COWAN PERRY PC
250 S. MAIN ST STE 226 | BLACKSBURG, VIRGINIA 24060 | (540) 443-2850 MAIN
1328 3RD ST SW | ROANOKE, VIRGINIA 24016 | (540) 777-3450 MAIN

SUMMARY of COVID-19 UPDATES as of 04.15.20: *The Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") and Families First Coronavirus Response Act ("FFCRA")*

1. An Initial Overview of the CARES Act

President Trump signed into law a historic $2 trillion economic recovery package on Friday, March 27, 2020, after both the Senate and House rushed to approve the bill. **The relief package, entitled *The Coronavirus Aid, Relief, and Economic Security Act* (the "CARES Act")** is designed to alleviate some of the worst effects of the swift economic downturn resulting from the coronavirus pandemic and spread relief across the American economy. The relief is to span across government, education, healthcare and industry and even provide relief directly to individuals.

Within the 880 plus pages of the new legislation lies approximately $2 trillion of relief, which can be broken down as follows: $560 billion to individuals, $153.5 billion to public health, $339.8 billion to State and Local Governments, $377 billion to small businesses, $500 billion to big corporations and $43.7 billion to education.

The CARES Act is divided into two sections, the first is focused on keeping workers paid and employed, providing health care system enhancements and general economic stabilization. The second section deals with emergency appropriations for the U.S.' coronavirus health response. In this overview, we provide a summary of both sections combined.

Small Business Loans. To keep American workers paid and employed, the CARES Act establishes the **Paycheck Protection Program**, which provides a low interest (no greater than 4%) loan that is eligible for 100% principal forgiveness if the borrower meets certain requirements. For the period from February 15, 2020 to June 30, 2020 (the "covered period"), the law directs the Small Business Administration ("SBA") to provide 100% federally backed loans to eligible businesses to help pay operational costs such as payroll, rent, health benefits, insurance premiums and utilities. Loans are calculated based on a 2.5 multiple of the eligible business' average monthly payrolls costs (including costs such as wages, health care benefits, retirement benefits, and certain taxes assessed on employee compensation, but excluding compensation of those employees earning in excess of an annual salary of $100,000), and capped at $10million.

Unemployment Benefits. To provide assistance for American workers and families, the CARES Act also provides federal funding for unemployment compensation to workers adversely impacted by COVID-19. The legislation provides for a payment of $600/week (in addition to state payments) for up to four months for those who qualify, and an additional 13 weeks of unemployment benefits being extended under State laws.

Individual Recovery Rebates. The CARES Act provides for recovery rebates of up to $1,200 ($2,400 for joint filers) for U.S. taxpayers. The rebates are available even if the taxpayer has no income, and no action is generally required to claim the rebates. However, the rebates are means tested and therefore, are phased out for taxpayers making $75,000 or more ($150,000 for joint filers).

Retirement Plans. The 10% additional tax is waived for premature distributions related to the coronavirus for amounts not to exceed $100,000, subject to certain rules, including that it applies only to individuals who have been diagnosed with COVID-19, or have a spouse or dependent who has been diagnosed, or have experienced adverse financial consequences due to being quarantined, furloughed, laid off or suffering reduced working hours, or have been unable to work due to lack of childcare.

Business Tax Provisions. The CARES Act provides employers with a refundable credit against payroll tax (Social Security and Railroad Retirement) liability equal to 50% of the first $10,000 in wages per employee. Eligible employers must have carried on a trade or business during 2020 and have either, had operations fully or partially suspended, or had a reduction in gross receipts of at least 50%. The legislation also postpones the due date for depositing employer payroll taxes and 50% of self-employment taxes. The deferred amounts would be payable over the next two years.

Additional tax provisions include the suspension of the 80% taxable income limit on net operating loss carryovers for three years, so that the limit does not apply to 2018, 2019 and 2020, the allowance of corporate Alternative Minimum Tax ("AMT") credits as refundable credits until 2021, and the increase of the adjusted taxable income threshold for business interest deductions to 50%.

Coverage of Testing and Preventative Services. The CARES Act extends the types of testing that would be covered with no cost sharing to any in vitro diagnostic testing approved, authorized, or cleared by the FDA.

Changes to Family and Medical Leave Act ("FMLA"). A new rule now applies for rehired employees under which an "eligible employee" under the FMLA (defined as employed for at least the last 30 calendar days) includes someone who (1) was laid off by the employer March 1, 2020 or later, (2) had worked for the employer for at least 30 days in the last 60 calendar days prior to the lay-off; and (3) has been rehired by the employer.

Economic Stabilization. The CARES Act provides that a borrower with a federally-backed mortgage loan may request forbearance, regardless of delinquency status and without penalties, fees or interest, by submitting a request to the borrower's service and affirming financial hardship due to COVID-19. The legislation also prohibits the servicers of a federally-backed mortgage loan from initiating any foreclosure process for at least 60 days beginning on March 18, 2020.

Corona Virus Relief Funds. $150 billion is set aside for states and local governments to respond to the COVID-19 emergency. The Secretary of the Treasury is charged with administration of these funds.

Emergency Appropriations. Emergency funds have been allocated to various programs that may be available to companies during these difficult times. The Department of Agriculture, Food and Drug Administration, Commerce, Justice, Science and related agencies are among those programs receiving specific funds.

2. Paycheck Protection Program – A closer look

The **Payment Protection Program** provides loans to small businesses with the aim of keeping American workers paid and employed during the coronavirus pandemic. For the period from February 15, 2020 through June 30, 2020 (the "Covered Period"), the program directs the Small Business Administration ("SBA") to provide 100% federally backed loans to eligible businesses to help pay operational costs such as payroll, rent, health benefits, insurance premiums and utilities. Below we will provide that vital information you need to know before you apply for a loan.

Who can apply? An eligible "small business concern" that does not employ more than the greater of: (i) 500 employees (including full time, part-time, and those employed on other bases), or (ii) if applicable, the size standard in number of employees established by the SBA for the industry in which the entity operates.

A "small business concern" is defined in the Small Business Act as a small business that is organized for profit, has a place of business in the United States, operates primarily within the U.S. or makes a significant contribution to the U.S. economy, is independently owned and operated, is not dominant in its field on a national basis, and may be a sole proprietorship, partnership, limited liability company or corporation.

Also, 501(c)(3) non-profit entities, veterans organizations and tribal businesses are also eligible to apply.

How much can we apply for? The maximum loan amount is capped at $10 million and is calculated as 2.5 times the average total monthly costs incurred in the one-year period before the loan is made, plus the outstanding amount of any 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 program. Payroll costs include compensation to employees, such as salary, wages, commissions, cash; paid leave; severance payments; group health benefits; and compensation to independent contractors; but excludes individual employee compensation above $100,000 per year, prorated for the covered period, and certain sick leave and family leave wages for which an employer is eligible for a credit under the Families First Coronavirus Response Act.

What are the loan terms? The loan has a maturity of 2 years and an interest rate of 1.0%. Loan payments will be deferred for six months. There will be no collateral or personal guarantees required, no prepayment penalty for payments made, and no recourse against any individual, shareholder, member, or partner of an eligible loan recipient for non-payment, unless the individual uses the loan proceeds for unauthorized purposes.

What is this we hear about loan forgiveness? The SBA will forgive the full principal of the loan and any accrued interest, if all employees are kept on the payroll for eight weeks after the loan is granted, and the money is used for payroll, rent, mortgage interest, or utilities. In the event the Borrower has reduced its number of employees and/or reduced the salary or wages of 1 or more employees, the total amount by which the loan is forgiven is also reduced. Borrowers have the ability to avoid this penalty by curing the reductions in staff and/or wages by June 30, 2020. Note, due to the high number of applications expected, it is anticipated that not more than 25% of the forgiven amount may be for non-payroll costs.

To apply for loan forgiveness, Borrowers must submit to their lender:

- Documentation verifying Full-Time Equivalent Employees on payroll and their pay rates;

- Documentation on covered costs/payments (e.g., documents verifying mortgage, rent, and utility payments);
- Certification from a business representative that the documentation is true and correct and that forgiveness amounts requested were used to retain employees and make other forgiveness-eligible payments; and
- Any other documentation the SBA may require.

How do we apply? By completing and submitting an application with your local lender, together with the required documentation (verifying payroll costs, mortgage interest payments, rent payments and utilities), to an SBA approved lender. The SBA has a list of approved lenders for their current programs, and additional regulated lenders are expected to be approved and enrolled into the program over the next number of weeks.

When can I apply? **Beginning April 3, 2020, small businesses can apply for the loans. Lenders are also expected to start processing the applications on April 3. Sole proprietors and independent contractors may apply starting April 10, 2020**.

3. Employee Retention Credit (additional information)

At the outset, we must clarify that you cannot receive the Employee Retention Credit if you have already received or been approved for a loan under the Paycheck Protection Program.

The Employee Retention Credit is a fully refundable tax credit for employers equal to 50% of the first $10,000 in wages paid to an employee (including value of health plan benefits). The credit applies to wages paid after March 12, 2020, and before January 1, 2021. The maximum credit for an eligible employer is $5,000 per employee.

To be an eligible employer, you must have carried on a trade or business during 2020 and satisfy one of the following two tests:

A. Have business operations **fully or partially suspended** due to orders from a governmental entity limiting commerce, travel, or group meetings; or
B. Experience a **significant decline in gross receipts** during the calendar quarter.

The operation of a trade or business may be "**partially suspended"** if a governmental order imposes restrictions upon your business operations by limiting commerce, travel or group meetings due to COVID-19. An example would be the Governor of Virginia ordering restaurants, bars and similar establishments to close in order to reduce the spread of COVID-19, however, those businesses can still offer carry-out, drive-through or deliveries.

Alternatively, a **"significant decline in gross receipts"** begins with the first quarter in which an employer's gross receipts for a calendar quarter in 2020 are less than 50% of its gross receipts for the same calendar quarter in 2019. The significant decline ends when gross receipts reach greater than 80% of gross receipts in the same calendar quarter in 2019.

So how do you apply for this credit? Eligible employers will report their total qualified wages and the related credits for each calendar quarter on their federal employment tax returns, usually Form 941, Employer's Quarterly Federal Tax Return. Therefore, the eligible employer may get a refund if the amount of the credit is more than what the employer owes in respect of federal employment taxes. Alternatively, in anticipation of receiving the credits, eligible employers may reduce the amount of federal employment taxes it deposits for that quarter by the amount of credits it qualifies for.

For example: An employer paid $10,000 in wages (including health plan expenses) and is therefore entitled to a $5,000 credit, and is otherwise required to deposit $8,000 in federal employment taxes, including taxes withheld from all of its employees, for wage payments made during the same quarter as the $10,000 in qualified wages. The employer may keep up to $5,000 of the $8,000 of taxes the Eligible Employer was going to deposit, and it will not owe a penalty for keeping the $5,000. The employer is required to deposit only the remaining $3,000 on its required deposit date. The Eligible Employer will later account for the $5,000 it retained when it files Form 941, Employer's Quarterly Federal Tax Return, for the quarter. *(Example adapted from the IRS FAQs page: https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act)*

Note: for employers with more than 100 full-time employees, only employees who are currently not providing services for the employer due to COVID-19 causes are eligible for the credit.

Finally, an employer may receive both the tax credits for the qualified leave wages under the Families First Coronavirus Response Act ("FFCRA") and the Employee Retention Credit under the CARES Act, however, not for the same wages. The amount of wages for which an eligible employer may claim the Employee Retention Credit must not include the amount of qualified sick and family leave wages for which the employer received tax credits under the FFCRA.

4. An Overview of the Families First Coronavirus Response Act ("FFCRA")

The Families First Coronavirus Response Act ("FFCRA" or the "Act") requires employers with less than 500 employees to provide employees with paid sick leave and expanded family and medical leave for specified reasons related to COVID-19. These provisions went into effect April 1, 2020 and expire December 31, 2020.

First, FFCRA provides that covered employees are eligible for two weeks (80 hours or average hours per week if part-time) of paid sick leave, paid at the employee's *regular rate of pay* (as calculated under the Fair Labor Standards Act and subject to the cap below), where the employee is unable to work (including telework) because:

1. is subject to a Federal, State, or local quarantine or isolation order related to COVID-19; or
2. has been advised by a health care provider to self-quarantine related to COVID-19; or
3. is experiencing COVID-19 symptoms and is seeking a medical diagnosis.

Second, the FFCRA provides that covered employees are eligible for two weeks (80 hours or average hours per week if part-time) of paid leave, paid at *two-thirds the employee's regular rate of pay* (subject to the cap below), where the employee is unable to work (including by telework, where appropriate) because:

4. The employee has a *bona fide* need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider);
5. to care for their child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19; and/or
6. the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor (not defined yet).

Third, the FFCRA provides that covered employees are eligible for up to 10 weeks of paid family medical leave (under the expanded family and medical leave act), paid at *two-thirds the employee's regular rate of pay* where an employee (defined as an employee who has been employed for at least 30 calendar days and generally including employees who have been laid-off and rehired), is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

Notably, the Company may not require that a covered employee use other PTO or sick leave *prior* to using leave under the FFCRA.

Pay-caps Under the FFCRA:

For leave reasons 1, 2, or 3 above: employees taking leave are entitled to pay at either their regular rate or the applicable minimum wage, whichever is higher, up to a maximum of $511 per day and $5,110 in the aggregate (over a 2-week period).

For leave reasons 4, 5, or 6 above: employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is highe r, up to $200 per day and $2,000 in the aggregate (over a 2-week period).

For paid leave under the expanded FMLA: employees taking leave are entitled to pay at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to $200 per day and $12,000 in the aggregate (over a 12-week period, which may include taking the first two weeks of required childcare leave under the paid-sick leave portion of the FFCRA (i.e. leave reason 5).

Recovery of wages via tax credits under FFCRA:

An employer may recover paid leave under the FFCA by offsetting certain payroll taxes and requesting expedited refunds if the offset does not cover the leave paid (estimated to be paid by the IRS within two weeks of receipt). IRS guidance is still developing but can be reviewed at: https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus

It is likely that the additional pending legislation may affect your legal obligations.

If you have any questions, please feel free to contact us. The following CowanPerry team member are happy to assist you:

CARES Act: **Suzanne Y. Pierce, Esq**. at 540-400-8127 or spierce@cowanperry.com
James K. Cowan Esq. at 540-443-2860 or jcowan@cowanperry.com

FFRCA: **Eric D. Chapman Esq**. at 540.443.2861 or echapman@cowanperry.com
James K. Cowan Esq. at 540-443-2860 or jcowan@cowanperry.com