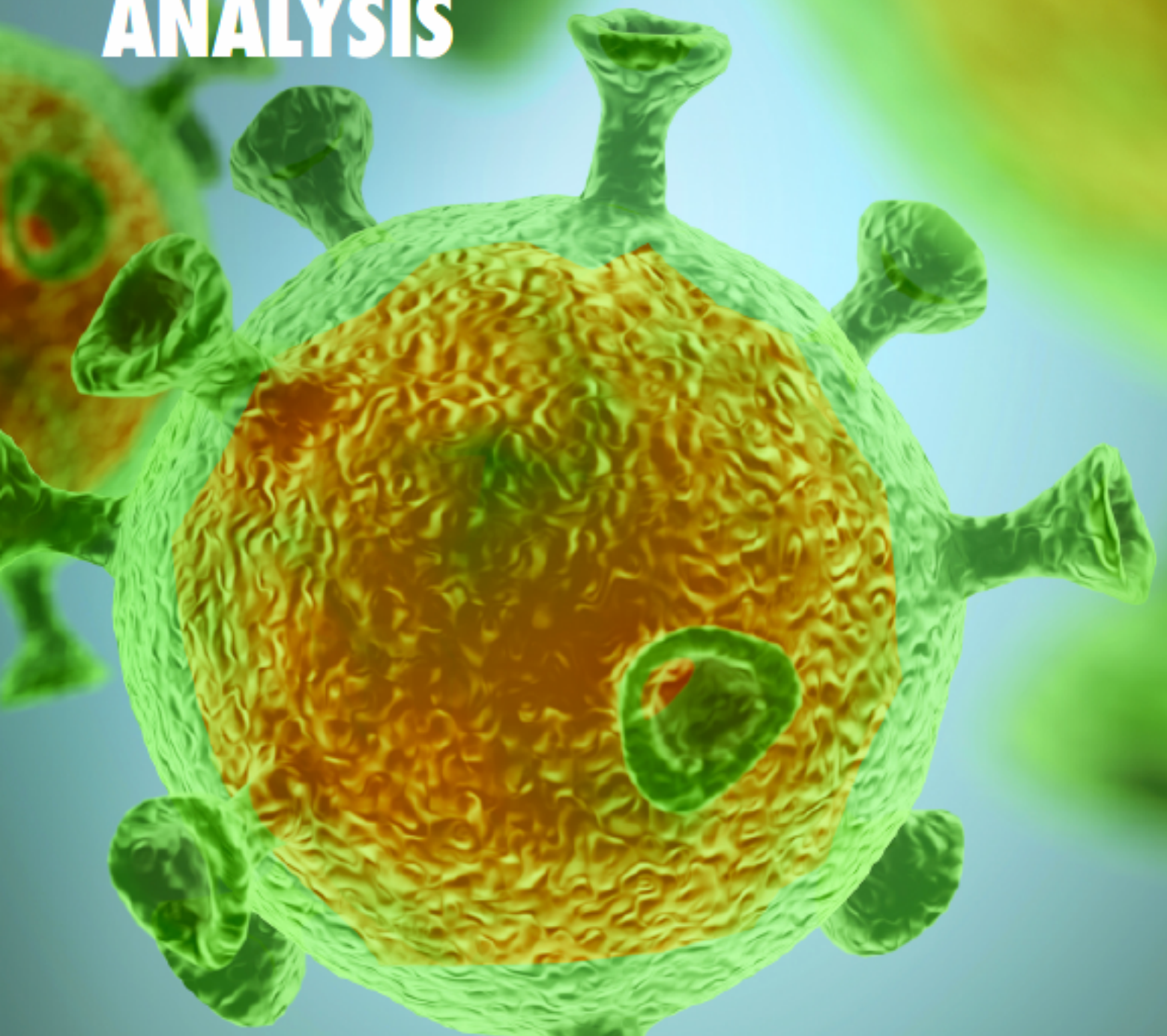


Morgan Lewis

INSIGHT

CARES ACT ANALYSIS



LABOR AND EMPLOYMENT

CREATION OF TEMPORARY UNEMPLOYMENT ASSISTANCE PROGRAM

- Sections 2101-2116 of the CARES Act covers the new temporary unemployment assistance program.
- Expanded UI Eligibility: Individuals who are not eligible for “regular compensation or extended benefits” under state or federal law or “pandemic emergency unemployment compensation” (including those who have exhausted all rights to regular unemployment, extended benefits under state or federal law, and “pandemic emergency unemployment compensation”) are eligible for up to 39 weeks of benefits for the weeks beginning January 27, 2020 through December 31, 2020.
 - The individual must certify that they are able or available to work as defined by applicable state law but “unemployed, partially unemployed, or unable or unavailable to work” for reasons related to COVID-19; or is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits under state or federal law or pandemic emergency unemployment compensation.
 - Individuals who can telework for pay or who are receiving paid sick leave or other paid leave benefits are not eligible.
- Emergency Increase in Unemployment Compensation Benefits: Individuals otherwise covered under a state’s unemployment law are eligible for an additional \$600 of unemployment compensation per week.
 - Benefits will be available starting on the week of the date the state and Secretary of Labor enter into an agreement to provide such benefits and through July 31, 2020.
- Pandemic Emergency Unemployment Compensation: “Pandemic emergency unemployment compensation” is available to individuals who have exhausted all rights to regular compensation under state or federal law, have no right to compensation under state or federal law or any state unemployment compensation, are not receiving unemployment compensation under Canadian law, and are able, available, and actively seeking work.
 - Benefit amounts are those benefits payable under state law plus \$600 per week for up to 13 weeks of pay.
 - States have the option of entering into an agreement with the Secretary of Labor to provide these benefits.
- **KEY TAKEAWAY:** The federal government will fund unemployment compensation under the Relief for Workers Affected by Coronavirus Act, not employers. Employers have no obligation under the new law, but should consider providing information on the benefits available under the new law to any newly-separated employees.

SMALL BUSINESS LOANS AND LOAN FORGIVENESS AVAILABLE TO HELP KEEP WORKERS EMPLOYED

- Sections 1101-1114 of the CARES Act, the “Keeping American Workers Paid and Employed Act,” provide small businesses with access to loans that could allow them to keep workers employed by meeting payroll and basic operating costs. The maximum loan amount available is determined by multiplying the employer’s eligible monthly costs by 2.5, with a cap of \$10 million. The Act also provides for loan forgiveness, even when employers temporarily reduce their workforce or salaries, so long as they return to normal levels by June 30, 2020.
- Loans are available to small businesses with up to 500 employees. Businesses eligible include:

- nonprofits;
- sole proprietorships;
- independent contractors;
- self-employed individuals; and
- businesses assigned an NAICS code beginning with 72, which have up to 500 employees per physical location.
- Each business is eligible for a loan of 2.5 times its average monthly payroll costs based on February 15, 2019 to June 30, 2019 - up to a maximum of \$10 million.¹ Payroll costs include payments for:
 - salaries, wages, commissions, or other compensation for US-based employees (up to \$100,000 annually per employee);
 - vacation, parental, family, medical, or sick leave (excluding sick or family leave credits allowed by the Families First Coronavirus Response Act);
 - separation or termination pay;
 - group health care benefits, including insurance premiums;
 - retirement benefits;
 - state or local taxes on employee compensation; and
 - compensation for self-employed individuals or independent contractors (up to \$100,000 annually).
- Loans can be used to pay the payroll costs defined above, as well as mortgage interest, rent, utilities, and interest on debts incurred before February 15, 2020.
- The CARES Act provides for forgiveness of the loan amount used to make those payments during the 8 weeks after receiving a loan. **However**, loan forgiveness is reduced proportionately for any reductions in the average number of full-time employees or in total compensation for any employee by more than 25% (if earning up to \$100,000). A temporary reduction in workforce or salaries made between February 15 and late April 2020 (30 days from enactment) would not reduce loan forgiveness if the employer returns to prior workforce and salary levels by June 30, 2020.
- Through December 31, 2020, the CARES Act allows for Emergency Economic Injury Disaster Loans under the Small Business Act for independent contractors, sole proprietorships, private nonprofits, and businesses with up to 500 employees. Businesses can receive an advance of up to \$10,000 that can be used to provide paid sick leave to employees unable to work due to COVID-19, maintain payroll and retain employees, meet increased costs due to interrupted supply chains, make rent or mortgage payments, and repay other obligations. Businesses are not required to repay the advance on the loan, even if their loan application is denied.
- **KEY TAKEAWAY:** Small businesses should carefully review their payroll costs and basic operating expenses, ensuring they apply for loans that will get them through the uncertainty of the immediate future. Employers that cannot continue to operate with their current workforce have the opportunity to use temporary workforce reductions without penalty in loan forgiveness - as long as they return to normal by June 30.

EMPLOYEE RETENTION CREDIT FOR EMPLOYERS SUBJECT TO CLOSURE DUE TO COVID-19

- Section 2301 of the CARES Act makes employers eligible for a refundable tax credit against applicable employment taxes for 50% of qualified wages for each employee in each calendar quarter affected by the crisis (up to \$10,000 per employee for all calendar quarters). Employers are eligible if they have carried on a trade or business in the 2020 calendar year and have experienced in a quarter either:
 - a full or partial suspension of their business due to an order from an appropriate government authority limiting commerce, travel, or group meetings because of COVID-19, or
 - a significant decline in gross receipts as compared to gross receipts in the same quarter last year.
- The tax credit is based on qualified wages paid between March 12, 2020, and January 1, 2021.
- Qualified wages include wages paid to the employee and amounts paid by the employer to provide and maintain a group health plan (but only to the extent that expenses for the group health plan are excludable

¹ Small businesses that were not operating during that period can use their costs for January 1, 2020 through February 29, 2020.

from the employees' gross income). For employers with greater than 100 full-time employees, only wages paid to employees not providing services due to the COVID-19 crisis qualify. For employers with 100 or fewer full-time employees, all employee wages paid throughout the crisis qualify as qualified wages, whether the business is running or shut down. An employer that receives a small business loan under Section 1106 of the CARES Act is **not** eligible for the credit.

- Section 2302 of the CARES Act defers payments of employer payroll taxes incurred from the date of the CARES Act passage until January 1, 2021. Payment on 50% of the deferred payroll taxes are due on December 31, 2021, with the remainder due by December 31, 2022. An employer that receives indebtedness forgiveness under Sec. 1106 of the CARES Act (small business loan) or Sec. 1109 of the CARES Act (Treasury Program Management Authority) is **not** eligible for deferral.
- **KEY TAKEAWAY:** The credit is an option for certain employers that do not qualify for a small business loan because they employ more than 500 employees. The credit's limit is calculated on an individual employee basis, rather than an aggregate amount, providing relief for larger employers forced to shut down. However, employers with fewer than 500 employees should determine whether they qualify for the small business loan and plan accordingly.

EMERGENCY PAID SICK LEAVE ACT AND THE EMERGENCY FAMILY & MEDICAL LEAVE EXPANSION ACT CLARIFICATIONS

- Section 3601 of the CARES Act clarifies the limitations on paid leave under the Emergency Family and Medical Leave Expansion Act. The Emergency Family and Medical Leave Expansion Act expanded FMLA coverage to qualifying employees unable to work due to a public health emergency such as the COVID-19 pandemic. While the Emergency Family and Medical Leave Expansion Act included the limitation that employers would not be required to pay more than \$200 per day and \$10,000 in the aggregate for such leave, the CARES Act clarifies that these limitations apply "for each employee paid for paid leave under this section," meaning the \$200 daily and \$10,000 aggregate caps apply per employee, not per employer.
- Section 3605 of the CARES Act expands the scope of eligible employees under the Emergency Family and Medical Leave Expansion Act. While the Act originally defined eligible employees as those employed for at least 30 days, the CARES Act expanded coverage to employees who were laid off on or after March 1, 2020 but were rehired, so long as the employee had worked for 30 of the last 60 days before the layoff.
- **KEY TAKEAWAY:** this provision allows employers with fewer than 500 employee who have already laid off workers to recall those workers and thus make them eligible for the paid leave benefit. Because of the tax credit associated with the bill, this would have no cost to the employer.
- The CARES Act also amended the Emergency Paid Sick Leave Act by including financial caps on the use of short-term paid sick time, stating that employers will not be required to pay more than either:
 - \$511 per day and \$5,110 in the aggregate for sick time related to employees subject to a government quarantine or isolation order, a self-quarantine advised by doctor, or an employee with COVID-19 symptoms who seeks a diagnosis; or
 - \$200 per day and \$2,000 in the aggregate for sick time related to caring for a quarantined individual or childcare, or for employees experiencing any other substantially similar condition.
 - **KEY TAKEAWAY:** While Section 5110 of the Emergency Paid Sick Leave Act already defined the dollar values of these limitations and the types of leave to which the limitations apply, the CARES Act adds "either, or" limitations into the "Paid Sick Time Requirements" in Section 5102. On its face, this change appears to require employers to pay an employee for sick time under only bullet 1 above (the employee's own needs) or bullet 2 above (the employee's caregiving needs), and not both. However, such a change would be significant and it may be advisable to wait for DOL and IRS guidance on this provision. The tax credit fully refunds the costs that an employer expends on leave that is *mandated* under the law. If only one form of leave is mandated for an employee, the employer's tax credit may be in jeopardy if it voluntarily provides both forms of leave to the employee. Thus, DOL and IRS guidance on this guidance will be helpful.

ECONOMIC ASSISTANCE TO CERTAIN BUSINESSES AFFECTED BY COVID-19

- Sections 4001-4029 of the CARES Act, the "Coronavirus Economic Stabilization Act," contains emergency relief for various businesses that do not otherwise receive targeted relief.

- These provisions in the Act provide for loans, loan guarantees, or other investments for certain U.S. businesses. These include “mid-sized businesses” and “air carrier[s],” among others, that have “not otherwise received adequate economic relief in the form of loans or loan guarantees provided under this Act.” However, numerous eligibility requirements and conditions apply to these business benefits.
- The CARES Act establishes a total of \$500 billion to be allocated for loans and loan guarantees to air carrier and cargo-related and critical national security businesses (up to a combined total of \$46 billion) and funds for loans, loan guarantees, and other investments for eligible businesses, States, or municipalities (up to \$454 billion plus unused amounts from the \$46 billion allocation described above). The \$454 billion will be administered by the Treasury Secretary and, as described in the Act, “shall be available to make loans and loan guarantees to, and other investments in, programs or facilities established by the [Federal Reserve] . . . for the purpose of providing liquidity to the financial system that supports lending to eligible businesses, States, or municipalities. . . .”
- As an initial threshold for eligibility, businesses must certify they are created or organized in the United States or under the laws of the United States with significant U.S. operations and a majority of its employees in the U.S. The CARES Act uses the “employee” definition set forth in the NLRA, which excludes “supervisors,” individuals “having the status of an independent contractor, agricultural laborers, and – based on NLRB case law – managerial employees and also includes individuals employed by employers subject to the Railway Labor Act (e.g., railroads and airlines). This exclusion may make it difficult for companies with a majority-contractor workforce to qualify for loans.
- The Act separately provides specific “assistance” for mid-sized businesses, defined as having between 500 and 10,000 employees. The bill states that the Treasury will “endeavor” to implement a program to provide “financing to banks and other lenders that make direct loans to eligible businesses” including, to the extent practicable, nonprofit organizations). These loans are subject to certain criteria and obligations, and require eligible borrowers to make a “good faith certification” by each recipient that:
 - “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”;
 - “the funds it receives will be used to retain at least 90 percent of the recipient’s workforce, at full compensation and benefits, until September 30, 2020”;
 - the recipient intends to restore not less than 90 percent 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 4 months after the termination date of the public health emergency declared by the Secretary of Health and Human Services on January 31, 2020”;
 - “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 not a debtor in a bankruptcy proceeding;
 - “the recipient will not pay dividends with respect to the common stock of the eligible business, or repurchase an equity security that is listed on a national securities exchange of the recipient or any parent company of the recipient while the direct loan is outstanding, except to the extent required under a contractual obligation that is in effect as of the date of enactment of [the] Act”
 - “the recipient will not outsource or offshore jobs for the term of the loan and 2 years after completing repayment of the loan”
 - “the recipient will not abrogate existing collective bargaining agreements for the term of the loan and 2 years after completing repayment of the loan”; and
 - “that the recipient will remain neutral in any union organizing effort for the term of the loan.”
 - The Act also contains provisions requiring that eligible businesses agree to other requirements, including agreements (a) not to repurchase equity securities listed on a national securities exchange until 12 months after any direct loan is no longer outstanding; (b) not to pay dividends or make other capital distributions with respect to common stock until 12 months after any direct

loan is no longer outstanding; and (c) to comply with limitations on officer/employee compensation and severance pay (which generally apply to officers or employees whose total compensation exceeded \$425,000 in calendar year 2019, with other limitations that apply to individuals whose compensation exceeded \$3 million).

- The Act has other provisions that apply to loans, loan guarantees or other investments for passenger air carriers and certain related entities, cargo air carriers and businesses critical to maintaining national security, with specific requirements for assistance to these employers.
- The Act provides that Treasury Secretary has fairly broad discretion regarding other covenants, representations, warranties, and requirements (including requirements for audits), and the Secretary may waive certain requirements if he determines that a waiver is “necessary to protect the interests of the Federal Government,” but any waiver would require the Secretary to be available to testify before the Senate and House Banking and Financial Services Committees regarding the reasons for the waiver.
- The Act provides that Treasury is mandated to publish procedures for loans and investments to the air and cargo carriers and national security businesses within 10 days of enactment; however, no similar requirement exists in the legislation for other loans contemplated under the Act.

- **KEY TAKEAWAYS:**

- The restrictions on officers or highly-paid employees' salary and severance payments for businesses receiving direct loans may restrict businesses' ability to retain critical personnel and/or reduce salaries of or terminate relationships with key executives, particularly when severance plan or employment agreements with "good cause" provisions may have severance pay-out requirements that exceed those thresholds provided for in the Bill. Confusion may arise from the compensation and severance pay limits – which apply to highly paid officers and “employees” – and the fact that the “employee” definition in the CARES Act appears to exclude supervisors and managerial employees (i.e., the individuals who are most likely to have compensation subject to the compensation limits) do not apply to individuals who are not “employees” under the NLRA, which would effectively render them meaningless.
- Many mid-size employers may regard the labor-related “good-faith certification” requirements as extremely onerous requirements, some of which persist for two years after employers complete repayment of the loans in question. The certification to remain neutral during any union organizing campaign means the employer agrees to not oppose a union’s attempt to organize its workforce, and the full scope of this requirement is not entirely clear, but neutrality is a major restriction on employer free speech and will severely hamstring a covered employer’s ability to prevent unionization of its employees.
- Employers with existing collective bargaining agreements cannot “abrogate” those CBAs during the term of the loan and for two years following. It is unclear what this language is intended to accomplish. However, an aggressive reading of this language could mean that any employer found to have engaged in a unlawful unilateral change or found to have violated a CBA in a grievance/arbitration hearing would be in violation of the obligation not to “abrogate” a CBA. It is unclear what the remedy would be for violation of this provision.
- It appears that mid-size employers who apply for any loans must certify in good faith that they will “retain at least 90 percent of the recipient’s workforce, at full compensation and benefits, until September 30, 2020” and “restore not less than 90 percent of the workforce of the recipient that existed as of February 1, 2020, and . . . restore all compensation and benefits to the workers . . . no later than 4 months after the termination date of the [COVID-19] public health emergency declared by the Secretary of Health and Human Services.” The Act makes no provision for the possibility that business conditions may not reasonably permit compliance with these thresholds, and it is unclear what options will be available to employer-recipients if circumstances make it impossible to satisfy these requirements.

- For mid-size employers who make a good-faith certification that they will not “outsource or offshore jobs for the term of the loan and 2 years after completing repayment,” the absence of any permitted minimum threshold suggests that the outsourcing or offshoring of any jobs may be precluded during the period of restriction. This presents very difficult questions to the extent that employer-recipients already have significant work performed by subcontractors or facilities outside of the U.S., and this may substantially limit the employer’s ability to address changing business needs for an extended period in the future.
- Many questions regarding detailed provisions in the CARES Act will hopefully be clarified in more detailed procedures and guidance from the Secretary of the Treasury, some of which should be forthcoming within 10 days after the CARES Act’s enactment. Other questions may remain unresolved, which will warrant careful review on a case-by-case basis.

FEDERALLY GUARANTEED LENDING

The [Keeping Workers Paid and Employed Act](#) (the "Act") supports workers and small businesses weathering the economic impacts of the COVID-19 crisis. The Act provides new and increased federally guaranteed Paycheck Protection Program ("PPP") loans through the Small Business Administration ("SBA") to small businesses that keep their workers employed. By maintaining employees on their payroll through the duration of the crisis, these small businesses can qualify for PPP loan forgiveness. The Act is also retroactive, incentivizing small businesses to rehire employees that have recently been laid off.

PAYCHECK PROTECTION PROGRAM

The SBA will offer up to \$349 billion in small business loans of up to \$10,000,000 to help small businesses stay afloat and keep employees on their payroll during the COVID-19 crisis.

- **PPP Loan Overview:**

- Up to a \$10,000,000 non-recourse loan with a maximum 4% interest rate
 - *Amount Determination*- The amount of the loan will be the lesser of:
 - (a) \$10,000,000; and
 - (b) a payroll-based formula, calculated in one of the two following ways:
 - (i) the sum of:
 - (A) (1) 2.5 multiplied by (2) the sum of the Borrower's 12-month average monthly payroll cost for the one-year period prior to the date of the loan being made (or for seasonal employers, either the 12-week period beginning on February 15, 2019, or at the election of the Borrower, March 1, 2019, and ending on June 30, 2019); and
 - (B) outstanding [Economic Injury Disaster Program](#) ("EIDP") loans made during the period beginning on January 31, 2020 and ending on the date on which covered loans are made available to be refinanced under the covered loan; or
 - (ii) if the Borrower was not in business during the period beginning on February 15, 2019 and ending on June 30, 2019, the sum of:
 - (A) (1) 2.5 multiplied by (2) average total monthly payments for payroll costs for the period beginning January 1, 2020 and ending on February 29, 2020, and (B) outstanding EIDP loans made during the period beginning on January 31, 2020 and ending on the date on which covered loans are made available to be refinanced under the covered loan.
 - Note that in both calculations, compensation above \$100,000 for any single employee is excluded.
 - The SBA will guarantee 100% of the loans made during the period commencing on February 15, 2020 and ending on June 30, 2020 (the "Covered Period").
 - Loan proceeds may be used to cover payroll costs (excluding individual employee compensation over \$100,000); group healthcare benefits (including benefits during periods of paid sick, medical or family leave, and related insurance premiums); mortgage interest payments (but not any prepayment of or payment of principal); and rent, utilities and interest on other debt incurred prior to the Covered Period.
 - Collateral requirements, Borrower and lender fees, prepayment penalties, personal guarantee requirements, and other [traditional SBA loan requirements](#) are waived, but the corporate guarantee requirement is not waived.
 - Deferment of principal, interest and fees for a period of between 6 months and one year is available.
 - The SBA has also increased the maximum loan amount for the existing [SBA Express Loan Program](#) from \$350,000 to \$1M.

- **Borrower Eligibility:**
 - **Eligible Businesses:** During the Covered Period, eligible Borrowers include small businesses (including sole-proprietors, paid independent contractors and other self-employed individuals whether or not they otherwise would be considered small under [SBA size regulations](#), nonprofits, veterans organizations, and Tribal businesses that have been operational since February 15, 2020.
 - **Affiliation Rules Waiver:** A special waiver of the affiliation rules for small business designations for businesses in the accommodation and food service industries ([North American Industry Classification System \(NAICS\) Code 72](#), certain approved franchises, and any business receiving financial assistance from a company under the [Small Business Investment Act](#), allowing for broader qualification of small businesses. See [MLB Disaster Law Flash](#) for discussion of these the affiliation rules that apply to all other small businesses. Current SBA affiliation rules will apply to non-profits in the same manner as to small businesses.
 - **Expanded Business Eligibility:** The legislation expands the current definitions of small business for purposes of the Paycheck Protection Program. As such, Borrowers must either be small businesses under current SBA rules for financial assistance or they must qualify under any of the additional categories applicable to this program which include the following:
 - (1) Businesses with fewer than 500 employees (full- or part-time), or the applicable SBA industry standard, with allowances made for specific businesses – this standard creates eligibility (a) for a company whose size normally is based on revenue and does not qualify under that standard, but has fewer than 500 employees, and (b) for a company whose size standard is normally some number of employees under 500 and does not qualify under that standard, but has fewer than 500 employees.
 - (2) Businesses in the accommodation and food service industries that ordinarily would not be small but that have (i) more than one physical location and (ii) no more than 500 employees per physical location.
 - (3) Sole-proprietors, paid independent contractors and other self-employed individuals.
 - **Borrower Certification:** Borrowers must provide a good faith certification that (a) the loan is necessary due to the uncertainty of current economic conditions caused by COVID-19; (b) it will use the funds to retain workers and maintain payroll or make mortgage payments, lease payments and utility payments; and (c) it is not receiving duplicative funds for the same uses from another SBA program.
 - **Prioritized Borrowers:** The SBA will encourage lenders to prioritize loans for small businesses in underserved and rural markets, including veteran-owned businesses, businesses owned by socially and economically disadvantaged individuals, women-owned businesses and businesses in operation for less than two years.
- **Key Limitations:**
 - Loan proceeds may not be used for:
 - Employee salaries over \$100,000
 - Certain taxes and wages or other employee payments covered under other recent COVID-19 federal legislation
 - Borrowers are not eligible for both EIDP loans and new SBA loans; however, Borrowers with an existing EIDP loan unrelated to COVID-19 for a purpose other than paying payroll costs may apply for a PPP loan, with an option to refinance the EIDP loan into the PPP loan. Any EIDP grant awards of up to \$10,000 would be subtracted under any amount forgiven pursuant to the PPP.
- **SBA Lenders:**
 - **Delegated Authority**– The SBA is granting lenders the authority to make determinations on Borrower eligibility and creditworthiness without going through traditional SBA channels.
 - **Additional Lenders**– The SBA Administrator and the Secretary of Treasury may add additional lenders to the program at their discretion; however, such additional lenders will only be permitted to make PPP loans, not regular SBA 7(a) loans.

LOAN FORGIVENESS

Borrowers will be eligible for loan forgiveness on loan proceeds used to support their employees and their businesses, subject to certain limitations and reductions.

- Borrowers are eligible for loan forgiveness for loan proceeds spent during the Covered Period on (i) payroll costs (including additional wages paid to tipped workers), (ii) mortgage interest payments, (iii) rent payments on leases in place before February 15, 2020 and (iv) utility payments.
- The amount forgiven cannot exceed the principal amount of the loan.
- Loan forgiveness amounts will be reduced based on:
 - The ratio of full-time equivalent (FTE) employees in the Covered Period compared to those in comparable periods in 2019 and earlier in 2020; and
 - Any salary/wage reduction to an employee during the Covered Period (for employees making less than \$100,000) in excess of 25% of that employee's salary/wage during the most recent quarter that the employee was employed;
 - **Re-hiring Exemption* - Borrowers are encouraged to rehire employees who have already been laid off due to the COVID-19 crisis and such Borrowers will not be penalized for these rehires via the loan forgiveness reduction calculations.
- Amounts forgiven will be treated as non-taxable cancelled indebtedness.
- Lenders will directly process loan forgiveness applications and the SBA will purchase the forgiven loan from the lender within 90 days of forgiveness.
- Borrowers will submit an application to the lender that originated the loan, and the lender must issue a decision on the application within 60 days.
- Any loan amounts not forgiven at the end of one year are carried forward as an ongoing loan, with a maximum 10-year term and 4% interest rate, with the 100% loan guarantee remaining in place.

LOAN PAYMENT SUBSIDIES

Other existing small business loans, excluding PPP loans, are now eligible for deferment and maturity extensions funded by a \$17 billion allocation by the SBA.

- These loans include existing [SBA 7\(a\) loans](#) (including loans through the [Community Advantage Program](#)), [504 loans](#), and [microloans](#).
- The SBA Administrator will pay principal, interest, and any associated fees that are owed on a Covered Loan in a regular servicing status for a 6-month period beginning with the next payment due on the loan.
- Lenders are encouraged to defer and/or extend the maturity of existing loans, with the SBA paying principal, interest and fees during a 6-month deferral period (loans currently in deferment are eligible for an additional 6-month deferral period).
- The SBA will coordinate with the FDIC, Office of the Comptroller of the Currency and state bank regulators to secure waivers on limits to maximum loan maturities and other current restrictions.

ENTREPRENEURIAL DEVELOPMENT

Section 1103 authorizes the Small Business Administration (the "Administration") to provide financial assistance to small business development centers and women's business centers (collectively, "resource partners") for purposes of providing education, training and advising to small business concerns and their employees on federal resources relating to access to capital and business resiliency and on business practices to mitigate the economic effects of COVID-19 or similar occurrences. The funds authorized for such purposes are to be awarded by the Administration 80% to small business development centers and 20% to women's business centers.

Section 1103 also authorizes the Administration to provide grants to an association or associations representing resource partners for purposes of establishing a single, centralized hub for COVID-19 information, including:

- one online platform that consolidates resources and information available across multiple federal agencies for small business concerns related to COVID-19; and
- a training program to educate resource partner counselors, members of the Service Corp of Retired Executives and counselors at veterans business outreach centers on federal resources and information available to small business concerns related to COVID-19.

EMPLOYEE BENEFITS

SPECIAL CORONAVIRUS DISTRIBUTION OPTION FOR ELIGIBLE RETIREMENT PLANS (§ 2202(A))

Under the Act, an individual may be permitted to take "coronavirus-related distributions" of up to \$100,000 (in the aggregate) from their qualified plans, 403(b) plans, IRAs or eligible 457(b) plans. Coronavirus distributions, which can only be taken between January 1, 2020 and December 31, 2020, will be exempt from any application of the 10% early-distribution penalty, and unless the recipient elects otherwise, any income from the distributions will be subject to federal income tax ratably over three years. Moreover, an individual can repay any coronavirus-related distribution during the three-year period beginning the day after the distribution date, and the repayment will be treated as a 60-day rollover in a direct trustee-to-trustee transfer. A "coronavirus-related distribution" is a distribution to an individual (1) who is diagnosed, or whose spouse or dependent is diagnosed, with SARS-CoV-2 or COVID-19 using a CDC-approved test or (2) who experiences adverse financial consequences because of an inability to work due to quarantine, furlough, lay off, reduced hours, loss of child care, or the closing or reduction of hours of a business owned or operated by the individual because of SARS-CoV-2 or COVID-19. Plan administrators can rely on individual's certification that he or she meets the eligibility requirements for a coronavirus-related distribution.

How this affects our clients

- This allows individuals affected by the coronavirus to be able to access their eligible retirement plan accounts.
- Many individuals who are affected by the coronavirus may be eligible to take other types of withdrawals or distributions. Please see our [blog post describing hardship withdrawal opportunities](#). However, unlike other types of withdrawals and distributions that are a source of leakage on retirement savings, coronavirus distributions can be repaid for up to three years.
- Terminated participants might also already be able to access their retirement plan account balances but a coronavirus withdrawal eliminates any 10% early distribution penalty that may otherwise be applied and allows for the resulting taxable income to be spread over 3 years.
- These provisions are optional – plan sponsors are not required to amend their plans to offer these withdrawals. However, we expect many plan sponsors will likely want to make this feature available to participants. We also understand that large recordkeepers are moving quickly to make these features available.
- If the plan offers a stable value fund, the impact of amending the plan to offer this feature should be coordinated with the plan's stable value manager.
- A plan amendment to add this provision must be made by the end of the first plan year beginning on or after January 1, 2022 (December 31, 2022 for calendar year plans) or, for governmental plans, after January 1, 2024 (December 31, 2024 for calendar year plans).

What is still up in the air

- It is not clear whether the IRS may require any documentation of the self-certification similar to what is required in the context of other distributions, such as hardship withdrawals.
- It is not clear whether or how the repayment of a coronavirus distribution will be coordinated with the unwinding of any earlier income inclusion.
- It is not clear if the Form 1099-R issued for the year of distribution will report the entire amount as taxable or if the reporting will require three 1099-Rs over the three-year income inclusion period.

RETIREMENT PLAN LOAN LIMITS EXPANSION (§ 2202(B))

The Act increases the qualified plan and 403(b) plan loan limit from the current limit of the lesser of \$50,000 and 50% of the vested account balance to the lesser of \$100,000 or 100% of the vested account balance for participants who meet the requirements to receive a coronavirus-related distribution under § 2202(a) of the Act (discussed above). This increase is effective for loans made within 180 days following the passage of the Act. In addition, the due date for any plan loan repayments that are due between the date of enactment and December 31, 2020 will be extended for qualified individuals (as described above) by one year (with interest), and subsequent loan repayments may be “appropriately adjusted” to reflect the delay. This extension is permitted even if the term of the loan is extended beyond five years (i.e., into a sixth year).

How this affects our clients

- Allows plan sponsors to offer participants the option to access funds through loans, which will be repaid to the plan, rather than withdrawals, which generally are not repaid. This provision also is optional, not mandatory.
- The delay of loan repayments, which applies to new loans as well as existing loans, may be helpful for participants working reduced hours or on furlough and would appear to be applicable to new coronavirus-related loans issued during the 180 day period following passage of the Act.
- A plan amendment to add this provision must be made by the end of the first plan year beginning on or after January 1, 2022 (December 31, 2022 for calendar year plans) or, for governmental plans, after January 1, 2024 (December 31, 2024 for calendar year plans).

What is still up in the air

1. The proposed changes are to the IRS rules in the Code regarding loans only and not to the DOL’s prohibited transaction exemption that allows loan programs. The DOL rules, at least as of now, would continue to prohibit loans in excess of 50% of the account balance. We think it is very unlikely the DOL would enforce their rules (e.g., the loan limit of 50% of the account balance). However, additional guidance will be needed for complete comfort.
2. There is some lack of clarity in the current drafting of this provision, but we believe that the general intent is to allow for an extension of all loans by one year in the form of a repayment holiday, but with continued interest accruals. The question is whether there would be a need to reamortize the loan once the repayment holiday ended or if the participant would instead need to make a deferred payment (with interest) once the holiday ends.

2020 REQUIRED MINIMUM DISTRIBUTION WAIVER FOR DEFINED CONTRIBUTION PLANS AND IRAS (§ 2203)

Similar to a required minimum distribution (RMD) waiver that was available in 2009 during the Great Recession, the Act allows qualified defined contribution plans, 403(b) plans, IRAs or eligible 457(b) plans to postpone all required minimum distributions that must be made in 2020 and postpone all required beginning dates that would occur in 2020 by one year.

How this affects our clients

- This allows participants and beneficiaries to leave their funds in their accounts rather than taking required minimum distributions in 2020 during a period of steep market declines.
- Participants and beneficiaries who wish to receive a distribution will remain eligible to do so, but the portion of the distribution that would have been the RMD will not be eligible for rollover.
- In the case of a defined contribution plan, an amendment to add this provision must be made by the end of the first plan year beginning on or after January 1, 2022 (December 31, 2022 for calendar year plans) or, for governmental plans, after January 1, 2024 (December 31, 2024 for calendar year plans).

EMPLOYEE RETENTION CREDIT FOR EMPLOYERS SUBJECT TO CLOSURE DUE TO COVID-19 (§ 2301)

The Act provides a refundable tax credit against the employer portion of Old Age, Survivors and Disability Insurance (OASDI) or Railroad Retirement Tax Act (RRTA) taxes for 50% of “qualified wages” for each employee from March 13, 2020 through December 31, 2020. The credit is available to any employer carrying on a trade or business in 2020 whose operations were fully or partially suspended due to a COVID-19-related shut down order or whose gross receipts (or operations, for tax-exempt employers) declined by more than 50% as compared to the same calendar quarter in the prior year. The credit is reduced by any credits received for paid sick or family leave under the Families First Coronavirus Response Act.

For an employer that had greater than 100 full-time employees (determined using the Affordable Care Act's measure of 30 hours per week) during 2019, “qualified wages” are wages paid by such employer to its employees who are not providing services due to the circumstances described above. For an employer with 100 or fewer full-time employees, all employee wages qualify for the credit whether or not the employer is open. The amount of qualified wages subject to the credit is limited to \$10,000 of taxable compensation, including health benefits, paid to each employee.

How this affects our clients

This tax credit provides some relief from the employment tax burden for employers affected by COVID-19 crises making it easier to retain their employees through the crises.

What is still up in the air

It is unclear how full and partial suspensions will be determined.

It is unclear whether the credit applies to employees of large employers that are providing reduced services.

It is unclear whether the credit applies to any new employees added after enactment.

The Families First Coronavirus Response Act, enacted on March 18, 2020, provided a similar refundable tax credit against OASDI taxes, but then the IRS in IR 2020-57 expanded the credit to cover federal income tax withholding and the employee portion FICA (which are collected by the employer from employee wages, and will be reflected on Form W-2 for 2020, but do not have to be deposited in order to facilitate payment of the balance of the “refundable credit” – payable if the amount of the credit exceeded just the OASDI taxes). It is unclear the IRS will similarly expand this credit to cover these other taxes.

DELAY OF PAYMENT OF EMPLOYMENT TAXES (§ 2302)

The Act provides that payment of 50% of the employer share of the OASDI tax and Tier I of the RRTA tax (including the tax on employee representatives) and 50% of self-employment taxes and any estimated taxes due thereon by self-employed individuals between the enactment of the Act and January 1, 2021 is delayed until December 31, 2021. The due date for the remaining 50% of the employment taxes is delayed until December 31, 2022. In the event that an agent or certified professional employer organization is directed to defer payment of employer payroll taxes under the Act by a customer, the Act makes the customer solely liable for the payment of the applicable employment taxes before the applicable deadline.

How this affects our clients

These employment tax delays will make it easier for employers and self-employed individuals to meet their OASDI tax obligations and other tax needs arising during the COVID-19 crisis through the end of 2020.

What is still up in the air

It is unclear how this payroll tax delay will interact with the employee retention credit (may the credit be used to cover delayed employment taxes?).

COVERAGE OF DIAGNOSTIC TESTING FOR COVID-19; PRICING OF DIAGNOSTIC TESTS (§§ 3201 AND 3202)

The Families First Coronavirus Response Act (FFCRA), effective March 18, 2020, requires a group health plan to cover in vitro diagnostic products for the detection of SARS-CoV-2 or the diagnosis of the virus that causes COVID-19 and to cover the cost of healthcare provider visits and services that are related to the testing or the evaluation of an individuals' need for a test. Coverage must be provided at no cost-sharing to participants during the period of the COVID-19 emergency.

The Act expands the coverage of in vitro diagnostic tests in the FFCRA to include tests that are approved, cleared, or authorized by the FDA, including tests that are in development under the auspices of the Food and Drug Administration, States and the Health and Human Services (HHS).

With respect to the tests and services mandated by the FFCRA, the group health plan or insurer must reimburse the provider based on the negotiated rate in effect before the emergency or, if there is no negotiated rate, the cash price for the service listed by the provider on a public internet site (or a lower, negotiated rate). Providers that do not publish a cash price for their COVID-19 diagnostic test can be subject to monetary penalties by HHS.

How this affects our clients

- Group health plan sponsor should work with their insurers and third party administrators to ensure that the group health plan complies with these mandates

What is still up in the air

1. Additional guidance is needed to address how employers can offer COVID-19 testing at no cost-sharing to individuals who do not enroll in or are not eligible for group health plan coverage.

GROUP HEALTH PLAN AND HEALTH INSURANCE ISSUERS COVERAGE OF CORONAVIRUS PREVENTIVE SERVICES AND VACCINES (§ 3203)

Group health plans and health insurance issuers offering group or individual health insurance are required to cover any "qualifying coronavirus preventive service" as a preventive health service under Section 2713 of the Public Health Services Act. A qualifying coronavirus preventive services is an item, service, or immunization that is intended to prevent or mitigate COVID-19 that has received an "A" or "B" rating under the recommendations of the United States Preventive Services Task Force or has a recommendation from the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention. Coverage of the qualifying coronavirus prevention service must be offered by the 15th business day after the recommendation is made by appropriate authority.

How this affects our clients

- Group health plans will be required to offer this coverage. Plan sponsors should talk to third party administrators to confirm that the third party administrators are ready to provide this coverage when it becomes required.

What is still up in the air

1. Qualifying coronavirus preventive services have not yet been developed. This requirement will not take effect until they have been developed and the use has been recommended by the United States Preventative Services Task Force or the Advisory Committee on Immunization Practices of the Centers for Disease Control and Prevention.

ADVANCED REFUNDING OF CREDITS (§ 3606)

The Families First Coronavirus Response Act, which became law on March 18, 2020 (FFCRA), provides a tax credit for OASDI or RRTA tax for each calendar quarter equal to 100% of certain qualified sick or family leave wages paid by any qualifying employer for such calendar quarter. The Act allows employers to receive an advanced credit from Treasury for such paid family or sick leave.

How this affects our clients

Permitting advanced refunds of the tax credits for qualified sick or family leave wages paid to employees relieves some of the financial burden of providing the qualified sick pay and extended family medical leave periods required under the FFCRA and allows employers to extend the leave with limited upfront cost.

2020 RECOVERY REBATES FOR INDIVIDUALS (§ 2201)

For eligible individuals, the CARES Act establishes a refundable credit, paid in cash, of \$1,200 to individuals with adjusted gross income ("AGI") of \$75,000 or less (\$112,500 or less for head of household filers) and \$2,400 to married couples filing jointly with AGI of \$150,000 or less. Individuals will also receive an additional \$500 for each "qualifying child." The credit is gradually phased out for taxpayers with AGI over the \$75,000/\$112,500/\$150,000 amounts, and eliminated entirely for individuals with AGI of \$98,000 and over, head of household filers with AGI of \$136,500 and over, and married taxpayers with AGI of \$198,000 and over. Nonresident alien individuals, anyone who is a dependent of another taxpayer, and estates and trusts, are not eligible for the credit. Eligible individuals and qualifying children must have a social security number in order to receive or be considered for payment purposes. The Act contemplates that the Internal Revenue Service ("IRS") will principally administer the issuance of payments by looking to 2019 federal income tax returns to (1) calculate the payments based upon AGI, filing status, and number of dependents, and (2) identify the individual's address and direct deposit information. If individuals have not filed their 2019 federal tax return, the IRS will utilize their 2018 tax return information, and in circumstances where an individual did not file a 2018 federal tax return, the IRS will utilize information from the Social Security Administration to determine eligibility.

No later than 15 days after the IRS distributes a payment (either electronically or by mail) it will mail a notice to the eligible individual stating the payment method and amount, and contact information for individuals to report any failures to receive the payment. In addition, the relevant governmental agencies shall conduct a public awareness campaign to provide information on payments to eligible individuals and to provide information to individuals who may not have filed a 2018 or 2019 tax return. The payments shall not be subject to reduction or offset by any federal income tax or other liability the eligible taxpayer otherwise owes.

How this affects our clients

- The IRS will be drawing on its experience with stimulus payments issued to taxpayers pursuant to the Economic Stimulus Act of 2008 when it mailed stimulus rebate checks to 130 million taxpayers, a process that took several months.
- For eligible individuals with income levels that qualify them to receive a rebate payment, it is important that the IRS have the up-to-date information, e.g., last known address and direct deposit information in order to calculate the payment correctly and issue it appropriately. To that end, eligible individuals should file their 2019 Form 1040, (US Individual Income Tax Return), as soon as possible, especially if their information has changed and if they would not qualify based on the information in their 2018 Form 1040. Treasury has granted an extension to pay the 2019 federal income tax liability to July 15, 2020, see IRS Notice 2020-18. Payment is not required to accompany a return filed before July 15, 2020, and can be made at any time on or before July 15, 2020.

What is still up in the air

- It is unclear how the IRS will calculate and administer the payment to individuals who are eligible but have not filed a return in 2018 or 2019 (because they were below the filing threshold or for other reasons) and who do not have an earnings history on file with the Social Security Administration.
- The timeline for actually receiving checks is unclear, but Treasury Secretary Steven Mnuchin has previously stated will be approximately three weeks from the date of enactment.
- It is unclear how long it will take an eligible individual to receive a payment if the bank account used to receive a refund from a 2018 or 2019 return is closed or the individual has moved since filing a 2018 or 2019 return. This issue could significantly delay the individual's receipt of the payment.
- Implementation will require Treasury and the IRS to issue regulations addressing payments to eligible individuals, among others, who filed jointly in 2019 but are now divorced, for qualifying children who are split between households, for foster children, and in relation to payments where a spouse has died.

- It is unclear whether eligible individual can challenge the amount of rebate check that is calculated incorrectly.