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**Coronavirus Aid, Relief, and Economic Security (“CARES”) Act Makes Significant Benefits Available to Qualifying Employers Impacted by Coronavirus Pandemic**

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On March 27, 2020, U.S. businesses breathed a sigh of relief when the House of Representatives passed, and the President signed the Coronavirus Aid, Relief, and Economic Security Act, known as the “CARES Act,” into law. The 880-page CARES Act and the more than 2 trillion dollars in relief thereunder aim to address a broad range of industries and activities impacted by the novel coronavirus and its related disease (COVID-19), including public health programs, waiver of certain provisions and penalties related to management of retirement funds, direct payments to individuals, expansion of unemployment insurance benefits, and critical increases in lending for small businesses. As such, a complete analysis of the CARES Act is beyond the scope of this publication.

Rather, as part of our ongoing effort to drive important information that can help businesses navigate the ever-changing COVID-19 world we live in today, the following is a summary of the provisions of the CARES Act most likely to be of interest to our current and prospective employment clients. We encourage all qualifying businesses to strongly consider taking advantage of the lending opportunities discussed herein and to reach out to us with any questions about the benefits to your business that may be available under the CARES Act.

**Keeping American Workers Paid and Employed**

Division A, Title I of the CARES Act, separately the “Keeping American Workers Paid and Employed Act,” provides crucial amendments to the Small Business Act. These amendments increase the availability of federally-backed, forgivable Payroll Protection Program loans administered by the U.S. Small Business Administration (“SBA”) to provide much-needed cash-flow assistance to employers who maintain their payroll during the coronavirus pandemic.

Payroll Protection Program loans will be available for the time period from February 15 to June 30, 2020 (the “coverage period”). Loans may be made to “small business concerns” that, as of February 15, 2020, were operational and had employees to whom they paid salaries and payroll taxes, and/or paid independent contractors. Such small business concerns include:

- Businesses, veterans’ organizations, and nonprofit organizations that, as of the date of loan dispersal, employ not more than *the greater of*:
  - **500 employees**; or
  - The alternative number of employees established by the SBA for the industry in which the business operates;<sup>1</sup> and

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<sup>1</sup> These maximum employee counts range from 250 to 1,500 as set forth in 13 C.F.R. § 121.201.

- Businesses in the accommodation and food services industry<sup>2</sup> that, as of the date of loan dispersal, employ no more than 500 employees **per location**.

For purposes of determining whether a business qualifies as a small business concern to whom a loan may be granted, the Affiliation Rules under the Small Business Act generally still apply. However, the CARES Act contained limited exception to these Rules for businesses that fall into at least one of the following categories:

- Operate hotels, motels, and/or restaurants;
- Provide traveler accommodations and/or catering services;
- Are franchises with SBA franchise identifier codes;
- Receive financial assistance from a small venture investment company under the Small Business Investment Act.

The maximum Payroll Protection Program loan amount is calculated as *the lesser of*:

- 10 million dollars; or
- 2.5 times the businesses' average total monthly payroll costs<sup>3</sup> for the one-year period preceding the loan,<sup>4</sup> *plus* the outstanding amount of any existing SBA Disaster Loan Program loan made between January 31, 2020 and the date of refinance of that loan under the CARES Act.

Loan funds may be used to cover payroll costs, costs of group health insurance continuation during an employee's leave of absence, mortgage interest payments, rent, utility payments, and interest on a loan predating the covered period. Loan funds may not be used to cover individual employee compensation over \$100,000 per year (or the pro-rated amount during the covered period), compensation of employees with principal residences outside the U.S., or Emergency Paid Sick Leave and Emergency Family and Medical Leave wages paid under the Families First Coronavirus Response Act ("FFRCA").<sup>5</sup>

During the coverage period, the SBA must waive personal guarantee and collateral requirements for Payroll Protection Program loans. Notably, the loans carry no recourse against individual shareholders, members, or partners of the borrowing entity unless (and then only to the extent that) such individuals misuse loan funds.

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<sup>2</sup> Under North American Industry Classification codes beginning with 72.

<sup>3</sup> Payroll costs are defined as the sum of all payments for compensation (including salary, wages, commissions, cash tip equivalents, paid time-off, severance payments, payment for group healthcare benefits (including insurance premiums), retirement benefits, and state or local payroll taxes) to employees, sole proprietors, or independent contractors.

<sup>4</sup> If the business did not exist in the year preceding the loan, this period can be replaced by the period from February 15, 2019 through June 30, 2019.

<sup>5</sup> For more information, please refer to our March 18, 2020 article on the FFCRA.

Critically, the CARES Act also contains broad debt forgiveness provisions. Employers are eligible for debt forgiveness (and exclusion from gross income) for funds used within eight weeks of the date of the loan's origination that are used for payroll costs, interest payments on mortgages, rent obligations, and payments to maintain utility services (including electricity, gas, water, transportation, telephone, or internet) if such services began before February 15, 2020.

The total amount of the loan forgiveness is the reasonable amount to be expended on such costs, reduced by each of the following:

- The amount calculated by dividing the average number of Full Time Equivalent Employees per month during the coverage period by, at the borrower's election, either:
  - The average number of Full Time Equivalent Employees per month from February 15, 2019 to June 30, 2019; **or**
  - The average number of Full Time Equivalent Employees per month from January 1, 2020 to February 29, 2020; **and**
- The amount of reduction in salary or wages of any employee during the coverage period that is greater than 25% of the salary or wages of that employee in the most recent full quarter he or she worked prior to the coverage period.

However, the borrower can avoid the reductions listed above if the reduction in Full Time Equivalent Employees and their wages is eliminated by June 30, 2020.

### **Assistance for American Workers, Families, and Businesses**

The CARES Act, under Title II – “Assistance for American Workers, Families, and Businesses,” also contains significant expansions of the unemployment insurance benefits available to workers impacted by COVID-19. These expansions include:

- Creating a new Pandemic Unemployment Assistance program to provide benefits to otherwise ineligible workers, such as self-employed individuals, independent contractors, and workers without sufficient work history;
- **Providing an additional \$600 per week for those eligible for unemployment benefits** as determined by applicable state law;
- **Covering the first weeks' worth of benefits paid by states, like California, that have elected to waive the traditional “waiting period” during the first week before benefits begin;**
- **Providing of an additional 13 weeks of coverage for those who remain unemployed after state unemployment benefits are no longer available;** and
- Allowing states more flexibility and related funding to hire temporary staff to process the sharp increase in unemployment claims more efficiently.

Particularly in light of the distressed economic times and the increased funds available under the CARES Act, it is important to remember that fraudulent receipt of benefits based upon false statements in an application or certification for benefits may subject the recipient, in addition to applicable state penalties, to all of the following:

- Ineligibility for further benefits under the CARES Act;
- Prosecution under 18 U.S.C. § 1001, which may result in imprisonment for up to 5 years, a fine up to \$250,000, or both; and
- Liability for repayment of funds already paid.

### **Employee Retention Credit**

The CARES Act also establishes a refundable payroll tax credit for up to 50% of the wages paid to employees during the COVID-19 pandemic. Specifically, the credit is applicable to the first \$10,000 in compensation, including healthcare benefits, paid from March 13, 2020 to December 31, 2020, to employees of employers whose:

- Operations were suspended, in whole or in part, due to a COVID-19-related government order; or
- Gross receipts declined by over 50% as compared to the same quarter in the prior year, because of circumstances surrounding the public health crisis.

Employers with an average of more than 100 Full Time Equivalent Employees in 2019 can seek the credit for any wages paid to employees during the time the employer was not providing services for a COVID-19-related reason. Employers with an average of 100 or fewer Full Time Equivalent Employees in 2019, however, can seek the credit for all employee wages, whether paid during the time the employer is open for business or subject to a shut-down.

### **Other Labor Provisions**

The CARES Act also contains a number of miscellaneous labor-related provisions, including those that:

- Amend the FFRCA to clarify that employees laid off on or after March 1, 2020, and later rehired by the same employer are eligible for Emergency Family and Medical Leave if they worked at least 30 of the 60 calendar days prior to being laid off.
- Provide the Department of Labor authority to postpone certain ERISA filing deadlines in the case of a public health emergency.
- Provide single employer pension plan companies with more time to meet 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.

- Ensure continued payment for federal contractors who, due to COVID-19 and because of the nature of their jobs, can neither perform work at their duty-station nor telework.
- Allow employers to defer payment of the employer's share of certain payroll taxes otherwise due to the federal government.
- Allow employers to provide certain student loan repayment benefits to employees on a tax-free basis.

Kring & Chung, LLP is continuing to monitor and work with our clients to respond to federal, state, and local government responses to this evolving situation. We strongly encourage those considering applying for loans mentioned in this summary to consult with their employment and business legal counsel, financial advisors, and tax specialists.

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