Bond INFORMATION MEMO

MARCH 27, 2020

What to Expect in the CARES Act

Earlier today, the House of Representatives passed and President Trump signed the Coronavirus Aid, Relief and Economic Security Act or the CARES Act (the Act). The Act provides certain relief for businesses and individuals amidst the coronavirus pandemic.

This Information Memo addresses certain significant aspects of relief available to businesses contained in the Act, focusing on the areas of loans, loan forgiveness, unemployment, employee benefits, healthcare and tax. Over the coming days, we will issue specific guidance on each these topics.

Loan Relief, Grants and Retention Credits

Paycheck Protection Program

The Paycheck Protection Program (PPP) is a new Small Business Administration (SBA) loan program, which will be administered through private lenders. The purpose of the PPP is to assist small businesses to retain employees and maintain payroll. With a cap of $10 million, the PPP loan amount will be equal to 2 1/2 times the average monthly payroll costs based on the prior year. The PPP loan may be used to pay certain business expenses, including: employee salaries; vacation, parental, family, medical or sick leave; group health care and retirement benefits; income withholding taxes; and mortgage, lease and utility payments.

Eligible small businesses may apply through an SBA-approved private lender. To qualify, a business must: (1) have been in operation since February 15, 2020; (2) have paid salaries, payroll taxes, or Form 1099 non-employee compensation; and (3) meet size limitations (e.g., 500 or less employees, with some exceptions). Nonprofits, sole-proprietors, independent contractors and the self-employed are also eligible for the PPP. Eligible small businesses must apply before June 30, 2020. Payment of principal, interest and fees under a PPP loan may be deferred. For PPP loans obtained between February 15, 2020 to June 30, 2020, the PPP lender will allow a complete deferment of repayment of at least 6 months, and up to a maximum of one year.

A business that obtains a PPP loan will be ineligible for certain other benefits under the Act. For example, a business that obtains a PPP loan is not eligible for the employee retention tax credit.

PPP Loan Forgiveness Program

PPP borrowers are eligible for loan forgiveness equal to certain costs incurred and payments made during the <u>8-week period starting from the date of loan origination</u>. Eligible costs and payments include: payroll costs and mortgage, rent and utility payments. To qualify, the lender will require detailed supporting documentation. The borrower also must certify that: (1) the uncertainty of current economic conditions justifies the loan request to support ongoing operations, (2) the supporting documentation provided by the borrower is true and correct, and (3) the funds expended were used to retain employees. An otherwise eligible recipient of loan forgiveness will be denied if the required documentation is not submitted to the lender.

Employee Retention Credit and Payroll Taxes

Under the Act, certain employers are entitled to credits against payroll taxes, as well as for certain expenses incurred with respect to employer-maintained health plans. The credit is a refundable credit, meaning that any excess credit (that is not applied against taxes due) will be paid in cash to the employer like a typical income tax refund. Employers are eligible if their operations were fully or partially suspended due to a COVID-19-related shut-down order, or if the employer has had a decline in gross receipts of more than 50% when compared to the same quarter last year.

The credit against employment taxes for each quarter equals 50% of the “qualified wages” paid to employees during the COVID-19 crisis. The dollar amount of the credit is capped at $10,000 per employee and certain restrictions apply to employers with more than 100 employees.

The Act also provides that all employers may delay payment of the employer's share of certain payroll taxes, with 50% of such taxes due December 31, 2021, and the other 50% due by December 31, 2022.

Economic Injury Disaster Loan

The existing Economic Injury Disaster Loan (EIDL) program has been expanded. An EIDL is a low-interest working capital loan available to small businesses, small agricultural co-ops and certain nonprofits whose businesses have been severely impacted and suffered working capital losses due to the COVID-19 coronavirus pandemic. Businesses must apply directly to the SBA for an EIDL. See our previous Information Memo available here for more information regarding EIDL.

The Act expands EIDL eligibility to all co-ops with 500 employees or less, ESOPs, tribal small business concerns and individuals who operate under a sole proprietorship or as an independent contractor. It also waives the personal guarantee requirement for loans under $200,000 and reduces the time frame from when businesses must have been in operation to January 31, 2020.

The Act allows businesses to receive both a PPP loan and an EIDL under certain circumstances, including if the business obtained the EIDL before the PPP loans became available. However, if a business obtains both an EIDL and a PPP loan, EIDL funds must be used for purposes other than paying payroll costs and other expenses covered under the PPP.

Emergency Economic Injury Grants

The Act includes an emergency EIDL grant of $10,000 to all eligible small businesses and nonprofits who apply for an EIDL. A borrower may request the grant be advanced within 3 days of applying for the EIDL. Grant funds may be used for allowable purposes under the EIDL, including: providing paid sick leave to employees unable to work due to the direct effect of COVID-19; maintaining payroll; paying increased material costs due to interrupted supply chains; paying rent or mortgage obligations and repaying other obligations that cannot be met due to revenue losses.

Other Loan Relief Available to Businesses

While small businesses and entities operating in the National Security and Airline industries are clearly a focus of the Act, and these businesses receive specifically targeted relief, the Act also provides a variety of other relief for other types of businesses.

For example, the Act authorizes the Secretary of the Treasury to make $454 billion available for loans, guarantees, or other investments to support programs established by the Federal Reserve "for the purpose of providing liquidity to the financial system that supports lending to eligible businesses, States, or municipalities." Unused funds appropriated for the sectors above would also now be available for this purpose.

For the entire authorization, the Treasury Secretary has the authority to determine terms and conditions for the program, including rates, which will be based on the risk and current average yield of Treasuries of comparable maturity. Additionally, the Treasury Department was given authority to designate various financial institutions as agents of the U.S. in order to carry out these programs.

The Act further requires the Secretary to attempt to provide liquidity to "the financial system that supports lending to States and municipalities."

Loans to Midsize Businesses

The Act emphasizes that the Secretary should "endeavor to" make loans and investments available—to the extent practicable – to midsize businesses with 500 to 10,000 employees, at a rate not higher than 2% annualized, and with no principal or interest payable for the first 6 months of the life of the loan.

Businesses wishing to take of advantage of this program must make a good-faith certification that: (1) economic uncertainty requires those terms; (2) funds received will be used to retain 90% of their workforce at full compensation and benefit levels through September 30, 2020; and (3) they intend to restore not less than 90% of their workforce level prior to February 1, 2020 while restoring all compensation and benefit levels to rehired workers no later than 4 months after their termination date.

These businesses must also certify that they will not "outsource or offshore jobs for the term of the loan or 2 years after completing repayment of the loan"; *will not* abrogate collective bargaining rights during this time; and will remain neutral in a union organizing effort for the term of the loan.

Loans to All Other Businesses

The Secretary may also make loans to businesses that can demonstrate: (1) they are an eligible business to which credit is not reasonably available at the time of the transaction; (2) the intended obligation is prudently incurred; and (3) the loan/guarantee is sufficiently secured or made at a rate that reflects the risk and, to the extent practicable, is not less than an interest rate based on market conditions for comparable obligations prior to the outbreak of COVID-19.

Additional terms an applicant must satisfy include: (1) foregoing buying back stock or paying dividends for common stock (unless contractually obligated to do so) for 12 months after the obligation is no longer outstanding and (2) certifying that the business is "created or organized in the U.S. or under the laws of the U.S. and has significant operations in and a majority of its employees based here. The Secretary has authority to waive the dividend restriction if it is in the interest of the Government to do so. However, the Secretary must be prepared to defend that decision before Congress, if compelled to do so.

Unemployment Insurance Expansion

The Act significantly expands unemployment benefits due to the COVID-19 coronavirus pandemic. Affected individuals could receive an additional $600 in weekly unemployment benefits for up to 4 months, including retroactive benefits dating back to January 27, 2020.

Individuals who are not typically eligible for unemployment benefits are also covered, including self-employed individuals and independent contractors who would now be allowed to collect unemployment benefits. Eligibility would also be expanded to include applicants who have already exhausted their unemployment benefits or who are still partially employed, provided they are unable to work due to certain qualifying reasons related to COVID-19.

New York State has already waived the 7-day waiting period to receive unemployment benefits, but the Act would require any states that have not already done so to waive any waiting period and allow individuals to apply for benefits immediately.

Finally, while unemployment benefits are typically only available to applicants for a maximum of 26 weeks, the Act provides funding for an additional 13 weeks, allowing applicants to receive up to 39 weeks of benefits.

Employee Benefits and Executive Compensation

The Act contains several provisions impacting employee benefits and executive compensation.

Subject to certain requirements, the Act permits certain retirement plans to: (1) be amended to permit tax-favored coronavirus-related distributions up to $100,000; (2) increase the amount of plan loans available to participants (as well as delaying the repayment of certain plan loans); (3) temporarily waive certain required minimum distributions from certain retirement plans; (4) delay minimum funding requirements for certain plans; and (5) delay certain filing deadlines.

The Act also allows for the exclusion from an employee's gross-income of certain employer payments for student loans made prior to January 1, 2021.

Health and welfare benefit plans are impacted as well. The Act provides the following: (1) clarifications and amendments to the coverage required for certain COVID-19 related costs; (2) provisions relating to the disclosure of certain health information; and (3) a clarification that the failure to impose a deductible on telehealth services does not jeopardize high deductible health plan status.

Additionally, if an entity receives certain aid under the Act, that entity will be subject to limitations on employees' compensation for a period of time. Different limitations apply to two classes of employees: (1) those who earned total compensation in excess of $425,000 in 2019; and (2) those who earned total compensation in excess of $3,000,000 in 2019.

Relief for Healthcare Providers

As part of the Act, there are a variety of financial resources for health care providers. Most importantly, $100 billion would be made available to reimburse eligible health care providers (public entities, Medicare and Medicaid enrolled suppliers and providers, and other for-profit and non-profit entities) for health care related expenses or lost revenues not otherwise reimbursed that are directly attributable to COVID-19. The Act would also provide a twenty percent (20%) Medicare add-on payment to the diagnosis related group rate of COVID-19 for patients treated at hospitals reimbursed through the inpatient prospective payment system. Additionally, there will be available supplemental awards for health centers and available grant money for telehealth networks. The Act further provides that (a) telehealth services will have increased flexibility, and (b) measures will be implemented to decrease potential drug or device shortages in the future.

Charitable Contributions

In an effort to encourage contributions to charities during this time, the Act permits an above-the-line deduction for up to $300 for charitable donations made in 2020, whether taxpayers itemize or not. The Act also increases the limitations on deductions for charitable donations by individuals who itemize, as well as corporations. For individuals, the adjusted gross income limitation is suspended for the year 2020. For corporations, the limitation on deductions will be increased from 10% to 25% of taxable income.

The attorneys at Bond, Schoeneck & King can help you determine if your business qualifies for relief under the CARES Act. Please contact Jeffrey B. Scheer or the attorney at the firm with whom you are regularly in contact.