

CORONAVIRUS RELIEF BILL: THE CARES ACT – PROVISIONS AFFECTING U.S. EMPLOYERS AND EMPLOYEES, PART I

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The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act” or “Act”), enacted on March 27, 2020, has been the subject of government agency interim regulations and guidance. This updates the original BCLP post on the employment-related provisions of the CARES Act through April 7, 2020.

The CARES Act represents the third Phase of Congressional relief responding to the novel coronavirus (COVID-19) pandemic. [Phase I \(Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 \(P.L. 116-123\)\)](#) and [Phase II \(Families First Coronavirus Response Act \(P.L. 116-127\)\)](#) were signed into law on March 6 and 18, respectively. At 883 pages, the CARES Act is the largest relief bill in U.S. history and addresses on multiple fronts the hardships faced by individuals and businesses throughout this crisis. These efforts include an unprecedented expansion of unemployment benefits, significant funding for the health care industry, aid to large and small businesses valued in the billions, and even direct payments to individuals.

The majority of economic relief provisions for U.S. workers and employers is provided in Titles I through IV of Division A of the Act (Division B consists of emergency appropriations to fund various program). The CARES Act also has specific provisions regarding relief for airlines, financial institutions, and other sectors that are considered critical to national security. The three key employment-related sections of the CARES Act, two of which are designed to incentivize employers to retain employees and continue to provide them wages by way of either providing smaller employers with loans, or providing payroll tax credits to certain eligible employers. The third key employment-related section of the CARES Act provides increased federal funding for employment benefits for eligible employees.

Title I of Division A of the CARES Act, which adds the Paycheck Protection Program is described in relevant part below.

Title I - Keeping American Workers Paid and Employed Act

Title I of the CARES Act adds the Paycheck Protection Program (“PPP”) to the Small Business Act (“SBA”) to provide federally-backed loans to enable eligible businesses to pay payroll costs, health benefits and insurance premiums, mortgage interest, rent, and utilities costs in the period February 15 through June 30, 2020. Such costs that are incurred and paid in the 8 week period after loan origination are eligible to be forgiven, subject to the SBA Interim Regulation allocation rules described below. The duration of these loans is two years; the interest rate is 1%; principal payments may be deferred for 6 months; and no personal guarantee or collateral is required.

BCLP’s Finance Team has published a summary of the SBA provisions of the CARES Act, and is available [here](#).

The PPP provides federally-guaranteed loans to eligible businesses up to a maximum amount of the lesser of (1) \$10 million or (2) the sum of 2.5 times the borrower’s average monthly payroll costs for U.S. employees in either 2019 or the 12 month period preceding the loan (excluding compensation for any employee who earned more than \$100,000 (pro-rated) in any payroll period in that 12-month period and FICA (after February 15, 2020) plus certain existing SBA loans (a different method applies for seasonal employers).

To be eligible, the business must qualify as a “small business concern,” and either: (1) not employ more than the greater of (i) 500 employees whose principal place of residence is in the United States (includes individuals employed on a full-time, part-time or other basis) or (ii) if applicable, the size standard in number of employees established by the SBA for the industry in which the business operates. or (2) satisfy both tests in SBA’s “alternative size standard” as of March 27,2020: (i) maximum tangible net worth of the business is not more than \$15 million; and; (ii) the average net income after Federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than \$5 million. For purposes of both calculating the 500 employee limit and the maximum loan amount, employers may either use the average number of employees in the 12 month period (2019 or the 12 month period preceding the loan) or the average number of employees per pay period in the 12 completed calendar months prior to the date of the loan application.

There is a special eligibility rule for businesses in the hospitality and food service industries. For businesses with more than one physical location, if it employs 500 or fewer employees per location and is assigned to the “accommodation and food services” sector (Sector 72) under the North American Industry Classification System (“NAICS”), the business is eligible to receive a loan. SBA regulations on entity affiliations (under 13 CFR 121.103) are waived for the covered period for business concerns, non-profits, and veterans’ organizations for businesses in Sector 72 under the NAICS with 500 or fewer employees, franchise businesses with SBA franchisor identifier codes, and any business that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act.

To be eligible for a PPP loan, the business must certify that the loan is needed to support ongoing operations during the COVID-19 emergency, funds will be used to retain workers and maintain

payroll or make mortgage interest, lease, and utility payments, and that the applicant does not have any other application pending under this program for the same purpose.

The proceeds of a PPP loan may be used to pay for only the following items (subject to certain specified exclusions) in the period February 15 through June 30, 2020:

(i) payroll costs (excluding the prorated portion of any compensation above \$100,000 per year for any person, and FICA), which includes costs related to group health care benefits during periods of paid sick, medical or family leave, and insurance premiums; severance payments; retirement benefits; and state and local payroll taxes;

(ii) mortgage interest payments (but not any prepayment of or payment of principal on a mortgage obligation);

(iii) rent and utilities; and

(iv) interest on any other debt obligations that were incurred before February 15, 2020.

Payments for mortgage interest, rent, and utility costs are only allowed for payment obligations entered into or in force before February 15, 2020. SBA Interim Regulations state that 75% of loan proceeds must be used to pay payroll costs.

Certain payments listed above are eligible to be forgiven by the lender (loan forgiveness does not apply to payroll costs for paid sick leave or expanded family and medical leave under the Families First Coronavirus Response Act to the extent that such paid leave is eligible for payroll tax credits) up to the principal amount of the loan if the obligations are incurred and the payments are made in the 8 week period starting on the loan commencement date ("Forgiveness Period"), subject to compliance with statutory requirements for documentation of payroll costs and other expenditures. (Because Section 1102 of Title I only permits proceeds to be used to make payments through June 30, there is a question whether the Forgiveness Period ends on June 30 for loans originating within 8 weeks of that date; that question is not addressed in the Interim Regulations). The Interim Regulations state that no more than 25% of the forgiven amount may be for non-payroll costs.

The amounts eligible for forgiveness are subject to reduction if during the Forgiveness Period either (a) there is a decline in the average full time equivalent employees (FTE) from the average FTE in January and February 2020, or (b) the salary/wages of any employee (who earned the rate of \$100,000 or less per year in any payroll period in 2019) is reduced more than 25% from the employee's salary/wages in the first quarter of 2020. If there is a reduction in average FTE, then the forgiveness will be reduced to an amount equal to multiplying the sum of the covered loan amounts (i.e. amounts used for payroll costs, covered mortgage interest payments, covered rental payments and covered utility payments) by the fraction in which the numerator is the average FTE during the Forgiveness Period and the denominator is, at the election of the borrower, either the average FTE in in January and February 2020 or the average FTE in the period February 15, 2019 through June 30,

2019. If the salary/wages of any employee who was paid at the rate of \$100,000 or less per year in any payroll period in 2019 decreases during the Forgiveness Period by more than 25 percent of salary/wage rates in the first quarter of 2020, then the loan forgiveness will be reduced by the amount of those excess reductions.

However, these reductions will be disregarded in the following circumstances: (1) any reduction in FTE as of February 15, 2020 in the period February 15 to April 26, 2020, will be disregarded if the reduction is restored by June 30, 2020; and (b) any salary/wage for employees (who were paid at a rate of \$100,000 or less per year in 2019) as of February 15, 2020, that is reduced by more than 25% in the period February 15 to April 26, 2020, will be disregarded if the salary/wage rate reduction is restored by June 30, 2020. The Interim Regulation rules requiring 75% of the loan proceeds to be used to pay payroll costs, and only allowing forgiveness of non-payroll costs up to 25% of the forgiven amount, create incentives to encourage rehiring/restoration of wage cuts as early as feasible within the 8 week Forgiveness Period, rather than waiting until June 30.

BCLP has assembled a COVID-19 HR and Labor & Employment taskforce to assist clients with labor and employment issues across various jurisdictions. You can contact the taskforce at: COVID-19HRLabour&EmploymentIssues@bcplaw.com. You can also view other thought leadership, guidance, and helpful information on our dedicated COVID-19 / Coronavirus resources page at <https://www.bcplaw.com/en-GB/topics/covid-19/coronavirus-covid-19-resources.html>

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