

KTJKLEIN, THORPE & JENKINS, LTD.
Attorneys at Law

April 7th, 2020

LEGAL ALERT**CARES Act Summary for Businesses**

The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) was signed into law on March 27, 2020. This e-note will focus on ten (10) sections of the CARES Act that specifically pertain to businesses and employees, ranging from topics such as statutory unemployment benefits for those impacted by the coronavirus, to tax credits for certain businesses that take steps to keep employees on payroll. Included in this e-note, is a short summary of the Paycheck Protection Program which will provide loans to small businesses affected by the coronavirus.

Section 2102 – Pandemic Unemployment Assistance

This section begins by defining terms, particularly “Covered Individuals,” which means, for purposes of this section, an individual who is not eligible for regular compensation or extended benefits under state or federal law or pandemic emergency unemployment compensation, and provides self-certification that she is otherwise able to work but is unable to work due to ramifications of the coronavirus, including: (a) being diagnosed with the coronavirus or having symptoms associated with the coronavirus and is therefore seeking diagnosis, (b) having a member of their household diagnosed with the coronavirus, (c) caring for a family member or member of the household with the coronavirus, (d) having a child or other person in the household that is unable to attend school or care facility as a result of coronavirus shutdowns, (e) being unable to reach work due to coronavirus quarantines, (f) being unable to reach work due to being advised by a medical professional to self-isolate due to coronavirus, (g) being scheduled to commence employment and does not have a job or is unable to reach the job as a result of the coronavirus, (h) having become the breadwinner of the household because the previous head of household died as a result of coronavirus, (i) having to quit her job as a result of the coronavirus, (j) having her work closed due to the coronavirus, (k) meeting any additional criteria established by the Secretary of Labor, or (l) being self-employed, seeking part-time employment, or not having sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits under state or federal law or pandemic emergency compensation. Individuals who can telework, or are receiving paid sick leave or other paid leave benefits, are not Covered Individuals.

Such Covered Individuals are entitled to unemployment benefit assistance from the Secretary of Labor for as long as the individual is unemployed, partially unemployed or unable to work because of the coronavirus, beginning on or after January 27, 2020 through the end of 2020, but no longer than 39 weeks. This 39 week cap includes weeks

For any questions or comments you might have regarding this newsletter, please feel free to contact:

Authored By:

Name: Donald E. Renner

Email: derenner@ktjlaw.com

Phone: 312-984-6469



Name: Derek A. Farrugia

Email: dafarrugia@ktjlaw.com

Phone: 312-984-6418



in which the covered individual received regular unemployment benefits provided under federal or state law.

Benefits provided under this section are equal to the amount of unemployment benefits the covered individual would otherwise be entitled to under state or federal law, as well as an additional amount called “Federal Pandemic Unemployment Compensation” totaling \$600 per week.

Section 2103 – Emergency Unemployment Relief for Government Entities and Non-Profit Organizations

This section provides that the Federal Treasury will reimburse states for 50% of the costs incurred in paying unemployment benefits to nonprofits, government agencies, and Indian tribes from March 13th through the end of 2020.

Section 2301 – Employee Retention Credit for Employers Subject to Closure Due to Covid-19

This section provides that eligible employers, as defined below, will be entitled to a refundable tax credit against Social Security taxes, for all wages paid between March 12, 2020 and the end of 2020. The credits are determined on a calendar-quarter basis and will be equal to 50% of qualified wages, up to \$10,000, paid to each employee. As such payroll taxes are due each quarter, eligible employers will be able to use the credit in the first calendar quarter in which gross receipts declined by 50% compared to the same quarter of the previous calendar year, and ends with the calendar quarter following the calendar quarter in which the business’ gross receipts exceed 80% of the same quarter of the prior calendar year.

Certain other credits, including credits related to employment of qualified veterans and credits for research expenditures of qualified small businesses, will reduce the amount of the credit created in this section.

The qualified wages used in computing the credit available, must also consider the cost of an employee’s health plan. Also, wages used for this credit cannot also be used for determining a credit made available in the paid sick leave and paid family and medical leave sections of the Families First Coronavirus Act.

Eligible employers are employers whose businesses were fully or partially closed or suspended due to a government-required shutdown or suspension of business, or an employer whose gross receipts declined by 50% or more compared to the same calendar quarter of the prior year. Employers with an average of more than 100 employees can claim a credit for all employees who are retained but cannot work as a result of the coronavirus. **Federal and state employers do not qualify for the credits provided in this section.**

Section 2302 – Delay of Payment of Employer Payroll Taxes

This section allows employers to defer, without interest, payment of their share of social security taxes that would otherwise be due for the period between March 27, 2020 through the end of 2020. The first 50% of these taxes may be paid up until December 31, 2021, while the other 50% will be due December 31, 2022. The same allowance of deferral will be available to self-employed individuals subject to self-employment taxes, **as well as government employers.** Employers who have had loans forgiven under the Paycheck Protection Program are ineligible for the delay of payroll tax deposits under this section.

Section 3601 – Limitation on Paid Leave

Reiterating the provision of the FFCRA which entitles employees of businesses with fewer than 500 employees to twelve (12) weeks of family leave if they are unable to work due to a school or child care closure, this section provides that such businesses are only responsible for a maximum of \$200 per day, and only up to \$10,000 in total, per employee.

Section 3602 – Emergency Paid Leave Act Limitation

Another section designed to clarify a FFCRA provision, this section provides that employers are only responsible for paying employees up to a cap of \$511 per day, and \$5,110 total, per employee for paid sick leave. The cap is \$200 per day, or \$2,000 in total, to employees taking care of a child or quarantined individual, due to the coronavirus. The employer is only responsible for paying such wages until the employee has returned to work, but never more than

the equivalent of 80 hours.

Section 3604 – OMB Waiver of Paid Family and Paid Sick Leave

Amending the Family and Medical Leave Act, this section provides the Director of the Office of Management and Budget the authority to exclude certain federal executive branch employees from the requirements of the FMLA for “good cause,” and the authority to exempt certain federal government employers from the requirements of the Emergency Paid Sick Leave Act with respect to certain federal executive branch employees for “good cause.”

Section 3605 – Paid Leave for Rehired Employees

An employee who was terminated from his or her position on or after March 1st, 2020, and is subsequently rehired by the terminating employer, is eligible for FMLA leave if he or she was employed by that employer for thirty (30) of the last sixty (60) calendar days before termination.

Section 3606 – Advance Refunding of Credits

This section amends portions of the Families First Coronavirus Response Act by allowing for the advancement of payroll tax credits, made available by the FFCRA, for sick leave and expanded family leave wages. Additionally, there is now penalty relief for businesses failing to deposit payroll tax amounts, due to anticipating sick leave and family medical credits.

Section 4003 – Liquidity for Eligible Businesses, States, and Municipalities

One of the keystone provisions of the CARES Act, this section provides as much as \$500 billion worth of loans, loan guarantees, and other investments for certain businesses, states, and municipalities. The first \$46 billion are earmarked for airlines, cargo carriers, and national security. The remaining \$454 billion is to be used to provide loans to, and investments in, eligible businesses, state governments, and municipalities.

To become eligible for a loan under this section, an applicant must comply with various terms and conditions established by the Secretary of the Treasury, including covenants, representations, warranties, and requirements for audits. The borrower will need to certify that:

- No credit is available elsewhere;
- The loan is prudently incurred;
- The loan will be sufficiently secured, and bears an interest rate that adequately reflects the risk of the loan brought on by the lender;
- The term of the loan is appropriately short, and not longer than five (5) years;
- The borrower will not purchase equity in its company, or any parent company, within the first twelve (12) months after the date of the loans (i.e. no stock buybacks);
- No dividends will be distributed within the first 12 months of the loans;
- Employment levels, as of March 24, 2020, will remain consistent through September 30, 2020, to the extent practicable, and in no case shall a borrower’s employment level decrease by more than ten percent;
- It is a U.S. business; and
- It has, or expects to have, incurred losses as a result of the Coronavirus.

Certain limitations are imposed on the loan proceeds, including a limit on certain employee compensation, no loans under this section will be available for loan forgiveness.

Included in this section, 4003(c)(3)(D)(i) indicates the Secretary of the Treasury will “endeavor to seek the implementation of a program or facility . . . that provides financing to banks and other lenders that make direct loans to eligible businesses including, to the extent practicable, nonprofit organizations, with between 500 and 10,000 employees . . .” This is a welcomed addition to the Act for many mid-sized businesses, as much of the relief

For any questions or comments you might have regarding this newsletter, please feel free to contact:

Chicago Office

20 N. Wacker Drive, Ste. 1660
Chicago, IL 60606

T: (312) 984-6400

F: (312) 984-6444

Orland Park Office

15010 S. Ravinia Ave., Ste. 10
Orland Park, IL 60462

T: (708) 349-3888

F: (708) 349-1506

Streator Office

7 Northpoint Drive
Streator, Illinois 61364

T: (815) 672-3116

F: (815) 672-0738

Lincolnshire Office

250 Parkway Drive, Ste. 330
Lincolnshire, Illinois 60069

T: (312) 984-6400

F: (312) 984-6444

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in the CARES Act and the Families First Coronavirus Response Act, has been pointed at smaller businesses.

As with many of the more complex sections of the CARES Act, business owners are still waiting for regulations to be released by the Treasury, in regards to this section. Until that time, legal professionals continue to try to interpret the meaning and intent of this section.

Payroll Protection Program (PPP)

Included in the CARES Act is the Payroll Protection Program. This section sets aside \$349 billion for small business loans to cover qualified payroll costs, rent, utilities, and interest on mortgage and other debt obligations. The businesses eligible to take part in the program include businesses with fewer than 500 employees, businesses in the accommodation and food services industries with more than one physical location but no more than 500 employees at each location, nonprofits, and some independent contractors and sole proprietors.

The maximum loan amount that a business may receive through this program is the lesser of \$10 million or the sum of 2.5x the average total monthly payroll costs for the prior year. The funds cannot be used to pay an annual salary of \$100,000 to any one employee, independent contractor, or sole proprietor. Further, the funds cannot be used to compensate employees with principal places of residence outside the U.S., or to pay leave wages already covered by the FFCRA.

Different from traditional Small Business Administration (SBA) loans, there is no personal guarantee or collateral required to be eligible for a loan under this Act. However, the Act does require a certification that (1) the loans are necessary as a result of current economic conditions; (2) the funds will be used to retain workers, maintain payroll, or make business-related payments such as lease, mortgage, or utility payments; and (3) duplicative loans or grants are not being obtained for the same purposes of the loaned funds. Because no collateral or guarantee is required to obtain a loan, there will be no recourse for the government for non-payment of the loan, unless the business uses the loan for a purpose other than those discussed above.

All loans obtained under the PPP will have a maturity of two years and a 1.0% interest rate. Loan forgiveness will be available, but 75% of the forgiven amount must have been used to cover payroll costs. The loan amounts will be forgiven so long as (1) the loan is used for one of the above-discussed purposes, and (2) employment and compensation levels are maintained.

Applications can be submitted through participating FDIC insured institutions, federally insured credit unions, and Farm Credit System institutions. However, due to the large number of anticipated applicants, some banks are limiting those they will accept applications from to clients with existing lending histories at the bank.