



Independent Insights

H.R. 6201 and the CARES Act

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ask@nationwidegroup.org



CONSTANGY
BROOKS, SMITH &
PROPHETE LLP

Pandemic Planning: An Employer's Guide to COVID-19 (Part II)

As of 3/31/20

Timothy A. Davis
(816.329.5910/913.205.8647)
Jill S. Stricklin (336.721.6861)
tadavis@constangy.com
jstricklin@constangy.com

A wider lens on workplace law



Agenda

- Employment-Related Provisions of CARES Act
- Families First Coronavirus Response Act--Updates
- Practical Workforce Planning

Since Last Week: Where Are We Now?

- Social distancing extended through 4/30/20
- Shelter in place/stay at home orders in more locales, with exceptions for “essential businesses”
- Increased COVID-19 diagnoses, with more individuals subject to isolation or quarantine
- Marked increase in unemployment claims related to COVID-19 slowdowns or shutdowns
- Preparing for paid sick leave/expanded family and medical leave provisions of FFCRA to take effect 4/1/20
- Now we have CARES Act, enacted 3/27/20

Coronavirus Aid, Relief and Economic Security Act (CARES Act)

- Paycheck Protection Program
 - SBA loans to cover payroll and other designated operating expenses
 - Potentially forgivable, at least in part, with incentives for keeping workers on the payroll
- Emergency EIDL Grants
- Enhanced Unemployment Benefits
 - Increased benefits and expanded entitlement period to those eligible for unemployment under state law
 - Expands coverage to those not traditionally eligible for unemployment benefits (self-employed, independent contractors, those with limited work history, and others)
- Payroll Tax Credits/Deferral

Paycheck Protection Program

- Amends Section 7(a) of Small Business Act to provide 100% federally guaranteed loans
- Applies to loans covering 2/15/20 – 6/30/20
- Available to entities with fewer than 500 employees and certain sole proprietors, independent contractors, and self-employed
 - For food service and accommodation industry, 500 or fewer employees per physical location
 - For those operating as franchise or receiving financial assistance from SBIC, normal affiliation rules do not apply
- Loans made by SBA and authorized lenders
- Certain SBA procedural requirements (e.g., no credit elsewhere, personal guarantee, collateral) and administrative fees waived

Maximum Loan Amount

- The lesser of:
 - 2.5X average total monthly payroll costs for one-year period before loan origination, or
 - \$10,000,000
- Alternative computation methods for entities not in business in 2019 and for seasonal employers
- 7(b)(2) disaster relief loans made after 1/31/20 may be refinanced as part of covered loan

Payroll costs defined broadly

- Salary, wage, commission, or similar compensation
- Payment of cash tips or equivalent
- Payment for vacation, parental, family and medical, medical, or sick leave
- Allowance for dismissal or separation
- Payment for group health insurance, including premiums
- Payment of retirement benefits
- State or local taxes assessed on earnings

Payroll costs exclude

- Compensation of an individual employee in excess of an annual salary of \$100,000, prorated for covered period
- Taxes imposed or withheld
- Compensation of employee whose principal residence is outside the U.S.
- Qualified sick leave/family and medical leave for which credits are allowed under FFCRA

Paycheck Protection Program

- Lenders will consider whether applicant:
 - Was in operation on 2/15/20
 - Had employees for whom it paid salaries and payroll taxes or paid independent contractors as reported on Form 1099s
- Borrowers must certify:
 - That the loan request is necessary to support ongoing operations due to the uncertainty of current economic conditions
 - That the funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments and utility payments
 - That no duplicative Section 7(a) loan application is pending and that, during the period of 2/15/20 through 12/31/20, the borrower has not received funds under 7(a) for same purpose

Allowable uses—2/15/20 through 6/30/20

- In addition to allowable uses of 7(a) loan (short- or long-term working capital, refinancing business debt, etc.), borrowers may use proceeds for:
 - Payroll costs
 - Costs related to continuation of group health care during periods of paid sick, medical, or family and medical leave, and insurance premiums
 - Employee salaries, commissions, or similar compensations
 - Interest payments on mortgage obligations
 - Rent, including rent under lease agreement
 - Utilities
 - Interest on debt obligations incurred before 2/15/20

Loan forgiveness

- Eligible for loan forgiveness on amount spent during 8-week period after loan originated on:
 - Payroll costs
 - Payment of interest on mortgage obligations incurred before 2/15/20 in ordinary course of business
 - Payment on rent obligations based on lease in effect before 2/15/20
 - Covered utility payments (electricity, gas, water, transportation, telephone, or internet access for which service began before 2/15/20)
 - Additional wages paid to tipped employees
- Forgiveness cannot exceed principal
- Considered cancelled indebtedness

Loan forgiveness—required documentation

- Borrower seeking loan forgiveness must submit to lender serving the loan:
 - Documentation verifying the number of FTE equivalent employees on payroll and pay rates for relevant time periods, including
 - Payroll tax filings reported to the IRS, and
 - State income, payroll, and unemployment insurance filings
 - Documentation, including cancelled checks, payment receipts, transcripts of accounts, or other documents verifying payments on covered mortgage obligations, payments on covered lease obligations, and covered utility payments

Reduction in loan forgiveness

- Forgiveness amount will be reduced if borrower reduces number of FTE employees or reduces salary/wages by more than 25%, compared with 2/15/20
 - Multiply amount of loan forgiveness by quotient obtained from dividing:
 - Average number of FTE employees per month during 8 weeks after loan origination by, at the borrower's election:
 - Average number of FTE employees per month from 2/15/19 to 6/30/19, or
 - Average number of FTE employees per month from 1/1/20-2/29/20
 - Deduct the amount of any reduction in total salary/wages of any employee during 8 weeks after loan origination that exceeds 25% of total salary/wages of the employee during most recent full quarter during which employee was employed before the 8-week period

Rehires/reinstatement of pay

- Amount of loan forgiveness determined without regard to reduction in FTE employees or reduction in salary/wages for period of 2/15/20 to 30 days after enactment of CARES Act (4/26/20) if, not later than 6/30/20, borrower has eliminated the reduction in employees or salary/wages
- To maximize loan forgiveness:
 - Any temporary reductions in workforce or salary/wages that might be needed should be conducted by 4/26/20
 - To the extent possible, employees should be reinstated and salary/wages should be restored:
 - During 8 weeks after loan origination, to increase forgivable amount
 - By 6/30/20, to avoid reduction in loan forgiveness

Remaining balance after loan forgiveness

- Guaranteed by Small Business Administration
- Maximum maturity of 10 years from application for loan forgiveness
- Interest rate not to exceed 4%
- Deferred payment of principal, interest and fees for 6 months to 1 year
- No prepayment penalty
- SBA guidance due 15 days after enactment
- **More information coming soon: www.sba.gov**

CARES Act--Emergency EIDL Grants

- Expands SBA Emergency Injury Disaster Loans (EIDLs) available to businesses with not more than 500 employees for period of 1/31/20 through 12/31/20
- For EIDLs in response to COVID-19 during covered period, waives rules regarding personal guarantee on loans below \$200,000, requirement of being in business for 1 year (as long as in operation on 1/31/20), and applicant unable to obtain credit elsewhere
- Approve based solely on applicant's credit score or use alternative method for determining applicant's ability to repay
- May request emergency advance, up to \$10,000, payable by Small Business Association within 3 days after submitting application
- Advance may be used for allowable purposes under 7(b)(2) of SBA, including
 - providing paid sick leave to employees unable to work due to COVID-19
 - maintaining payroll to retain employees during business disruptions or substantial slowdowns
 - Meeting increased costs to obtain materials unavailable due to interrupted supply chains
 - Making rent or mortgage payments, and
 - Repaying obligations that cannot be met due to revenue losses
- Applicant shall not be required to repay any amounts of the advance, even if 7(b)(2) loan is subsequently denied
- If applicant receives advance and is approved for Payroll Protection Program loan, advance shall be reduced from the loan forgiveness amount

FFCRA—initial expansion of unemployment

- Amended Social Security Act to allow states greater access to emergency funds for UI for employees who lose their jobs or have hours reduced due to COVID-19
- Required states to amend unemployment rules to allow greater access and hasten payment
- States responded—e.g., waiver of 7-day waiting period, eliminated job search requirements, or mandating/encouraging employers to file partial claims on behalf of their employees
- Check applicable state laws

CARES Act--Enhanced Unemployment Benefits

- Emergency Increase in Unemployment Compensation benefits—amount entitled to receive under state law + \$600/week (through 7/31/20)
- Pandemic Emergency Unemployment Compensation—extended benefits for up to additional 13 weeks if exhausted rights to unemployment benefits under state law (for a total of 39 weeks in most states)
- Pandemic employment assistance to individuals not otherwise eligible—self-employed, insufficient earnings during base period, etc.—who are out of work for specified reasons related to COVID-19 (39 weeks)

CARES Act--Payroll Tax Credits

- Refundable payroll tax credit for 50% of wages (up to \$10,000 per employee) paid each calendar quarter during COVID-19 crisis
 - Excludes paid sick/family and medical leave under FFCRA
 - Includes qualified health plan expenses
- Available to businesses whose:
 - Operations were fully or partially suspended due to orders from a governmental authority limiting commerce, travel, or group meetings due to COVID-19, or
 - Receipts declined by more than 50% when compared to the same quarter in 2019
- For employers with:
 - 100 or fewer fulltime employees, covers wages paid to all employees during any applicable quarter in which there was COVID-19 impact as described above
 - More than 100 fulltime employees, only covers wages for employees not providing services due to COVID-19 impact
- May not exceed applicable employment taxes in any one quarter
- Employer who receives forgivable loan under Paycheck Protection Program **not eligible** for tax credits

CARES Act--delayed payment of payroll taxes

- All employers and self-employed individuals may defer payment of the employer share of payroll taxes owed on wages paid for period beginning on date of enactment (3/27/20) and ending 12/31/20
 - 50% due by 12/31/21
 - 50% due by 12/31/22
- **Does not apply** to any taxpayer who receives loan forgiveness on Paycheck Protection Program loan

Practical Considerations for Employers

- Are you presently operating? Do you expect that to continue, given business needs and any restrictions that apply to you?
- Have you already laid off/terminated employees?
- What is your projection for staffing needs in upcoming months?
- What is your cash flow situation? Can you continue to cover operating expenses while awaiting relief?

Revisiting Families First Coronavirus Response Act

- Applies to qualifying family and medical or paid leave between 4/1/20 and 12/31/20 (not retroactive)
- Guidance/FAQs/Poster available on www.dol.gov
- May satisfy posting requirement by:
 - Posting notice in conspicuous place on premises
 - If workforce is teleworking, by emailing or direct mailing the notice, or by posting notice on internal or external website providing employee information
- Must post by 4/1/20
- Need only provide notice to current employees

CARES Act modifications to FFCRA

- Codifies payroll tax credit advances for qualifying wages paid under FFCRA as emergency paid sick leave and emergency family and medical leave
- Clarifies that individual and aggregate pay and tax credit caps apply for each employee, not on cumulative basis for all employees
- Directs Secretary of Treasury to provide forms and instructions for calculating advances
- Rehired employees eligible for emergency family and medical leave if laid off after 3/1/20 and later rehired, as long as worked for the employer at least 30 of the last 60 calendar days before layoff

FFCRA—DOL on calculating paid leave

- Regular rate of pay—average rate of pay for 6 months preceding leave, including commissions, tips and piece rates
- For part-time employees, determine average number of work hours in 2-week period
 - Number of hours employee regularly scheduled to work
 - If normal hours scheduled are unknown or if schedule varies, use 6-month average
- family and medical leave expansion requires paid leave to include overtime hours normally worked, but not paid sick leave (limited to 80 hours)
- No need to include overtime premium under paid sick leave of expanded family and medical leave

FFCRA—DOL on “stacking” of leave

- Total of 2 weeks (or 80 hours) paid sick leave available, for any combination of qualifying reasons
- Employee home with child because school or child care center is closed, or child care provider is unavailable, may be eligible for 2 weeks of paid sick leave and expanded family and medical leave, for a total of 12 weeks of paid leave
- Employee may take 12 weeks of family and medical leave total, including both “traditional” and expanded FMLA leave
- Employee eligible for paid sick leave no matter how much FMLA leave might have previously been taken

FFCRA—DOL on documentation of leave

- Employers that provide paid sick leave and expanded family and medical leave are eligible for reimbursement through refundable tax credits
- If you intend to claim tax credit, retain appropriate documentation (e.g., notice posted on government, school, or day care website regarding closure)
- Consult IRS for applicable forms, instructions and information to be retained to support the credit

FFCRA—DOL on closure of worksite

- If employer closes worksite, either before 4/1/20 or after FFCRA becomes effective, and no work is available for employee to do, the employee will **not** receive paid sick leave or expanded family and medical leave, but might be entitled to unemployment benefits
- If worksite closes while employee on paid sick leave or expanded family and medical leave, employer must pay for any leave used before closure
- True regardless of whether employer closes worksite for lack of business or due to federal, state, or local directive

FFCRA—DOL on group health coverage

- Employer must continue group health coverage during expanded family and medical leave, although employee must continue making any normal contributions to cost of coverage
- While on paid sick leave, must continue group health coverage based on plan language treating absence from work due to any health factor as being actively at work
- Otherwise, COBRA applies to employers with 20 or more employees upon separation or reduction in work hours

FFCRA—DOL on small business exemption

Employer with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave and (b) expanded family and medical leave when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

- The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
- The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
- There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

FFCRA—DOL enforcement position

- 30-day non-enforcement provision on paid sick leave and expanded family and medical leave requirements of FFCRA runs from date of enactment, not effective date
- After 4/17/20, limited stay of enforcement will be lifted, per Field Assistance Bulletin issued 3/25/20



THANK YOU

ask@nationwidegroup.org