

THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT

Client Bulletin for Individuals and Businesses

On March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act” or “Act”), a \$2 trillion stimulus package intended to support struggling households and businesses during the COVID-19 pandemic. At a high level, the CARES Act provides for economic relief to individual Americans, the states, and distressed businesses by means of the following programs:

- A forgivable Small Business Administration (“SBA”) loan program, the “Paycheck Protection Program,” which is available to eligible businesses with no more than 500 employees.
- Rebates and other tax relief for individuals and businesses.
- Funding and other resources for education and health care.
- An economic stabilization loan program for certain businesses, including airlines.

Summarized below are several of the key provisions of the Act applicable to individuals and businesses, many of which provide significant tax and other benefits to eligible persons.

PAYCHECK PROTECTION PROGRAM – SBA LOANS

The CARES Act expands the SBA’s 7(a) program by creating a new “Paycheck Protection Program,” which authorizes forgivable small business loans to eligible applicants. Generally, the Paycheck Protection Program establishes broad eligibility requirements for businesses seeking SBA loans (greatly expanding the number of businesses that qualify); creates specific loan terms establishing the loan amount and how the loans may be used; and allows for loan forgiveness if certain conditions are met. Each of these points is discussed below, as well as the application requirements a business must satisfy to apply for forgiveness of the loan.

Eligibility

The Paycheck Protection Program expands the eligibility for SBA loans such that any business that was in operation on February 15, 2020, paid employee salaries and payroll taxes, and that has 500 or fewer employees (or who meets a size standard for its industry as determined by the SBA) may apply for a loan under the ACT. The Act’s definition of employees includes all individuals employed on a full-time, part-time, or other basis.

Further, for certain affiliated businesses (particularly those in the accommodation and food services industries), the Act waives affiliation rules that would cause the business to be aggregated with its affiliated entities for purposes of determining the 500-employee threshold. This waiver, however, is only applicable to a narrow field of businesses. Large organizations should consult with their Kirton McConkie attorney to determine whether the organization and its affiliates meet the SBA’s affiliation test.

Terms of Loan

During the “covered period” of the Paycheck Protection Program—i.e., February 15, 2020 to June 30, 2020—each eligible business may receive only one Paycheck Protection loan, subject to the terms and requirements listed below.

Certification

The borrower must certify “that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations” of the borrower, that the funds will be used to retain workers and maintain payroll or pay for workspace, that no other application is pending, and that the recipient has not already received amounts under the Act.

Amount

In general, the maximum loan amount is the lesser of (1) \$10 million, or (2) 2.5 times the average total monthly payments by the applicant for payroll costs incurred during the one-year period before the date of the loan.

Allowable uses of Loan Proceeds

Proceeds of the loan may be used on payroll costs, payments for insurance premiums or to continue group health care benefits during periods of paid leave, employee salaries or commissions, payment of interest on any mortgage obligation, utility payments, and interest on any other debt obligations.

Waiver of Guarantee and Collateral

Loans under this program do not require collateral or personal guarantees. The loan is nonrecourse so long as the loan is used for appropriate payroll-type purposes (set forth above).

Interest Rate

Covered loans under the Act “shall bear an interest rate not to exceed 4 percent.”

Maturity

The covered loan “shall have a maximum maturity of 10 years.”

Forgiveness

The Act allows for forgiveness of the covered loan if certain conditions are met. The loan forgiveness amount is equal to the eligible payroll costs, mortgage interest payments, rent, and utility payments incurred or paid by the business during the first 8 weeks following origination of the loan, and cannot exceed the principal amount of the loan. The loan forgiveness amount is reduced if the average number of full-time equivalent employees is reduced, or if certain employees’ wages are reduced significantly, during the term of the loan. Moreover, any amounts forgiven under the Act are not included in the taxable income of the borrower. To seek forgiveness, eligible businesses must submit an application to the issuing lender, including: (1) documentation verifying full-time employees on payroll; (2) state income, payroll, and unemployment insurance filings; and (3) documentation verifying payments on mortgage obligations, lease obligations, etc. The SBA should issue further guidance within 15 days of the passage of the Act.

Those interested in applying for a loan under the Paycheck Protection Program should reach out to their Kirton McConkie attorney.

EMERGENCY EIDL GRANTS

As an additional means of providing emergency funds, the CARES Act authorizes small businesses (including sole proprietors with or without employees) and private non-profits to apply for an emergency advance of up to \$10,000 within three days of applying for an SBA Economic Injury Disaster loan (“EIDL”). EIDLs are low-interest rate loans, in the amount of up to \$2 million dollars, that are available from the SBA to help distressed companies pay for disaster-related expenses.

Appropriate uses of the emergency grant include providing sick leave to employees, maintaining payroll, meeting increased costs to obtain materials during the disaster, making rent or mortgage payments, or repaying obligations due to revenue losses. Recipients of emergency grants under the Act are not required to repay the advanced amount under any circumstance, even if the underlying EIDL application is not approved.

To apply for an emergency grant under the Act, the applicant must have been in operation since January 31, 2020, have 500 or fewer employees (including sole proprietors with or without employees), and apply for an EIDL with the SBA. These emergency grants are only available from January 31, 2020 until December 31, 2020. Businesses applying for an emergency grant may also apply for a Paycheck Protection Program loan (described above). Any amounts received under the emergency grant program, however, reduce the amounts forgivable under the Paycheck Protection Program. Applications for the EIDL and emergency grant are available online with the SBA at [covid19relief.sba.gov](https://www.sba.gov/covid19relief).

SUBSIDY FOR CERTAIN LOAN PAYMENTS

The Act creates a debt-relief program through which the SBA will cover all loan payments, including principal, interest, and fees, during a 6-month period for loans received by a small business under the SBA's Section 7(a) loan program (other than loans under the Paycheck Protection Program discussed above), 504 loan program, and microloan program. EIDL loans are not eligible for this subsidy program. Further, the SBA's loan relief applies to all qualified loans taken out before and after the passage of the Act.

The SBA will begin making the relief payments no later than 30 days after the date on which the loan payment in question is due, and any relief provided shall be "applied to the covered loan such that the borrower is relieved of the obligation to pay that amount." Businesses and persons seeking relief under this emergency program may contact their local Small Business Development Center or Women's Business Center for application details.

2020 RECOVERY REBATES FOR INDIVIDUALS

The Act provides direct aid to individual Americans in the form of a cash payment of up to \$1,200 for individuals and \$2,400 for joint filers, with an additional \$500 tax credit per qualifying child. The amount of the direct rebate is subject to phase-out reduction for individual taxpayers with \$75,000 or more in adjusted gross income (\$150,000 or more for joint filers) and completely phased out for such that individual taxpayers with adjusted gross income of more than \$99,000 (\$198,000 in the case of joint filers) would not receive a rebate payment. Eligibility and payment amounts are based on 2019 income tax filings (or 2018 income tax filings if 2019 filings are unavailable).

SPECIAL RULES FOR USE OF RETIREMENT FUNDS

The Act permits qualified individuals to withdraw up to \$100,000 of the individual's vested account balance from a qualified retirement plan or IRA any time during calendar year 2020. A qualified individual is anyone who has been diagnosed with COVID-19, whose spouse or dependent is diagnosed with COVID-19, or who experiences certain negative financial consequences due to COVID-19. The amount distributed is not subject to an early-withdrawal penalty, but pre-tax distributions are considered taxable income to the recipient. If the taxpayer elects, he or she may spread the income ratably over three tax years beginning with the tax year of distribution. Amounts distributed may, but are not required to, be repaid to the plan or IRA within three years from the date after the date on which the distribution was received.

Additionally, a qualified individual who participates in a qualified retirement plan is permitted to take a loan from the plan any time during the 180-day period beginning on the date the Act was enacted (March 27, 2020), in an amount equal to the greater of \$100,000 or 100% of their vested account balance. For any outstanding plan loan of a qualified individual that has a payment due between March 27, 2020 and December 31, 2020, such due date is delayed for one year, with appropriate adjustments for subsequent payments.

If a plan sponsor wishes to adopt these features, it should operate the plan consistent with that intent and amend its plan document. Plan sponsors have until at least December 31, 2022 to amend their plan.

TEMPORARY WAIVER OF REQUIRED MINIMUM DISTRIBUTION RULES FOR CERTAIN RETIREMENT PLANS AND ACCOUNTS

The Act suspends required minimum distributions for calendar year 2020 for qualified plans and IRAs. This includes distributions that would have been required to be paid in 2020 for individuals who turned 70 ½ in calendar year 2019 but who did not receive their first required minimum distribution before January 1, 2020. Note that this provision does not affect the new rule under the SECURE Act (Pub. L. 116-94) that raised the minimum age for required minimum distributions to age 72 for individuals who attain age 70 ½ after December 31, 2019. The plan document of a qualified plan should be amended if necessary to reflect these provisions, but plan sponsors have until at least December 31, 2022 to amend their plan.

INCREASE IN CHARITABLE DEDUCTIONS

The Act permits an eligible individual to treat up to \$300 of cash charitable donations made in 2020 as an “above the line” deduction. Thus, individual taxpayers who do not itemize are eligible for a limited deduction for certain charitable contributions made in 2020. The Act also suspends the 60% of adjusted gross income limitation for electing individuals making charitable contributions in cash in 2020. Additionally, the Act increases the limitation from 10% to 25% on deductions for charitable donations made in cash to qualifying charities by corporate taxpayers in 2020.

EXCLUSION FOR CERTAIN EMPLOYER PAYMENTS OF STUDENT LOANS

Under existing law, an employer may provide tax-preferred benefits to its employees through an “educational assistance program” under Internal Revenue Code section 127. Such benefits are deductible to the employer and excludable from the employees’ taxable income. The CARES Act expands the types of expenses that may be paid under an educational assistance program to include payments made by an employer before January 1, 2021 toward a qualified education loan. As with before, an educational assistance program must be set forth in a written plan document, which should be amended to reflect these new benefits if an employer wishes to adopt them. And benefits under the program are limited to \$5,250 per employee per year and may not discriminate in favor of highly compensated employees. Only limited amounts may be paid for the benefit of significant owners of the employer or their family members.

EMPLOYEE RETENTION CREDIT FOR EMPLOYERS SUBJECT TO CLOSURE DUE TO COVID-19

An eligible employer may take as a credit against employment taxes for the quarter an amount equal to 50% of the qualified wages paid for that quarter. The credit is available to an employer for a quarter only if the operations of the employer were fully or partially suspended during the quarter due to a government order limiting commerce, travel, or group meetings due to COVID-19, or if the employer experienced a more than 50% reduction in its quarterly gross receipts compared with the same period in 2019.

For employers who had more than 100 full-time employees on average during 2019, “qualified wages” means those wages paid to an employee for time spent not working as a result of reduced hours or a furlough during the applicable quarter. For employers who had 100 or fewer full-time employees on average during 2019, qualified wages means any wages paid to employees during the applicable quarter. For all eligible employers, qualified wages also includes the portion of the employer’s qualified health plan expenses allocable to such wages. The amount of qualified wages is limited to an aggregate amount of \$10,000 per employee (or, for large employers, the lesser of \$10,000 or the amount the employee would have been paid for working an equivalent duration during the prior 30 days).

The credit applies against the employer portion of Social Security taxes for the quarter, reduced by any credits already allowed under the Internal Revenue Code and by any credits claimed under the Families First Coronavirus Response Act. (For more information, see our Families First Coronavirus Response Act: Client Bulletin for Employers.) Any excess of the credit over this amount is treated as an overpayment and refunded to the employer.

The credit is not available to employers who receive a loan under the Paycheck Protection Program described above.

DELAY OF PAYMENT OF EMPLOYER PAYROLL TAXES

All employers (other than those who have an amount forgiven under the Paycheck Protection Program described above) may delay the payment of the employer portion of Social Security taxes imposed during the period beginning on March 27, 2020 through December 31, 2020. Half of this amount may be delayed until December 31, 2021, and the remaining half may be delayed until December 31, 2022. Similar rules apply for self-employed individuals subject to SECA taxes. The Treasury should provide further guidance as necessary to carry out the purpose of these rules.

MODIFICATIONS FOR NET OPERATING LOSSES

The CARES Act suspends several of the restrictions imposed on the use of net operating losses (“NOLs”) introduced by the 2017 tax reform commonly referred to as the “Tax Cuts and Jobs Act” (the “TCJA”). Prior to the passage of the Act, and as provided in the TCJA, NOLs were subject to limitations based on taxable income and could not be carried back to prior tax years. The Act made two substantial changes to the use of NOLs. First, the Act, for tax years prior to 2021, removes the TCJA rule limiting the use of NOL carryforwards in a given year to 80% of taxable income. Second, the Act permits a taxpayer to carry back NOLs from tax years beginning in 2018, 2019, or 2020 for up to five years.

MODIFICATION OF LIMITATION ON LOSSES FOR TAXPAYERS OTHER THAN CORPORATIONS

The Act delays the application of the TCJA’s loss limitation rules applicable to pass-through entities (such as LLCs taxed as partnerships) and sole proprietorships by making the limitations on the use of “excess business losses” applicable starting with the 2021 tax year (rather than the 2018 tax year).

MODIFICATION OF CREDIT FOR PRIOR YEAR MINIMUM TAX LIABILITY OF CORPORATIONS

The TCJA repealed the alternative minimum tax (“AMT”) for corporate taxpayers for taxable years beginning after December 31, 2017. In repealing the AMT, the TCJA provided AMT credits that were refundable over several years, ending in 2021. The Act accelerates the ability of corporations to recover these AMT credits by permitting corporations to recover the credits immediately.

MODIFICATIONS OF LIMITATION ON BUSINESS INTEREST

The TCJA amended the corporate business interest deduction rules by disallowing interest deductions that are more than an amount equal to the sum of business interest income and 30% of the taxpayer’s adjusted taxable income. The CARES Act increases the limit for the 2019 and 2020 tax years from 30% to 50% of adjusted taxable income. Different, and highly technical, rules apply for entities taxed as partnerships for Federal income tax purposes.

This bulletin is not intended to provide legal advice, and no legal or business decision should be based on its content.

Questions concerning issues addressed in this bulletin should be directed to:

Brad Lowe | blowe@kmclaw.com | 801.239.3182

Alexander N. Pearson | apearson@kmclaw.com | 801.321.4864

Lucas R. Deppermann | ldeppermann@kmclaw.com | 801.239.3146

Kyle Harvey | kharvey@kmclaw.com | 801.350.7682