

COVID-19

## CORONAVIRUS: KEY TAX AND BUSINESS PROVISIONS

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*Foulston has produced a series of issue alerts as we continue to monitor the evolving COVID-19 situation and provide additional guidance. Please find all updates and our latest resources available [here](#).*

Today, the US House of Representatives passed the \$2-trillion Coronavirus Aid, Relief, and Economic Security (CARES) Act, and President Trump signed it into law. This alert offers a preview of key provisions of the Act, sometimes referred to as “Phase 3” of the federal government’s response to the Coronavirus pandemic and related economic slowdown. This alert focuses on tax and business provisions of the CARES Act. Other issue alerts will cover components of the Act related to healthcare-specific issues.

### PAYCHECK PROTECTION PLAN

The Act expands the Small Business Administration (SBA’s) 7(a) Loan Program to extend credit to small businesses (including sole proprietors and self-employed individuals), 501(c)(3) nonprofits, and certain veterans’ organizations and tribal businesses).

These loans have many advantages over typical loans because the Act provides that the borrower does not need to provide collateral nor guarantee the loan, and all payments can be deferred for 6 months to 1 year. There are no loan fees to the borrower and a portion of the loan may be forgiven. Any portion that is not forgiven will be payable over 10 years at a maximum interest rate of 4%. The amount you may be able to borrow is determined based on a formula tied to the borrower’s payroll and cannot exceed \$10,000,000.

Generally, these loans are available to businesses with 500 employees or fewer, although certain businesses with more than 500 employees may qualify if (i) there are no more than 500 employees in any one location, and (ii) the borrower is engaged in certain dining or hospitality businesses.

Proceeds of the loan must be used for (i) payroll (including salaries, paid sick or medical leave, and health insurance premiums), (ii) interest on mortgage payments, (iii) rent payments, (iv) utility payments, and (v) interest

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on other debt obligations incurred before February 15, 2020. Borrowers must certify that the current economic conditions make the loan necessary and that they will use the funds for the approved purposes listed above.

These loans are attractive not just because of their loan terms (which are pretty decent), but also because a portion of the loan may be forgiven. In addition, the amount forgiven will NOT be taxed as income to the borrower.

The forgivable portion of the loan is the amount the borrower spends in the eight weeks after the loan is disbursed on: payroll costs, interest on qualified mortgage debt, qualified rent or lease payments, and utilities.

The forgivable amount will be reduced to the extent that the borrower has decreased its compensation and/or head count. For purposes of calculating forgivable payroll costs, amounts paid to employees earning more than \$100,000 per year are excluded. To encourage employers to re-hire workers they previously laid off, reductions in compensation and head count that are rectified before June 30, 2020, may be excused.

We expect further guidance from the IRS regarding the calculation of the forgivable amount (and any *de minimis* exemptions).

## EMPLOYEE RETENTION (PAYROLL) TAX CREDIT

Employers who have been hard hit by the COVID-19 crisis may be eligible for a tax credit of up to \$5,000 per employee. The Act provides for a payroll tax credit for 50% of the wages paid by a qualified employer to its employees during the COVID-19 crisis. This credit is available for employers who either:

- i. had their operations suspended in full or in part due to a COVID-19 related shut-down order (for example, because of a Shelter in Place order); or
- ii. saw their gross receipts decline by more than 50% in comparison to the same quarter in 2019.

This credit is based on actual wages paid to the employee. For an employer with more than 100 full-time employees, the only wages that count toward the credit are wages paid to employees who are not working due to the shutdown or due to slow business conditions. For employers with fewer than 100 full-time employees, all employee wages paid during the relevant period qualify for the credit (even if the employees were providing services to the employer during that time).

An employer who receives a loan under the Payroll Protection Plan may not also receive the Employee Retention Credit.

## DUE DATE FOR SOME EMPLOYMENT AND SELF-EMPLOYMENT TAXES DEFERRED

To assist businesses with cash-flow issues, the Act permits employers to delay paying the employer's (but NOT the employee's) portion of Social Security taxes (6.2%) and permits self-employed people to delay paying one-half of their Social Security portion of their self-employment taxes. The taxes that may be deferred are taxes that relate to the period from March 27 and ending before January 1, 2021. The deferred taxes can be paid over the next two years with 50% due by December 31, 2021, and the remaining 50% due by December 31, 2022.

## UNEMPLOYMENT BENEFITS

One of the more talked-about aspects of the CARES Act is the infusion of an estimated \$260 billion into the unemployment system. These funds will cover a four-month boost to individual unemployment benefits of \$600 per week in federal funds that will be paid on top of the benefits the employee would otherwise receive under his/her state unemployment system.

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In addition, the Act provides a 13-week extension on the timeframe (which varies by state) during which an employee may receive benefits. It also expands the scope of individuals eligible for unemployment benefits to include certain part-time employees and individuals in work settings that were not previously covered, such as those who are self-employed, independent contractors, and gig workers.

The law also creates a new Pandemic Unemployment Assistance program that will run through the end of 2020 and provide benefits to employees who lose work directly as a result of the public health emergency.

## DIPPING INTO RETIREMENT FUNDS

While many people will want to avoid dipping into retirement funds (given the beating that their retirement fund assets may have taken in the stock market), the CARES Act permits taxpayers to withdraw up to \$100,000 from qualified retirement accounts without paying the 10% early withdrawal penalty. In addition, income attributable to the distribution may be spread over three tax years. Alternatively, the taxpayer may recontribute the funds to the retirement account during a 3-year period (without regard to annual limits on contributions) and avoid payment of taxes on the distribution.

In order to qualify, the withdrawal must be made a “coronavirus-related distribution,” and the distribution must be made to an individual:

- i. who was diagnosed with COVID-19;
- ii. whose spouse or dependent was diagnosed with COVID-19;
- iii. who experiences adverse financial consequences as a result of being quarantined, being furloughed or laid off, or having work hours reduced due to COVID-19; or
- iv. who is unable to work due to a lack of child care due to COVID-19, or closing or reducing hours of a business owned or operated by the individual due to COVID-19.

Only distributions occurring after Jan. 1, 2020, and before Dec. 31, 2020, may qualify. The retirement plan must be amended to permit such distributions.

Individuals described above who qualify to take a coronavirus-related distribution may also obtain a retirement plan loan of up to \$100,000, rather than being subject to the regular limit of \$50,000, if the loan is obtained during the next six months (within 180 days after March 27, 2020). This is only available through retirement plans that otherwise permit plan loans.

For those who are looking to retain assets in their retirement accounts, the CARES Act waives the requirement to obtain a minimum distribution during 2020 from an IRA and certain other tax-favored retirement plans.

## MORE TO COME

We continue to monitor developments in these areas. We anticipate there will be guidance from federal agencies and possibly additional legislation, so anticipate more changes and clarifications to come.

## FOR MORE INFORMATION

If you have questions or want more information regarding the tax and business provisions of the CARES Act, contact your legal counsel. If you do not have regular counsel for such matters, Foulston Siefkin LLP would welcome the opportunity to work with you to meet your specific business needs. For more information, contact

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