

CORONAVIRUS RELIEF LEGISLATION – A BREAKDOWN OF THE AVAILABLE LOANS AND EMPLOYMENT AND TAX LAW CHANGES

April 17, 2020 10:00-12:00

2.0 CLE credit hours

Understanding the New Emergency Leave Laws Under the Families First Coronavirus Response Act

Presented by: Brian J. Moore, Esq. - Dinsmore & Shohl, Charleston, WV

A Six Foot Look at the Business, Loan and Tax Reform Legislation in Response to COVID-19

Presented by: Michael W. Barill, Esq. - Steptoe & Johnson, Morgantown, WV



Brian J. Moore

Partner

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Brian represents companies in labor, employment, deliberate intent, and general litigation. His business-oriented approach enables him to guide clients through a myriad of challenges. He draws on his experience to help clients reach efficient resolutions -- or pursue litigation and trial -- as the situation warrants. Working with clients in the banking, insurance, retail, health care, energy, hospitality, and food and beverage industries, he has guided them through an array of issues, including discrimination, harassment, wage and hour, deliberate intent, unfair labor practice, union representation, injunction, and general litigation matters. Brian has substantial experience practicing in both state and federal courts, including trying cases to verdict, as well as practice before the West Virginia Human Rights Commission, the Equal Employment Opportunity Commission, and the National Labor Relations Board. He has also drafted and litigated employment and arbitration agreements, covenants not to compete, and various other contracts.

He places a premium on partnering with his clients to learn their operations and culture as he builds a strategy that suits their needs. He often works closely with in-house counsel, human resources professionals, and company management, taking a proactive approach to help clients anticipate and overcome challenges before they arise. He prepares employee handbooks, conducts supervisory training, and understands the increasing role of technology and social media in the workplace.

Brian is an active speaker and writer and has published a book entitled *The Pocket Guide to West Virginia Law*. In addition, he speaks, writes and provides training on leadership, networking, time management and other personal development topics. When he is not practicing law, speaking, or writing, Brian is an avid fitness, automobile and college football enthusiast.

Services

- Labor
- Employment
- Litigation
- Employment Discrimination Litigation
- Labor Arbitrations

- Collective Bargaining Negotiations
- NLRB Issues
- Strike Preparation/Litigation
- Wage/Hour Law
- Wrongful Discharge
- Workplace Safety
- Audits, Counseling & Training
- First Amendment & Media
- Natural Resources Industry

Education

- West Virginia University College of Law (J.D., 2001)
 - West Virginia Law Review, executive editor for research
 - Class treasurer
- West Virginia University (B.S.B.A., *summa cum laude*, 1998)
 - Accounting

Bar Admissions

- West Virginia
- Kentucky

Court Admissions

- U.S. Supreme Court
- Kentucky Supreme Court
- West Virginia Supreme Court of Appeals
- U.S. Court of Appeals for the Fourth Circuit
- U.S. District Court for the Eastern District of Kentucky
- U.S. District Court for the Western District of Kentucky
- U.S. District Court for the Southern District of West Virginia
- U.S. District Court for the Northern District of West Virginia

Affiliations/Memberships

- Mountain State Rotary, president (2013 - 2015)
- Putnam County Chamber of Commerce, Board of Directors
- Generation Putnam, director

- Generation West Virginia, Board of Directors (2013 - 2015)
- Defense Trial Counsel of West Virginia, Chairperson of Employment Law Committee (2009 - 2010)
- Habitat for Humanity of Kanawha & Putnam County, Board of Directors (2011 - 2012)
- Appalachian Reading Center, Inc., Board of Directors (2009 - 2012)
- Problem Gamblers' Help Network of West Virginia Advisory Board (2009 - 2012)
- American Bar Association, Section of Labor and Employment Law
- Defense Research Institute (DRI), Employment Law Committee
- West Virginia Bar Association
- Kentucky Bar Association
- Kanawha County Bar Association
- West Virginia Bar, Employment Law Committee
- Generation Charleston, Membership Committee
- WVU Alumni Association
- Energy & Mineral Law Foundation
- Leadership West Virginia, Class of 2012
- Leadership Putnam County, Class of 2009

Distinctions

- *Best Lawyers*®
 - Employment Law - Management and Litigation - Labor and Employment
- West Virginia *Super Lawyers*®
- *West Virginia Rising Stars*®
- Peer Review Rated AV in *Martindale-Hubbell*
- National Kidney Foundation of Maryland, Volunteer Service Award (2008)
- University of Virginia Trial Advocacy Institute (2004)
- Generation Next: 40 Under 40 award by *The State Journal* (2011)
- Young Leader Award, Putnam County Chamber of Commerce

Experience

Represented a Company in NLRB Charges Related to Collective Bargaining Negotiations (2017)

We successfully represented a Caterpillar dealer in NLRB charge following last best final offer and implementation in collective bargaining with the Operating Engineers.

Secured Favorable Resolution for a Publicly Held Client in Hazing Case (2013)

We obtained the favorable and confidential resolution of a case for a publicly held client where two employees claimed constructive discharge following unfortunate horseplay and extreme hazing which led to embarrassing allegations and two constructive discharges.

Ellis v. West Virginia American Water Company, Inc. (Kanawha County, WV 05-C-749) (2010)

Successful defense in suit by HR manager alleging sex discrimination by company where HR manager was discharged for inappropriate e-mail communications. Obtained summary judgment on all issues on case of trial.

Represented a Hospital Following Collective Bargaining (2010)

We successfully defended a hospital in NLRB charge following the implementation of its last best final offer in collective bargaining with the USW.

Hospital and Union

Successfully defended against an unfair labor practice charge alleging that the Hospital improperly declared impasse and implemented its last best final offer.

Plaintiff v. Hospital

Successfully obtained reversal by the West Virginia Supreme Court of an award of unemployment compensation benefits.

Plaintiff v. Large Retailer

Obtained summary judgment in United States District Court for the Southern District of West Virginia on disability discrimination claim brought by former employee.

Plaintiff v. Regional Airline

Successfully obtained reversal by the West Virginia Supreme Court of the West Virginia Human Rights Commission's finding of discrimination.

Publications

February 28, 2020

NLRB Publishes Final Rule on Joint Employers

December 19, 2019

NLRB Restores Longstanding Dues Checkoff Rule

December 16, 2019

NLRB Issues Final Rule Modifying Representation Case Procedures

September 25, 2019

Breaking: US DOL Final OT Rule Raises the FLSA Exemption Thresholds, Effective Jan. 1, 2020

September 18, 2019

MV Transportation Inc. – NLRB rules on employer unilateral action

September 11, 2019

NLRB Issues New Decision Adopting 3 Part Test for Analyzing Bargaining Unit Scope Disputes

September 4, 2019

FMLA for School IEP Meetings

August 20, 2019

NLRB Addresses Several Issues Involving Mandatory Arbitration Agreements Following Supreme Court Opinion in Epic Systems

August 8, 2019

Fifth Circuit Court of Appeals Enjoins EEOC Guidance on use of Criminal History in Employment Decisions

June 18, 2019

NLRB Will No Longer Require Employers to Permit Union Organizers in “Public Space” on Employers’ Property

June 3, 2019

U.S. Supreme Court Rules Title VII’s Administrative Charge-Filing Requirement is Not Jurisdictional

July 26, 2018

The Top 10 Reasons Your Organization Should Have an Employee Handbook

April 7, 2017

Employer’s Rights and Obligations When Dealing With Employees on Workers’ Compensation Leave
Sterling Education Services

April 6, 2017

Privacy and Today’s Technology in the Workplace
Sterling Education Services

November 23, 2016

District Court in Texas Issues Nationwide Injunction on New DOL Overtime Rule

December 1, 2014

Keeping Pace With Social Media and Other Technologies in the Workplace, from The Impact of Recent Regulatory Developments in Employment Law (2015 Edition, Aspatore Publishing).

January 1, 2013

The Pocket Guide to West Virginia Employment Law
New Linxus Publishing, LLC

June 1, 2012

Employment Litigation Issues

May 25, 2012

The Uniformed Services Employment and Re-employment Rights Act

May 17, 2012

Retaliation Claims Under Civil Rights Statutes

May 10, 2012

How Do You Handle Employees in the Workplace?

May 3, 2012

Employment Law Issues in the Workplace: EEOC Developments

February 17, 2012

Accommodating Religion in the Workplace is a Balancing Act

Understanding the New Emergency Leave Laws Under the Families First Coronavirus Response Act

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The Families First Coronavirus Response Act (“FFCRA”), went into effect on April 1, 2020 and it will end on December 31, 2020 (unless extended). This new temporary law requires almost all employers with fewer than 500 employees to provide “emergency paid sick leave” and new FMLA leave for a “public health emergency” related to COVID-19.

FFCRA

What is the effective date of the act?

The FFCRA’s paid leave provisions are effective on April 1, 2020, and apply to qualifying leave taken between April 1, 2020 and December 31, 2020.

When will the DOL begin enforcement?

The DOL has stated that it will not begin enforcement actions until April 17, 2020, so long as employers have made reasonable good faith efforts to comply with the act, the employer remedies any violations as soon as practical, and the violations were not willful.

Who are covered employers?

The FFCRA applies to private employers with fewer than 500 employees and covered public employers. The determination on whether the employer has 500 or more employees is conducted at the time the employee is taking leave. The calculation includes employees on leave, temporary employees, jointly-employed employees, and day-laborers. Independent contractors are not included in the calculation.

Employers with fewer than 50 employees may seek an exemption for the school-related portions of the leave law where their economic viability would be jeopardized by compliance.

Employers employing health care providers or emergency responders may elect to exclude those employees from this leave. This exemption is broad and covers just about all of the health care provider’s employees, subject to the discretion of the employer as to who to include.

When can employees be aggregated to meet the 500-employee threshold?

The law does not address whether limited liability companies and subsidiaries may aggregate all employees to reach the threshold of 500 employees.

Generally, a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees may be aggregated in reaching the 500-employee threshold.

Where a corporation has an ownership interest in another corporation, the two corporations are considered separate employers unless they qualify as joint employers under the FLSA. Under the FFCRA, if two entities are considered joint employers, their common employees may be aggregated in determining if the 500-employee threshold is met for Emergency Paid Sick Leave (“EPSL”) and the Emergency Family and Medical Leave Expansion Act (“EFMLA”). Factors for determining if separate entities are joint employers include whether the putative joint employer:

- Hires or fires the employee;
- Supervises and controls the employee’s work schedule or conditions of employment to a substantial degree;
- Determines the employee’s rate and method of payment; and
- Maintains the employee’s employment records.

For purposes of the EFMLA, entities are separate employers unless they meet the integrated employer test. Factors for determining if separate entities are an integrated employer include:

- (1) Common Management;
- (2) Interrelation of Operations;
- (3) Centralized Control of Labor Relations; and
- (4) Degree of common ownership or financial control.

When are employers with fewer than 50 employees exempt?

Employers with fewer than 50 employees may seek an exemption under certain circumstances.

Emergency Family Medical Leave

Who are eligible employees?

Emergency FMLA would be available to any employee who has been employed for 30 calendar days, unless the employee is excluded under regulations issued by the Secretary of Labor (as described above). To be considered employed for at least 30 calendar days, the employee must have been on the company’s payroll for the 30 calendar days immediately prior to the day the leave would begin, even if it was in a temporary capacity.

What events trigger Emergency FMLA leave?

The FFCRA's new emergency FMLA covers eligible employees who must care for a minor child because of a COVID-19-related school closure or childcare provider loss *if* the employee is unable to work from home or telework. Employees who become ill with COVID-19 or are caring for family members who have COVID-19 may still be covered by the FMLA's original unpaid "serious health condition" provision.

Is the Emergency FMLA leave paid?

Under this leave, the first 10 days of leave are unpaid. For the final 10 weeks, employees receive up to two-thirds (2/3) of their regular rate of pay, with payments capped at \$200 per day and \$10,000 in the aggregate (\$12,000 in the aggregate if emergency paid sick leave is utilized).

Employees may choose to utilize emergency paid sick leave or apply any current paid time off to the unpaid weeks, but employers may not require employees to do so, regardless of existing company policy.

Are overtime hours included?

Yes. The Emergency Family and Medical Leave Expansion Act requires employers to pay an employee for hours the employee would have been normally scheduled to work even if that is more than 40 hours in a week. However, employees are still subject to the daily cap and the bill does not require premium pay for overtime hours.

Does the FFCRA mandate job restoration following leave?

Emergency FMLA leave taken is generally job-protected requiring an employer to restore employees to their prior positions or an equivalent position following leave. The FFCRA includes an exception for employers with fewer than 25 employees, if the employee's position no longer exists following leave due to operational changes caused by a public health emergency, subject to certain conditions that include requiring the employer to attempt to place the employee in an equivalent position over a one-year period.

How long is the Emergency FMLA leave available for eligible employees?

The FFCRA sunsets on Dec. 31, 2020.

Emergency Paid Sick Leave

How long must the employee be employed to qualify for Emergency Paid Sick Leave?

Covered employers must give emergency paid sick leave to any employee, *regardless of the length of employment*, for a qualifying emergency related to the coronavirus.

What emergency paid sick leave benefits are employees entitled to?

Full-time employees are entitled to 80 hours of emergency paid sick leave, capped at \$511 per day (\$5,110 total) when the employee is absent for eligible reasons related to his or her own circumstances or capped at \$200 per day (\$2,000 total) for reasons related to eligible care for another person. Part-time employees are also entitled to receive a proportionately similar amount of leave based upon their average hours they work in a two-week period.

In what circumstances can employees utilize Emergency Paid Sick Leave benefits?

The FFCRA's emergency paid sick leave component provides for emergency paid sick leave if the employee is unable to work (or telework) because the employee:

- (1) is subject to a federal, state or local quarantine or isolation order;
- (2) has been advised by a health care provider to self-quarantine;
- (3) is experiencing symptoms of COVID-19 and is seeking a diagnosis;
- (4) is caring for an individual covered by (1) or (2) above;
- (5) is caring for a son or daughter whose school or place of care has been closed or whose child care provider is unavailable due to COVID-19 precautions; or
- (6) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

What is the rate of pay for emergency paid sick leave benefits?

It depends on the employee's normal schedule and the reason for the leave.

Employees absent for their own health emergency (qualifying reasons (1), (2), or (3) above) should be paid at the highest of: (1) regular rate of pay; (2) federal minimum wage; or (3) the local minimum wage. Payments are capped at \$511 per day (\$5,110 in the aggregate).

Employees absent to care for a sick family member, a child unable to attend school or place of care has been closed or whose child care provider is unavailable due to COVID-19, or is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services (qualifying reasons (4), (5), or (6) above) are entitled to two-thirds (2/3) of their regular rate of pay, capped at \$200 per day (\$2,000 in the aggregate).

Are overtime hours included?

Yes. However, employees are only entitled to a total of 80 hours of emergency paid sick leave. For example, an employee who is scheduled to work 50 hours a week may take 50 hours of paid

sick leave in the first week and 30 hours of paid sick leave in the second week. Additionally, the Emergency Paid Sick Leave Act does not require premium pay for overtime hours.

Does emergency paid sick leave carryover from year to year?

No. Emergency paid sick leave will not carry over from year to year.

How long do the benefits last?

The benefits expire on December 31, 2020.

Can employers require employees to utilize other paid leave provided by the employer before utilizing emergency paid sick leave?

No.

Can employers require that employees notify them of their intention to take emergency paid sick leave under the act?

Yes. Employers may require notice of the use of leave after the first workday (or portion thereof) that an employee receives paid sick time under the act. Further guidance on the necessary documentation is located below.

Can employers deny emergency paid sick leave if they gave paid leave for a reason identified in the Emergency Paid Sick Leave Act prior to the Act going into effect?

No. The Emergency Paid Sick Leave Act imposes a new leave requirement on employers that is effective beginning on April 1, 2020. Employers must provide emergency paid sick leave in addition to any leave already provided.

Additional Questions:

What are employer's notice requirements under the FFCRA?

Each covered employer must post a notice of the FFCRA requirements in a conspicuous place on its premises. The DOL has developed a poster available online at its website. An employer may also satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website.

Are the emergency paid leave requirements retroactive?

No. Only leave taken after April 1, 2020 is qualified.

Are employees eligible for leave if the employer closes a worksite?

No. If an employer closes a worksite due to lack of business or because it is required to pursuant to a local, state or federal directive, its employees are not entitled to FFCRA paid leave benefits. However, the employee may be eligible for unemployment insurance benefits.

If an employer closes while employees are receiving FFCRA paid leave benefits, the employer must pay employees for any FFCRA paid leave benefits used before the employer closed, but employees are not entitled to FFCRA paid leave benefits from the date the employer closes the worksite.

Are employees eligible for leave if the employee is furloughed?

No. If an employee is furloughed, they are not qualified for FFCRA paid leave benefits. However, the employee may be eligible for unemployment insurance benefits.

What is the impact on eligibility for employees whose work hours have been reduced?

Employees are not able to utilize FFCRA paid leave benefits for hours that they are no longer scheduled to work due to a reduction in hours. The DOL's rationale for this is that employees are not prevented from working those hours due to a COVID-19 qualifying reason, even if the reduction in hours was somehow related to COVID-19. However, the employee may be eligible for partial unemployment insurance benefits.

Can employees take paid sick leave or expanded family and medical leave intermittently?

It will depends on why the employee is taking paid sick leave and whether the employer agrees to allow intermittent leave.

If the employee is utilizing emergency paid sick leave or emergency family medical leave intermittently to care for a child whose school or place of care is closed, or whose child care provider is unavailable because of COVID-19 related reasons, the employee may take leave intermittently if the employer agrees.

Unless an employee is teleworking, paid sick leave is only available in full-day increments. Intermittent leave is not available if the employee is working on site and if he/she: (1) is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; (2) has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; (3) is experiencing symptoms of COVID-19 and seeking a medical diagnosis; (4) is caring for an individual who either is subject to a quarantine or isolation order related to COVID-19 or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or (5) is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services. Unless the employee is teleworking, once he/she begins taking paid sick leave for one or more of these qualifying reasons, he/she must continue to take paid sick leave each day until he/she either (1) uses the full amount of paid sick leave or (2) no longer has a qualifying reason for taking paid sick leave.

Can employees collect FCCRA benefits and unemployment benefits simultaneously?

No. If the employer provides FCCRA benefits, the employee is not eligible for unemployment insurance.

Can employees use their employer's preexisting leave entitlements and their FFCRA paid leave benefits concurrently for the same hours?

No. Unless your employer agrees, if you are eligible to take FFCRA paid leave benefits and other paid leave benefits provided by your employer, you must choose one type of leave. Your employer may allow you to supplement the amount you receive in FFCRA paid leave benefits, up to your normal earnings, with preexisting leave. For example, if the employee is receiving 2/3 of their normal earnings from emergency family medical leave under the FFCRA, the employer may permit the employee to utilize their pre-existing employer-provided paid leave for the additional 1/3 of their normal earnings.

Can an employer pay their employees more than they are entitled to receive for emergency paid sick leave or emergency family and medical leave?

Yes, but employers cannot claim a tax credit for the amounts in excess of the FFCRA's statutory limits.

Are there anti-retaliation provisions?

Yes. Employers may not discharge, discipline, or otherwise discriminate against any employee who takes leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

What record keeping is required?

For emergency paid sick leave, the employer must require employees to provide documentation sufficient to show:

1. Employee's name;
2. Qualifying reason for requesting the leave;
3. A statement that the employee is unable to work, including telework, and the reason for the inability to work;
4. The dates for which leave is requested; and
5. Documentation supporting the qualifying reason for requesting leave.

For quarantine or isolation orders, the employee will need to provide documentation showing the quarantine or isolation order, or the name of the health care provider who advised them to self-quarantine, such as a copy of the federal, state, or local quarantine or isolation order or written documentation by a health care provider advising the employee to self-quarantine. For employers seeking a tax credit, they should return this documentation for the records and consult IRS

applicable forms, instructions and information for the procedures that must be followed to claim a tax credit.

For emergency FMLA leave, employees must provide appropriate documentation to support the need for leave as would be required for conventional FMLA leave requests, such as a notice posted on a government, school or day care website, published in a newspaper, or on an email from an employee or official of the school, place of care, or child care provider. This documentation would also be sufficient for paid sick leave taken for COVID-19 school or child care closings.



Michael W. Barill | Member

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EDUCATION LL.M. Emory University

Mike Barill focuses his practice in taxation, and trust and estate administration. He has significant experience in estate planning, estate administration, fiduciary litigation, taxpayer representation before the Internal Revenue Service and U.S. Tax Court, corporate and partnership taxation, retirement planning, and merger structuring and reorganizations. He is the leader of the firm's Tax Practice Group and Estate and Trust Team.

REPRESENTATIVE EXPERIENCE

Represented owners and management in transferring a multi-million dollar closely held business to its employees through the use of an Employee Stock Ownership Plan (ESOP). The majority shareholders were able to receive tax-free results on the sale, and the transaction was structured to ensure that the company going forward did not pay federal income tax.

Assisted closely held professional employer organization with evaluating offers for company divestiture. Represented client in negotiating, structuring, and papering a stock sale and partial roll-over transaction.

Represented locally owned restaurant in front of the West Virginia Office of Tax Appeals on petition for reassessment of sales and use tax.

Represented multimillion-dollar trust in defending the trustee against claims by beneficiaries of breach of fiduciary duties and excessive compensation.

Corporate reorganization and consolidation of family-owned businesses to streamline operations and increase profitability.

Advised auto dealership owner in evaluating offers to purchase franchise, real property, and assets.

Represented trust beneficiary in litigation in an effort to protect interests and uphold trustee obligations.

Defended a corporation on an appeal before the United States Court of Appeals for the Fourth Circuit where the corporation sought damages for the misapplication and miscalculation of loan terms.

Represented large corporations in stock and asset sales, tax-free and taxable mergers and acquisitions.

Assisted multi-tier corporate conglomeration in converting into S corporation with numerous subchapter S subsidiaries.

Served as counsel to client on tax penalty abatement case before the Internal Revenue Service.

Represented executor/beneficiary in defending against a breach of fiduciary duty and will contest action.

Represented numerous clients on federal estate, gift, generation-skipping, transfer, and income tax matters.

Represented large corporate executive in successfully negotiating supplemental executive retirement plan and split dollar insurance arrangement.

Represented client in structuring a part sale/part conservation easement gift to a government agency administered by both federal and West Virginia governments.

Represented large estates in settling and dissolving various businesses upon the death of the decedent.

Represented numerous clients on estate administration, elective share, and other probate matters in West Virginia, Pennsylvania and Ohio.

Lead counsel in negotiating sale of a home health care business for \$35M in which the transaction was structured as a stock sale with a 338(H)(10) election to provide tax treatment as an asset.

Handled the sale of metals company for approximately \$5M in which the purchaser used assets of the company as collateral.

Represented companies in corporate acquisitions in the form of stock sales in excess of \$2M.

Drafted numerous stock restriction agreements and membership interest restriction agreements as well as cross purchase agreements between shareholders to cover limitations on transferability and buy-backs in stock and membership interest.

Drafted restricted stock agreements to limit the vesting of stock to predetermined events and incorporated an 83(b) election to accelerate the taxation to the year of the transaction.

WORK EXPERIENCE

1996 Steptoe & Johnson PLLC

RECENT PUBLICATIONS / SPEAKING ENGAGEMENTS

Mr. Barill has been a featured speaker at West Virginia and Pennsylvania CLE and CPE seminars, as well as numerous civic organizations on taxation, fiduciary litigation, special needs trusts, elder law, and estate planning issues.

“ESOP is Not a 4 Letter Word” – West Virginia Society of CPAs June 2019

Mr. Barill is an Adjunct Lecturer and is a Supervising Attorney at the Low Income Taxpayer Clinic of the West Virginia University College of Law.

MEMBERSHIPS AND AWARDS

PROFESSIONAL

The Best Lawyers in America®

Best Lawyers® 2020 Morgantown, WV Tax Law, Lawyer of the Year

Best Lawyers® 2015 Morgantown, WV Trusts and Estates, Lawyer of the Year

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Tax and Estate Sections, American Bar Association

Former President, North Central Estate Planning Council, Inc.

Probate Committee, American Bar Association

Tax Law Section, Pennsylvania State Bar

ALI-ABA Estate Planning Advisory Board

INDUSTRY/CIVIC

North Central West Virginia Estate Planning Council

Columbus Estate Planning Council

COVID-19 Business, Loans, and Individual Provisions

[Synopsis for News Alert Email.]

In response to the COVID-19 pandemic, on March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) into law in an effort to stimulate the economy and provide expanded benefits to those who have suffered from the impact of this virus. The implementation of the CARES Act affects both individuals and businesses alike. In essence, the CARES Act provides \$2 trillion for businesses, individuals, federal agencies, and state and local governments to make capital available quickly and broadly. Here is a our breakdown of what individuals and businesses need to know:

- **Business Loan Provisions.** The CARES Act implemented and expanded on various opportunities for businesses to qualify and apply for loans to offset the impact of COVID-19, some of which are forgivable.
 - **Paycheck Protection Program.** The Paycheck Protection Program sets aside \$350 billion in government-backed loans. This Program creates a type of emergency loan that is forgivable when utilized to maintain payroll through June and is intended to incentivize small businesses to not lay off employees and to rehire any employees that were laid off due to COVID-19.
 - **Economic Injury Disaster Loans.** The CARES Act expands eligibility for the SBA’s Economic Injury Disaster Loans and eases the application procedure. Notably, the CARES Act allows an applicant to utilize an EIDL to borrow up to \$2 million at 3.75% interest for a period of up to 30 years.
 - **Coronavirus Economic Stabilization Act.** The CARES Act provides \$500 billion for the Treasury Secretary to provide loans, loan guarantees, and other investments to eligible businesses to provide liquidity related to losses incurred as a result of COVID-19.
 - **Assistance for Mid-Size Businesses.** The CARES Act authorizes and directs the Treasury Secretary to implement a program to provide financing to banks and other lenders that make direct loans to eligible businesses, including nonprofits, with between 500 and 10,000 employees.
- **Business Tax Provisions.** The CARES Act makes prominent changes to the existing tax laws and policies in order to ease the burden on businesses impacted by COVID-19.
 - Businesses are now eligible for an employee retention tax credit.
 - Businesses and self-employed individuals may delay their payroll tax payments.
 - The limitations on utilizing net operating losses to offset taxable are relaxed, now allowing a business to carry back these losses for 5 years. The CARES Act also temporarily removes the taxable income limitation on NOLs.
 - Corporations due to receive alternative minimum tax credits at the end of 2021 may claim a refund now.
- **Individual Provisions.** The CARES Act made several changes that are relevant to individuals aside from business considerations.

- Individuals are eligible for a rebate of \$1,200 for single taxpayers making gross income up to \$75,000 and \$2,400 for married taxpayers making gross income up to \$150,000;
- Individuals are eligible for an additional \$500 rebate per qualifying child;
- Waives the 10% early withdrawal penalty for distributions up to \$100,000 from qualified retirement accounts for COVID-19 related purposes;
- Waives the required minimum distribution rules for certain defined contribution plans and IRAs for 2020; and
- Allows an above-the-line deduction for charitable contributions made in 2020 and modifies the income limitation relating to such contributions.

It is imperative that individuals determine whether any of the individual or business provisions are appropriate in light of the COVID-19 to ensure their personal and/or business needs are met, as well as the needs of their employees. Of course, this article does not contain all of the details the CARES Act implemented and does not cover every exception that may be applicable.

If you have any questions or concerns about how the CARES Act may affect your tax or business plans, please contact one of the authors of this alert.

[Information for full alert is below, to be included with the brief overview above.]

Below are further details on the business, loan, and tax provisions applicable to both businesses and individuals from the CARES Act.

LOAN ASSISTANCE PROVISIONS

Express Bridge Loan Pilot Program:

Unilateral pronouncement of the SBA

- While not part of the CARES legislation, the SBA announced as a response to COVID-19, small businesses who currently have a business relationship with an SBA Express Lender may access up to \$25,000 with less paperwork. These loans may provide vital economic support to small businesses to help overcome the temporary loss of revenue they are experiencing and can be a term loan or used to bridge the gap while applying for a direct SBA Economic Injury Disaster Loan. If a small business has an urgent need for cash while waiting for a decision and disbursement on Economic Injury Disaster Loan, they may qualify for an SBA Express Disaster Bridge Loan.
- Terms
 - Up to \$25,000
 - Fast turnaround
 - Will be repaid in full or in part by proceeds from the EIDL loan

Small Business Administration's Emergency Injury Disaster Loan ("EIDL")

Section 1110 of Coronavirus Aid, Relief and Economic Security Act "CARES ACT"

- The CARES Act expands the existing Small Business Administration's Emergency Injury Disaster Loan ("EIDL") Program under Section 7(b)(2) of the Small Business Act which allows an applicant to borrow up to \$2 million at 3.75% interest for a period of up to 30 years. The bill expands the covered period for the hardship is from January 31, 2020, through December 31, 2020. Nonprofits receive a better rate at 2.75%.
- Eligible entities for participation in this loan program include small businesses (500 or fewer employees); sole proprietors; independent contractors; cooperatives (500 or fewer employees); Employee Stock Owned Plans (500 or fewer employees); and Tribal small business concerns.
- The EIDL loan program waives the following requirements under Section 7(b)(2):
 - Any required personal guarantee on loans of \$200,000 or less;
 - The requirement that an applicant be in business for at least one year before the disaster; and
 - The requirement that an applicant is unable to obtain credit elsewhere.
- The CARES Act allows the SBA to approve an applicant solely on credit score, without requiring that the applicant submit a tax return or by "alternative appropriate methods" to determine the applicant's ability to repay.
- The CARES Act allows an applicant to request from the SBA an emergency advance of up to \$10,000 as a "grant." This grant does not have to be repaid, even if the applicant's EIDL loan application is subsequently denied. The SBA is charged with verifying an applicant's eligibility via "self-certification."
- The "grant" may be used to provide paid sick leave to employees unable to work because of COVID-19, maintaining payroll to retain employees, meeting increased costs to obtain materials unavailable due to supply chain disruption; making rent or mortgage payments; and repaying obligations that cannot be met due to loss of revenue.

Paycheck Protection Program

Section 1102 of Coronavirus Aid, Relief and Economic Security Act "CARES ACT"

Appropriations - \$350 billion

- **General** – The CARES Act (the "Act") expands the existing Small Business Administration's Loans to Small Business Concerns Program under Section 7(a) of the Small Business Act. Under this Program, before expansion by the Act, only businesses defined as small businesses by the SBA and operated for profit are eligible for loans, which are capped at \$5 million and are only 75% or 85% guaranteed. The loans are not offered directly through the SBA; instead, financial institutions like banks, credit unions, and other business lenders loan the money, and the SBA guarantees the loan.
- **Eligibility for Loan** – The Act expands eligibility during February 15, 2020 – June 30, 2020, to businesses (including sole props & self-employed) and nonprofits, veteran organization, or tribal business and
 - with **fewer than 500 employees** (subject to the limited exceptions); or
 - that meet the Small Business Administration's ("SBA") industry-based "size standard" requirements for the applicable NAICS code (based either on number of employees or annual receipts)
- **Loan Duration and Amount** – With a **maximum maturity of 10 years**, the amount may be no more than the lesser of (a) \$10 million or (b) 2.5 multiplied by the average total monthly payroll payments by the applicant for generally the one year preceding the date on which the loan is made. Note that (b) above is different for newer companies or those with seasonal employees.
 - "Payroll costs" means "the sum of payments of any compensation for employees that is a salary, wage, commission, or similar compensation; payment of cash tip or equivalent; payment for vacation, parental, family, medical or sick leave; 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, the term "payroll costs" shall not include "the compensation of an individual employee in excess of an annual salary of \$100,000, as prorated for the covered period; taxes imposed or withheld under chapters 21, 22 or 24 of the Internal Revenue Code of 1986 during the covered period; any compensation of an employee whose principal place of residence is outside of the United States; qualified sick leave wages for which a credit is allowed under section 7001 of the Families First Coronavirus Response Act (Public Law 116-127); or qualified family leave wages for which a credit is allowed under section 7003 of the Families First Coronavirus Response Act (Public Law 116-127)."
- **Interest Rate** – The Act establishes a 4% cap on interest.

- **EIDL Loan** – A borrower cannot get a Paycheck Protection Payment loan in addition to an EIDL loan for the same purpose.
- **Allowable Uses of Loan** – The proceeds of a loan can be used for payroll costs, costs related to health care benefits and regular paid leave; salaries, commission, or similar compensations; interest on any mortgage obligation (excluding payment or prepayment of principal); rent (including rent under a lease agreement); utilities; and interest on any other debt obligations that were incurred before the covered period.
- **Borrower Requirements** – Borrower must make a good faith certification that the loan is necessary due to uncertainty of current economic conditions caused by COVID-19, that the loan will be used for a permitted purpose as specified in the Act, and that the funds are not duplicative funds for the same uses. Must have been "**substantially affected by COVID-19,**" which are described as:
 - supply chain disruptions;
 - staffing challenges;
 - a decrease in sales or customers; or
 - shuttered businesses
- **Loan Forgiveness**
 - The borrower shall be eligible for loan forgiveness *equal to the following costs incurred and paid by the borrower during the 8-week period after the origination date of the loan*: payroll costs; interest payments on any mortgage incurred prior to February 15, 2020; payment of rent on any lease in force prior to February 15, 2020; and payment on any utility for which service began before February 15, 2020.
 - **Taxability** – The borrower will have no taxable income (discharge of indebtedness income) stemming from the forgiveness of the loan.
 - **General Limit on Forgiveness** – The amount forgiven shall not exceed the principal of the loan.
 - **Reduction Based on Employee Reduction** – The amount forgiven will be reduced by multiplying the forgiveness amount, as detailed above, by the quotient of the average number of full-time equivalent employees per month during the covered period over the average number of full-time equivalent employees during one of two specified periods: (1) the period beginning on February 15, 2019, and ending on June 30, 2019, or (2) the period beginning on January 1, 2020, and ending on February 29, 2020. The borrower chooses which period is ultimately used for the quotient.
 - **Reduction based on Salary & Wage Reduction** – Loan forgiveness is reduced by the amount of any reduction in salary or wages of any employee who did not receive, during any pay period during 2019, wages or salary in an amount more than \$100,000 during the covered period that is in excess of 25% of the total salary or wages during the most recent full quarter preceding the covered period.
 - **Tipped Workers** – Borrowers with tipped employees may receive forgiveness for additional wages paid to those employees.

- **Reduction Exemptions** – During the period between February 15, 2020 and thirty days after enactment of the Act, forgiveness is not reduced for reductions in employees or salary or wages if the reduction at the beginning of the period is eliminated by June 30, 2020.
- **Application** – In order to receive loan forgiveness, a borrower must submit an application with documentation detailed in the Act. The lender has sixty days from receipt of an application for forgiveness to issue a decision.
- **Remittance** – The Administrator has ninety days from forgiveness to remit the amount forgiven, increased by accrued interest, to the lender.
- **Remaining Amount** – Any loan amounts not forgiven at the end of one year is carried forward as an ongoing loan with terms of a max of ten years, at max 4% interest. The 100% loan guarantee remains intact.
- **Business Concern with more than 1 Physical Location** – During the covered period, any business concern that employs not more than 500 employees per physical location and is assigned a North American Industry Classification System (NAICS) code beginning with 72 at the time of disbursement is eligible to receive a covered loan.
- **Remaining Balance after Forgiveness** – If there is a remaining balance after the loan forgiveness detailed in section 1106 of the Act, the remaining balance shall continue to be guaranteed by the SBA, and the maximum maturity of the balance will be ten years from the application for forgiveness.
- **Loan Deferment** – For all Paycheck Protection Program Loans, all lenders are required to provide complete payment deferment (including principal, interest, and fees) for at least six months, but no more than one year. The length of the deferment appears to be at the discretion of the lender. This deferment is guaranteed even if the loan is bought on the secondary market.
- **SBA Guarantee** – The SBA's guarantee is increased to 100% for loans under the Paycheck Protection Program.
- **Lenders¹** – Lenders that are currently approved to make SBA 7(a) loans are authorized to make Program loans and are given delegated authority to determine a borrower's eligibility and creditworthiness without going through typical SBA channels.
- **Additional Lenders** – The Act provides an avenue, through the US Department of Treasury, for additional lenders to be approved to help keep workers paid and employed. Additional lenders approved by Treasury are only permitted to make Paycheck Protection Program loans, not regular 7(a) loans.

¹ Hundreds of lenders across the country make 7(a) loans, is a list of the most active section 7(a) lenders as published by the SBA <https://www.sba.gov/article/2020/mar/02/100-most-active-sba-7a-lenders>.

- **Lender Considerations** – For eligibility purposes, in lieu of determining repayment ability, lenders are required to simply determine whether a business was operational on February 15, 2020, and had employees for whom it paid salaries and payroll taxes, or a paid independent contractor.
- **Nonrecourse and Refinancing** – The Act waives the personal guarantee and collateral requirement of SBA 7(a) loans and allows loans made within a set period to be refinanced as a Payment Protection Loan.
- **Waivers** – The SBA 7(a) Loans' typical guarantee and yearly fees are waived. Additionally, borrowers cannot be charged a prepayment fee and are not required to have looked for and exhausted other loan options.
- **Lender Fees** – The Act requires the Administrator to provide a lender with a process fee for servicing the loan and sets the fee based on the amount loaned.

Subsidy for Certain Existing Loan Payments

Section 1112 of Coronavirus Aid, Relief and Economic Security Act "CARES ACT"

- The SBA is required to pay the principal, interest, and any associated fees that are owed on the covered loans for a six-month period starting on the next payment due date. Loans that are already in deferment will include an additional six months of payment by the SBA beginning with the next payment. Loans made up until six months after the enactment of the legislation will also receive a full six months of loan payments by the SBA.
- The Act defines a covered loan as an existing 7(a) (including Community Advantage Pilot Program loan), 504, or microloan product. Paycheck Protection Program (PPP) loans are not covered.
- The SBA must make payments no later than 30 days after the date on which the first payment is due. It requires the SBA to still make payments even if the loan was sold on the secondary market.
- **Other Requirements** – Requires SBA to encourage lenders to provide deferments and allows lenders, up until one year after enactment, to extend the maturity of SBA loans in deferment beyond existing statutory limits.

Coronavirus Economic Stabilization Act of 2020

Section 4003 of Coronavirus Aid, Relief and Economic Security Act "CARES ACT"

Appropriations – \$500 billion

The **Coronavirus Economic Stabilization Act (CESA)** provides \$500 billion for the Secretary to provide loans, loan guarantees, and other investments in accordance with the Federal Credit Reform Act of 1990 (2 U.S.C. § 661) to eligible businesses, states, and municipalities to provide liquidity related to losses incurred as a result of the coronavirus to be made available as follows:

- (1) \$25 billion for air carriers.
- (2) \$4 billion for cargo air carriers.
- (3) \$17 billion for “businesses critical to maintaining national security,” which term is not defined in the Act. This term may be defined in Secretary's procedures and rules when released.
- (4) \$454 billion to programs or facilities established by the Federal Reserve to provide liquidity to the financial system that supports lending to eligible businesses, states or municipalities by:
 - a. Making "direct loans" to eligible businesses;
 - b. Purchasing obligations or other interests directly from issuers of such obligations or other interests; or
 - c. Purchasing obligations or other interests in secondary markets or otherwise.
- A loan, loan guarantee, or other investment under CESA shall be on such terms and conditions as the Secretary determines appropriate. A loan shall be at a rate determined by the Secretary based on the risk and current average yield on outstanding market obligations of the United States or comparable maturity.
- Within 10 days after enactment, the Secretary shall publish procedures dealing with these loans and programs.

Loans and loan guarantees for the three enumerated industries. Items (1), (2), and (3) above must meet the following criteria:

- Alternative credit is not reasonably available;
- The loan or loan guarantee is sufficiently secured or is made at a rate that
 - Reflects the risk; and
 - Is to the extent practicable, not less than an interest rate based on market conditions for comparable obligations prior to the outbreak of the virus;
- The term of the loan is as short as practical and not longer than 5 years;
- Until 12 months after the loan is no longer outstanding, the eligible business nor any affiliate will not purchase an equity security listed on the national securities exchange of the eligible business or any parent company, unless contractually obligated prior to the enactment of the Act;
- Until 12 months after the loan is no longer outstanding, the eligible business will not pay dividends or make other capital distributions with respect to common stock;
- Until September 30, 2020, the eligible business shall maintain employment levels as of March 24, 2020, to the extent practicable, and in any case not reduce employment levels by more than 10%;
- Certification that the eligible business is organized in the United States or under its laws and has significant operations in the US and a majority of its employees based in the US;

- The eligible business must have incurred or is expected to incur covered losses such that continued operations of the business are jeopardized, as determined by the Secretary.
- The Secretary may only enter into an agreement under paragraph (1), (2), or (3) of § 4003(b) if such agreement provides that during the period beginning on the date on which the agreement is executed and ending 1 year after the obligation is no longer outstanding:
 - No officer or employee whose total compensation exceeded \$425,000 in calendar year 2019 (unless determined by a collective bargaining agreement) will:
 - Receive total compensation which exceeds the total compensation received in 2019; or
 - Receive severance pay or other benefits which exceeds twice the maximum compensation received in 2019.
 - No officer or employee whose total compensation exceeded \$3 million in 2019 may receive compensation in excess of the sum of:
 - \$3 million; and
 - 50% of the excess over \$3 million received in 2019
- The Secretary shall not issue a loan unless:
 - The eligible business has issued securities that are traded on a national securities exchange; and
 - The Secretary receives a warrant or equity interest in the eligible business; or
 - In case the preceding two bullets do not apply, the Secretary receives:
 - A warrant or equity interest in the eligible business; or
 - A senior debt instrument.

Loans, loan guarantees and other investments referenced in Item (4) above for general businesses (approximately 90% of the allocated \$500 billion) can either be through "direct loans" or "bank loans":

Direct Loans:

- For purposes of this paragraph, "direct loan" means a loan under a bilateral loan agreement that is:
 - Entered into directly with an eligible business as borrower and
 - Not part of a syndicated loan, a loan originated by a financial institution in the ordinary course of business, or a securities or capital markets transaction.
- The Secretary may make a loan, loan guarantee, or other investment under paragraph (4) as part of a program or facility that provides direct loans upon the following criteria (the Secretary may waive to protect the interests of the federal government):
 - Until 12 months after the loan is no longer outstanding, the eligible business nor any affiliate will not purchase an equity security listed on the national securities exchange of the eligible business or any parent company, unless contractually obligated prior to the enactment of the Act;
 - Until 12 months after the loan is no longer outstanding, the eligible business will not pay dividends or make other capital distributions; and
 - Complies with the limitations on compensation set forth in § 4004.
- Applicable requirements under § 13(3) of the Federal Reserve Act (12 USC § 343(3)) apply.

- The eligible business must be organized in the United States or under its laws and has significant operations in the US and a majority of its employees based in the US.

Assistance for Mid-Sized Businesses:

- The Secretary shall endeavor to implement a program or facility described in Paragraph (4) above that provides financing to banks and other lenders that make direct loans to eligible businesses, including nonprofits, with between 500 and 10,000 employees; an annualized interest rate that is not higher than 2% per annum; and for the first 6 months (or longer if determined by the Secretary), no principal or interest is due. The borrower shall make a certification that:
 - The uncertainty of economic conditions makes the loan necessary to support ongoing operations;
 - The funds received will be used to maintain 90% of the workforce at full compensation and benefits until September 30, 2020;
 - The recipient intends to restore 90% of the workforce as existed on February 1, 2020, and to restore all compensation and benefits no later than 4 months after the termination of the public health emergency;
 - The recipient is domiciled in the US with significant employees and operations in the US;
 - The recipient is not a debtor in bankruptcy;
 - The recipient business is organized in the United States or under its laws and has significant operations in him the US and a majority of its employees based in the US.
 - The recipient will not pay dividends or make other capital distributions with respect to common stock or repurchase an equity security that is listed on a national securities exchange while the loan is outstanding, except as contractually obligated prior to enactment;
 - The recipient will not outsource or offshore jobs for the term of the loan and 2 years after repayment;
 - The recipient will not abrogate existing collective bargaining agreements for the term of the loan and 2 years after repayment; and
 - The recipient will remain neutral in any union organizing effort for the term of the loan.
- The Secretary will endeavor to implement a similar program to provide liquidity to states and municipalities.
- The principal amount of any obligation issued under this section shall not be reduced through loan forgiveness and shall be treated as indebtedness for purposes of the Internal Revenue Code.
- The provisions of § 4025 relating to protection of collective bargaining agreements apply to loans or loan guarantees made under this section.

Foreclosure Moratorium and Consumer Right to Request Forbearance

- "Federally backed mortgage loan" means any loan secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of 1-4 families that is:
 - Insured by the FHA;

- Insured under 12 USC. § 1715z-20 (National Housing Act);
- Guaranteed under 12 USC. 1715z-13a, 1715z-13b (Housing and Community Development Act of 1992);
- Guaranteed or insured by the VA;
- Made, guaranteed or insured by USDA; or
- Purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.
- A borrower with a Federally backed mortgage loan experiencing financial hardship due to, directly or indirectly, the COVID-19 emergency may request forbearance by submitting a request and certifying the financial hardship is due to the emergency.
- The forbearance shall be granted for up to 180 days and may be extended by up to 180 days at the request of borrower.
- During the forbearance, no fees, penalties, or interest beyond the amounts scheduled or calculated as if the borrower made all payments on time and in full shall accrue.
- Except with respect to vacant or abandoned property, a servicer of a Federally backed mortgage loan may not initiate judicial or non-judicial foreclosure, move for a foreclosure judgment or order of sale, or execute a foreclosure-related eviction for foreclosure sale for not less than the 60-day period beginning on March 18, 2020.

Forbearance of Residential Mortgage Loan Payments for Multifamily Properties with Federally Back Loans.

- "Federally backed multifamily mortgage loan" means any loan (other than temporary financing such as a construction loan) that is:
 - Secured by a first or subordinate lien on residential multifamily real property designed principally for 5 or more families; and
 - Is made in whole or in part, insured, guaranteed, supplemented, or assisted in any way by an officer of agency of the Federal Government or under or in connection with a HUD program or is purchased or securitized by Fannie Mae or Freddie Mac.
- "Covered Period" means the period from the date of enactment to the earlier of the termination of the national emergency or December 31, 2020.
- A borrower with a Federally backed multifamily mortgage loan that was current as of February 1, 2020, experiencing financial hardship due to, directly or indirectly, the COVID-19 emergency may request forbearance by submitting an oral or written request and certifying the financial hardship is due to the emergency.
- The servicer shall document the financial hardship, provide forbearance for up to 30 days, and extend forbearance for up to 2 additional 30-day periods at the request of the borrower; provided the request is made at least 15 days prior to the end of the forbearance period.
- A borrower who receives a forbearance may not evict a tenant solely for nonpayment of rent, fees, or charges or charge any late fees, penalties, or other charges to a tenant for late payment of rent.
- A borrower who receives a forbearance may not require a tenant to vacate with less than 30 days' notice and may not issue a notice to vacate until the expiration of the forbearance period.

Temporary Moratorium on Eviction Filings.

- "Covered Property" means any property that participates in

- A covered housing program under 34 USC. § 12491(a) (Violence Against Women Act of 1994); or
 - The rural housing voucher program under 42 USC. 1490r (Housing Act of 1949); or
 - Has a "Federally backed mortgage loan" (see § 4022); or
 - A "Federally backed multifamily mortgage loan" (see § 4023).
- During the 120-day period beginning on the date of enactment, the lessor of dwelling on covered property may not initiate eviction for nonpayment of rent or other fees or charges or charge fees, penalties, or other charges to a tenant for nonpayment of rent.
- The lessor may not require a tenant to vacate with less than 30 days' notice and may not issue a notice to vacate until the expiration of the 120-day period.

TAX BENEFITS FROM THE FEDERAL LEGISLATION

BUSINESS PROVISIONS

Employee retention credit for employers subject to closure due to COVID-19.

Section 2301 of Coronavirus Aid, Relief and Economic Security Act "CARES ACT"

Provides a refundable payroll tax credit for each calendar quarter for 50 percent of qualified wages paid by employers to employees during the COVID-19 crisis. The credit is available to employers whose (1) operations were fully or partially suspended, due to a COVID-19-related shutdown order, or (2) gross receipts declined by more than 50 percent when compared to the same quarter in the prior year. The credit is at the election of the employer.

The credit is based on qualified wages paid to the employee. For employers with greater than 100 full-time employees, qualified wages are wages paid to employees when they are not providing services due to the COVID-19-related circumstances described above (may not exceed the amount the employee would have been paid for working an equivalent duration during the 30 days immediately preceding such period). For eligible employers with 100 or fewer full-time employees, all employee wages qualify for the credit, whether the employer is open for business or subject to a shut-down order. The credit is provided for the first \$10,000 of compensation, including health benefits, paid to an eligible employee. The credit is provided for wages paid or incurred from March 13, 2020 through December 31, 2020.

There are provisions that prevent employers from taking advantage of the employee retention credit and other credits for the same employee, including the work opportunity credit under IRC § 51 and the employer credit or paid family leave under IRC § 45S.

Delay of payment of employer payroll taxes.

Section 2302 of Coronavirus Aid, Relief and Economic Security Act "CARES ACT"

Allows employers and self-employed individuals to defer payment of the employer share of the Social Security tax they otherwise are responsible for paying to the federal government with respect to their employees, with the deferral period beginning March 25, 2020 and ending December 30, 2020. All employers are responsible for paying a 6.2-percent Social Security tax on employee wages. The provision requires that the deferred employment tax be paid over the following two years, with half of the amount required to be paid by December 31, 2021 and the other half by December 31, 2022. However, employers who received Small Business Act loans that are forgiven under the CARES Act do not qualify for the deferral program.

Modifications for net operating losses.

Section 2033 of Coronavirus Aid, Relief and Economic Security Act "CARES ACT"

Relaxes the limitations on a company's use of losses from prior years. NOLs are currently subject to a taxable income limitation, and they cannot be carried back to reduce income in a prior tax

year. This provision provides that a loss from 2018, 2019, or 2020 can be carried back five years. The provision also temporarily removes the taxable income limitation to allow an NOL to fully offset income. These changes will allow companies to utilize losses and amend prior years' returns, which will provide critical cash flow and liquidity during the COVID-19 emergency.

Modification of limitation on losses for taxpayers other than corporations

Section 2034 of Coronavirus Aid, Relief and Economic Security Act "CARES ACT"

Modifies the loss limitation applicable to pass-through businesses and sole proprietors, so they can benefit from the NOL carryback rules described above and access critical cash flow to maintain operations and payroll for their employees.

Modification of credit for prior year minimum tax liability of corporations

Section 2035 of Coronavirus Aid, Relief and Economic Security Act "CARES ACT"

The corporate AMT was repealed as part of the Tax Cuts and Jobs Act, but corporate AMT credits were made available as refundable credits over several years, ending in 2021. The provision accelerates the ability for companies to recover those AMT credits, permitting companies to claim a refund now and obtain additional cash flow during the COVID-19 emergency.

Modifications of limitation on business interest.

Section 2036 of Coronavirus Aid, Relief and Economic Security Act "CARES ACT"

Temporarily increases the amount of interest expense businesses are allowed to deduct on their tax returns, by increasing the 30-percent limitation to 50 percent of the taxable income for 2019 and 2020. As businesses look to weather the storm of the current crisis, this provision will allow them to increase liquidity with a reduced cost of capital, so that they are able to continue operations and keep employees on payroll. A taxpayer may elect not to claim the increased percentage but may revoke the election only with the consent of the Treasury Secretary.

Technical amendments regarding qualified improvement property.

Section 2037 of Coronavirus Aid, Relief and Economic Security Act "CARES ACT"

Enables businesses, especially in the hospitality industry, to immediately write off costs associated with improving facilities instead of having to depreciate those improvements over the 39-year life of the building. The provision, which corrects an error in the Tax Cuts and Jobs Act, not only increases companies' access to cash flow by allowing them to amend a prior year return, but also incentivizes them to continue to invest in improvements as the country recovers from the COVID-19 emergency.

INDIVIDUAL PROVISIONS

Recovery Rebates for Individuals.

Section 2201 of Coronavirus Aid, Relief and Economic Security Act "CARES ACT"

All US residents with adjusted gross income up to \$75,000 (\$150,000 married), who are not a dependent of another taxpayer and have a work eligible social security number, are eligible for the full \$1,200 (\$2,400 married) rebate. In addition, they are eligible for an additional \$500 per qualifying child (children who have not attained age 17). This is true even for those who have no income, as well as those whose income comes entirely from non-taxable means-tested benefit programs, such as SSI benefits. For the vast majority of Americans, no action on their part will be required in order to receive a rebate check as IRS will use a taxpayer's 2019 tax return if filed, or in the alternative their 2018 return. This includes many low-income individuals who file a tax return in order to take advantage of the refundable Earned Income Tax Credit and Child Tax Credit. The rebate amount is reduced by \$5 for each \$100 that a taxpayer's income exceeds the phase-out threshold. The amount is completely phased-out for single filers with incomes exceeding \$99,000, \$146,500 for head of household filers with one child, and \$198,000 for joint filers with no children.

Special rules for use of retirement funds.

Section 2202 of Coronavirus Aid, Relief and Economic Security Act "CARES ACT"

Consistent with previous disaster-related relief, this provision waives the 10-percent early withdrawal penalty for distributions up to \$100,000 from qualified retirement accounts for coronavirus-related purposes. In addition, income attributable to such distributions would be subject to tax over three years, and the taxpayer may recontribute the funds to an eligible retirement plan within three years without regard to that year's cap on contributions. Further, the provision provides flexibility for loans from certain retirement plans for coronavirus-related relief. A coronavirus-related distribution is a distribution made to an individual: (1) who is diagnosed with COVID-19, (2) whose spouse or dependent is diagnosed with COVID-19, or (3) who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, having work hours reduced, being unable to work due to lack of child care due to COVID-19, closing or reducing hours of a business owned or operated by the individual due to COVID-19, or other factors as determined by the Treasury Secretary.

Temporary waiver of required minimum distribution rules for certain retirement plans and accounts.

Section 2203 of Coronavirus Aid, Relief and Economic Security Act "CARES ACT"

Waives the required minimum distribution rules for certain defined contribution plans and IRAs for calendar year 2020. This provision provides relief to individuals who would otherwise be required to withdraw funds from such retirement accounts during the economic slowdown due to COVID-19.

Allowance of partial above the line deduction for charitable contributions.

Section 2204 of Coronavirus Aid, Relief and Economic Security Act "CARES ACT"

Encourages Americans to contribute to churches and charitable organizations in 2020 by permitting them to deduct up to \$300 of cash contributions, whether they itemize their deductions or not.

Modification of limitations on charitable contributions during 2020.

Section 2205 of Coronavirus Aid, Relief and Economic Security Act "CARES ACT"

Increases the limitations on deductions for charitable contributions by individuals who itemize, as well as corporations. For individuals, the 50-percent of adjusted gross income limitation is suspended for 2020. For corporations, the 10-percent limitation is increased to 25 percent of taxable income. This provision also increases the limitation on deductions for contributions of food inventory from 15 percent to 25 percent.

Exclusion for certain employer payments of student loans.

Section 2206 of Coronavirus Aid, Relief and Economic Security Act "CARES ACT"

Enables employers to provide a student loan repayment benefit to employees on a tax-free basis. Under the provision, an employer may contribute up to \$5,250 annually toward an employee's student loans, and such payment would be excluded from the employee's income. The \$5,250 cap applies to both the new student loan repayment benefit as well as other educational assistance (e.g., tuition, fees, books) provided by the employer under current law. The provision applies to any student loan payments made by an employer on behalf of an employee after date of enactment and before January 1, 2021.



A Six Foot Look at the Business, Loan, and Tax Reform Legislation In Response to COVID-19

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**A Six Foot Look at the Business, Loan, and Tax Reform Legislation
In Response to COVID-19**

LOAN ASSISTANCE PROVISIONS

Express Bridge Loan Pilot Program:

Unilateral pronouncement of the SBA

- While not part of the CARES legislation, the SBA announced as a response to COVID-19, small businesses that currently have a business relationship with an SBA Express Lender may access up to \$25,000 with less paperwork. These loans may provide vital economic support to small businesses to help overcome the temporary loss of revenue they are experiencing and can be a term loan or used to bridge the gap while applying for a direct SBA Economic Injury Disaster Loan. If a small business has an urgent need for cash while waiting for a decision and disbursement an Economic Injury Disaster Loan, they may qualify for an SBA Express Disaster Bridge Loan.
- Terms:
 - Up to \$25,000
 - Fast turnaround
 - Will be repaid in full or in part by proceeds from the EIDL loan

Small Business Administration's Emergency Injury Disaster Loan ("EIDL")

Section 1110 of Coronavirus Aid, Relief and Economic Security Act "CARES Act"

- The CARES Act expands the existing Small Business Administration's Emergency Injury Disaster Loan ("EIDL") Program under Section 7(b)(2) of the Small Business Act which allows an applicant to borrow up to \$2 million at 3.75% interest for a period of up to 30 years. The bill expands the covered period for the hardship is from January 31, 2020, through December 31, 2020. Nonprofits receive a better rate at 2.75%.
- Eligible entities for participation in this loan program include small businesses (500 or fewer employees); sole proprietors; independent contractors; cooperatives (500 or fewer employees); Employee Stock Owned Plans (500 or fewer employees); and Tribal small business concerns.
- The EIDL loan program waives the following requirements under Section 7(b)(2):
 - Any required personal guarantee on loans of \$200,000 or less;
 - The requirement that an applicant be in business for at least one year before the disaster; and
 - The requirement that an applicant is unable to obtain credit elsewhere.
- The CARES Act allows the SBA to approve an applicant solely on credit score, without requiring that the applicant submit a tax return or by "alternative appropriate methods" to determine the applicant's ability to repay.
- The CARES Act allows an applicant to request from the SBA an emergency advance of up to \$10,000 as a "grant." This grant does not have to be repaid, even if the applicant's EIDL loan application is subsequently denied. The SBA is charged with verifying an applicant's eligibility via "self-certification."

- The "grant" may be used to provide paid sick leave to employees unable to work because of COVID-19, maintaining payroll to retain employees, meeting increased costs to obtain materials unavailable due to supply chain disruption; making rent or mortgage payments; and repaying obligations that cannot be met due to loss of revenue.

Paycheck Protection Program

Section 1102 of Coronavirus Aid, Relief and Economic Security Act "CARES Act"

Appropriations - \$350 billion

- **General** – The CARES Act (the "Act") expands the existing Small Business Administration's Loans to Small Business Concerns Program under Section 7(a) of the Small Business Act. Under this Program, before expansion by the Act, only businesses defined as small businesses by the SBA and operated for profit are eligible for loans, which are capped at \$5 million and are only 75% or 85% guaranteed. The loans are not offered directly through the SBA; instead, financial institutions like banks, credit unions, and other business lenders loan the money, and the SBA guarantees the loan.
- **Eligibility for Loan** – The Act expands eligibility during February 15, 2020 – June 30, 2020, to businesses (including sole proprietorships and self-employed) and nonprofits, veterans organizations, or tribal businesses and
 - with **fewer than 500 employees** (subject to the limited exceptions); or
 - that meet the Small Business Administration's ("SBA") industry-based "size standard" requirements for the applicable NAICS code (based either on number of employees or annual receipts)
- **Loan Duration and Amount** – With a **maximum maturity of 10 years**, the amount may be no more than the lesser of (a) \$10 million or (b) 2.5 multiplied by the average total monthly payroll payments by the applicant for generally the one year preceding the date on which the loan is made. Note that (b) above is different for newer companies or those with seasonal employees.
 - "Payroll costs" means "the sum of payments of any compensation for employees that is a salary, wage, commission, or similar compensation; payment of cash tip or equivalent; payment for vacation, parental, family, medical or sick leave; 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, the term "payroll costs" shall not include "the compensation of an individual employee in excess of an annual salary of \$100,000, as prorated for the covered period; taxes imposed or withheld under chapters 21, 22 or 24 of the Internal Revenue Code of 1986 during the covered period; any compensation of an employee whose principal place of residence is outside of the United States; qualified sick leave wages for which a credit is allowed under section 7001 of the Families First Coronavirus Response Act (Public Law 116-127); or qualified

family leave wages for which a credit is allowed under section 7003 of the Families First Coronavirus Response Act (Public Law 116-127)."

- **Interest Rate** – The Act establishes a 4% cap on interest.
- **EIDL Loan** – A borrower cannot get a Paycheck Protection Payment loan in addition to an EIDL loan for the same purpose.
- **Allowable Uses of Loan** – The proceeds of a loan can be used for payroll costs, costs related to health care benefits and regular paid leave; salaries, commission, or similar compensations; interest on any mortgage obligation (excluding payment or prepayment of principal); rent (including rent under a lease agreement); utilities; and interest on any other debt obligations that were incurred before the covered period.
- **Borrower Requirements** – Borrower must make a good faith certification that the loan is necessary due to uncertainty of current economic conditions caused by COVID-19, that the loan will be used for a permitted purpose as specified in the Act, and that the funds are not duplicative funds for the same uses. Must have been "**substantially affected by COVID-19**," which is described as:
 - supply chain disruptions;
 - staffing challenges;
 - a decrease in sales or customers; or
 - shuttered businesses
- **Loan Forgiveness**
 - The borrower shall be eligible for loan forgiveness *equal to the following costs incurred and paid by the borrower during the 8-week period after the origination date of the loan*: payroll costs; interest payments on any mortgage incurred prior to February 15, 2020; payment of rent on any lease in force prior to February 15, 2020; and payment on any utility for which service began before February 15, 2020.
 - **Taxability** – The borrower will have no taxable income (discharge of indebtedness income) stemming from the forgiveness of the loan.
 - **General Limit on Forgiveness** – The amount forgiven shall not exceed the principal of the loan.
 - **Reduction Based on Employee Reduction** – The amount forgiven will be reduced by multiplying the forgiveness amount, as detailed above, by the quotient of the average number of full-time equivalent employees per month during the covered period over the average number of full-time equivalent employees during one of two specified periods: (1) the period beginning on February 15, 2019, and ending on June 30, 2019, or (2) the period beginning on January 1, 2020, and ending on February 29, 2020. The borrower chooses which period is ultimately used for the quotient.
 - **Reduction Based on Salary & Wage Reduction** – Loan forgiveness is reduced by the amount of any reduction in salary or wages of any employee who did not

receive, during any pay period during 2019, wages or salary in an amount more than \$100,000 during the covered period that is in excess of 25% of the total salary or wages during the most recent full quarter preceding the covered period.

- **Tipped Workers** – Borrowers with tipped employees may receive forgiveness for additional wages paid to those employees.
 - **Reduction Exemptions** – During the period between February 15, 2020, and thirty days after enactment of the Act, forgiveness is not reduced for reductions in employees or salary or wages if the reduction at the beginning of the period is eliminated by June 30, 2020.
 - **Application** – In order to receive loan forgiveness, a borrower must submit an application with documentation detailed in the Act. The lender has sixty days from receipt of an application for forgiveness to issue a decision.
 - **Remittance** – The Administrator has ninety days from forgiveness to remit the amount forgiven, increased by accrued interest, to the lender.
 - **Remaining Amount** – Any loan amounts not forgiven at the end of one year is carried forward as an ongoing loan with terms of a maximum of ten years, at maximum 4% interest. The 100% loan guarantee remains intact.
- **Business Concern with more than 1 Physical Location** – During the covered period, any business concern that employs not more than 500 employees per physical location and is assigned a North American Industry Classification System (NAICS) code beginning with 72 at the time of disbursement is eligible to receive a covered loan.
 - **Remaining Balance after Forgiveness** – If there is a remaining balance after the loan forgiveness detailed in Section 1106 of the Act, the remaining balance shall continue to be guaranteed by the SBA, and the maximum maturity of the balance will be ten years from the application for forgiveness.
 - **Loan Deferment** – For all Paycheck Protection Program Loans, all lenders are required to provide complete payment deferment (including principal, interest, and fees) for at least six months, but no more than one year. The length of the deferment appears to be at the discretion of the lender. This deferment is guaranteed even if the loan is bought on the secondary market.
 - **SBA Guarantee** – The SBA's guarantee is increased to 100% for loans under the Paycheck Protection Program.
 - **Lenders¹** – Lenders that are currently approved to make SBA 7(a) loans are authorized to make Program loans and are given delegated authority to determine a borrower's eligibility and creditworthiness without going through typical SBA channels.

¹ Hundreds of lenders across the country make 7(a) loans. Here is a list of the most active section 7(a) lenders as published by the SBA: <https://www.sba.gov/article/2020/mar/02/100-most-active-sba-7a-lenders>.

- **Additional Lenders** – The Act provides an avenue, through the U.S. Department of Treasury, for additional lenders to be approved to help keep workers paid and employed. Additional lenders approved by Treasury are only permitted to make Paycheck Protection Program loans, not regular 7(a) loans.
- **Lender Considerations** – For eligibility purposes, in lieu of determining repayment ability, lenders are required to simply determine whether a business was operational on February 15, 2020, and had employees for whom it paid salaries and payroll taxes, or a paid independent contractor.
- **Nonrecourse and Refinancing** – The Act waives the personal guarantee and collateral requirement of SBA 7(a) loans and allows loans made within a set period to be refinanced as a Payment Protection Loan.
- **Waivers** – The SBA 7(a) loans' typical guarantee and yearly fees are waived. Additionally, borrowers cannot be charged a prepayment fee and are not required to have looked for and exhausted other loan options.
- **Lender Fees** – The Act requires the Administrator to provide a lender with a process fee for servicing the loan and sets the fee based on the amount loaned.

Subsidy for Certain Existing Loan Payments

Section 1112 of Coronavirus Aid, Relief and Economic Security Act "CARES Act"

- The SBA is required to pay the principal, interest, and any associated fees that are owed on the covered loans for a six-month period starting on the next payment due date. Loans that are already in deferment will include an additional six months of payment by the SBA beginning with the next payment. Loans made up until six months after the enactment of the legislation will also receive a full six months of loan payments by the SBA.
- The Act defines a covered loan as an existing 7(a) (including Community Advantage Pilot Program loan), 504, or microloan product. Paycheck Protection Program (PPP) loans are not covered.
- The SBA must make payments no later than 30 days after the date on which the first payment is due. It requires the SBA to still make payments even if the loan was sold on the secondary market.
- **Other Requirements** – Requires SBA to encourage lenders to provide deferments and allows lenders, up until one year after enactment, to extend the maturity of SBA loans in deferment beyond existing statutory limits.

Coronavirus Economic Stabilization Act of 2020

Section 4003 of Coronavirus Aid, Relief and Economic Security Act "CARES Act"

Appropriations – \$500 billion

The Coronavirus Economic Stabilization Act (CESA) provides \$500 billion for the Secretary to provide loans, loan guarantees, and other investments in accordance with the Federal Credit

Reform Act of 1990 (2 U.S.C. § 661) to eligible businesses, states, and municipalities to provide liquidity related to losses incurred as a result of the coronavirus to be made available as follows:

- (1) \$25 billion for air carriers;
 - (2) \$4 billion for cargo air carriers;
 - (3) \$17 billion for “businesses critical to maintaining national security,” which term is not defined in the Act. This term may be defined in the Secretary's procedures and rules when released.
 - (4) \$454 billion to programs or facilities established by the Federal Reserve to provide liquidity to the financial system that supports lending to eligible businesses, states, or municipalities by:
 - a. Making "direct loans" to eligible businesses;
 - b. Purchasing obligations or other interests directly from issuers of such obligations or other interests; or
 - c. Purchasing obligations or other interests in secondary markets or otherwise.
- A loan, loan guarantee, or other investment under CESA shall be on such terms and conditions as the Secretary determines appropriate. A loan shall be at a rate determined by the Secretary based on the risk and current average yield on outstanding market obligations of the United States or comparable maturity.
 - Within 10 days after enactment, the Secretary shall publish procedures dealing with these loans and programs.

Loans and loan guarantees for the three enumerated industries. Items (1), (2), and (3) above must meet the following criteria:

- Alternative credit is not reasonably available;
- The loan or loan guarantee is sufficiently secured or is made at a rate that
 - Reflects the risk; and
 - Is to the extent practicable, not less than an interest rate based on market conditions for comparable obligations prior to the outbreak of the virus;
- The term of the loan is as short as practical and not longer than 5 years;
- Until 12 months after the loan is no longer outstanding, the eligible business nor any affiliate will not purchase an equity security listed on the national securities exchange of the eligible business or any parent company, unless contractually obligated prior to the enactment of the Act;
- Until 12 months after the loan is no longer outstanding, the eligible business will not pay dividends or make other capital distributions with respect to common stock;
- Until September 30, 2020, the eligible business shall maintain employment levels as of March 24, 2020, to the extent practicable, and in any case not reduce employment levels by more than 10%;
- Certification that the eligible business is organized in the United States or under its laws and has significant operations in the U.S. and a majority of its employees based in the U.S.;
- The eligible business must have incurred or is expected to incur covered losses such that continued operations of the business are jeopardized, as determined by the Secretary.
- The Secretary may only enter into an agreement under paragraph (1), (2), or (3) of § 4003(b) if such agreement provides that during the period beginning on the date on which the agreement is executed and ending 1 year after the obligation is no longer outstanding:

- No officer or employee whose total compensation exceeded \$425,000 in calendar year 2019 (unless determined by a collective bargaining agreement) will:
 - Receive total compensation which exceeds the total compensation received in 2019; or
 - Receive severance pay or other benefits which exceeds twice the maximum compensation received in 2019.
- No officer or employee whose total compensation exceeded \$3 million in 2019 may receive compensation in excess of the sum of:
 - \$3 million; and
 - 50% of the excess over \$3 million received in 2019
- The Secretary shall not issue a loan unless:
 - The eligible business has issued securities that are traded on a national securities exchange; and
 - The Secretary receives a warrant or equity interest in the eligible business; or
 - In case the preceding two bullets do not apply, the Secretary receives:
 - A warrant or equity interest in the eligible business; or
 - A senior debt instrument.

Loans, loan guarantees, and other investments referenced in Item (4) above for general businesses (approximately 90% of the allocated \$500 billion) can either be through "direct loans" or "bank loans."

Direct Loans:

- For purposes of this paragraph, "direct loan" means a loan under a bilateral loan agreement that is:
 - Entered into directly with an eligible business as borrower and
 - Not part of a syndicated loan, a loan originated by a financial institution in the ordinary course of business, or a securities or capital markets transaction.
- The Secretary may make a loan, loan guarantee, or other investment under paragraph (4) as part of a program or facility that provides direct loans upon the following criteria (the Secretary may waive to protect the interests of the federal government):
 - Until 12 months after the loan is no longer outstanding, the eligible business nor any affiliate will not purchase an equity security listed on the national securities exchange of the eligible business or any parent company, unless contractually obligated prior to the enactment of the Act;
 - Until 12 months after the loan is no longer outstanding, the eligible business will not pay dividends or make other capital distributions; and
 - Complies with the limitations on compensation set forth in § 4004.
- Applicable requirements under § 13(3) of the Federal Reserve Act (12 USC § 343(3)) apply.
- The eligible business must be organized in the United States or under its laws and has significant operations in the U.S. and a majority of its employees based in the U.S.

Assistance for Mid-Sized Businesses:

- The Secretary shall endeavor to implement a program or facility described in Direct Loans above that provides financing to banks and other lenders that make direct loans to

eligible businesses, including nonprofits, with between 500 and 10,000 employees; an annualized interest rate that is not higher than 2% per annum; and for the first 6 months (or longer if determined by the Secretary), no principal or interest is due. The borrower shall make a certification that:

- The uncertainty of economic conditions makes the loan necessary to support ongoing operations;
 - The funds received will be used to maintain 90% of the workforce at full compensation and benefits until September 30, 2020;
 - The recipient intends to restore 90% of the workforce as existed on February 1, 2020, and to restore all compensation and benefits no later than 4 months after the termination of the public health emergency;
 - The recipient is domiciled in the U.S. with significant employees and operations in the U.S.;
 - The recipient is not a debtor in bankruptcy;
 - The recipient business is organized in the United States or under its laws and has significant operations in the U.S. and a majority of its employees based in the U.S.
 - The recipient will not pay dividends or make other capital distributions with respect to common stock or repurchase an equity security that is listed on a national securities exchange while the loan is outstanding, except as contractually obligated prior to enactment;
 - The recipient will not outsource or offshore jobs for the term of the loan and 2 years after repayment;
 - The recipient will not abrogate existing collective bargaining agreements for the term of the loan and 2 years after repayment; and
 - The recipient will remain neutral in any union organizing effort for the term of the loan.
- The Secretary will endeavor to implement a similar program to provide liquidity to states and municipalities.
 - The principal amount of any obligation issued under this section shall not be reduced through loan forgiveness and shall be treated as indebtedness for purposes of the Internal Revenue Code.
 - The provisions of § 4025 relating to protection of collective bargaining agreements apply to loans or loan guarantees made under this section.

Foreclosure Moratorium and Consumer Right to Request Forbearance

- "Federally backed mortgage loan" means any loan secured by a first or subordinate lien on residential real property (including individual units of condominiums and cooperatives) designed principally for the occupancy of 1-4 families that is:
 - Insured by the FHA;
 - Insured under 12 USC. § 1715z-20 (National Housing Act);
 - Guaranteed under 12 USC. 1715z-13a, 1715z-13b (Housing and Community Development Act of 1992);
 - Guaranteed or insured by the VA;
 - Made, guaranteed or insured by USDA; or

- Purchased or securitized by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association.
- A borrower with a Federally backed mortgage loan experiencing financial hardship due to, directly or indirectly, the COVID-19 emergency, may request forbearance by submitting a request and certifying the financial hardship is due to the emergency.
- The forbearance shall be granted for up to 180 days and may be extended by up to 180 days at the request of borrower.
- During the forbearance, no fees, penalties, or interest beyond the amounts scheduled or calculated shall be assessed as if the borrower made all payments on time and in full shall accrue.
- Except with respect to vacant or abandoned property, a servicer of a Federally backed mortgage loan may not initiate judicial or non-judicial foreclosure, move for a foreclosure judgment or order of sale, or execute a foreclosure-related eviction for foreclosure sale for not less than the 60-day period beginning on March 18, 2020.

Forbearance of Residential Mortgage Loan Payments for Multifamily Properties with Federally Backed Loans.

- "Federally backed multifamily mortgage loan" means any loan (other than temporary financing such as a construction loan) that is:
 - Secured by a first or subordinate lien on residential multifamily real property designed principally for 5 or more families; and
 - Is made in whole or in part, insured, guaranteed, supplemented, or assisted in any way by an officer of an agency of the Federal Government or under or in connection with a HUD program or is purchased or securitized by Fannie Mae or Freddie Mac.
- "Covered Period" means the period from the date of enactment to the earlier of the termination of the national emergency or December 31, 2020.
- A borrower with a Federally backed multifamily mortgage loan that was current as of February 1, 2020, experiencing financial hardship due to, directly or indirectly, the COVID-19 emergency may request forbearance by submitting an oral or written request and certifying the financial hardship is due to the emergency.
- The servicer shall document the financial hardship, provide forbearance for up to 30 days, and extend forbearance for up to 2 additional 30-day periods at the request of the borrower; provided the request is made at least 15 days prior to the end of the forbearance period.
- A borrower who receives a forbearance may not evict a tenant solely for nonpayment of rent, fees, or charges, or charge any late fees, penalties, or other charges to a tenant for late payment of rent.
- A borrower who receives a forbearance may not require a tenant to vacate with less than 30 days' notice and may not issue a notice to vacate until the expiration of the forbearance period.

Temporary Moratorium on Eviction Filings.

- "Covered Property" means any property that participates in:
 - A covered housing program under 34 USC. § 12491(a) (Violence Against Women Act of 1994); or

- The rural housing voucher program under 42 USC. 1490r (Housing Act of 1949); or
- Has a "Federally backed mortgage loan" (see § 4022); or
- A "Federally backed multifamily mortgage loan" (see § 4023).
- During the 120-day period beginning on the date of enactment, the lessor of dwelling on covered property may not initiate eviction for nonpayment of rent or other fees or charges or charge fees, penalties, or other charges to a tenant for nonpayment of rent.
- The lessor may not require a tenant to vacate with less than 30 days' notice and may not issue a notice to vacate until the expiration of the 120-day period.

TAX BENEFITS FROM THE FEDERAL LEGISLATION

BUSINESS PROVISIONS

Employee retention credit for employers subject to closure due to COVID-19.

Section 2301 of Coronavirus Aid, Relief and Economic Security Act "CARES Act"

Provides a refundable payroll tax credit for each calendar quarter for 50 percent of qualified wages paid by employers to employees during the COVID-19 crisis. The credit is available to employers whose (1) operations were fully or partially suspended, due to a COVID-19-related shutdown order, or (2) gross receipts declined by more than 50 percent when compared to the same quarter in the prior year. The credit is at the election of the employer.

The credit is based on qualified wages paid to the employee. For employers with greater than 100 full-time employees, qualified wages are wages paid to employees when they are not providing services due to the COVID-19-related circumstances described above (may not exceed the amount the employee would have been paid for working an equivalent duration during the 30 days immediately preceding such period). For eligible employers with 100 or fewer full-time employees, all employee wages qualify for the credit, whether the employer is open for business or subject to a shut-down order. The credit is provided for the first \$10,000 of compensation, including health benefits, paid to an eligible employee. The credit is provided for wages paid or incurred from March 13, 2020 through December 31, 2020.

There are provisions that prevent employers from taking advantage of the employee retention credit and other credits for the same employee, including the work opportunity credit under IRC § 51 and the employer credit or paid family leave under IRC § 45S.

Delay of payment of employer payroll taxes.

Section 2302 of Coronavirus Aid, Relief and Economic Security Act "CARES Act"

Allows employers and self-employed individuals to defer payment of the employer share of the Social Security tax they otherwise are responsible for paying to the federal government with respect to their employees, with the deferral period beginning March 25, 2020 and ending December 30, 2020. All employers are responsible for paying a 6.2-percent Social Security tax on employee wages. The provision requires that the deferred employment tax be paid over the

following two years, with half of the amount required to be paid by December 31, 2021 and the other half by December 31, 2022. However, employers who received Small Business Act loans that are forgiven under the CARES Act do not qualify for the deferral program.

Modifications for net operating losses.

Section 2033 of Coronavirus Aid, Relief and Economic Security Act "CARES Act"

Relaxes the limitations on a company's use of losses from prior years. NOLs are currently subject to a taxable income limitation, and they cannot be carried back to reduce income in a prior tax year. This provision provides that a loss from 2018, 2019, or 2020 can be carried back five years. The provision also temporarily removes the taxable income limitation to allow an NOL to fully offset income. These changes will allow companies to utilize losses and amend prior years' returns, which will provide critical cash flow and liquidity during the COVID-19 emergency.

Modification of limitation on losses for taxpayers other than corporations.

Section 2034 of Coronavirus Aid, Relief and Economic Security Act "CARES Act"

Modifies the loss limitation applicable to pass-through businesses and sole proprietors, so they can benefit from the NOL carryback rules described above and access critical cash flow to maintain operations and payroll for their employees.

Modification of credit for prior year minimum tax liability of corporations.

Section 2035 of Coronavirus Aid, Relief and Economic Security Act "CARES Act"

The corporate AMT was repealed as part of the Tax Cuts and Jobs Act, but corporate AMT credits were made available as refundable credits over several years, ending in 2021. The provision accelerates the ability for companies to recover those AMT credits, permitting companies to claim a refund now and obtain additional cash flow during the COVID-19 emergency.

Modifications of limitation on business interest.

Section 2036 of Coronavirus Aid, Relief and Economic Security Act "CARES Act"

Temporarily increases the amount of interest expense businesses are allowed to deduct on their tax returns, by increasing the 30-percent limitation to 50 percent of the taxable income for 2019 and 2020. As businesses look to weather the storm of the current crisis, this provision will allow them to increase liquidity with a reduced cost of capital, so that they are able to continue operations and keep employees on payroll. A taxpayer may elect not to claim the increased percentage but may revoke the election only with the consent of the Treasury Secretary.

Technical amendments regarding qualified improvement property.

Section 2037 of Coronavirus Aid, Relief and Economic Security Act "CARES Act"

Enables businesses, especially in the hospitality industry, to immediately write off costs associated with improving facilities instead of having to depreciate those improvements over the

39-year life of the building. The provision, which corrects an error in the Tax Cuts and Jobs Act, not only increases companies' access to cash flow by allowing them to amend a prior year return, but also incentivizes them to continue to invest in improvements as the country recovers from the COVID-19 emergency.

INDIVIDUAL PROVISIONS

Recovery Rebates for Individuals.

Section 2201 of Coronavirus Aid, Relief and Economic Security Act "CARES Act"

All U.S. residents with adjusted gross income up to \$75,000 (\$150,000 married), who are not a dependent of another taxpayer and have a work eligible social security number, are eligible for the full \$1,200 (\$2,400 married) rebate. In addition, they are eligible for an additional \$500 per qualifying child (children who have not attained age 17). This is true even for those who have no income, as well as those whose income comes entirely from non-taxable means-tested benefit programs, such as SSI benefits. For the vast majority of Americans, no action on their part will be required in order to receive a rebate check as IRS will use a taxpayer's 2019 tax return if filed, or in the alternative their 2018 return. This includes many low-income individuals who file a tax return in order to take advantage of the refundable Earned Income Tax Credit and Child Tax Credit. The rebate amount is reduced by \$5 for each \$100 that a taxpayer's income exceeds the phase-out threshold. The amount is completely phased-out for single filers with incomes exceeding \$99,000, \$146,500 for head of household filers with one child, and \$198,000 for joint filers with no children.

Special rules for use of retirement funds.

Section 2202 of Coronavirus Aid, Relief and Economic Security Act "CARES Act"

Consistent with previous disaster-related relief, this provision waives the 10-percent early withdrawal penalty for distributions up to \$100,000 from qualified retirement accounts for coronavirus-related purposes. In addition, income attributable to such distributions would be subject to tax over three years, and the taxpayer may recontribute the funds to an eligible retirement plan within three years without regard to that year's cap on contributions. Further, the provision provides flexibility for loans from certain retirement plans for coronavirus-related relief. A coronavirus-related distribution is a distribution made to an individual: (1) who is diagnosed with COVID-19, (2) whose spouse or dependent is diagnosed with COVID-19, or (3) who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, having work hours reduced, being unable to work due to lack of child care due to COVID-19, closing or reducing hours of a business owned or operated by the individual due to COVID-19, or other factors as determined by the Treasury Secretary.

Temporary waiver of required minimum distribution rules for certain retirement plans and accounts.

Section 2203 of Coronavirus Aid, Relief and Economic Security Act "CARES Act"

Waives the required minimum distribution rules for certain defined contribution plans and IRAs for calendar year 2020. This provision provides relief to individuals who would otherwise be

required to withdraw funds from such retirement accounts during the economic slowdown due to COVID-19.

Allowance of partial above the line deduction for charitable contributions.

Section 2204 of Coronavirus Aid, Relief and Economic Security Act "CARES Act"

Encourages Americans to contribute to churches and charitable organizations in 2020 by permitting them to deduct up to \$300 of cash contributions, whether they itemize their deductions or not.

Modification of limitations on charitable contributions during 2020.

Section 2205 of Coronavirus Aid, Relief and Economic Security Act "CARES Act"

Increases the limitations on deductions for charitable contributions by individuals who itemize, as well as corporations. For individuals, the 50-percent of adjusted gross income limitation is suspended for 2020. For corporations, the 10-percent limitation is increased to 25 percent of taxable income. This provision also increases the limitation on deductions for contributions of food inventory from 15 percent to 25 percent.

Exclusion for certain employer payments of student loans.

Section 2206 of Coronavirus Aid, Relief and Economic Security Act "CARES Act"

Enables employers to provide a student loan repayment benefit to employees on a tax-free basis. Under the provision, an employer may contribute up to \$5,250 annually toward an employee's student loans, and such payment would be excluded from the employee's income. The \$5,250 cap applies to both the new student loan repayment benefit as well as other educational assistance (e.g., tuition, fees, books) provided by the employer under current law. The provision applies to any student loan payments made by an employer on behalf of an employee after date of enactment and before January 1, 2021.