CLIENT ALERT: Coronavirus Aid, Relief, and Economic Security Act (CARES Act)

On March 27, 2020, the U.S. House of Representatives approved and President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act or "CARES Act."

The CARES Act includes, among many things: (1) almost $350 Billion dollars allocated for loans to small businesses, as part of the Payment Protection Program; (2) over $500 Billion in loans and assistance for large companies; (3) and an expansion to the eligibility requirements and total unemployment benefits provided to individuals, in addition to their normal state unemployment benefits. This extraordinary infusion of money for small businesses during the COVID-19 pandemic is designed to relieve the significant financial burdens on employers during the burgeoning financial stresses caused by the pandemic. The full text of the bill can be found here.

PROVISIONS FOR THE ASSISTANCE OF SMALL BUSINESSES

(1) The Paycheck Protection Program

The Paycheck Protection Program allows small businesses, non-profits, independent contractors, and self-employed individuals, with fewer than 500 employees, to apply for loans covering certain business costs and expenses. For these loan applicants, if they meet certain criteria for maintaining employees on payroll, the loan amount may be largely forgiven, meaning that the Federal government will take on the financial burden for paying much employee payroll cost, rent, and utilities for these small business during the height of the pandemic.

In addition to the size threshold, eligibility under the CARES Act requires potential borrowers to meet these other criteria:

- Applicants must certify:

  (a) That due to the uncertainty of the current economic conditions, the loan is necessary to support the employer's ongoing operations;

  (b) That the funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments; and

  (c) That the applicant does not have any applications pending nor has the applicant received any loan funds for Disaster Recovery Loans or Economic Stabilization Loans under the COVID-19 Stimulus package.
- The applicants must have been in operation as of February 15, 2020;
- The applicant must have enough employees to support the ongoing operations (otherwise the certification would be false); and
- The applicant cannot receive loans under the Economic Injury Disaster Loan Programs, and remain eligible.

The maximum loan amount available to employers and other eligible recipients will be in an amount

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that is equal to roughly 2.5 months of the applicant-employer's average "Payroll Costs." The loan cannot exceed a total of $10 Million. For the purposes of calculating an eligible borrower's maximum loan amount, "Payroll Costs" under the law is defined as:

- Salary, wage, commission, or similar compensation;
- Payment of cash, tip, or equivalent;
- Payment for vacation, parental, family, medical, or sick leave **(not including payments made under the Families First Coronavirus Relief Act (FFCRA), the Phase I federal response that provides government sick leave and extended paid emergency FMLA related to employees affected by the pandemic) (see MBJ's summary of FFCRA here)**;
- Allowance for dismissal or separation;
- Payment required for the provisions of group health care benefits, including insurance premiums;
- Payment of any retirement benefit; or
- Payment of State or local tax assessed on the compensation of employees **(However, taxes imposed or withheld by chapters 21, 22, or 24 of the Internal Revenue Code are not included in this calculation. In other words, the government will not pay the payroll taxes that an employer owes.**); and
- The sum of payment of any compensation to or income of a sole proprietor that is a wage, commission, income, net earnings from self-employment, or **similar compensation that is not more than $100,000 in 1 year, as pro-rated for the covered period.**

Importantly, any compensation received by an individual employee, independent contractor, or self-employed individual, in excess of an annual salary of $100,000 may not be included in either the initial calculation of payroll costs nor can it be included for purposes of obtaining loan forgiveness mentioned further below.

Loan recipients may use the proceeds to cover specified business costs with the potential of obtaining up to 100% in loan forgiveness. In other words, if an employer or other eligible borrower uses the loan proceeds to cover the costs that Congress is encouraging them to cover, the debt will be completely cancelled.

Those costs include:

- Payroll costs;
- Payments related to the continuation of group healthcare benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- Employee salaries (excluding compensation amounts in excess of $100,000), commissions, or similar compensation;
- Payments of interest on any mortgage obligation (not including interest on any prepayment of or payment of principal on a mortgage obligation);
- Rent (including rent under a lease agreement);
- Utilities; and

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- Interest on any other debt obligations that were incurred before the loan began.

Employers who apply and accept a loan under this program should be aware that if they subsequently reduce the number of employees on their payroll, reduce the pay of their employees, or both, the total amount of loan forgiveness available to them will face a potential corresponding reduction.

Loan forgiveness will be provided to borrowers in an amount equal to the above costs incurred during the 8-week period following origination of the loan. In those instances where the employer is found to have reduced its workforce during the 8-week loan period (using a simple formula to determine the total percentage reduction), the employer's loan forgiveness amount will be reduced by that same percentage. For example, if an employer reduced its total workforce by 35%, as compared to either (a) the period beginning February 15, 2019 and ending June 30, 2019, or (b) the period beginning January 1, 2020 and ending February 29, 2020, then the employer would see its loan forgiveness amount reduced by 35%.

Similarly, if the employer reduces the pay of its employees by more than 25%, the employer's loan forgiveness amount will be reduced by the amount exceeding the 25% reduction. Here, if the employer were to reduce the pay of its employees making less than $100,000 by 35%, the employer's loan forgiveness amount would be reduce by 10% (the difference between 35% and 25%).

Lenders must provide applicants with a decision with regard to their application for loan forgiveness within 60 days of receiving the application for loan forgiveness.

Employers seeking more information and clarification around the specifics of these new loans can also reference this helpful summary provided the U.S. Chamber of Commerce.

(2) SBA Loans Easy Access

Access to the loan above will be through both participating private lenders and directly through the Small Business Administration ("SBA"). Toward this end, the SBA has created easier access to larger loans through the SBA's express loan process. Changes to the current law increase the previous maximum loan amount under the express loan process, from $350,000 to $1,000,000. In addition to increasing the potential loan maximums, the CARES Act amended the Small Business Administration Act by waiving the "no credit elsewhere" requirement and temporarily allowing the SBA to guarantee 100% of the loans. Further still, employers applying for a loan through the express loan process may defer all loan payments for at least 6 months (to a year) and forgo providing the lender with a personal guarantee or collateral to secure the loan.

Employers who elect to apply for a loan through the SBA express loan process may use the proceeds to:

- Provide long-term working capital: accounts payable, purchasing inventory, and other operational expenses;
- Provide short-term working capital: seasonal financing, contract performance, construction financing, and/or export;
- Purchase real estate;

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- Purchase equipment, furniture, machinery, supplies, and materials;
- Cover construction and/or renovation costs;
- Establish or acquire a new business, or expand an existing business; and
- Refinance existing business debt (so long as the lender, and ultimately the SBA, are not in a position to sustain a loss through refinancing).

(3) Expanding Eligibility under the Small Business Act to the Economic Injury Disaster Loan Program (EIDL)

In addition to the loans provided to small businesses under the Paycheck Protection Program, the CARES Act makes EIDL loans more widely available and easier to access for businesses residing in states that have declared themselves to be a Disaster Area.

The CARES Act expands the definition of a "small business" to include almost all businesses with fewer than 500 employees, including sole proprietorships and independent contractors, so long as they still meet the SBA's previously enacted size standards for their respective industries. Private non-profit organizations and agricultural cooperatives will also be eligible to apply for an EIDL loan up until December 31, 2020.

If an eligible employer is applying for an EIDL loan between now and December 31, 2020 in response to the effects of COVID-19, the SBA will approve the application based solely on the applicant's credit score or it will "use alternative appropriate methods to determine an applicant's ability to repay." Similar to the SBA's express loans, the "no credit elsewhere" requirement has been waived for EIDL loans. However, personal guarantees will still be required for EIDL loans over $200,000. Finally, the SBA will not deny an EIDL loan application based on insufficient collateral to secure the EIDL loan.

EIDL loan proceeds may be used for business expenses and obligations that the applicant would have been able to pay had the disaster not occurred. The proceeds cannot be used to replace lost profits or to expand the applicant's business.

Accompanying the broader and easier access to EIDL loans is the SBA's provision of emergency cash grants of up to $10,000 to eligible EIDL loan applicants within 3 days of the SBA receiving the applicant's request for a grant. The grant may be used to pay only certain costs, including:

- "Providing sick leave to employees unable to work due to the direct effect of the COVID-19";
- "Maintaining payroll to retain employees during business disruptions or substantial slowdowns";
- "Meeting increased costs to obtain materials unavailable from the applicant's original source due to interrupted supply chains";
- "Making rent or mortgage payments"; and
- "Repaying obligations that cannot be met due to revenue losses."

An Emergency EIDL grant does not need to be repaid, but if the applicant receives a loan under the Payment Protection Program, the total emergency grant money provided will be reduced from the applicant's loan forgiveness amount. Access to the emergency grant funds will expire on December 31, 2020.

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OTHER IMPORTANT PROVISIONS OF THE CARES ACT

While the following pieces of the CARES Act are less applicable for employers from an employment law perspective, it should be noted that there were several other helpful provisions in the CARES Act.

(1) Payroll Tax Credit and Deferral of Employer's Share of Social Security Taxes

In addition to the powerful incentives for employers to retain their workforce through favorable loans and loan forgiveness, the CARES Act includes tax incentives for employers. The CARES Act provides employers with a refundable payroll tax credit of 50% on qualified wages (including health benefits) paid to employees between March 31, 2020 and December 31, 2020. The payroll tax credit will apply to the first $10,000 in eligible compensation.

In order to be deemed eligible for the payroll tax credit, the employer must:

- Have had its operations fully or partially suspended as a result of a COVID-19 related shut down order; or
- Have incurred a decline in gross receipts by more than 50% when compared to the same quarter in the prior year.

The payroll tax credit is based on qualified wages paid to the employees. Whether or not the employer has paid "qualified wages" will depend on the number of employees employed by the company.

- **For employers with more than 100 full-time employees** – qualified wages are wages that are paid to employees, despite the fact that they are not providing services due to a COVID-19 related shut down order.
- **For Employers with 100 or less employees –** qualified wages will be paid to employees, whether the employer is open for business or not.

Employers, including self-employed individuals, will also be allowed under the CARES Act to defer their share of Social Security taxes paid on their employees' wages over the course of two years. Half of all deferred Social Security taxes must be paid by December 31, 2021, while the second half of all deferred Social Security tax payments must be paid by December 31, 2022.

(2) Expanded Unemployment Benefits

The CARES Act temporarily expands, through December 31, 2020, unemployment benefits to individuals who are not traditionally eligible for unemployment benefits and who are also unable to work as a direct result of the COVID-19 pandemic. This includes self-employed individuals and independent contractors, who would not otherwise be eligible for weekly unemployment benefits. By contrast to the FFCRA, the CARES Act provides assistance to those currently not working as a result of COVID-19, regardless of their employer's size. Under the new law, benefits will simply be provided to individuals who are able and available to work, but remain unemployed or partially unemployed due to COVID-19. This includes:

- The employee has been diagnosed with COVID-19 or is experiencing symptoms and seeking a medical diagnosis;

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- A member of the individual's household has been diagnosed with COVID-19;
- The individual is providing for a family member or a 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 to 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;
- The individual's place of employment is closed as a direct result of the COVID-19 public health emergency; or
- The individual meets any additional criteria established by the Secretary for unemployment assistance under this section; 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 under 2017 and meets the requirements of subclause (I); and does not include:

    (a) An individual who has the ability to telework with pay; or

    (b) An individual who is receiving paid sick leave or other paid leave benefits.

The law also extends access to weekly benefits from 26 weeks to 39 weeks and includes an additional $600 in weekly Pandemic Unemployment Compensation to be provided to an eligible recipient in addition to their regular UI weekly benefit for up to four months.

(3) Economic Stabilization Loans and Loan Guarantees for Large Businesses

Finally, the CARES Act provides roughly $500 Billion for loans and loan guarantees to large U.S. based businesses (of more than 500 employees) and to states and municipalities of any size. Within the $500 Billion, specific amounts were allocated to certain U.S. industries, namely air carriers and businesses critical to maintaining national security.

Loans and loan guarantees under this section of the CARES Act, while critical to these large businesses given the uncertain economic conditions, come with significant oversight and restrictions. Borrowers eligible to access funds under the CARES Act must:

- To the extent practicable, maintain employment levels as of March 24, 2020 and retain no less

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than 90 percent of employees as of that date, until September 30, 2020;
- Not engage in stock buy backs, unless contractually obligated, or paying dividends until one year after the loan is no longer outstanding;
- Limit increases to executive compensation and severance amounts for executives making over $425,000 and $3 million.

As a result of the CARES Act, employers, specifically small businesses facing a reduction in business activity due to COVID-19 now have a number of tools at their disposal to take an economically prepared and responsible approach to maintaining their valued workforce, in anticipation of a return to normal business activity.

Employers seeking additional guidance as they attempt to navigate this new legislation may find some helpful information provided in these FAQs published by the U.S. Senate Committee on Small Business and Entrepreneurship.

As each employer's individual circumstances differ widely, we strongly encourage employers to consult their MBJ attorney if they have any questions about the implementation of the CARES Act and how it applies to their business.

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