

LABOR AND EMPLOYMENT

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The Coronavirus Aid, Relief, and Economic Security Act (CARES) – What Employers and Workers Need to Know

By Brian M. Wallen, Jo Bennett, and Michael J. Wietrzykowski

On March 27, 2020, the President signed the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) into law – the third piece of federal legislation addressing the COVID-19 pandemic. The CARES Act follows passage of the Coronavirus Preparedness and Response Supplemental Appropriations Act and the Families First Coronavirus Response Act (“FFCRA”). While the first law focused on COVID-19 preparations and the FFCRA focused on paid leave, the CARES Act provides economic relief to state and local governments through additional unemployment funding; financial assistance to individuals through fixed payments based on income; and short-term crisis funding for struggling industries. The CARES Act also enacts several programs for small businesses and federal contractors and makes changes to the FFCRA.

This Alert focuses on how employers and workers are affected by the CARES Act – important changes and clarifications to the FFCRA; expansion of unemployment compensation benefits; and special programs available to small businesses and federal contractors.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT (“FFCRA”) CHANGES

The CARES Act makes notable changes by tweaking some provisions of the FFCRA. Under the CARES Act, employers may take an advance of the credit available to them for providing paid sick leave or partially paid leave under the Family and Medical Leave Act. This provision permits employers to lessen their tax burdens in the calendar quarter during which the

leave is actually taken instead of waiting until after filing their quarterly taxes to receive the benefit of the credit. The CARES Act also broadens the definition of employees who are eligible for paid leave under the FFCRA to include employees who were laid off on or after March 1, 2020 and worked for the employer for 30 of the last 60 calendar days prior to the layoff.

The CARES Act clarifies financial caps under the FFCRA for paid family leave and paid emergency sick leave. Under the Act, an employer is not required to pay more than \$511 per day and \$5,110 in total for each employee who takes emergency paid sick leave because of the following:

1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19;
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19; or
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.

Additionally, an employer is not required to pay more than \$200 per day and \$2,000 in total for each employee who takes emergency paid sick leave because of the following:

1. The employee is caring for an individual who is experiencing symptoms of and seeking diagnosis for COVID-19, or is subject to a governmental order or medical recommendations to quarantine or self-isolate;

2. The employee is caring for a son or daughter because the child's school has closed or because the child's regular child-care provider is unavailable due to COVID-19 precautions; or
3. The employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

The Act also clarifies that, under the paid family leave provisions of the FFCRA, an employer is not required to pay more than \$200 per day and \$10,000 in total per employee to care for a child due to school closures or unavailability of child care caused by COVID-19.

EXPANSION OF STATE UNEMPLOYMENT COMPENSATION BENEFITS

The CARES Act expands unemployment benefits eligibility under state programs to individuals who become unemployed, become partially unemployed, or are unable to work between January 27, 2020 and December 31, 2020 due to COVID-19. These expanded benefits are potentially important to employers who make layoffs and hope to re-hire workers after the crisis period has passed.

The class of workers potentially eligible for expanded unemployment benefits includes not only W-2 employees but also individuals who are self-employed, individuals seeking part-time employment, individuals who do not have sufficient work history, and individuals "who otherwise would not qualify for unemployment benefits." Based on legislators' statements, "otherwise would not qualify for unemployment benefits" means that independent contractors, gig workers, freelancers, and other non-traditional workers who typically do not receive unemployment benefits will be eligible for benefits under the CARES Act.

Individuals will be eligible for "pandemic unemployment compensation" if they become unemployed, become partially unemployed, or are unable to work because:

1. The person has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
2. A member of the person's household has been diagnosed with COVID-19;
3. The person is providing care for a family member or a member of the person's household who has been diagnosed with COVID-19;
4. A child or other individual in the household for whom the person has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the person to work;
5. The person is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;
6. The person is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
7. The person was scheduled to commence employment and was told not to report or is unable to reach the job as a direct result of the COVID-19 public health emergency;
8. The person has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;
9. The person had to quit a job as a direct result of COVID-19;
10. The person's place of employment is closed as a direct result of the COVID-19 public health emergency; or
11. The person meets any additional criteria established by the Secretary of Labor for unemployment assistance under this section.

The only individuals specifically not eligible to receive unemployment benefits under the CARES Act expansion are individuals with the ability to telework and individuals receiving paid sick leave or other paid leave benefits. A person who is seeking pandemic unemployment compensation benefits must provide a “self-certification” that they are otherwise able to work and available for work (as defined by their state’s unemployment laws). Individuals who qualify for unemployment assistance due to one of the aforementioned reasons will receive their state benefit plus an additional \$600 per week for up to four months. It remains to be seen whether the Secretary of Labor publishes any regulations further expanding the pool of individuals who are potentially eligible to receive unemployment benefits.

SMALL BUSINESS ADMINISTRATION LOANS

Under the CARES Act, small businesses may take out Small Business Administration (“SBA”) loans, called the Paycheck Protection Program. The loans are up to \$10 million or 2.5 times the average total monthly payments by the business for payroll costs incurred during the one-year period before the date on which the loan is made. (There is a different calculation for seasonal employers.) A small business is defined as an employer with fewer than 500 employees, regardless of hours worked. Hotels and restaurants with more than one location and fewer than 500 employees at any one location are also eligible for the loan (businesses with an NAICS code beginning with 72). Finally, self-employed individuals are eligible for these loans.

The loans provided under the CARES Act may be used for employee compensation through June 30, 2020, capped at salaries equal to an annual rate of \$100,000. Employers also may use the loans for group health benefits costs; payments for vacation, parental, family, medical or sick leave (other than payments for paid leave provided per FFCRA); severance payments; payments required for retirement benefits; and state and local employment taxes. In addition to salary assistance, the loans may be used by businesses for rent, utilities, and loan interest incurred prior to the COVID-19 pandemic. Notably, the loans can only be used to pay employees based in the United States.

Potential borrowers should be aware of the loan forgiveness requirements that incentivize employers to keep staffing and wages at or near the status quo. Loan forgiveness is available eight weeks after the date the loan is made. However, the forgiveness amount may be reduced if there are fewer employees at the end of the covered period, February 15, 2020 – June 30, 2020, than there were at the end of the last quarter ending prior to February 15, 2020. In the alternative, forgiveness amounts will be reduced if any employee’s salary is lowered by more than 25 percent when compared with the employee’s salary at the end of the last quarter prior to February 15, 2020.

This is a significant benefit for small businesses left wondering how they will survive during these times of economic uncertainty. Small businesses that are interested in these loans and are also considering furloughs, layoffs, or salary reductions should ensure that their staffing decisions will not adversely impact any forgiveness provided through this loan program.

EMPLOYER TAX CREDITS

Many employers may choose to forego the SBA Paycheck Protection Program loans based on the restrictions on staffing changes incurred by such a loan. Employers who choose to forego these loans may be eligible for a 50 percent payroll credit against employer taxes for qualified wages up to \$10,000 (the definition of qualified wages is different depending on whether the business employs 100 or more employees). Businesses may be eligible for these credits if the operation of the trade or business is fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19. As some businesses are still operating, those businesses that earn less than 50 percent of gross receipts for the same comparable calendar quarter in the prior year will be eligible for the credit. These businesses will continue to maintain eligibility for each quarter where gross receipts are more than 80 percent less than gross receipts for the same calendar quarter in the prior year. This credit will be reduced based on any credit provided for paid leave or partially paid FMLA leave under the FFCRA.

Since this tax credit is not available for employers who accept a loan through the Payroll Protection Program, businesses must be careful in evaluating which option makes more sense for their operations.

GOVERNMENT CONTRACTOR BENEFITS

In one of the less-publicized portions of the CARES Act, Congress has granted authority to the various federal agencies to reimburse contractors who continue to pay employees assigned to federal contracts when the employee is otherwise unable to work because of COVID-19. This provision of the CARES Act states the reimbursement will be equal to any minimum applicable contract billing rate. There is no requirement that the contractor provide any consideration to negotiate payment for hours that would otherwise not be billable. As this clause merely permits agencies to reimburse and does not mandate reimbursement, it is unclear how the various administrative agencies of the government will interpret this section. Moreover, the amount of the reimbursement will be reduced by any tax credit the contractor receives under other sections of the CARES Act as well as credits claimed for leaves granted under the FFCRA. Regardless of how agencies apply this clause in practice, federal contractors should immediately contact the contracting officer to whom they report to begin negotiations regarding reimbursement for paid leaves.

CONCLUSION

The CARES Act, along with the FFCRA, provides significant financial support to businesses and displaced employees. It is paramount for all employers to know the benefits and consequences that employment decisions may have on their ability to maximize benefits to the business and its workers.

This Alert is based on information available at the time of publishing. It is subject to change. Business leaders should consult with counsel and refer to government websites and publications for the most up-to-date information.

For more detailed analysis on a wide range of legal issues, please see Schnader's COVID-19 Resource Center at www.schnader.com/blog/covid-19-coronavirus-resource-center. ◆

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For more information about Schnader's Labor and Employment Practices Group or to speak with a member of the firm, please contact:

*Michael J. Wietrzychowski
Co-Chair, Labor and Employment Practices Group
856-482-5723
mwietrzychowski@schnader.com*

*Jo Bennett
Co-Chair, Labor and Employment Practices Group
215-751-2134
jbennett@schnader.com*

*Brian M. Wallen
Associate
215-751-2031
bwallen@schnader.com*

www.schnader.com

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