The CARES Act and Leave Guide for Employers: Deciding Which Option is Best for You and Your Employees

PilieroMazza Client Alert

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Congress passed the Coronavirus Aid, Relief, and Economic Security Act (the "Act" or the "CARES Act") on March 27, 2020 in an effort to mitigate the economic impact of COVID-19 on businesses and employees. President Trump is expected to sign the bill into law any moment. Once signed, the CARES Act allows businesses to apply for loans to continue paying employees and maintaining operations, which may be forgiven, expands on provisions of the Families First Coronavirus Act (FFCRA), and provides for additional flexibilities regarding unemployment insurance, among other aid and relief for employers. The CARES Act is an unprecedented piece of legislation, but many employers are struggling to determine how to make the right choice to save their business and maintain their workforce. *In this blog, we are breaking down options for employers who have affected workforces and identifying resources available to them.*

I. Can I Continue Paying Salaries and Operating Expenses?

Many businesses have been hit hard by the COVID-19 crisis and have had to stop work entirely. The programs available in CARES can facilitate payment of wages and operating expenses during this time.

Paycheck Protection Program:
Good for businesses with fewer than 500 employees that would otherwise have to layoff or furlough their employees.

The Paycheck Protection Program expands upon the U.S. Small Business Administration’s (SBA) 7(a) Loan Program. The program would allow small businesses of no more than 500 employees, as well as businesses otherwise considered small under their NAICS code, to cover payroll costs and other expenses from February 15, 2020 through June 30, 2020. Eligible businesses will include nonprofit organizations, veteran organizations, Tribal businesses, sole-proprietors, independent contractors, and certain self-employed individuals. Additionally, businesses in the hospitality industry (those with a NAICS Code of 72) are eligible for a loan as long as they employ not more than 500 employees per each physical location. The Act also waives many requirements previously required to qualify for a loan, such as a personal guarantee or collateral.

The eligible loan amount will be determined based on the lesser of the following:

- 2.5 times the average monthly payroll costs of the employer during the prior year; or
- $10 million.

Loan recipients may use the loan to fund the following:

- Payroll costs up to $33,000 per employee ($100,000 annually);
- Costs related to group health care benefits during periods of sick leave, medical or family leave, and insurance premiums;
- Employee salaries, commissions, or similar compensations;
- Payments of interest on any mortgage obligation;
- Rent;

- Utilities; and
- Interest on any other debt obligations that were incurred prior to February 15, 2020.

An eligible business will have to certify to a number requirements, including that the uncertainty of economic conditions makes the loan necessary to maintain ongoing operations.

The program provides for loan forgiveness for any amount equal to the sum of all the costs incurred and payments made during the covered period, including payroll costs, interest on any mortgage obligations, payments on rent obligation, or any covered utility payment. Please note that the amount of the forgiveness for the loans will be reduced if the employer reduces its workforce during the covered period or reduces the salary or wages paid to an employee by more than 25% during the covered period (as compared to the most recent quarter). However, an employer may avoid the loan reduction where, by June 30, 2020, the employer rehires any and all employees laid off since February 15, 2020 or increases previously reduced wages.

For a more detailed analysis of the Act's Paycheck Protection Program and the 7(a) loan program, please visit this link for PilieroMazza's Client Alert on the CARES Act.

Emergency Relief and Taxpayer Relief: Good for Mid-Size Businesses over 500 Employees that would otherwise have to layoff or furlough employees.

If employers do not meet the eligibility requirements for the small business loans as described above, they may qualify for the loan programs for mid-size businesses. Those businesses with 500 to 10,000 employees could receive direct loans under the Emergency Relief and Taxpayer protections of the Act. While the details of this program are not yet clear, if a business believes they may qualify for this type of loan, they must provide a "good faith certification" that, among other things, the funds it receives will be used to retain at least 90 % of its workforce until September 30, 2020 and it will not outsource or offshore jobs for 2 years after completing repayment of the loan.

Relief for Government Contractors: Good for federal government contractors under a stop work order or facility closure or restriction.

The Act provides a mechanism for contracting officers to modify the terms and conditions of a contract and reimburse contractors at the minimum applicable contract billing rates to keep their employees or subcontractors in a ready state, not to exceed an average of 40 hours per week. This authority extends until September 30, 2020 and only applies to a contractor whose employees or subcontractors cannot perform work on a site due to facility closures or restrictions, and whose employees cannot telework because their job duties cannot be performed remotely.

The Act is in line with the recent March 9, 2020 memorandum from the Office of Management and Budget (OMB), which provides agencies with additional flexibilities on administrative relief to an expanded scope of recipients affected by the loss of operational capacity and increased costs due to the COVID-19 crisis. For government contractors, best practice now would be to communicate with your contracting officers and provide them with the tools and knowledge of the flexibility provided to them under the Act and related guidance.

The Downside

While the relief in the Act provides a funding source for businesses that qualify, there will be a period of time from application to funding that may be difficult for some employers to sustain. Employers may have to explore interim options before funding becomes available.

II. Can I Provide Sick or Family Leave to Employees?

Effective April 1, the FFCRA provides for new paid leave requirements as part of new Emergency Paid Sick Leave and Emergency Paid Family and Medical Leave requirements. The CARES Act makes several changes to the FFCRA, most of which are technical in nature. We previously wrote on the FFCRA signed into law by President Trump on March 18, 2020 (link).

FFCRA continues to be a good option for employers who are not shut down or facing significant layoffs, but who have employees who cannot telework (or need to telework on an intermittent basis) and are ill with COVID-19 related symptoms, are told by a physician to isolate, need to take care of a child or relative, or are subject to a federal, state, or local isolation order. If an employer takes advantage of FFCRA sick leave, any tax credit received by the employer cannot be used as a basis for loan forgiveness under the Payment Protection Program described above.

The Act adds a new provision for rehired employees under the FFCRA's Emergency Family and Medical Leave. Specifically, the Act now provides that employees who were laid off by an employer after March 1, 2020, had worked for the employer at least 30 of the last 60 days before the layoff, and have now been rehired, can be eligible for Emergency Family and Medical Leave.

Additionally, the Act allows for refundable tax credits under the FFCRA to be advanced. The IRS is expected to release guidance on this issue and other tax implications under the FFCRA in the coming weeks.

Key Takeaways

If you do not qualify for a loan and you have been able to maintain business operations, the FFCRA provides you with a means to seek assistance and relief for employees because of one of the eligible reasons prescribed by the FFCRA.

Keep in mind that the FFCRA does not kick in until April 1 and the relief is limited in scope and duration. Also, it is important to note that FFCRA's paid sick leave and expanded family medical leave is in addition to employees' preexisting leave entitlements. Under the FFCRA, the employee may choose to use existing paid vacation, personal, medical, or sick leave from the company's paid leave policy to supplement the amount your employee receives from paid sick leave or expanded family and medical leave, up to the employee's normal earnings. However, you are not required to permit an employee to use existing paid leave to supplement any portion of the FFCRA leave that is unpaid and you cannot claim and will not receive tax credits for such supplemental amounts.

III. Do I Layoff or Furlough Employees?

In spite of all of the relief that may be available through the CARES Act and the FFCRA, some employers have had and will have to make the decision to layoff or furlough employees, even if for a short period of time. Whether to layoff or furlough employees can depend largely on state unemployment compensation regulations and whether your benefit plans will require an employer to continue benefit payments during a period of leave without pay, such as a furlough. It is advisable to check with your benefits providers regarding the expectation of your benefit plans.

The CARES Act also expands unemployment assistance for covered individuals through December 31, 2020. It will apply to individuals who are unemployed, partially unemployed, or unable to work between January 27, 2020 and December 31, 2020. Additionally, a covered individual will receive an additional $600 per week on top of the amount determined under the state law. The Act allows for expanded assistance to continue for a maximum of 39 weeks, which is greater than the 26 weeks typically provided by most states.

Each employer is facing tough challenges unique to its business operations and circumstances. PilieroMazza will continue to monitor the rapidly developing COVID-19 crisis and will provide updates accordingly, especially as more guidance gets released by the government agencies as has been promised. In the meantime, the Labor & Employment Group at PilieroMazza is here to help with any of the above as need be. We also invite you to visit PilieroMazza's Client Resource Center to access further resources that will help businesses navigate the effects of the COVID-19 pandemic.

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