



April 1, 2020 | LEGAL ALERT

Congress passes the Coronavirus Aid, Relief, and Economic Security Act (CARES Act)

On March 27, the President signed into law the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). The CARES Act comes as a continued response to the Coronavirus 2019 (COVID-19) pandemic that is significantly impacting the United States. The Act is a \$2.2 trillion economic package that is meant to stabilize individuals and employers, while the nation continues to experience shelter-in-place advisories/orders and hospitals report a surge of severely ill COVID-19 patients. The Act's Paycheck Protection Program is retroactive to February 15, 2020, which is important for businesses that have been experiencing financial hardships starting in February.

Overview of CARES Act

The CARES Act amends several laws, as well as appropriates funds to assist individuals, families, and businesses that are experiencing financial difficulties due to COVID-19. There are loans available to small businesses for paycheck protection and loan forgiveness, and other assistance for individuals and businesses as it relates to unemployment insurance and tax relief. The Act supports the health care system by providing financial assistance for medical supplies and coverage. It also provides economic stabilization and assistance for severely distressed sectors (such as airlines), as well as additional COVID-19 relief funds, expanded telehealth and COVID-19 testing provisions, and emergency appropriations for COVID-19 health response and agency operations.

HSA and Telehealth Expansion

The CARES Act includes a new safe harbor under which high deductible health plans (HDHPs) can cover telehealth and other remote care before participants meet their deductibles (i.e., without cost-sharing). This temporary safe harbor applies for plan years beginning on or before December 31, 2021, unless extended. As a result of this safe harbor, no-cost telehealth may be provided for any reason—not just COVID-19 related issues—without disrupting HSA eligibility.

Prescription Drug Reimbursement under FSA/HRA/HSAs

The CARES Act allows health flexible spending accounts (FSAs), Health Reimbursement Arrangements (HRAs), and Health Savings Accounts (HSAs) to pay for or reimburse over-the-counter medication and menstrual products without a prescription. This is a *permanent* repeal of the ACA's prohibition on reimbursements under such plans for over-the-counter medication obtained without a prescription. This change is effective January 1, 2020. The IRS may issue further guidance regarding the timing of any necessary plan amendments.

COVID-19 Testing

Under the CARES Act, COVID-19 testing and related services must be offered at no cost-sharing, until the end of the public health emergency, as declared by Health and Human Services. This also means the health plans cannot require prior-authorization or medical management for COVID-19 testing and services (such as an urgent care visit associated with COVID-19). This coverage requirement for COVID-19 *testing* applies to **all health plans**, including self-funded and grandfathered plans, and expires at the end of the public health emergency.

Any future COVID-19 *vaccine* must be provided cost-free, similar to other preventive care vaccines, by any non-grandfathered group health plan, pursuant to the ACA's preventive care rules. In addition, the CARES Act requires group health plans and health insurers to cover any "A" or "B" recommended qualifying coronavirus preventive service or CDC-recommended immunization, within 15 business days after the date on which a recommendation is made. This is a much shorter timeframe than typically allowed for new recommended preventive care services to be added to a group health plan.

The CARES Act also clarifies how plans must pay for COVID-19 testing when performed by an out-of-network provider. Providers who offer COVID-19 testing must post a cash price on their website. Plans may pay out-of-network providers based on their posted cash rate for COVID-19 testing. Providers who do not post the cost for COVID-19 testing face a potential penalty of up to \$300 per day. This provision is effective retroactively to March 18, 2020.

Assistance for Businesses – Payroll Protection Program

The Act implements small business loans for employers that have fewer than 500 employees. An employer classified as hospitality and dining under the North American Industry Classification System (NAICS) with multiple locations may obtain loans on a location-specific basis, so particular locations may qualify for a loan. The loans are 100% federally-backed and can be utilized to pay for specific, operational costs. The interest rates for these loans cannot exceed 4%, and no subsidy recoupment or prepayment penalty is permitted. Any small business administration disaster loan admitted after January 31, 2020 can be refinanced into the new loan program. This loan is capped at \$10 million, and requires a good-

faith certification that: the loans are needed to continue operations during the emergency; funds will be used to retain workers and maintain payroll; pay for mortgage, lease, and utility payments; that there is no other application pending for the same purpose; and that from February 15, 2020 to December 31, 2020 the applicant has not received duplicate amounts. The facts and circumstances should be closely reviewed when applying for and utilizing a small business loan. The Department of Treasury and Small Business Administration are likely to release additional guidance for these applications.

There is also assistance made for larger companies, which provides \$500 billion in loans, loan guarantees, and investments for air carriers, cargo air carriers, businesses critical maintaining national security, and facilities that are established by the Federal Reserve to support lending. Loan forgiveness is not allowed for these loans. Again, employers should consult with counsel when availing themselves of these loans, and the Department of Treasury will likely release additional guidance.

Assistance for Individuals

The Act also addresses assistance for individuals and their families who qualify for unemployment benefits. In states that adopt it, an additional federal unemployment benefit of \$600 per week is added to what is provided under state law, through July 31, 2020 (unless extended). Individuals unemployed or underemployed due to COVID-19 reasons may also be eligible for an additional 13 weeks of extended unemployment benefits, once state unemployment benefits end.

Additional funding is also available for states that waive the waiting period for unemployment benefits, and states are authorized to enter into agreements with the federal government to initiate short-term compensation agreements to help subsidize payments to employees that have hours reduced due to COVID-19.

Individuals will also be eligible to receive a recovery rebate up to \$1,200 (\$2,400 for joint filers), including an additional \$500 per child. This will phase out for taxpayers making \$75,000 or more (\$150,000 for joint filers, and \$112,500 for heads of household), with the rebate completely phasing out for those earning in excess of \$99,000 (\$198,000 for joint filers). The rebates will be made available even if a taxpayer had no income, as long as a return is filed. Furthermore, 2018 tax filings will be utilized if filers have not yet filed 2019 taxes. Similarly, there is waiver of taxes for premature distributions of certain accounts, such as retirement and IRAs. Individuals wishing to exercise this waiver will need to confirm it is due to a COVID-19 financial hardship and are urged to consult with a personal tax advisor.

Student Loan Relief

Under the CARES Act, employers may use an educational assistance program to reimburse employees for qualifying student loans up to \$5,250 on a tax-free basis (state or local taxes may still apply). This

provision applies to loan payments, including principal and interest, made between March 28, 2020 and December 31, 2020, unless extended. Educational assistance programs are subject to Section 127 of the Internal Revenue Code and must be offered pursuant to a written plan document, be communicated to employees, and comply with certain nondiscrimination requirements.

Amendments to Families First Coronavirus Response Act (FFCRA) and Health Benefits

The CARES Act made several clarifications to the FFCRA. For purposes of the expanded FMLA provision, employees will be considered rehired if they were laid off by their employer on or after March 1, 2020, had worked for the employer at least 30 days in the last 60 days prior to layoff, and are rehired. This means that employees that are rehired after March 1 may be eligible for expanded FMLA immediately without having to re-satisfy the 30-day employment requirement under expanded FMLA. The CARES Act also clarifies that employers can receive advance tax credit from Treasury instead of waiting to be reimbursed.

The CARES Act also expands upon the types of COVID-19 testing that are required to be covered, which include in-vitro testing from any developer that has requested or intends to request emergency authorization from the FDA, or diagnostic tests authorized by a state.

Miscellaneous

The Act also provides additional funding for other federal departments to help continue to support industries during this time, as well as increase manufacturing and approval efforts for vaccines and other supplies. Likewise, some adjustments (generally technical corrections) were made to the 2017 Tax Cuts and Jobs Act.

What Employers Should Expect Next

We expect additional guidance at the federal level with regard to applying for and receiving a business loan. Further information from the IRS regarding individual payments is likely to be released in the coming weeks. Employers may also refer to state unemployment websites for question regarding unemployment, as many states have been updating consistently in response to the pandemic. In addition, employers need to be cognizant of local and state emergency regulations that may affect how employers in certain industries, such as food services, operate during a public health emergency.

For more information on COVID-19, see:

- <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
 - <https://www.who.int/emergencies/diseases/novel-coronavirus-2019>
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