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LEGAL MEMORANDUM

From: Douglas K. Paul
Date: March 27, 2020
Re: The Coronavirus Aid, Response, and Economic Security Act “CARES Act”

The Coronavirus Aid, Response, and Economic Security Act “CARES Act” was enacted on March 27, 2020. The CARES Act is a \$2 trillion stimulus package to address the economic needs of businesses and individuals due to the Coronavirus Pandemic. The following is a summary of the CARES Act provisions specifically for businesses.

Paycheck Protection Program

- Employers with 500 or fewer employees are eligible to receive a loan to cover costs incurred by the employer between February 15 and June 30. For purposes of counting the number of employees that are employed, the term “employee” includes full-time employees, part-time employees, and individuals employed on “other basis,” like seasonal or temporary.
- Loan to support, among other things, wages, cash tip equivalents, the cost of health benefits, the cost of retirement benefits, the cost of leave (e.g., vacation, family, and sick leave), or the payment of State or local taxes assessed on employee compensation. The loan can also be used to pay mortgage interest, rent, utility bills, and premiums for COBRA.
- Defines eligibility for loans as a small business, 501(c)(3) nonprofit, a 501(c)(19) veteran’s organization, or Tribal business concern described in section 31(b)(2)(C) of the Small Business Act with not more than 500 employees, or the applicable size standard for the industry as provided by SBA, if higher. Self-employed individuals are also eligible to receive a loan.

- Small businesses may take out loans through December 31, 2020 and cover employees making up to \$100,000 per year; loans taken for this purpose may be forgiven if the business maintains an average monthly number of employees during the covered period (between February 15 and June 30) that is no less than the number it had before the crisis began, among other requirements. Firms that have laid off employees may qualify for forgiveness if employees are rehired by April 1, 2020.
- The cost of participation in the program would be reduced for both borrowers and lenders by providing fee waivers, an automatic deferment of payments for one year, and no prepayment penalties.

Payroll Tax Credit

- Provides a refundable payroll tax credit for 50% of 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 shut-down order, or (2) gross receipts declined by more than 50% when compared to the same quarter in the prior year.
- For employers with more than 100 full-time employees, qualified wages are wages paid to employees when they are not providing services due to the COVID19-related circumstances.
- For 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 and is provided for wages paid or incurred from March 13, 2020 through December 31, 2020.

Deferred Social Security Tax Payments

- 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. All employers are responsible for paying a 6.2% 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. The Social Security Trust Funds will be held harmless under this provision.

Relief Loans

- Employers (of any size) may apply for relief loans due to COVID-19. One requirement (among others) for loan recipients is to maintain employment levels as of March 24, 2020 through September 30, 2020, to the extent practicable, and in any case shall not reduce their employment levels by more than 10% from the levels on such date the loan is acquired.
- Midsize to large employers (500 to 10,000 employees) including nonprofit organizations may qualify for loans related to losses incurred as a result of COVID-19. Loan borrowers will not be required to pay principal or interest towards the loan for the first six months or longer at the discretion of the Treasury Secretary. Loan recipients must retain at least 90% of the workforce, at full compensation and benefits, until September 30, 2020, among other requirements.

Employee Benefits

- Allows an employee who was laid off by an employer March 1, 2020, or later to have access to paid family and medical leave in certain instances if they are rehired by the employer. The employee would have had to work for the employer at least 30 days prior to being laid off.
- Allows employers to receive an advance tax credit from the Department of Treasury instead of having to be reimbursed on the back end. Creates regulatory authority to implement tax credit advancements.
- Amends Section 518 of ERISA to provide the Department of Labor the ability to postpone certain ERISA filing deadlines for a period of up to one year in the case of a public health emergency.
- Provides single employer pension plan companies with more time to meet their funding obligations by delaying the due date for any contribution otherwise due during 2020 until January 1, 2021. At that time, contributions due earlier would be due with interest. The bill also provides that a plan's status for benefit restrictions as of December 31, 2019, will apply throughout 2020.
- Ensures that federal contractors who cannot perform work at their duty-station or telework because of the nature of their jobs due to COVID-19, continue to get paid.

Unemployment Insurance

- Creates a new Pandemic Unemployment Assistance program (through December 31, 2020) to help those not traditionally eligible for Unemployment Insurance (UI), including self-employed individuals, independent contractors, those with limited work history and those who are unable to work as a result of the coronavirus public health emergency. Pays 50% of the unemployment insurance costs incurred by state, local and tribal governments and non-profit organizations, not part of the UI system.
- Provides additional \$600/week payment to each UI or Pandemic Unemployment Assistance recipient through the end of July 2020.
- Provides funding for the 1st week of unemployment for states to waive the traditional “waiting week” before benefits begin.
- Provides an additional 13 weeks of unemployment to help those who remain unemployed after weeks of state unemployment are no longer available.
- Provides states with temporary, limited flexibility to hire temporary staff or re-hire former staff to quickly process unemployment claims.
- Provides funding to states to help them maintain short-time compensation programs to prevent layoffs, as well as expand these work sharing programs in the future.

Retirement Related Provisions

- Waives the 10% tax on early withdrawals up to \$100,000 from a retirement plan or IRA (made on or after January 1, 2020) for an individual who is diagnosed with COVID-19; whose spouse or dependent is diagnosed with COVID-19; 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.
- Permits individuals to pay tax on the income from the distribution over a three-year period and allows individuals to repay that amount tax-free back into the plan over the next three years. Those repayments would not be subject to the retirement plan contribution limits.
- Doubles the current retirement plan loan limits to the lesser of \$100,000 or 100% of the participant’s vested account balance in the plan. Individuals with an outstanding loan from their plan with a repayment due from the date of enactment of the CARES Act through Dec. 31, 2020, can delay their loan repayment(s) for up to one year.

- Retirement plans can make amendments and adopt these rules immediately, even if the plan does not currently allow for hardship distributions or loans, provided the plan is amended on or before the last day of the first plan year beginning on or after Jan. 1, 2020, or later if prescribed by the Treasury Secretary.
- Waives the required minimum distribution rules for accountholders who are age 70-1/2 or older that are subject to mandatory minimum distributions 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.

Health Care Provisions

- Clarifies that all testing for coronavirus (COVID-19) is to be covered by private insurance plans (fully-insured and self-insured) without cost sharing. Coverage extends to any services or items provided during a medical visit—including an in-person or telehealth visit to a doctor’s office, an urgent care center, or an emergency room—that results in coronavirus testing or screening. This coverage requirement began on March 18 (when Families First Coronavirus Response Act was enacted) and remains in effect only while there is a declared public health emergency (as defined under federal law).
- For private health insurance plans, the bill broadens the testing that would be covered without cost-sharing beyond FDA-approved testing to include 1) tests provided by clinical labs on an emergency basis (including public health labs); and 2) state-developed labs.
- Changes the use of health savings accounts (HSAs) paired with high-deductible health plans (HDHPs). Allows a high-deductible health plan (HDHP) with a HSA to cover telehealth services prior to a patient reaching the deductible. This means that telehealth and other remote care services could be covered pre-deductible without violating federal rules for HDHPs paired with an HSA. This provision is temporary and will sunset December 31, 2021 unless Congress takes future action to extend or make permanent.
- Inclusion of certain over-the-counter medical products as qualified expenses. Allows patients to use funds in HSAs, Flexible Spending Accounts, Archer medical savings accounts and health reimbursement arrangements for the purchase of over-the-counter medical products, including those needed in quarantine and social distancing, without a prescription from a physician. This change would apply for amounts paid or expenses incurred after December 31, 2019.
- Allows HSAs (and the similar arrangements noted above) to be used to pay for certain menstrual care products, such as tampons and pads. These products would be treated as qualified medical expenses for purposes of these arrangements. This change would apply for amounts paid or expenses incurred after December 31, 2019.

Student Loan Repayment Assistance

- Allows 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.