

## Coronavirus Aid, Relief, and Economic Security Act—Key Employer Takeaways

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### The Coronavirus Aid, Relief, and Economic Security Act:

- **Significantly Expands Unemployment Assistance**
- **Amends the Families First Coronavirus Response Act**
- **Provides for an Unprecedented Forgivable Loan Program for Small Businesses Contingent on Avoidance of Certain Layoffs and Wage Reductions**
- **Makes Financial Assistance Available to Certain Other Businesses Subject to Specific Labor and Employment Restrictions**
- **Provides Certain Tax Relief and ERISA Relief to Employers and Employees**

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### SUMMARY

**Updated August 12, 2020.** On August 8, 2020, President Trump signed a [memorandum](#) titled “Authorizing the Other Needs Assistance Program for Major Disaster Declarations Related to Coronavirus Disease 2019” (“White House Memo”). The White House Memo directs the Federal Emergency Management Agency (“FEMA”) to provide additional unemployment benefits of \$400 per week to individuals currently receiving unemployment benefits due to disruptions caused by COVID-19. These additional unemployment benefits would be 75% funded by the federal government, and the White House Memo additionally “call[s] upon the States” to use funds appropriated by the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) to provide the remaining funds. It remains to be seen how states will react to the White

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House Memo, and it is possible that it will face future legal challenges. Our post on President Trump's memorandum is available [here](#).

**Updated May 28, 2020.** On May 15, 2020, the Small Business Administration, in consultation with the U.S. Department of Treasury, [released](#) the [Paycheck Protection Program Loan Forgiveness Application](#) (the "Application"), which contains step-by-step instructions for borrowers seeking forgiveness of some or all of their Paycheck Protection Program loan. Our post on the Application is available [here](#). On May 22, 2020, the Small Business Administration, in consultation with the U.S. Department of Treasury, released the [Interim Final Rule on Loan Forgiveness](#) and the [Interim Final Rule on SBA Loan Review Procedures and Related Borrower and Lender Responsibilities](#), which provide borrowers with further guidance regarding loan forgiveness and provide lenders with guidance on their responsibilities.

**Updated April 24, 2020.** The Paycheck Protection Program and Health Care Enhancement Act (the "Act") was passed by the U.S. Senate via unanimous consent on April 21, 2020 and by the U.S. House by a vote of 388 to 5 on April 23, 2020, and was signed by President Trump on April 24, 2020. In addition to certain supplemental appropriations related to health care, the Act amends the Coronavirus Aid, Relief, and Economic Security Act by increasing the appropriations to the Paycheck Protection Program from \$349 billion to \$659 billion, an increase of \$310 billion. The initial \$349 billion has already been distributed. Of the \$310 billion in additional appropriations for the Paycheck Protection Program, \$60 billion is earmarked for loans made by certain lenders: (1) at least \$30 billion for loans made by insured depository institutions and credit unions with assets between \$10 billion and \$50 billion, and (2) at least \$30 billion for loans made by "community financial institutions" as well as insured depository institutions and credit unions with assets less than \$10 billion.

**Updated April 8, 2020.** In light of recent guidance, this memorandum has been revised to reflect that the Federal Pandemic Unemployment Compensation payments of \$600 per week are available only through July 31, 2020, and the relevant period for calculating loan forgiveness under the Paycheck Protection Program is eight weeks after loan origination.

The [Coronavirus Aid, Relief, and Economic Security Act](#) (the "CARES Act") is the largest economic stimulus package in United States history, providing about \$2 trillion in relief and covering a wide range of subjects. This memorandum focuses on the key CARES Act provisions affecting employers and employees, specifically (1) the expansion of unemployment assistance in the Relief for Workers Affected by Coronavirus Act (the "Relief for Workers Act"); (2) amendments to the recently enacted Families First Coronavirus Response Act; (3) the "Paycheck Protection Program" to provide forgivable loans to small businesses in the Keeping American Workers Paid and Employed Act; (4) the employment-related conditions on the loans, loan guarantees, and other financial assistance available under Title IV of the CARES Act, including limits on officer and employee compensation and requirements to remain neutral if the employees of certain

businesses seek to unionize; and (5) the provisions in the CARES Act that provide tax and ERISA relief to employers and employees.

Our Firm has issued Client Memoranda addressing other aspects of the legislation, which you can find [here](#).

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## BACKGROUND

The CARES Act was passed by the U.S. Senate by a vote of 96-0 on March 25, 2020 and by the U.S. House by a voice vote on March 27, 2020, and was signed into law by President Trump later that same day. The CARES Act is the third emergency legislation enacted in response to the COVID-19 pandemic, following (1) the March 6, 2020 enactment of supplemental appropriations in the Coronavirus Preparedness and Response Supplemental Appropriations Act 2020, and (2) the March 18, 2020 enactment of the Families First Coronavirus Response Act.

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## UNEMPLOYMENT ASSISTANCE

The CARES Act provides for an unprecedented expansion of unemployment benefits—not only for those who are presently eligible to receive such benefits, but also for those who are not traditionally covered by unemployment insurance programs.<sup>1</sup>

- **Increase in Maximum Unemployment Benefits by \$600 per Week.**<sup>2</sup> The Relief for Workers Act (included in Title II of the CARES Act) creates a Pandemic Unemployment Compensation program to provide unemployment compensation to “Covered Individuals,” as defined below. That compensation will consist of (1) “the amount of the regular unemployment compensation (including dependents’ allowances) payable to such individual during such individual’s benefit year under the state law for a week of total unemployment” or half of the state’s average regular unemployment compensation for that week, whichever is greater; and (2) “an additional amount of \$600” per week during the compensation period, through July 31, 2020.<sup>3</sup> These benefits will be distributed by the state<sup>4</sup> agency responsible for distributing unemployment compensation benefits. A few legislators unsuccessfully argued that \$600 per week on top of existing state unemployment benefits may lead to some individuals receiving more than 100 percent of their previous wages by claiming unemployment. The CARES Act, however, does not contain a cap of unemployment benefits at 100 percent of previous wages.
- **Expanded Eligibility for Unemployment.** The Relief for Workers Act also extends unemployment benefits to individuals who historically would not qualify under state employment regulations. A “Covered Individual” under the Act is any individual who (1) is not eligible for regular compensation or extended benefits under state or federal law or pandemic emergency unemployment compensation;<sup>5</sup> (2) is able to work and available to work; and (3) is actively searching for work or is unemployed, partially unemployed, or unavailable to work for any of the reasons set forth below:
  - **COVID-19-Affected Individual or Family Member.** The individual (1) is diagnosed with COVID-19, or has symptoms of COVID-19 and is seeking a medical diagnosis; (2) is sharing a household with someone diagnosed with COVID-19; or (3) is providing care for a family member or household member diagnosed with COVID-19;

- **Childcare Responsibilities.** The individual has primary caregiving responsibility for a child or other person in his or her household who cannot attend school or another facility that is closed as a direct result of the COVID-19 public health emergency;
- **Quarantine.** The individual cannot reach his or her place of employment because of a mandated quarantine or advice by a health care provider to self-quarantine due to concerns related to COVID-19;
- **Disruption of Employment.** As a direct result of the COVID-19 public health emergency, the individual (1) was scheduled to commence employment but does not have employment or is unable to reach his or her place of employment; (2) had to quit his or her employment; or (3) lost his or her employment due to business closure;
- **Death of Head of Household.** The individual became the “breadwinner” or major support for a household because the head of the household has died as a direct result of COVID-19;
- **Self Employed.** The individual is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits under state or federal law or pandemic emergency unemployment compensation. This would include, for example, gig workers such as rideshare drivers.
- **Residual Clause.** The individual meets any additional criteria established by the Secretary of Labor for unemployment assistance under this section.<sup>6</sup>
- **Individuals Who Are Not Covered.** An individual who is able to telework with pay or is receiving paid sick leave or other paid leave benefits is not eligible, regardless of whether the individual meets any other eligibility requirements.<sup>7</sup>
- **39-Week Limitation on Duration of New Assistance.** Pandemic Unemployment Compensation covers unemployment, partial unemployment, or inability to work caused by COVID-19 beginning on or after January 27, 2020 and ending on or before December 31, 2020. The total number of weeks for which a Covered Individual may receive Pandemic Unemployment Compensation cannot exceed 39 weeks, including any weeks for which the Covered Individual received regular unemployment benefits under federal or state law.<sup>8</sup>
- **Extends Regular Unemployment Benefits an Additional 13 Weeks.** The 39-week limitation period described above gives Covered Individuals an additional 13 weeks of unemployment compensation after they would have normally exhausted their state unemployment benefits, which are generally only available for 26 weeks, if the work-search requirements described below are met.
- **Work-Search Requirements.** To be eligible for the additional 13 weeks of Pandemic Unemployment Compensation, a Covered Individual is required to actively seek work. That requires the Covered Individual to (1) be registered for employment services, (2) be engaged in an active search for employment, (3) maintain a record of such searches (including the employer contacted and the method and date of contact), and, when requested, (4) provide their work search record to the state unemployment agency.<sup>9</sup> The work-search requirements do not apply if the individual’s unemployment, partial unemployment, or inability to work is caused by COVID-19, and states should “provide flexibility” in meeting the work-search requirements for Covered Individuals “unable to search for work because of COVID-19, including because of illness, quarantine, or movement restriction.”<sup>10</sup>
- **No Waiting Period for Pandemic Unemployment Compensation.** There is no waiting period for a Covered Individual to be eligible for Pandemic Unemployment Compensation.<sup>11</sup>
- **Full Funding Provision to Encourage States to Waive Waiting Period for Unemployment Benefits.** Prior to the pandemic, most states typically had a one-week waiting period before receipt of unemployment benefits. The Relief for Workers Act provides that the federal government will

fund the cost of the first week of unemployment benefits until December 31, 2020 for those states that waive a waiting period. As a result, Covered Individuals who are furloughed or laid off will be able to receive benefits immediately once the unemployment begins.

- **“Short-Time” Compensation Program Funding.** The Relief for Workers Act provides funding for short-time compensation programs that allow employers to preserve trained employees by allowing employers to reduce the hours of all employees, rather than laying off some. Under such programs, affected employees are allowed to collect a percentage of their unemployment compensation to replace their lost wages. The short-time compensation provisions provide reimbursement to states that have existing programs and grants and temporary financing for states that choose to enact such a program. Specifically, any state with an existing short-time compensation program is eligible to be reimbursed the full amount of any short-time compensation paid. States that do not currently have a short-time compensation program will be reimbursed up to 50 percent of the costs for starting a program, and the Relief for Workers Act also makes \$100 million in grants available for those states. Any short-time compensation plan entered into by an employer must provide that the employer will pay the state an amount equal to one-half of the amount of short-time compensation paid under such plan.<sup>12</sup>
- **Payment.** The state must pay the Pandemic Unemployment Compensation either at the same time and in the same manner that it would normally pay unemployment insurance benefits or in a separate payment that must occur on a weekly basis.<sup>13</sup>
- **Medicaid and Children’s Health Insurance Program.** Pandemic Unemployment Compensation will not be counted as income for purposes of determining eligibility for Medicaid, Children’s Health Insurance Program (“CHIP”), or any other program established under titles XIX and title XXI of the Social Security Act (42 U.S.C. §§ 1396 *et seq.*, 1397aa *et seq.*).<sup>14</sup>
- **Relief for Nonprofit Organizations.** The Relief for Workers Act also provides special relief for certain nonprofit organizations by compensating the state unemployment agency for 50 percent of any costs the nonprofit incurs in order to pay unemployment benefits. These funds shall be exclusively used to reimburse the nonprofit organization (in lieu of contributions) for amounts paid into the state unemployment fund.<sup>15</sup>

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## AMENDMENTS TO THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The CARES Act amends certain leave provisions of the recently enacted Families First Coronavirus Response Act (the “FFCRA”). As discussed in S&C’s memorandum, available [here](#), the FFCRA (1) applies to employers with fewer than 500 employees and public agencies, (2) enacted the Emergency Family and Medical Leave Expansion Act (the “Expansion Act”) and the Emergency Paid Sick Leave Act (the “Sick Leave Act”), and (3) provided for certain payroll tax credits to cover wages provided under either of those acts (the “FFCRA Tax Credits”). As discussed in our [blog post](#), according to guidance issued by the Department of Labor on March 24, 2020, these FFCRA provisions go into effect on April 1, 2020 and expire on December 31, 2020.

The CARES Act (Title III, Subtitle C) amends the leave and tax credit provisions of the FFCRA in the following ways.

- **Expanding Eligibility Under the Expansion Act to Include Certain Employees Laid Off After March 1, 2020 and Subsequently Re-Hired.** The original Expansion Act defined an eligible employee as one who has been employed by the employer “for at least 30 calendar days.”<sup>16</sup> The

CARES Act amends the Expansion Act to provide that an employee “employed for at least 30 calendar days” includes “an employee who was laid off by that employer not earlier than March 1, 2020, had worked for the employer for not less than 30 of the last 60 calendar days prior to the employee’s layoff, and was rehired by the employer.”<sup>17</sup>

- **Advance Refunding of Tax Credits.** The CARES Act provides that FFCRA Tax Credits, including any refundable portion of such credits, calculated through the end of the most recent payroll period in a given quarter, may be advanced according to forms and instructions to be provided.<sup>18</sup> Penalties for an employer’s failure to deposit its portion of social security taxes will be waived if it is determined that such failure was due to the employer anticipating an advance of FFCRA Tax Credits.
- **Granting Regulatory Authority to DOL Under the Expansion Act.** The CARES Act amends the Expansion Act to allow the Secretary of Labor to issue regulations for good cause, and without public comment or the customary 30-day pre-effective publication period, “as necessary to carry out the purposes” of the Expansion Act, “including to ensure consistency” between the Expansion Act and the Sick Leave Act and tax credit provisions of the FFCRA.<sup>19</sup> The Sick Leave Act already contained a comparable provision.<sup>20</sup>
- **Adoption of Payment Caps Under the Sick Leave Act.** The CARES Act amends the Sick Leave Act to provide that an employer is not required to pay an employee more than (1) \$511 per day and \$5,110 total for paid sick leave for self-care, or (2) \$200 per day and \$2,000 total for paid leave to care for a family member.<sup>21</sup> This amendment is consistent with guidance provided by the Department of Labor’s Wage and Hour Division on March 24 and 25, 2020. An employer may choose to pay an employee more than the daily and aggregate caps.
- **Adoption of Payment Caps Under the Expansion Act.** The CARES Act amends the Expansion Act to provide that an employer is not required to pay an employee more than \$200 per day and \$10,000 total for paid child care leave.<sup>22</sup> This amendment is also consistent with Wage and Hour Division guidance published on March 24 and 25, 2020. An employer may choose to pay an employee more than the daily and aggregate caps.
- **Confirmation of No Private Right of Action Against Small Businesses Under the Expansion Act.** The CARES Act makes technical corrections<sup>23</sup> to a provision of the Expansion Act that provides that employees do not have a private right of action against their employer for violations of the child care leave requirements of the Expansion Act if the covered employer does not also meet the definition of “employer” under the Family and Medical Leave Act of 1993 (“FMLA”).<sup>24</sup> An employer with fewer than 500 employees does not meet the FMLA definition of “employer” if it has not employed at least 50 employees “for each working day during each of 20 or more calendar workweeks in the current or preceding calendar year.”<sup>25</sup> All covered employers under the Expansion Act are subject to administrative or civil actions by the Secretary of Labor.<sup>26</sup>

**Reimbursements for Federal Contractors.** The CARES Act also allows an agency that receives appropriations under the CARES Act or otherwise to reimburse a federal contractor for “any paid leave, including sick leave” that federal contractor pays to keep employees or subcontractors “in a ready state.” Authorized reimbursements must be at minimum applicable contract billing rates and cannot exceed a weekly average of 40 hours. Such reimbursements may only be provided to a federal contractor whose employees or subcontractors cannot (1) work on a federally approved job site because of facility closures or other restrictions, and (2) perform their job responsibilities remotely during the public health emergency due to COVID-19. Any reimbursements will be reduced by (1) the tax credits allowable under the FFCRA, and (2) any applicable credits allowable under the CARES Act.<sup>27</sup>

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## FORGIVABLE LOAN PROGRAM TO PROTECT SMALL BUSINESS EMPLOYMENT

The Keeping American Workers Paid and Employed Act (Title I of the CARES Act) authorizes a temporary paycheck protection program (the “Paycheck Protection Program”) through which the Small Business Administration (the “SBA”) will administer directly, or in cooperation with an approved lender, up to \$349 billion in low-interest loans to qualifying small businesses. S&C’s memorandum covering the Paycheck Protection Program, including the businesses eligible for loans, the allowable uses of loan proceeds, the available loan amounts and interest, and the deferral of payments, is available [here](#).

**Eligible Businesses.** Small businesses will be eligible if they have “not more than the greater of” 500 employees or, if applicable, the number of employees established by the SBA for the industry in which the business participates.<sup>28</sup> However, hospitality businesses (such as hotels and restaurants) are eligible if they have fewer than 500 employees per physical location. Businesses that are operating as franchises or that receive financial assistance from a small business investment company are also exempted, regardless of their size. Generally, in determining the number of employees for this purpose, a business must consider all employees of its domestic and foreign affiliates as well as its own employees. An affiliate is any business over which the primary business exercises, or has the power to exercise, control, or that is under common control with the primary business. The SBA’s guidance on business size and affiliation is available [here](#).<sup>29</sup>

**Loan Forgiveness.** The loans provided under the Paycheck Protection Program can be forgiven up to the entire loan principal amount if the borrower demonstrates it has retained employees without reducing their compensation below a certain threshold, as set forth in more detail below.<sup>30</sup>

- **Loan Forgiveness Amount.** Provided that a business does not decrease employment or employee compensation as described in the incentive paragraph below, the business will be eligible for forgiveness of the principal amount of the loan up to the amount the business has spent on qualifying expenses during the eight-week period after the loan origination date.<sup>31</sup>
- **Qualifying Expenses.** Qualifying expenses include (1) payroll costs (as defined below), (2) interest on a mortgage entered into before February 15, 2020, (3) rent under a lease agreement in force before February 15, 2020, and (4) utility payments for a service that began before February 15, 2020.<sup>32</sup> Payroll costs are defined as compensation payments to employees, including (1) salaries, wages or similar compensation; (2) cash tips; (3) vacation, parental, family, medical, or sick leave payments; (4) allowance for dismissal or separation; (5) payment required for group healthcare benefits, including insurance premiums; (6) retirement benefits payments; (7) state and local tax payments assessed on employee compensation; and (8) a prorated portion of up to \$100,000 in annual compensation paid to a sole proprietorship or independent contractor.<sup>33</sup> Payroll costs do not include (1) compensation to an individual in excess of \$100,000 annually (prorated for the period from February 15 through June 30, 2020); (2) compensation to employees principally residing outside the United States; (3) certain taxes; and (4) certain qualified sick leave and family leave wages that receive a tax credit under the FFCRA.<sup>34</sup>
- **Limit on Loan Forgiveness Amount.** The amount forgiven may not be greater than the principal amount of the loan made available under the Paycheck Protection Program.<sup>35</sup>

- **Incentive to Retain Employees.** To incentivize businesses to retain their employees, a borrower's loan forgiveness amount is reduced if the borrower decreases its workforce or wages paid to employees during the eight-week period after the loan origination date (the "Covered Period").<sup>36</sup>
- **Calculating Forgiveness Reduction Based on Employee Reduction.** A borrower's loan forgiveness amount will be reduced in proportion to its workforce reduction during the Covered Period. Specifically, the reduction to the loan forgiveness amount is calculated by multiplying the borrower's maximum available loan forgiveness amount (set forth above) by the borrower's monthly average number of "full-time equivalent employees" during the Covered Period and then dividing by the monthly average number of such employees during the borrower's choice of time period, either (1) from February 15, 2019 through June 30, 2019; or (2) from January 1, 2020 through February 29, 2020. If the borrower is a seasonal employer, it must compare its workforce during the Covered Period against its workforce during the time period from February 15, 2019 through June 30, 2019.<sup>37</sup>
- **Calculating Forgiveness Reduction Based on Wage Reduction.** A borrower's loan forgiveness amount also will be reduced by its wage reductions during the Covered Period. Specifically, the reduction to the loan forgiveness amount is equal to the amount the borrower reduces the total salary or wages of any employee during the Covered Period in excess of 25 percent of that employee's total salary or wages, as compared to the most recent full quarter the employee was employed prior to the Covered Period. The loan forgiveness amount will not be reduced if the employee whose salary or wages was reduced had an annualized rate of pay of more than \$100,000 during any pay period in 2019.<sup>38</sup>
- **Rehiring Savings Clause.** A borrower's loan forgiveness will not be reduced for workforce or wage reduction where: (1) the borrower decreased the number of its full-time equivalent employees or reduced the compensation of any applicable employee between February 15, 2020 and April 26, 2020, as compared to its workforce or wages paid as of February 15, 2020, and (2) the borrower eliminates the reduction in the number of its full-time equivalent employees or employee compensation not later than June 30, 2020.<sup>39</sup> In sum, any workforce reduction from February 15, 2020 to April 26, 2020 that is reversed by June 30, 2020 will not count against loan forgiveness.
- **Applications for Loan Forgiveness.** A borrower seeking loan forgiveness must submit an application to the lender servicing the loan. The application must include (1) documentation of the borrower's qualifying costs; (2) documentation of the borrower's employee numbers and compensation paid, as necessary to calculate any reduction of loan forgiveness amount based on workforce or wage reduction; (3) any other documentation the SBA determines is necessary; and (4) a certification. The certification must state that (1) the provided documentation is "true and correct"; and (2) the loan amount for which the borrower is seeking forgiveness was used to retain employees and pay other qualifying costs.<sup>40</sup> The lender must issue a decision on a borrower's application "[n]ot later than 60 days" after it receives the application.<sup>41</sup>
- **Regulations.** The CARES Act requires the SBA to issue guidance and regulations implementing the loan forgiveness program "[n]ot later than 30 days" after the CARES Act is enacted, which is April 26, 2020.<sup>42</sup> It also authorizes the SBA and the Department of Treasury to issue regulations "granting de minimis exemptions" from the requirements of the loan forgiveness program.<sup>43</sup>

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## LOANS, LOAN GUARANTEES, AND OTHER FINANCIAL ASSISTANCE TO MID-SIZE BUSINESSES AND BUSINESSES IN CERTAIN INDUSTRIES

As discussed in further detail in S&C's memorandum covering the Coronavirus Economic Stabilization Act of 2020 (available [here](#)), the CARES Act (Title IV, Subtitle A) authorizes the Secretary of the Treasury



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(“Treasury Secretary”) to make up to \$500 billion in additional loans, loan guarantees, and other investments to support businesses that have suffered losses as a result of COVID-19.

The CARES Act authorizes the Treasury Secretary to make the \$500 billion available as follows:

- **Passenger Air Carriers.** Up to \$25 billion for loans and loan guarantees to U.S. passenger air carriers and related eligible businesses;<sup>44</sup>
- **Cargo Air Carriers.** Up to \$4 billion for loans and loan guarantees to U.S. cargo air carriers;<sup>45</sup>
- **Critical National Security Businesses.** Up to \$17 billion for loans and loan guarantees to businesses critical to maintaining national security;<sup>46</sup> and
- **Other Eligible Businesses.** The remaining budgeted amount (\$454 billion plus any amounts not used in the first three categories of authority) for loans, loan guarantees, and other assistance to programs or facilities established by the Board of Governors of the Federal Reserve System (the “Federal Reserve”) for providing liquidity to the financial system that supports lending to eligible businesses, states or municipalities. Among other things, under this fourth category of authority, the Treasury Secretary must endeavor to seek the implementation of a Federal Reserve program or facility that benefits mid-sized businesses—businesses with between 500 and 10,000 employees, including nonprofit organizations.<sup>47</sup>

As discussed in further detail in S&C’s memorandum regarding the CARES Act’s provision of relief to the aviation industry (available [here](#)), the CARES Act (Title IV, Subtitle B) also authorizes grants to certain businesses in the aviation industry to be used exclusively for the continuation of payment of employee wages, salaries, and benefits.

### A. COMPENSATION LIMITS RELATED TO LOANS, LOAN GUARANTEES, AND OTHER ASSISTANCE UNDER TITLE IV

**Loans and Loan Guarantees.** Under Subtitle A of Title IV of the CARES Act, the Treasury Secretary may enter into an agreement to make a loan or loan guarantee to U.S. passenger air carriers and related businesses, U.S. cargo air carriers, and businesses critical to national security (collectively, “Covered Businesses”) only if, among other things, the agreement provides that for the period beginning on the date of the agreement and ending one year after the date on which the loan or loan guarantee is no longer outstanding (the “Covered Period”):

- **Limits on Compensation Above \$425,000.** No officer or employee of the business whose total compensation exceeded \$425,000 in calendar year 2019 (other than an employee whose compensation is determined through an existing collective bargaining agreement executed before March 1, 2020) will receive from the eligible business (1) total compensation during any 12 consecutive months during the Covered Period that exceeds the total compensation received in calendar year 2019; or (2) severance pay or other benefits upon termination of employment that exceed twice the maximum total compensation received by the officer or employee from the eligible business in calendar year 2019; and
- **Limits on Compensation Above \$3 Million.** No officer or employee of the eligible business whose total compensation exceeded \$3 million in calendar year 2019 may receive compensation during any 12 consecutive months of the Covered Period in excess of the sum of (1) \$3 million; and (2) 50 percent of the portion of the total compensation received in calendar year 2019 that

exceeded \$3 million. The severance cap described above for officers and employees whose 2019 total compensation exceeded \$425,000 applies also to officers and employees whose 2019 total compensation exceeded \$3 million.<sup>48</sup>

“Total compensation” for this purpose is defined to include salary, bonuses, awards of stock, and other financial benefits provided by an eligible business to an officer or employee of the eligible business.<sup>49</sup>

As discussed in further detail in S&C’s memorandum covering the Coronavirus Economic Stabilization Act of 2020 (available [here](#)), these compensation limits also apply to certain “eligible businesses” receiving “direct loans,” unless waived by the Treasury Secretary in certain circumstances.<sup>50</sup> These compensation limits do not apply to the forgivable loan program for small businesses under Title I of the CARES Act, described above.

**Grants to Aviation Businesses.** Under Subtitle B of Title IV of the CARES Act, the Treasury Secretary may provide financial assistance to qualifying businesses in the aviation industry only if the businesses agree to the above-described compensation limits on officers and employees making more than \$425,000 and \$3 million during the two-year period from March 24, 2020 to March 24, 2022. An officer or employee of the business is exempt from the first set of compensation limitations described above, applicable when total 2019 compensation exceeded \$425,000, if his or her compensation is determined through an existing collective bargaining agreement executed before the date of enactment of the CARES Act (March 27, 2020).<sup>51</sup>

## **B. LABOR AND UNION PROVISIONS RELATED TO LOANS, LOAN GUARANTEES, AND OTHER ASSISTANCE UNDER TITLE IV OF THE CARES ACT**

**Loans and Loan Guarantees.** Under Subtitle A of Title IV of the CARES Act, the Treasury Secretary may enter into an agreement to make a loan or loan guarantee to a Covered Business only if, among other things, the agreement provides that (1) the business will maintain its March 24, 2020 employment levels until September 30, 2020 “to the extent practicable” and will not reduce its workforce by more than 10 percent compared to March 24, 2020; (2) it will not engage in stock buybacks;<sup>52</sup> and (3) it will not pay dividends with respect to its common stock.<sup>53</sup> The federal government is restricted from conditioning loans or loan guarantees to Covered Businesses on the implementation of measures to enter into negotiations with the certified bargaining representative of a class of employees regarding pay or other terms and conditions of employment. This restriction ends one year after the applicable loan or loan guarantee is no longer outstanding.<sup>54</sup> Covered Businesses considering applying for loans or loan guarantees under these provisions of the Coronavirus Economic Stabilization Act should be mindful of the applicable conditions.

In addition, as described above, Subtitle A of Title IV of the CARES Act also authorizes up to \$454 billion (plus any amounts not used for Covered Businesses) in loans and loan guarantees to, or other investments in, certain Federal Reserve programs or facilities. Any eligible business obtaining a direct loan in the

program or facility to be set up for mid-sized businesses under this fourth authority of the Coronavirus Economic Stabilization Act must certify that, among other things: (1) the funds obtained will be used to retain at least 90 percent of its workforce at full salary and benefits (or, if it has already terminated employees, will restore its workforce to 90 percent); (2) it will not pay dividends with respect to its common stock; and (3) it will not outsource or offshore any jobs for up to two years after completing repayment. Significantly, a mid-sized business obtaining a direct loan must also certify that it will not abrogate existing collective bargaining agreements for up to two years after completing repayment and will remain neutral in any union organizing efforts of its employees.<sup>55</sup> Mid-sized businesses considering applying for a direct loan under the Coronavirus Economic Stabilization Act's fourth authority should be mindful of these conditions.

The conditions regarding collective bargaining agreements and union neutrality for direct loans to mid-sized businesses do not apply to loans or loan guarantees to Covered Businesses under the Coronavirus Economic Stabilization Act's first three authorities. None of the conditions in the Coronavirus Economic Stabilization Act applies to the forgivable loan program for small businesses under Title I of the CARES Act, described above.

**Grants to Aviation Businesses.** Under Subtitle B of Title IV of the CARES Act, the Treasury Secretary may provide financial assistance to qualifying businesses in the aviation industry to be used exclusively for the continuation of payment of employee wages, salaries and benefits. Among other things, to receive this assistance, businesses must agree not to: (1) conduct involuntary furloughs or reduce pay rates and benefits until September 30, 2020; (2) engage in stock buybacks; or (3) pay dividends on their common stock.<sup>56</sup> Until September 30, 2020, the federal government is restricted from conditioning financial assistance on an air carrier's or contractor's implementation of measures to enter into negotiations with the certified bargaining representative of a class of employees regarding pay or other terms and conditions of employment.<sup>57</sup>

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## TAX AND ERISA PROVISIONS

Certain provisions of the CARES Act provide tax and ERISA relief for employers and employees. S&C's memorandum focused on the business tax relief aspects of the CARES Act is available [here](#).

**Employee Retention Credit for Employers Subject to Closure Due to COVID-19.** The CARES Act provides certain employers with a quarterly refundable payroll tax credit (the "Retention Credit") equal to 50 percent of certain wages paid between March 12, 2020 through January 2, 2021 and not exceeding \$10,000 with respect to any employee (*i.e.*, the Retention Credit may not exceed \$5,000 per employee) for all quarters. There is no limit as to the number of employees in respect of which an Eligible Employer may claim the Retention Credit. The Retention Credit is not available with respect to wages for which the

employer received an FFCRA Tax Credit, or if the employer or an affiliate receives a loan under the Paycheck Protection Program.<sup>58</sup>

- **Eligible Employers.** An employer may be eligible for the Retention Credit (a) if, for a calendar quarter, the employer's business is fully or partially suspended due to a government order limiting commerce, travel or group meetings (a "Business Suspension"), or (b) from the time that an employer experiences a 50 percent year-over-year decline in gross receipts until the employer's gross receipts recover to the point that they are more than 80 percent of the prior year's gross receipts (a "Significant Decline"), in each case determined by reference to the same calendar quarter of the prior year (such employer, an "Eligible Employer" and such credit, the "Retention Credit").<sup>59</sup> Note that the CARES Act does not specify what it means for a business to be "partially suspended". As noted above, the Retention Credit is not available, however, if the employer (or any entity treated as related or under common control with the employer) receives a loan as part of the Paycheck Protection Program.
- **Qualified Wages.** The number of an Eligible Employer's full-time employees (*i.e.*, employees working on average at least 30 hours per week) affects the amount of "qualified wages" taken into account for purposes of determining the Retention Credit. If, during 2019, an Eligible Employer (together with any entity treated as related or under common control with the employer) had on average more than 100 full-time employees (a "Large Eligible Employer), the Retention Credit is available only with respect to wages paid to employees who are not providing services due to a Business Suspension or Significant Decline. Otherwise, the Retention Credit is available with respect to wages paid while the employer qualifies as an Eligible Employer (whether or not such employees are providing services). For purposes of calculating the Retention Credit, wages also include certain qualified health plan expenses that are allocable (as determined under forthcoming regulations) to such wages.

Large Eligible Employers may not take into account in determining Retention Credits any wages with respect to an employee in a given period that exceed what the employee would have been paid for working during an equivalent period in the 30 days immediately preceding the Business Suspension or Significant Decline. The Retention Credit will also not be available for wages paid to related employees (*e.g.*, if the employee owns more than 50 percent of the Eligible Employer).

The CARES Act provides other special rules that prevent the duplicative receipt of tax credits and other tax benefits by the employer for the same wages paid to an employee. An Eligible Employer can elect to opt out of the Retention Credit with respect to any calendar quarter.

The Treasury Secretary is given authority to issue regulations or guidance to allow advance payment of Retention Credits to employers and is authorized to waive penalties for an employer's failure to make deposits of employment taxes in reasonable anticipation of receiving such credits.

**Delay of Payment of Employer Payroll Taxes.** The CARES Act allows employers to defer the payment (including the deposit) of payroll taxes for the 2020 calendar year (but beginning after the date of enactment of the CARES Act) until (1) December 31, 2021 for 50 percent of such taxes and (2) December 31, 2022 for the remaining 50 percent of such taxes.<sup>60</sup> Unlike the payroll tax credits discussed above, all employers regardless of size are generally eligible for this deferral of employer payroll taxes, except for small

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businesses whose loans under the Paycheck Protection Program are forgiven under certain other provisions of the CARES Act.<sup>61</sup>

**Individual Rebate.** Individuals may be eligible for an advance refund of their 2019 federal income tax liability in an amount equal to \$1,200 (or \$2,400 in the case of eligible individuals filing a joint return) plus \$500 for every dependent child under age 17 (the “Rebate Amount”).<sup>62</sup> A taxpayer’s Rebate Amount begins to phase out by 5 percent of a taxpayer’s adjusted gross income exceeding \$75,000 (or \$150,000 in the case of a joint return and \$112,500 in the case of a head of household). The Rebate Amount is completely phased out for taxpayers with adjusted gross income exceeding \$99,000 (or \$198,000 for joint filers with no children or \$146,500 for a head of household with one child). The CARES Act provides that the IRS will refund or credit a taxpayer’s Rebate Amount as soon as possible using information from the taxpayer’s 2019 return (or 2018 return if the taxpayer has not filed a 2019 income tax return).<sup>63</sup>

Eligible individuals may credit the Rebate Amount against their 2020 federal income tax liability, but such credit must be reduced by the taxpayer’s Rebate Amount for 2019, whether or not received.

The Treasury Secretary is authorized to provide regulations or other guidance as necessary to carry out the purpose of the Individual Rebate, including measures to avoid allowing multiple credits or rebates to a taxpayer.

**ERISA Retirement Plan-Related Amendments.** The CARES Act makes several changes to the Employee Retirement Income Security Act of 1974 (“ERISA”) rules that may impact certain employee benefit plans and their sponsors in the event of a public health emergency. Specifically, the CARES Act allows the DOL to postpone certain deadlines imposed under ERISA on pension, 401(k) and health and welfare plans, including the filing of annual reports on Form 5500.<sup>64</sup> Further, the CARES Act delays the payment deadline for certain single-employer plan minimum required contributions, including quarterly payments, that would otherwise be due during the 2020 calendar year to January 1, 2021; any such delayed payments will, however, be subject to an interest charge.<sup>65</sup> Finally, plan sponsors may elect to treat a plan’s adjusted funding target attainment percentage (“AFTAP”) for the last plan year ending before January 1, 2020 as the plan’s AFTAP for 2020.<sup>66</sup> This may reduce the likelihood that a plan is treated as underfunded for purposes of certain benefit restrictions based on a decline in asset values resulting from the current market dislocation.

In addition, the CARES Act also permits retirement plan participants impacted by COVID-19 to take a special “coronavirus-related distribution” of up to \$100,000, which is not subject to the 10 percent early withdrawal penalty, may be repaid over three years and may be taxable over three years.<sup>67</sup> Additional retirement plan loan relief for participants impacted by COVID-19 was also provided in the form of a one-year extension for certain existing plan loan payments and an increase in the amount a participant may take in plan loans from \$50,000 to \$100,000 (and from 50 percent to 100 percent of the participant’s vested

account balance).<sup>68</sup> The CARES Act also provides for waiver of 2020 required minimum distributions from 401(k) plans and IRAs, including required minimum distributions that are due by April 1, 2020 for participants who turned 70½ during 2019.<sup>69</sup>

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## KEY IMPLICATIONS FOR EMPLOYERS

For employers who are facing significant business uncertainty as a result of the ongoing COVID-19 pandemic, the various CARES Act provisions merit careful consideration in determining what is best for the employer and employee on a going forward basis.

For those employers who are considering the need to furlough or lay off employees as a result of COVID-19, the CARES Act provides employees an additional \$600 per week through July 31, 2020 and up to 39 weeks of unemployment compensation for those who are actively seeking work or who are unable to work due to COVID-19, in addition to the regular unemployment compensation that employees may be entitled to under state law. The CARES Act does not cap total unemployment compensation at 100 percent of an employee's prior compensation.

For those employers who employ fewer than 500 employees in the United States, the CARES Act broadens employees' eligibility to receive expanded child care leave under the FFCRA to include certain employees who were laid off due to COVID-19 and then rehired by the same employer, among other amendments to the FFCRA. The CARES Act also establishes advances for FFCRA Tax Credits.

For small businesses who receive a forgivable loan under the CARES Act's Paycheck Protection Program, the program provides a significant incentive to continue employing workers at their full wages during the expected height of the COVID-19 pandemic. An employer's loan forgiveness amount will be reduced proportional to any reduction in workforce and dollar-for-dollar for any reduction in employee compensation above a certain threshold, but employers who laid off workers or reduced compensation as a result of COVID-19 between February 15, 2020 and April 26, 2020 will not have their loan forgiveness reduced if they reverse their workforce reductions by June 30, 2020.

Businesses that are considering applying for a loan, loan guarantees, or other assistance under Title IV of the CARES Act should be mindful of the conditions of receiving such financial assistance, including compensation limits for well-compensated officers and employees and the requirement that businesses receiving direct loans under a Federal Reserve program not abrogate existing collective bargaining agreements for a certain period and remain neutral if their employees seek to organize a union.

Organizations looking to take advantage of the tax relief provisions of the CARES Act should be attentive to how the various provisions of the CARES Act interact with other benefits available under the CARES

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Act. Broad aggregation rules for employers may also prevent an organization from being eligible for certain tax relief.

Finally, plan sponsors determining whether to take advantage of ERISA plan funding relief should consider the impact the reduction of 2020 contributions will have on the level of required 2021 contributions, absent the adoption of additional relief.

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ENDNOTES

- 1 Prior to enactment of the Relief for Workers Act, Congress enacted the Emergency Unemployment Insurance Stabilization and Access Act of 2020 as part of the Families First Coronavirus Response Act on March 18, 2020, which, *inter alia*, provides access to \$1 billion in funding to states for the administration of the states' unemployment compensation laws. See Families First Coronavirus Response Act, Pub. L. No. 116-127 §§ 4101–4105, 134 Stat. 178 (2020) (hereinafter “FFCRA”).
- 2 In addition to Pandemic Unemployment Compensation, the Relief for Workers Act also provides certain additional benefits for transportation workers under the Railroad Unemployment Insurance Act. See CARES Act, Pub. L. No. 116-136 §§ 2112–14, 134 Stat. 281 (2020) (hereinafter “CARES Act”).
- 3 CARES Act §§ 2102(d), 2104(b)(1), 2107(a)(4)(A); U.S. Department of Labor, Employment and Training Administration Advisory System, Unemployment Insurance Program Letter (“UIPL”) No. 14-20 (Apr. 2, 2020); UIPL No. 15-20 (Apr. 4, 2020); UIPL No. 16-20 (Apr. 5, 2020).
- 4 The term “state” includes the District of Columbia, the Commonwealth of Puerto Rico, the Virgin Islands, Guam, American Samoa, the Commonwealth of the Northern Mariana Islands, the Federated States of Micronesia, the Republic of the Marshall Islands, and the Republic of Palau. *Id.* § 2102(a)(5).
- 5 Under the Relief for Workers Act, states may enter into agreements with the federal government to provide pandemic emergency unemployment compensation, which extends these unemployment benefits to Covered Individuals who have exhausted the unemployment benefits available to them. See *id.* § 2107.
- 6 *Id.* § 2102(a)(3)(A).
- 7 *Id.* § 2102(a)(3)(B).
- 8 *Id.* § 2102(c)(2).
- 9 *Id.* § 2107(a)(7)(A)(i)-(iv).
- 10 *Id.* § 2107(a)(7)(B).
- 11 *Id.* § 2102(e).
- 12 *Id.* § 2109.
- 13 *Id.* § 2102(d)(3).
- 14 *Id.* § 2104(h).
- 15 *Id.* § 2103.
- 16 FFCRA § 3102(b).
- 17 CARES Act § 3605.
- 18 *Id.* § 3606.
- 19 *Id.* § 3611(7).
- 20 See FFCRA § 5111(3).
- 21 CARES Act § 3602.
- 22 *Id.* § 3601.
- 23 The technical corrections specify which provisions of the FMLA the Expansion Act amends.
- 24 *Id.* § 3611(4).



ENDNOTES (CONTINUED)

- 25 Family and Medical Leave Act of 1993, Pub. L. No. 103-3, § 101(4)(A), 107 Stat. 7 (1993) (codified as amended at 29 U.S.C. § 2611(4)(A)) (hereinafter “FMLA”); 29 CFR § 825.104(a).
- 26 FMLA § 107(b) (codified at 29 U.S.C. § 2617(b)).
- 27 CARES Act § 3610.
- 28 *Id.* § 1102.
- 29 *See also* 13 CFR § 121.103 (“How does SBA determine affiliation?”).
- 30 CARES Act § 1106.
- 31 *Id.* § 1106(b).
- 32 *Id.*
- 33 *Id.* § 1102(a)(1)(b).
- 34 *Id.*
- 35 However, the SBA will reimburse for the amount forgiven, plus interest accrued through the date of reimbursement. *Id.* §§ 1106(c)(3), (d)(1).
- 36 *Id.* § 1106(d)(2)-(3).
- 37 *Id.* § 1106(d)(2).
- 38 *Id.* § 1106(d)(3).
- 39 *Id.* § 1106(d)(5).
- 40 *Id.* § 1106(e).
- 41 *Id.* § 1106(g).
- 42 *Id.* § 1106(k). The SBA also must provide guidance on the required deferral of payments under loans to borrowers who have applied for a loan under this program. *Id.* § 1102.
- 43 *Id.* § 1106(d)(6).
- 44 *Id.* § 4003(b)(1).
- 45 *Id.* § 4003(b)(2).
- 46 *Id.* § 4003(b)(3).
- 47 *Id.* § 4003(b)(4).
- 48 *Id.* § 4004(a).
- 49 *Id.* § 4004(b).
- 50 *Id.* § 4003(c)(3).
- 51 *Id.* § 4116(a).
- 52 S&C’s memorandum regarding the CARES Act’s limitations on stock buybacks for businesses receiving assistance under Title IV is available [here](#).
- 53 *Id.* § 4003(c)(2).
- 54 *Id.* § 4025.
- 55 *Id.* § 4003(c)(3)(D)(i).
- 56 *Id.* § 4114(a).
- 57 *Id.* § 4115.

ENDNOTES (CONTINUED)

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- 58 *Id.* § 2301.
- 59 The Treasury Secretary is to issue regulations or guidance for new businesses that did not have a trade or business in the same quarter of the prior year.
- 60 *Id.* § 2302.
- 61 *See id.* §§ 1106, 1109.
- 62 The Individual Rebate is not available for nonresident aliens.
- 63 *Id.* § 2201(a).
- 64 *Id.* § 3607.
- 65 *Id.* § 3608(a).
- 66 *Id.* § 3608(b).
- 67 *Id.* § 2202(a).
- 68 *Id.* § 2202(b).
- 69 *Id.* § 2203.

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