

Specifics Of CARES Act And Implications For Businesses And Individuals

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The Coronavirus Aid, Relief, and Economic Security Act or the CARES Act, which was passed by the U.S. Senate on March 25, 2020, and is expected to pass the House soon, includes significant provisions that affect American citizens personally and professionally. Importantly, the CARES Act is a [stimulus bill that releases over \\$330 billion of federal funding](#) to help maintain and/or boost the economy by supporting American institutions, including national businesses, large and small.

Particular highlights of the package include:

TAX PROVISIONS FOR BUSINESSES

- Allows employers to provide a student loan repayment benefit to employees on a tax-free basis. Under the provision, an employer may contribute up to \$5,250 annually toward an employee's student loans, and such payment would be excluded from the employee's income. The \$5,250 cap applies to both the new student loan repayment benefit as well as other educational assistance (e.g., tuition, fees, books) provided by the employer under current law. The provision applies to any student loan payments made by an employer on behalf of an employee after date of enactment and before Jan. 1, 2021.
- Provides a refundable payroll tax credit for 50 percent of wages paid by employers to employees during the COVID-19 crisis. The credit is available to employers whose 1) operations were fully or partially suspended, due to a COVID-19-related shutdown order, or 2) gross receipts declined by more than 50 percent when compared to the same quarter in the prior year.
The credit is based on qualified wages paid to the employee. For employers with greater than 100 full-time employees, qualified wages are wages paid to employees when they are not providing services due to the COVID-19-related circumstances described above. For eligible employers with 100 or fewer full-time employees, all employee wages qualify for the credit, whether the employer is open for business or subject to a shut-down order. The credit is

provided for the first \$10,000 of compensation, including health benefits, paid to an eligible employee. The credit is provided for wages paid or incurred from March 13, 2020 through Dec. 31, 2020.

- Allows employers and self-employed individuals to defer payment of the employer share of the Social Security tax they otherwise are responsible for paying to the federal government with respect to their employees. Employers generally are responsible for paying a 6.2-percent Social Security tax on employee wages. The provision requires that the deferred employment tax be paid over the following two years, with half of the amount required to be paid by Dec. 31, 2021 and the other half by Dec. 31, 2022. The Social Security Trust Funds will be held harmless under this provision.
- Provides that a net operating loss, or NOL, arising in a tax year beginning in 2018, 2019, or 2020 can be carried back five years. The provision also temporarily removes the taxable income limitation to allow an NOL to fully offset income. These changes will allow companies to utilize losses and amend prior year returns, which will provide critical cash flow and liquidity during the COVID-19 emergency.
- Modifies the loss limitation applicable to pass-through businesses and sole proprietors, so they can utilize excess business losses and access critical cash flow to maintain operations and payroll for their employees.
- Temporarily increases the amount of interest expense businesses are allowed to deduct on their tax returns, by increasing the 30-percent limitation to 50 percent of taxable income (with adjustments) for 2019 and 2020. As businesses look to weather the storm of the current crisis, this provision will allow them to increase liquidity with a reduced cost of capital, so that they are able to continue operations and keep employees on payroll.
- Enables businesses, especially in the hospitality and restaurant industry, to write off immediately costs associated with improving facilities instead of having to depreciate those improvements over the 39-year life of the building. The provision, which corrects an error in the Tax Cuts and Jobs Act, not only increases companies' access to cash flow by allowing them to amend a prior year return, but also incentivizes them to continue to invest in improvements as the country recovers from the COVID-19 emergency.
- Provides for temporary exception from excise tax for alcohol used to produce hand sanitizer. The provision waives the federal excise tax on any distilled spirits used for or contained in hand sanitizer that is produced and distributed in a manner consistent with guidance issued by the Food and Drug Administration and is effective for calendar year 2020.

Unemployment Benefits

- Creates a temporary program through Dec. 31, 2020, to provide payment to those not traditionally eligible for unemployment benefits (self-employed, independent contractors, those with limited work history, and others) who are unable to work as a direct result of the coronavirus public health emergency.
- Provides payment to states to reimburse nonprofits, government agencies, and Indian tribes for half of the costs they incur through Dec. 31, 2020, to pay unemployment benefits.

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- Provides an additional \$600 per week payment to each recipient of unemployment insurance or Pandemic Unemployment Assistance for up to four months.
 - Provides funding to pay the cost of the first week of unemployment benefits through Dec. 31, 2020, for states that choose to pay recipients as soon as they become unemployed instead of waiting one week before the individual is eligible to receive benefits.
 - Provides an additional 13 weeks of unemployment benefits through Dec. 31, 2020, to help those who remain unemployed after weeks of state unemployment benefits are no longer available.
 - Pays 100 percent of employer's costs of providing short-time compensation through Dec. 31, 2020, where employers reduce employee hours instead of laying off workers and the employees with reduced hours receive a pro-rated unemployment benefit. Pays for 50 percent of the costs that a state incurs in providing short-time compensation through Dec. 31, 2020.

TAX PROVISIONS FOR INDIVIDUALS

- All U.S. residents with adjusted gross income up to \$75,000 (\$150,000 married), who are not a dependent of another taxpayer and have a work eligible Social Security number, are eligible for the full \$1,200 (\$2,400 married) rebate. In addition, they are eligible for an additional \$500 per child. This is true even for those who have no income, as well as those whose income comes entirely from non-taxable means-tested benefit programs, such as SSI benefits. The rebate amount is reduced by \$5 for each \$100 that a taxpayer's income exceeds the phase-out threshold. The amount is completely phased-out for single filers with incomes exceeding \$99,000, \$146,500 for head of household filers with one child, and \$198,000 for joint filers with no children.

Charitable Deductions

- Allows charitable deductions of up to \$300 to churches and charitable organizations in 2020 regardless of whether contributors itemize their deductions or not.
- Increases the limitations on deductions for charitable contributions by individuals who itemize, as well as corporations. For individuals, the 50 percent of adjusted gross income limitation is suspended for 2020. For corporations, the 10 percent limitation is increased to 25 percent of taxable income. This provision also increases the limitation on deductions for contributions of food inventory from 15 percent to 25 percent.

Retirement Plan Withdrawals

- Waives the 10 percent early withdrawal penalty for distributions up to \$100,000 from qualified retirement accounts for coronavirus-related purposes made on or after Jan. 1, 2020. In addition, income attributable to such distributions would be subject to tax over three years, and the taxpayer may recontribute the funds to an eligible retirement plan within three years without regard to that year's cap on contributions. Further, the provision provides flexibility for

loans from certain retirement plans for coronavirus-related relief. A coronavirus-related distribution is a one made to an individual: 1) who is diagnosed with COVID-19, 2) whose spouse or dependent is diagnosed with COVID-19, or 3) who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, having work hours reduced, being unable to work due to lack of child care due to COVID-19, closing or reducing hours of a business owned or operated by the individual due to COVID-19, or other factors as determined by the Treasury Secretary.

- Waives the required minimum distribution rules for certain defined contribution plans and IRAs for calendar year 2020. This provision provides relief to individuals who would otherwise be required to withdraw funds from such retirement accounts during the economic slowdown due to COVID-19.

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PROVISIONS RELATED TO THE SMALL BUSINESS ADMINISTRATION

The first substantive section of the CARES Act, called the Keeping American Workers Paid and Employed Act, provides for \$349 million to be used to guarantee loans to small businesses and other entities that have 500 employees or less. Details include:

- Eligible borrowers can obtain up to a \$10 million loan based on its payroll over a 12-month or annualized basis, depending on the nature of the business, prior to the COVID-19 outbreak in the United States.
- Such covered loans would have up to a 10-year term with an interest rate not to exceed four percent (4%).
- Loan proceeds can be used for payroll costs and other employee compensation for employees who make less than \$100,000; group health care premiums and certain other related costs; mortgage interest payments; rent, utilities, and interest on any other debt obligations incurred prior to Feb. 15, 2020; and to refinance any loan that the borrower received under the Small Business Administration's disaster assistance loan program for small businesses impacted by COVID-19.

The loan program will be administered by the Small Business Administration through its existing Section 7(a) business loan program, which requires applying through an approved SBA lender, but certain requirements associated with typical SBA loans, such as guarantees, collateral, and a "credit available elsewhere" underwriting, have been relaxed or eliminated.

One of the most anticipated provisions of the loan program was the "forgivable" nature of the loan, but these provisions are more limited than people may have been thinking prior to the public release of the legislation. The legislation provides that:

- A borrower under a covered loan can have a portion of the principal of the loan forgiven in an amount equal to payroll costs, mortgage interest, rent, or utility costs during the eight-week period following the origination of the loan.

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- Further, the forgiven amount may be reduced based on the number of employees and each employee's wage or salary in such eight-week period as compared to a specified pre-COVID period.

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PROVISIONS RELATED TO DEBTORS

The Senate Bill amends the 2019 enactment of the Small Business Debtor Reorganization (SBDR) provisions of Title 11 U.S.C. §101 et seq., the Bankruptcy Code, to provide for special expanded bankruptcy protections to many thousands more small businesses. Under the legislation, the Bankruptcy Code would allow:

- Small businesses to qualify as "Small Business Debtors" with as much as \$7.5 million in debt.
- The proposal provides that the increased debt cap to qualify for the SBDR will sunset after one year and the eligibility will return to the current level of \$2,725,625.

The SBDR reflects a recent effort to expedite and reduce the cost of bankruptcy for Small Business Debtors to reorganize their businesses, allowing qualifying debtors to elect a process providing greater flexibility in negotiating restructuring plans with creditors under the oversight and with the input of private trustees.

The bill also provides greater protections to debtors under Chapter 13 of the Bankruptcy Code, applicable to individuals. Chapter 13 generally allows for individual debtors to repay creditors under court supervision over a three –to five-year period. It also provides for:

- The insulation from the definition of "income" all coronavirus relief related payments from the federal government.
- Enhanced protections from material financial hardship directly or indirectly caused by the COVID-19 pandemic impacting performance under court-approved repayment plans.
- Individuals requesting the court extend repayment for up to seven years after the initial plan payment was due. This provision sunsets after one year.

The proposed legislation adopts some, but not all, recommendations from bankruptcy commentators, rejecting recommendations like a general breathing spell for individuals and businesses due to financial dislocations occasioned by the pandemic and modeled on protections available under the Service members Civil Relief Act of 2003.

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PROVISIONS IMPACTING EMPLOYMENT AND LABOR LAWS

Employment Strings Attached to the Treasury's Exchange Stabilization Fund

One of the largest components of the CARES Act is the Coronavirus Economic Stabilization Act of 2020, which provides for \$500 billion in loans, loan guarantees and investments. A portion of this money is reserved for employers with between 500 and 10,000 employees. However, in order to participate in this program, there were a number of strings attached. The ban on stock buy-backs was one provision that gain the most notoriety. However, there are a number of employment obligations, including that:

- The money will be used to retain at least 90 percent of the recipient's workforce, at full compensation and benefits, until Sept. 30, 2020
- The recipient intends to restore not less than 90 percent of the workforce of the recipient that existed as of Feb. 1, 2020, and to restore all compensation and benefits to the workers of the recipient no later than 4 months after the termination date of the public health emergency;
- The recipient will not outsource or offshore jobs for the term of the loan and 2 years after completing repayment of the loan
- The recipient will not abrogate existing collective bargaining agreements for the term of the loan and two years after completing repayment of the loan
- That the recipient will remain neutral in any union organizing effort for the term of the loan

The last point, union neutrality, is a point that has received almost no attention and seems little connected to recovery from the coronavirus emergency. Employers should carefully consider if this obligation is one that would be in the best interests of their business.

Confirmation of Families First Leaves Caps

The CARES Act confirms the limitations under the new Families First Coronavirus Response Act. The caps are \$200 per day and \$10,000 in the aggregate for each employee under the Emergency Paid Family Leave, and \$200 per day under the Paid Sick Leave provisions, \$2,000 in the aggregate to care for a quarantined individual or child for each employee under this section or \$511 per day and \$5,110 in the aggregate for the employee's own absence due to coronavirus quarantine or isolation order or medical direction or for testing.

There are provisions that permit the Treasury to advance the tax credits built into the Families First Act rather than requiring employers to be reimbursed on the back end.

The bill also allows the Director of Office Management and Budget (OMB) to exempt certain Executive Branch employees from coverage of the Paid Family Leave and Paid Sick Leave.

Unemployment Insurance

The bill has a variety of unemployment insurance provisions that are designed to speed assistance to employees, cover the costs for the states and provide enhanced benefits.

The most notable and most controversial is a flat \$600 per week Pandemic Unemployment Assistance above and beyond the benefit the employee would otherwise receive from the states. This benefit is available for four months. It is controversial because the assistance is not tied to any particular wage level, leaving the possibility that workers could receive more in unemployment benefits than they would for returning to work. A similar benefit is provided under the Railroad Unemployment Insurance Act.

The unemployment assistance is also available to workers not usually covered by unemployment insurance who are out of work as a result of the coronavirus pandemic. These workers include the self-employed, independent contractors and workers with limited work history.

The bill also extends the duration of traditional unemployment insurance by 13 weeks. The one-week waiting period is also suspended under CARES. Similar benefits are provided under the Railroad Unemployment Insurance Act.

There is also a \$100 million block grant to the states for the implementation of other “short term compensation” programs.

All of this is being funded by the federal monies. There are also flexibilities written into CARES to allow states flexibility in how to implement these various provisions. The bill also mandates that, to the extent practicable, workers be allowed to apply for benefits in person, by phone or online.

For more information, please contact the Barnes & Thornburg attorney with whom you work or Scott Witlin at 310-284-3777 or scott.witlin@btlaw.com, or Mark Keenan at 404-264-4044 or mark.keenan@btlaw.com.

PROVISIONS FOR EDUCATIONAL INSTITUTIONS

The following key provisions in the CARES Act provides newly-available resources which may be of interest to educational institutions:

- \$30.75 billion for higher education institutions and schools (K-12) to provide education services to students
- \$14.25 billion in emergency relief for institutions of higher education to deal with coronavirus-related fallout. Colleges and universities may use the funds to defray relevant expenses, such as lost revenue, distance education costs, and grants to students for food, housing, course materials, technology, health care, and child care.
- Institutions will have wide latitude on how they disperse the funds, but at least 50 percent must go directly to coronavirus-related student relief efforts (e.g. food, housing, course materials, etc.). That means that up to 50 percent can cover other things like “lost revenue,” a term that can be construed broadly, likely to include expected tuition revenue, technology licensing and athletics revenue. So, institutions that are hurting financially from the loss of many avenues of expected income will get some relief, and will have fairly wide latitude in how they realize these funds as revenue in their budgets. And, while at least 50 percent of the funds must go to student relief, it will still be important revenue that institutions otherwise could not realize – and using those funds to cover student food, housing, course materials, etc, should help mitigate the enrollment crunch than many anticipate in the coming fall semester.

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- The act does not earmark any funds for university research, but it does permit schools to include research-related losses and disruptions in the up-to-50-percent total, above.
 - Funds will be allocated to institutions pro rata based on their adjusted enrollment. The adjusted-enrollment formula gives 75 percent weight to Pell-eligible students, and 25 percent weight to Pell-ineligible students. Students who were solely distance learners prior to the pandemic are excluded from the calculus. In general and in short, the larger the institution, and the greater the share of Pell-eligible students, the more money the institution will receive.
 - The legislation also creates a new tax benefit to encourage companies to help their employees pay off student loan debt. Under the bill, a company could pay up to \$5,250 of an employee's student loan payments each year on a tax-free basis. This may help universities with their post-graduation employment statistics and could incentive certain students to complete their degrees.
 - It also grants the Department of Education authority to distribute an additional \$300 million to colleges hardest hit by the COVID-19 crisis. The Secretary likely will have broad discretion in administering these funds, but virtually no such discretion with respect to the other roughly \$14 billion in the package.
 - Elementary and secondary education – \$13.5 billion in formula-grants to states, which will distribute 90 percent of the funds to local educational agencies to use for coronavirus-response activities, such as closure planning and logistics, purchasing educational technology for online learning, and any other activities authorized by existing federal law.
 - Additional funds – \$3 billion, split among the states – will be granted to support local education agencies most significantly impacted by coronavirus.

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PROVISIONS FOR HEALTHCARE PROVIDERS

The CARES Act provides both funding and administrative flexibility for healthcare providers and entities providing COVID-19 pandemic relief and services. Most importantly, the act allocates \$100 billion to the Public Health and Social Services Emergency Fund for necessary expenses to reimburse eligible health care providers for healthcare-related expenses or lost revenues that are attributable to COVID-19. The act also modifies the Medicare Hospital Inpatient Prospective Payment System and provides a 20 percent add on to the DRG rate for COVID-19 patients. The act assists hospitals and providers by expanding the ability to receive accelerated Medicare payments, waiving the 50 percent rule and site-neutral payment policies for post-acute care, eliminating the planned \$4 billion reduction in Medicaid reimbursement for 2020, further reducing what is planned for 2021 from \$8 billion to \$4 billion, and limiting liability for volunteer healthcare professionals.

The act also:

- Provides billions in support for telemedicine and telecommunications infrastructure to enable the provision of telehealth services, including providing reimbursement for federally qualified

health centers and rural health clinics providing telehealth services

- Waives or modifies specific provider billing requirements, such as the non-federal share requirement, the face-to-face requirement for in-home dialysis patients, and the allowance of non-physician providers to certify a home health admission
- Provides better funding to the CDC to increase testing and support the collection of COVID-19 health data
- Provides grants to establish geriatric care training programs

For more information, please contact the Barnes & Thornburg attorney with whom you work or Matthew Agnew at 214-258-4153 or matthew.agnew@btlaw.com.

PROVISIONS FOR LIFE SCIENCES AND BIOTECH COMPANIES

The following key provisions in the CARES Act provides newly-available resources which may be of interest and/or utilized by U.S. life sciences and biotech companies, clients and academic institutions to support their business and employees:

- \$80 million to U.S. Food and Drug Administration (FDA) to continue efforts related to COVID-19 critical medicines, identification and enforcement on counterfeit coronavirus medications, and emergency use authorization for pre- and post-market coronavirus countermeasures, therapies, vaccines, and research
- \$10 million to the National Institute for Innovation in Manufacturing Biopharmaceuticals to support development and manufacture of new medical countermeasures and biomedical supplies and equipment to combat the coronavirus
- \$30 million in assistance to fisherman, fisheries, and aquaculture farmers to recover losses due to the disappearing market in light of the impact of coronavirus
- \$6 million to the National Institute of Standards and Technology to support research and measurement science for accurate and rapid testing of the coronavirus
- \$75 million to the National Science Foundation (NSF) to support molecular, cellular, physiological, and ecological studies of COVID-19 levels in order to better understand coronavirus genetics, transmission, etiology, epidemiology, and virulence.
- NSF is currently accepting proposals for this funding through its Rapid Response Research (RAPID) program.
- \$945 million to the National Institute of Health (NIH) to support scientific research to better understand the prevalence, transmission, history, novel diagnostic approaches or methodologies, treatment, and prevention of the coronavirus

Life sciences and biotech companies, clients, and academic institutions are highly encouraged to submit general or expedited grant proposals to obtain this available federal funding in order to further

contribute to the ongoing national effort to combat coronavirus by investing in coronavirus-related innovation, development, and protection during this unprecedented time.

For more information please contact the Barnes & Thornburg attorney with whom you work or Angela B. Freeman at 317-519-7161 or afreeman@btlaw.com.

PROVISIONS FOR NATIVE AMERICAN TRIBES

Congress is expected to allocate approximately \$11 billion to assist Indian country in responding to the effects and impacts of COVID-19. Of note, of that \$11 billion, the bill creates a Tribal Stabilization Fund in the amount of \$8 million made available to tribal governments who certify that the funds will be used to offset expenditures incurred due to the COVID-19 pandemic.

The bill also provides \$1.032 billion in funds specifically for health and human services, both through the Indian Health Service (his) and the U.S. Centers for Disease Control and Prevention (CDC), to assist tribes in getting the medical equipment and resources needed to combat the virus and its healthcare impacts. The bill also earmarks \$300 million for tribes through HUD to help prevent homelessness due to lost income from the coronavirus, as well as contain the spread of the virus on tribal lands. These programs are intended to be administered by local tribal governments in order to respond to the specific needs of each tribe.

In addition, tribes are eligible to access an additional approximately \$803 billion through other grants and loan guarantee programs. Importantly, tribes and their businesses are eligible for the \$454 billion loan guarantee fund through the Treasury as well as the \$349 billion loan guarantee program through the SBA. For those tribal business with less than 500 employees, SBA loans will be forgiven subject to employee retention requirements, while guaranteed loans to tribal businesses with more than 500 employees will be provided on traditional lending terms. This is specifically important for tribes with smaller casinos that have been forced to close as a result of COVID-19.

There added funds specifically and indirectly allocated to tribes and their businesses other than those discussed above. It is important that in deciding which funds your tribe is eligible, focus on the areas of need that are most critical for your tribe in this time of need.

Finally, individual tribal members are eligible for the one-time payments of \$1,200 per person, or \$2,400 per couple, so long as they meet the income requirements. They are also eligible for the \$500 per child as well.

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