

CARES Act Provides Payroll Relief and Compensation Restrictions

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The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) became law on March 27, 2020, providing financial assistance to individuals and businesses impacted by the COVID-19 pandemic, as previously discussed in our client alert [“CARES Act Provides Much-Needed Stimulus for U.S. Businesses, Individuals.”](#)

The CARES Act imposes certain limitations on compensation payable by businesses that either receive a loan or loan guarantee under the act and further provides that certain of these businesses must maintain or not reduce workforce levels for designated time periods. See our March 29, 2020, client alert [“Federal Reserve Lending Programs to Support U.S. Economy During COVID-19 Pandemic”](#) for additional information regarding the direct lending programs to which these limitations will be applicable.

In addition, the CARES Act provides for a refundable payroll tax credit with respect to certain wages paid to employees during periods of a business shutdown or significant decline in gross receipts resulting from the COVID-19 pandemic. The act also permits employers to defer payment of the employer portion of payroll taxes owed on wages paid through December 31, 2020, for up to two years. Additionally, the CARES Act exempts certain distributions from tax-qualified, defined-contribution plans and individual retirement accounts from early withdrawal tax penalties, and delays minimum required 2020 contributions to tax-qualified, defined-benefit pension plans until January 1, 2021.

Below is a summary of these provisions.

Restrictions on Stimulus Recipients

Limitation of Certain Employee Compensation

The CARES Act imposes certain limitations on compensation payable by passenger air carriers, cargo air carriers, businesses critical to maintaining national security, and any other business that receives a loan or loan guarantee under the act (a Loan Recipient). It also places limits on compensation payable by air carriers and certain contractors that provide services to air carriers receiving financial assistance to be used for continuation of the payment of employee wages, salaries and benefits (a Payroll Assistance Recipient).

For Loan Recipients, the compensation limitations apply for the period commencing on the date that the company enters into an agreement with the Secretary of the Treasury and ending on the first anniversary of the date that the loan or loan guarantee is no longer outstanding. For Payroll Assistance Recipients, the limitations apply during a two-year period beginning March 24, 2020, and ending March 24, 2022.

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During the applicable restricted period, no officer or employee of a Loan Recipient or Payroll Assistance Recipient whose total compensation exceeded \$425,000 in calendar year 2019 (a Covered Employee) may receive: (i) total compensation, during any 12 consecutive months, exceeding his or her total compensation in 2019, or (ii) severance pay or other benefits upon termination of employment that exceeds twice the maximum total compensation received by the Covered Employee in 2019. In addition, during the restricted period, any Covered Employee whose total compensation exceeded \$3 million in calendar year 2019 may not receive total compensation during any 12 consecutive months in excess of the sum of (i) \$3 million and (ii) 50% of the total compensation received by the Covered Employee in calendar year 2019, in excess of \$3 million. For purposes of these provisions, “total compensation” includes salary, bonuses, stock awards and other financial benefits.

The limitations on compensation do not apply to any employees whose compensation is determined through an existing collective bargaining agreement entered into prior to March 1, 2020, for Loan Recipients, or March 27, 2020, for Payroll Assistance Recipients.

The limitations raise various unanswered questions that may be addressed in future guidance including, for example, how total compensation is determined — particularly regarding the stock award component — and how the limitations apply to new hires or those hired midyear in 2019.

Maintaining Employment Levels

The CARES Act provides that, until September 30, 2020, Loan Recipients which receive loans or guarantees under programs specific to passenger air carriers, cargo air carriers and businesses critical to maintaining national security must maintain their employment levels as of March 24, 2020, to the extent practicable, and, in any event, not reduce employment by more than 10% from March 24, 2020, levels.

In addition, the CARES Act provides that the Secretary of the Treasury will endeavor to seek the implementation of a program or facility to provide direct loans to certain eligible businesses that have between 500 and 10,000 employees. Loan Recipients under this program or facility will be required to make a good-faith certification that (i) the funds they receive will be used to retain at least 90% of their workforce, at full compensation and benefits, until September 30, 2020; (ii) they intend to restore not less than 90% of the workforce that existed as of February 1, 2020, and restore all compensation and benefits no later than four months following the termination of the COVID-19 public emergency; (iii) they will not outsource or offshore jobs for the term of the loan or guarantee and for two years thereafter; (iv) they will not abrogate existing collective bargaining agreements

for the term of the loan and for two years thereafter; and (v) they will remain neutral in any union organizing effort for the term of the loan. Payroll Assistance Recipients (*i.e.*, those air carriers and certain contractors that provide services to air carriers receiving payroll assistance under the act) will be required to refrain from conducting involuntary furloughs or reducing pay rates and benefits until September 30, 2021.

Payroll Tax Provisions

Employee Retention Payroll Tax Credit

The CARES Act provides a refundable tax credit against employment taxes paid by eligible employers in an amount equal to 50% of the first \$10,000 of “qualified wages” paid to employees. An employer is eligible for the payroll tax credit if, during any calendar quarter of 2020, it either has (i) operations fully or partially suspended due to a governmental order related to COVID-19 or (ii) a decline in gross receipts of more than 50% compared to the same quarter of the prior year. Since this is a refundable tax credit, if the amount subject to the credit would otherwise exceed the applicable amount of employment taxes payable by the employer, then the excess amount will be treated as an overpayment subject to a tax refund.

For employers with more than 100 full-time employees, “qualified wages” only covers wages paid to those employees who are not providing services due to a COVID-19-related impact as described above. For employers with 100 or fewer full-time employees, “qualified wages” covers wages paid to all employees of the employer during any applicable quarter in which a COVID-19-related impact as described above, including employees who are continuing to provide services to the employer.

This credit is not available to employers that receive a loan under the Paycheck Protection Program, the program under the CARES Act providing loans of up to \$10 million to offset certain payroll costs for employers with fewer than 500 employees.

Deferral of Employer Payroll Taxes

The CARES Act provides that employers and self-employed individuals may defer payment of the employer share of payroll taxes owed on wages paid for the period ending December 31, 2020. Such deferred taxes are due in two installments: 50% by December 31, 2021, and 50% by December 31, 2022.

This payroll tax deferral applies to all employers, with no requirement to show any specific COVID-19-related impact. However, the deferral is not available to any employer that receives loan forgiveness with respect to the Paycheck Protection Program loan as described above.

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Retirement Plan Relief

Defined Contribution Plans

The CARES Act includes several provisions related to tax-qualified defined contribution retirement plans and individual retirement accounts (IRAs). Plan participants and IRA owners affected by the COVID-19 pandemic may take up to \$100,000 in “coronavirus-related distributions” from qualified plans and IRAs during 2020 that are exempt from the 10% tax penalty typically applicable to early withdrawals. If these coronavirus-related distributions are recontributed to an eligible retirement plan or IRA at any time within three years after the distribution, they will be treated similar to rollover contributions, with no taxes due on the original distributions. If the distributions are not recontributed, the participant may elect to be taxed on such distribution ratably over three years.

The CARES Act also temporarily increases the amount an affected individual may borrow from a qualified plan account to the lesser of \$100,000 or 100% of the vested account balance and extends for one year the due date of any plan loan that becomes due during 2020. Required minimum distributions that are otherwise payable in 2020 are waived under the CARES Act.

For purposes of these provisions, a “coronavirus-related distribution” means any distribution from a tax-qualified, defined-contribution retirement plan or an IRA made in 2020 to an individual (i) who was diagnosed with the virus SARS-CoV-2 or with COVID-19 by a test approved by the Centers for

Disease Control and Prevention; (ii) whose spouse or dependent is diagnosed with such virus or disease; or (iii) who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, having reduced work hours due to such virus or disease, being unable to work due to lack of child care due to such virus or disease, closing or reducing hours of a business owned or operated by the individual due to such virus or disease, or other factors as determined by the Secretary of the Treasury.

Defined Benefit Pension Plans

For tax-qualified, defined-benefit pension plans, the CARES Act extends the due date of any required minimum contributions that would otherwise have been due at any time during 2020 to January 1, 2021. The amount of any such contribution is increased by interest (calculated using the plan’s interest rate at the payment date) from the original due date to the payment date. For purposes of funding-based restrictions under Section 436 of the Internal Revenue Code, a plan sponsor may elect to treat the plan’s adjusted funding target attainment percentage (AFTAP) for the last plan year ending before January 1, 2020, as the AFTAP for all plan years that include calendar year 2020.

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The Secretary of the Treasury is expected to promulgate regulations regarding these stimulus programs, which we will continue to monitor along with their impact on compensation and workforce levels.

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