

CLIENT ALERT

From: Fisher, Tousey, Leas & Ball

Re: Summary of CARES Act

Date: April 1, 2020



In response to the COVID-19 pandemic, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act (the “**CARES Act**”) into law on March 27, 2020, after approval by Congress. The CARES Act, well known for its \$2 trillion price tag, provides a variety of relief programs to benefit a significant component of American society, including small business owners, consumers, and displaced employees.

Fisher, Tousey, Leas & Ball’s attorneys have analyzed the CARES Act and can help you navigate this unprecedented period in history. Below are summaries of different sections of the CARES Act that may be relevant to your business and you.

Loans (Two Types)

Small Business Loans (Paycheck Protection Loan Program)

During the covered period (February 15, 2020 – July 30, 2020), the Small Business Administration (“**SBA**”) can provide loans to eligible businesses to assist them with certain costs, including payroll, rent, health benefits, insurance premiums, utilities, salary and employee commissions, and interest on debt incurred before the covered period.

Paycheck Protection Loan Details:

- Interest rate is capped at 4% per year (and may be only .5% per year)
- Maturity is 2 years from the loan date
- Lender does not go through standard SBA channels when determining a borrower’s eligibility
- No collateral or personal guarantee requirements
- SBA Express Loan maximum is \$1 million through December 31, 2020; it will then return to its historic \$350,000 cap
- No recourse against any individual, shareholder, member, or partner of an eligible loan recipient for non-payment *as long as funds are used for proper purposes*
- *Loan funds may not be used for individual employee compensation above \$100,000 per year*, prorated for the covered period; certain federal taxes; compensation to employees whose principal place of residence is outside the US; and sick and family leave wages, which credit is allowed under the Families First Act.
- *Applications can be made until June 30, 2020*

This Client Alert is provided for informational purposes only; it does not constitute legal advice and does not necessarily reflect the opinions of Fisher, Tousey, Leas & Ball or any of its attorneys or clients. You should evaluate the CARES Act as it applies to your own individual circumstances.

Eligibility: To be eligible, a business or nonprofit organization must not employ more than the greater of (i) 500 employees, or (ii) if applicable, the size standard in number of employees in their North American Industrial Classification System. These numbers include both full-time and part-time employees.

Maximum Loan Amount: The maximum loan amount is the lesser of:

- 2.5 times average total monthly payroll costs incurred in the one-year period before the loan is made (or for seasonal employers the average monthly payroll costs for the 12 weeks beginning on February 15, 2019, or from March 1, 2019 to June 30, 2029),¹ PLUS the outstanding amount of a loan made under the SBA’s Disaster Loan Program between the date on which such loan may be refinanced as part of this new program; **OR**
- \$10 million

Loan Forgiveness: A portion of a Paycheck Protection Program Loan (a “**PPP Loan**”) is eligible for forgiveness. The portion of the PPP Loan that is eligible for forgiveness is determined at the end of the 8-week period after the loan is originated. The amount of loan principal that may be forgiven is equal to the sum of the borrower’s expenses for payroll costs, and existing interest payments on mortgages entered into before February 15, 2020, rent payments on a lease entered into before February 15, 2020, and covered utility payments. The amount of the loan forgiven will not exceed the principal of the loan. The PPP Loan can be used for other business-related expenses, but that portion of the loan will not be forgiven. Any amount of loan forgiveness is excluded from taxable income. ***However, a borrower whose PPP Loan is forgiven is not eligible for the payroll tax credit or deferral offered under the CARES Act.***

The amount of loan forgiveness will be reduced if the borrower fails to maintain the same level of full-time equivalent employees (FTEs) as it employed during certain time periods. The loan forgiveness will be reduced by multiplying the loan amount by the ratio of reduced number of FTEs during the covered period divided by one of the following:

- The average number of FTEs between February 15, 2019 and June 30, 2019; or
- The average number of FTEs between January 1, 2020 and February 29, 2020; or
- For seasonal employers, the average number of FTEs per month between February 15, 2019 and June 30, 2019.

So, if a borrower borrows \$1,000,000, had 50 FTEs between February 15, 2019 and June 30, 2019 and reduced the number of FTEs to 10 during the covered period (April 1, 2020 to May 31, 2020), the amount of principal forgiveness is reduced to \$200,000.

¹ Upon request, for businesses that were not in existence during the period from February 15, 2019 to June 30, 2019, 2.5 times the average total monthly payroll payments from January 1, 2020 to February 29, 2020, PLUS the outstanding amount of a loan made under the SBA’s Disaster Loan Program between January 31, 2020 and the date on which such loan may be refinanced as part of this new program.

If a borrower laid off employees, the borrower has an incentive to rehire those employees to maintain the same number of FTEs to be eligible for the loan forgiveness by June 30, 2020. Specifically, the rules reducing the principal amount of a PPP Loan that will be forgiven will not apply to an employer that laid off employees between February 15, 2020 and 30 days following enactment of the CARES Act to the extent that:

- The employer reduces the number of FTEs in that period and, not later than June 30, 2020, the employer has eliminated the reduction in FTEs; **OR**
- There is a salary reduction, as compared to February 15, 2020, during that period for one or more employees and that reduction is eliminated by June 30, 2020 (*it is unclear whether this is also intended to be limited to employees who made under \$100,000 in 2019*).

As part of the CARES Act, tax credits will be available based on wages paid. Additionally, employment tax deferral is available. Because a borrower cannot receive both loan forgiveness and the tax credits/employment tax deferral, it is important to determine whether the tax credits/employment tax deferral or the loan forgiveness will have more value to each borrower.

Economic Injury Disaster Loan Program (EIDLs)

Maximum Loan Amount: \$2 million.

Eligibility: Small businesses that are currently eligible under original EIDL program, any business, cooperative, Employee Stock Ownership Plan (ESOP) with fewer than 500 employees, private nonprofit organizations, small agricultural cooperatives, and individuals who operate as a sole proprietorship or an independent contractor with or without employees are eligible.

Covered Loan Period: January 31, 2020 to December 31, 2020

Use of Loan Proceeds: Loan proceeds can be used to provide sick leave to employees unable to work due to COVID-19, maintain payroll, meet increased supply chain costs, pay rent or mortgage payments, and repay debts that cannot be paid due to lost revenue.

Emergency Advance: Borrowers may request an emergency advance up to \$10,000 within three days after the SBA receives the borrower's application. If a borrower's application for the full loan amount is denied but the advance has been made, the borrower is not required to repay the \$10,000 advance.

Loan Details:

- No personal guarantee is required on advances and loans of up to \$200,000.
- The CARES Act waives the requirement that the applicant be in business at least one year before the disaster as long as the business was in operation on January 31, 2020.

- No requirement that the applicant be unable to obtain credit elsewhere.
- Applicants may be approved based solely on the borrower's credit score or by the use of an alternate method to determine the borrower's ability to repay the EIDL; no tax return is required.

Frequently Asked Questions:

- May businesses borrow under both loan programs?

Yes. Borrowers may apply for an EIDL loan in addition to a PPP Loan, provided the loans are not used for the same purpose.

- What if I have an existing SBA loan? Will it be impacted by the CARES Act?

Yes. For any SBA-guaranteed Section 7(a) loans (other than PPP Loans) in regular servicing status made before the CARES Act was enacted, or during the six-month period after enactment, the SBA will pay all scheduled principal, interest and fees due during such period. Your payments will resume after the six-month period ends, but you will not be responsible to the lender or the SBA for the principal, interest or fees scheduled to be paid during the subsidy period and paid by the SBA.

Employment Issues

Emergency FMLA Expansion: The CARES Act clarifies provisions in the Families First Coronavirus Response Act (“*FFCRA*”); specifically, it provides that an employer's liability under the Emergency FMLA Expansion Act is limited to \$200 per day and \$10,000 in the aggregate for each eligible employee. An eligible employee is (a) an employee who worked for the employer for no less than 30 calendar days, and (b) an employee who was laid off no earlier than March 1, 2020, had worked for the employer for no less than 30 days of the last 60 calendar days prior to being laid off, and was rehired by the employer.

- “Emergency Leave” is available beginning on and after April 1, 2020 through December 31, 2020.
- The Emergency Leave requirements only apply to businesses with fewer than 500 employees on the date an employee takes leave.
- Small businesses with fewer than 50 employees can seek an exemption from their Emergency Leave obligations if providing the Emergency Leave would jeopardize the viability of the employer as a going concern.
- If the employee is unable to work or telework because he or she must care for a child under 18 years of age because that child's school (elementary or secondary) or paid childcare provider has closed or is unavailable due to a public health emergency with respect to COVID-19, ***the employer must provide up to 12 weeks of job-protected leave***. The first 10 days of leave may be unpaid, after which employee receives pay for the remainder of leave at two-thirds (2/3) of the employee's regular pay rate ***up to a maximum paid leave*** of \$200 per day (not to exceed \$10,000 in the aggregate over 12 weeks). The total amount to be paid will

be based on the number of hours the employee would otherwise be normally scheduled to work. During the initial 10-day period, the employee may elect to use available paid leave (i.e., vacation, leave, personal leave, or medical or sick leave).

Emergency Paid Sick Leave: The CARES Act clarifies that an employer’s liability under the Emergency Paid Sick Leave Act (“*EPSL*”) is limited to \$511 per day and \$5,110 in the aggregate for each employee for their care, and \$200 per day and \$2,000 in the aggregate for each employee for the care of others or because the employee is experiencing any other similar condition described in the Act.

- **EPSL Applies To:** Private employers with fewer than 500 employees are subject to the EPSL unless future DOL regulations allow businesses with fewer than 50 employees to opt out if providing the leave would affect the employer’s ability to continue as a “going concern” (i.e. not financially viable).
- **Covered Employees:** All employees are covered regardless of their length of service with the employer.
- **Covered Conditions:** The employee is entitled to benefits if the employee is unable to work or telework because the employee: (a) is subject to a government quarantine order related to COVID-19; (b) has been advised by a health care provider to self-quarantine due to COVID-19 concerns; (c) has been experiencing COVID-19 symptoms and is seeking a medical diagnosis; (d) is caring for an individual (not limited to a family member) subject to a government quarantine order or advised by a health care provider to self-quarantine due to COVID-19 concerns; (e) is caring for a child if the child’s school or day care is closed or the childcare provider is unavailable due to public health emergency (*same as Emergency FMLA above*); or (f) 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.
- **Benefits:**
 - A full-time employee is entitled up to 80 hours of paid sick leave; a part-time employee is entitled to be paid for the number of hours per day he or she worked on average over the prior two-week period.
 - Sick leave taken because the employee has a Covered Condition described in (a), (b) or (c) above (COVID-19 Related self-care) must be paid at the employee’s regular rate of pay, with maximum paid leave calculated at the rate of \$511/day (\$5,110 in total).
 - Sick leave taken because the employee has a Covered Condition described in (d), (e) or (f) above (Care for Others and Other Government Specified Conditions) must be paid at two-thirds (2/3) of the employee’s regular rate of pay, with maximum paid leave of \$200/day and \$2,000 in total.
 - *This emergency sick leave is in addition to any employer-provided or statutory sick leave*; employees have the option to take emergency sick leave before any other sick leave available to them. However, emergency paid sick time shall not carry over from one year to the next.

- **Restriction:** Employers may not require an employee to use other paid leave under an employer policy before the employee uses the paid sick time under the Act.

Unemployment Insurance Relief

The CARES Act provides federal unemployment benefits for employees who were laid off and no longer eligible for regular compensation or extended benefits. The new benefits will be available from January 27, 2020 to December 31, 2020; the CARES Act provides funding to pay for the cost of the first week of unemployment for those states that waive the one-week waiting period. Under the Act, unemployment insurance benefits for all covered individuals will increase by an additional \$600 per week; this additional amount is fully covered by the federal government and is available from the date that the state enters into an agreement with the Secretary of Labor until July 31, 2020. A qualified individual will receive the additional \$600 weekly payment regardless of whether the amount provides the individual more than he or she was earning while employed. The CARES Act also extends the duration of state unemployment insurance benefits. The Act provides 13 additional weeks (in addition to the usual 26 weeks), thus extending the duration of benefits to 39 weeks.

Retirement Plans

The CARES Act increases available plan distributions and the amount of loans available from plans to participants. The CARES Act also waives the required minimum distribution requirements for 2020. Plan sponsors may now offer participants the option to take “Coronavirus Related Distributions” of up to \$100,000 from their qualified retirement plans, 403(b) plans, and 457(b) plans in 2020 without incurring the 10% penalty.

- “Coronavirus Related Distributions” will be available to participants who become ill (or whose spouses or dependents become ill) from COVID-19 or who experience adverse financial consequences from being furloughed, laid off, suffered reduced work hours, or quarantined, or who are unable to work because of lack of childcare, or other impacts identified by the U.S. Department of Treasury. ***People who continue to work but suffer a salary reduction as a result of business contraction are not included in the definition of affected persons – The Treasury has the ability to include this group by Regulation.*** Participants will be able to self-certify their eligibility for a distribution.
- “Coronavirus Related Distributions” can be made immediately and may be taken up until December 30, 2020.
- “Coronavirus Related Distributions” are not subject to the 10% early withdrawal penalty for distributions to made participants under age 59.5.
- “Coronavirus Related Distributions” must be repaid within 3 years of the date of the distribution; provided the distribution is repaid, the repayment will be treated as a rollover contribution so a repayment can be made to an IRA.
- “Coronavirus Related Distributions” ***remain*** taxable unless repaid but participants may include the income from the distribution ratably over 3 years.

Waiver of Required Minimum Distributions

The CARES Act eliminates required minimum distributions (RMDs) for 2020. Participants who are required to take RMDs from their retirement plans (generally those over age 72) are not required to take RMDs for 2020 or 2019 RMDs that were scheduled to be made by April 1, 2020. The RMD waiver applies to all qualified defined contributions plans, including 403(b) plans and 457(b) plans, and individual retirement accounts (IRAs). Further, the 2020 year will be disregarded for purposes of determining the 5-year period for the required depletion of inherited retirement plan accounts and IRAs. Finally, distributions of amounts that would have otherwise been subject to RMDs in 2020 may be rolled over.

Banking, Mortgages and Landlord/Tenant

The Federal Deposit Insurance Corporation will continue to guarantee accounts at insured institutions at 100%. In the realm of mortgages and rent, there are 3 key categories:

1. **Single Family Residence Mortgages:** Lenders and servicers holding loans insured or guaranteed by FHA, VA, USDA, Fannie Mae, or Freddie Mac are prohibited from filing a foreclosure action for 180 days, plus an additional 180 days at the request of the borrower. In the event forbearance is requested, penalties and delinquency-related fees may not be charged. Forbearance may extend an extra 4 months if the borrower can demonstrate a COVID-19 hardship.
2. **Multi-Family Residence Mortgages.** Lenders and servicers holding loans insured or guaranteed by FHA, VA, USDA, Fannie Mae, Freddie Mac, or part of HUD-assisted housing are afforded 90 days of forbearance eligibility. This forbearance period expires on the earlier of December 31 or the termination of the emergency declaration.
3. **Residential Rent Space:** Landlords are subject to a 120-day moratorium on filing eviction proceedings due to a tenant's failure to pay rent. Rent will continue to be due as normal; however, late fees or penalties may not accrue during the 120-day period. Landlords may not report failures to pay rent to credit agencies.

Notwithstanding any provision in a mortgage or residential lease covered by the CARES Act that contemplates interest at a default rate, interest must be computed at the regular interest rate.

Tax Benefits

Filing Extensions (Notices 2020-18 and 2020-20)

- Notice 2020-18 extends the deadline for filing Federal income tax returns and paying income, self-employment or estimated tax from April 15, 2020 to July 15, 2020; interest and penalties do not begin to accrue on July 16, 2020. Notice 2020-18 does not apply to any other Federal tax due or any Federal information return due.
- Notice 2020-20 extends the deadline for filing Federal gift tax or generation-skipping transfer tax returns and the payment of any tax otherwise due on April 15, 2020 to July 15, 2020; interest and penalties do not begin to accrue until July 16, 2020.
- The extensions are automatic and do not require any action by the taxpayer.

Employment Tax Relief

To address some of the cash flow concerns arising under FFCRA, the CARES Act provides a mechanism for employers to receive an advance of the payroll tax credits (including any refundable credits). It also provides penalty relief to employers who do not make a deposit of payroll taxes in anticipation of the payroll tax credits being available. In addition to providing for an advance of the FFCRA payroll tax credit for emergency paid leave, the CARES Act creates an employee retention credit for employers who have been forced to close or suspend their operations and permits employers to defer the payment of the employers' portion of the payroll tax.

Employee Retention Payroll Tax Credit

Amount of Credit: The employer payroll tax credit is available for 50% of “qualified wages” (up to \$10,000 in wages) per employee; consequently, the credit cannot exceed \$5,000 per employee in any year. The total amount of the credit an employer can claim is limited to the amount of the “applicable employment taxes” due with respect to all qualified wages paid by the employer.

Eligibility: An employer is eligible for the credit if the employer:

- Closes or partially suspends its operations because of COVID-19-related orders; or
- Experiences a 50% decline in gross receipts as compared to the same quarter last year.

For employers with more than 100 full-time employees, eligible wages are those wages paid to employees who are not providing services for COVID-19-related reasons. For employers with 100 or fewer full-time employees, all wages paid will qualify for the credit whether the employer remains open for business or subject to a COVID-19 order.

Trade-Off: If an employer claims the employee retention payroll tax credit, it is not entitled to **loan forgiveness of any PPP Loan pursuant to the Paycheck Protection Program.**

Additional Regulations: The Treasury will be promulgating regulations to implement the tax credit provisions of the CARES Act.

Payment Deferral for Employer Payroll Taxes: The CARES Act permits employers to delay the payment of the employer payroll tax due for the periods between March 27 and December 31, 2020. Fifty percent (50%) of the employer payroll tax amount due after taking into account credits available under FFCRA and the CARES Act, will now be due on December 31, 2021; the remaining amounts will be due on December 31, 2022. Employers who receive loan forgiveness under the CARES Act are not eligible for the payment deferral. All employers must still remit the employee portion of the payroll tax

under the current deadlines regardless of whether the employers defer the employer portion of the employment tax.

Trade-Off: If an employer defers paying the employer share of its payroll taxes, it is not entitled to **loan forgiveness of any PPP Loan pursuant to the Paycheck Protection Program.**

Losses for Non-Corporate Businesses

The CARES Act repeals excess loss limitation rules with respect to business losses arising in 2018, 2019, and 2020. Specifically, pass-through businesses and sole proprietors, including farms, will now be able to take losses for these tax years even if their losses exceed \$250,000.

Temporary Lift of Corporate NOL Limitations & 5-year Carryback

The CARES Act rolls back the limitations on net operating loss (“*NOL*”) carryovers for losses arising before 2021 and permits NOLs arising in 2018, 2019, or 2020 to be carried back for 5 years. Taxpayers with losses in 2018 and 2019 should consider filing carryback claims promptly (for years 2013–2018) and be prepared to file carryback claims in the first quarter of 2021 for any NOLs in the 2020 tax period. NOLs are first carried back to the earliest tax year where they can be applied, and any remaining NOLs will be carried to the next succeeding tax year. While NOLs from 2018–2020 can still be carried forward indefinitely, carrybacks to pre-2018 tax years will generally be more valuable because the maximum federal income tax rate for such years was 35% compared to the flat 21% for all post-2017 years. NOLs incurred in, or carried to, tax years beginning after December 31, 2020 may only offset up to 80% of taxable income.

Temporary Lift of Interest Limitations

The limitations on the deductibility of interest have been changed for the 2019 and 2020 tax years from 30% to 50% of EBITDA to allow a greater interest deduction. In addition, a taxpayer may choose to use 2019 adjusted taxable income instead of 2020 when computing its limitation for the 2020 taxable year. Notwithstanding the general rule, there is a special rule for partnerships; the lift on the interest limitation only applies at the partnership level in the 2020 tax year. For the 2019 tax year, 50% of excess partnership business interest will be treated as business interest of the partners in their 2020 tax year even if such partners are not allocated excess taxable income in such year. The general rule is that such excess interest is carried forward only to years where the partners are allocated excess taxable income; the remaining 2019 excess business interest is subject to the typical limitation on interest.

Expensing for Qualified Improvement Property

The CARES Act includes a long-awaited fix to the TCJA by classifying “qualified improvement property” as 15-year property. As a result, qualified improvement property

placed in service any time between September 27, 2017 and December 31, 2022 now is eligible for 100% bonus depreciation. Qualified improvement property includes interior improvements to nonresidential real property (but does not include enlargements of the building, any elevator or escalator, or improvements to the internal structural framework of the building). Qualified improvement property had previously required a substantially longer cost recovery period.