



HOW THE CORONAVIRUS PANDEMIC IMPACTS YOUR BUSINESS

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How Small Businesses Can Get Money from the Stimulus Package

I. Overview

A. There's a significant amount of money — \$377 billion — allocated to support small businesses in Congress's latest Coronavirus stimulus package. But figuring out exactly how to access it can be somewhat confusing.

B. The funds from the CARES Act, which President Donald Trump signed into law on March 27, are divided among three small-business programs that offer forgivable grants and loans, as well as loan deferral.

C. These Small Business Administration programs also apply to nonprofits that meet the necessary size requirements.

D. In addition to traditional SBA funding programs, the CARES Act established several new temporary programs to address the COVID-19 outbreak.

1. The two major programs are:

- The Paycheck Protection Program
- The EIDL Loan Program

2. It is possible for businesses and nonprofits to apply to both.

3. Since both programs also have a limited amount of funding, applying sooner is also important in case their allocated funding is fully used.

E. In addition to these two programs, the CARES Act established other programs to address the COVID-19 outbreak. They include:

- The SBA Express Bridge Loan
- SBA Debt Relief Program

II. The Paycheck Protection Program

A. Overview

1. The Paycheck Protection Program (PPP), enables organizations to obtain up to \$10 million in loans that are 100 percent forgivable if they do not lay off any employees or if they rehire employees they've already laid off.

2. The loans are fully guaranteed by the Federal Government through December 31, 2020 (returning to an 85% guarantee for loans greater than \$150,000 after that date),

B. Eligibility

1. This program is for any small business with less than 500 employees adversely impacted by COVID-19.

2. The business must have been in business on 3/1/2020, and paid employees' salaries and payroll taxes, or paid independent contractors.

3. The business can be Sole Proprietor or Independent Contractor, LLCs, Partnerships, C Corporations, S Corporations.

4. Certain businesses without employees or independent contractors are eligible.

5. 501(c)(3) Non-profits also are eligible.

C. The Loan Amount

1. The loan amount is generally limited to the lesser of:

(A) The sum of

(1) "average monthly payroll cost" for the 1 year period ending on the date the loan was made (an alternative calculation is available for seasonal employers) multiplied by 2.5, and

(2) any disaster loan (discussed below) taken out after January 31, 2020 that has been refinanced into a paycheck protection loan¹, and

(B) \$10 million

2. "Average monthly payroll cost" is defined as the average monthly payroll in the 12 months prior to the loan, excluding seasonal employers. Seasonal employers² use the 12 weeks prior to the covered period, or the amount between March 1, 2019 and June 30, 2019, or, if they were not in business from Feb 15, 2019 through June 30, 2019, the average monthly payments from Jan 1, 2020 to Feb 29, 2020.

3. For other than sole proprietors "payroll costs" in turn, are the sum of the following:

- Wages, commissions, salary, or similar compensation to an employee or independent contractor,
- Payment of a cash tip or equivalent,
- Payment for vacation, parental, family, medical or sick leave,
- Allowance for dismissal or separation,
- Payment for group health care benefits, including premiums,
- Payment of any retirement benefits, and

¹ If a business has an outstanding SBA loan from January 31, 2020 through the origination of this new loan, that balance will be added to the 2.5x average monthly payroll costs, and refinanced through the new loan.

² Seasonal employers normally have higher-than-average payroll costs during the months in the "Covered Period" (Feb 15 - June 30) should select a period of Feb 15, 2019 - June 30, 2019.

- Payment of state or local tax assessed on the compensation of employees,
4. For a sole proprietor or independent contractor, “payroll costs” are: wages, commissions or similar compensation that is less than \$100,000 in 1 year, as prorated for the “covered period,” which is Feb. 15, 2020 through June 30, 2020.
 5. “Payroll costs” *do not include*, however:
 - The compensation of any individual employee in excess of an annual salary of \$100,000,
 - Payroll taxes,
 - Any compensation of an employee whose principal place of residence is outside the U.S., or
 - Any qualified sick leave or family medical leave for which a credit is allowed under the new Coronavirus Relief Act passed last week.
 6. Calculate your average monthly payroll cost for the twelve month period prior to the date of the loan as follows:
 1. Determine “Gross Wages” paid for that period
 2. Subtract Gross Wages over \$100,000 paid to any employee.
 3. Add any state taxes paid by the Employer
 4. Add Employer-paid “Benefit Contributions”
 5. Do not include Payroll Taxes

“Gross Wages” - This is the total amount of gross pay (salary, wages, commissions, tips, and bonuses) you paid to full-time and part-time employees during a given month. It includes employee-paid State and Federal Taxes and employee-paid Benefits Contributions. It does not include employer-paid Federal Taxes or State Taxes.

“Benefits Contributions”: This is employer or employee contributions paid for “group health plans” and retirement plans. Group health plans include: health insurance plans, dental and vision plans, and health FSAs. This does not include HSAs, Group Term Life Plans, or Long-Term and Short-Term Disability Plans.

Example. Rob’s Car Wash applies for a paycheck protection loan on May 1, 2020. The business had \$1.2 million in payroll costs for the period May 1, 2019 through May 1, 2020, for a monthly average of \$100,000. Rob’s Car Wash is entitled to a fully guaranteed federal loan of \$250,000 — assuming it’s made before December 31, 2020 — equal to the lesser of: (A) \$250,000 (\$100,000 in average payroll costs x 2.5), or (B) \$10 million.

D. Loan Forgiveness of Paycheck Protection Loans

1. A separate section of the CARES Act calls for a portion of the aforementioned paycheck protection loans to be forgiven on a tax-free basis.

2. The amount to be forgiven is the sum of the following payments made by the borrower during the 8-week period beginning on the date of the loan:

- payroll costs (as defined above)
- mortgage interest,
- rent,
- certain utility payments.

Note: Not more than 25% of the forgiven amount may be for non-payroll cost

3. To seek forgiveness, a borrower must submit to the lender an application that includes documentation verifying the number of employees and pay rates, and cancelled checks showing mortgage, rent, or utility payments.

Example. Continuing the previous example with Rob's Car Wash, in the first 8 weeks after the business borrows the \$250,000, the business pays \$200,000 in payroll costs, mortgage interest, and utility payments. Rob's Car Wash is eligible to have \$200,000 of the \$250,000 loan forgiven. The forgiveness will not create taxable income. In addition, because of the deferment rules in the CARES Act, any payments due on the remaining \$50,000 will not be due for six months.

4. All lenders have 60 days to decide on the loan forgiveness, and any portion that is not forgiven must be repaid within two years. Any forgiven loans will be excluded from gross income for tax purposes.

5. There is a provision, however, that reduces the amount that may be forgiven if the employer either:

- a. Reduces its workforce during the 8-week covered period when compared to other periods in either 2019 or 2020³, or
- b. Reduces the salary or wages paid to an employee who had earned less than \$100,000 in annualized salary by more than 25% during the covered period.

6. If a borrower lays people off during the covered period the amount of the loan forgiveness will be reduced by:

³ The "look back period" is at the election of the borrower either the period beginning on February 15, 2019 and ending on June 30, 2019, or the period beginning on January 1, 2020 and ending on February 29, 2020;

Avg. monthly full time employees during covered period / Avg. monthly full time employees during the lookback period x Total amount of loan forgiveness = New loan forgiveness

Example: Widgets, Inc. wants \$1 million in loan forgiveness under the Paycheck Protection Program. During the covered period, Widgets has 25 average monthly full-time employees. During the lookback period, Widgets had 50 average monthly full-time employees. Widgets is eligible for \$500,000 in loan forgiveness $[(25 / 50) \times \$1,000,000]$.

7. If a borrower cuts its employees' wages during the covered period, the amount of loan forgiveness will be reduced by:

- **The amount of any salary or wage reduction of employees whose annualized rate of pay during any pay period in 2019 was less than \$100,000; and**
- **whose salary or wage reduction was in excess of 25% of the total salary or wages they received during the most recent full quarter before the covered period.**

Example: Bidgets, Inc. wants \$250,000 in loan forgiveness under the Paycheck Protection Program. During the covered period, Bidgets cut his employee's wages \$80,000 to \$50,000. $25\% \text{ of wages} = \$80,000 \times .25 = \$20,000$

The excess of the reduction in wages over that amount is \$10,000 $(\$30,000 - 20,000)$ Bidgets would be eligible for \$240,000 of loan forgiveness $(\$250,000 - \$10,000 = \$240,000)$.

8. This reduction can be avoided, however, if the employer rehires or increases the employee's pay within an allotted time period.

E. Use of the Funds

1. May be used to pay for used for fixed (existing) debts, accounts payable, payroll, medical leave, sick leave, salaries, health benefits, mortgage payments, rent, utilities, insurance, and existing debt that cannot be paid because of the impact of COVID-19

2. The loan proceeds cannot be used refinancing, expansion, or growth.

F. To Apply

1. Application is made with an approved SBA Lender (Banks and Credit Unions).

2. Banks will originate SBA will 100% guarantee the loan.

G. Payment Terms

1. Maximum loan amount – See section IIC, above

2. Interest Rate – 0.5%
3. Loan Term – Two year term loan
4. Deferment – An additional provision in the CARES Act provides for possible deferment of repayment of the loans for a period of at least six months, but not to exceed a year.
5. Collateral - None.
6. Personal Guarantee – None – nonrecourse.
7. Prepayment Penalty – None
8. Fees - The lender cannot charge a guarantee fee, a yearly fee, a prepayment penalty, or request a personal guarantee or collateral for the loan. Also, the requirement that the business cannot obtain credit from another lender doesn't apply.

H. Impact on Other Programs

1. A loan under the Paycheck Protection Program makes the borrower ineligible for the Employee Retention Tax Credit made available under the CARES Act.
2. This only applies to the Employee Retention Tax Credit in the CARES Act and does not apply to any credits available under the FFCRA (such as the paid sick leave tax credit) or other credits available under the CARES Act.

III. The EIDL Loan Program

A. Overview

1. The SBA's Economic Injury Disaster Loan (EIDL) Program provides economic support to small businesses to help overcome the temporary loss of revenue they are experiencing as a result of the COVID-19 pandemic.
2. The EIDL Program includes a \$10,000 grant that businesses can apply for and which they do not need to pay back.
3. The rest of the EIDL loan, which caps out at \$2 million, is not forgivable but can be more flexible than PPP in the types of expenses it covers.
4. The funding source is the Small Business Administration.

B. Eligibility

1. This program is for any small business with less than 500 employees adversely impacted by COVID-19.
2. This includes sole proprietorships, persons, private non-profit organization or 501(c)(19) veterans' organizations – Also, independent contractors and self-employed.
3. Businesses in certain industries may have more than 500 employees if they meet the SBA's size standards for those industries.

4. Businesses and nonprofits eligible for the EIDL program are required to have been operational on January 31, 2020, and to have experienced negative economic effects because of the coronavirus crisis.

5. Must be in a declared disaster area (all states as of 3/28/2020 are – not all counties are however).

6. Eligible even if credit is available elsewhere.

C. Use of the Funds -

1. The funds may be used for existing debts, accounts payable, payroll, medical leave, sick leave, health benefits, mortgage payments, rent, utilities, insurance, and exiting debt that cannot be paid because of the impact of COVID -19.

2. The funds cannot be used for refinancing, expansion, or growth.

D. To Apply

1. To apply for the EIDL loan and the \$10,000 grant: Small-business owners and nonprofits can apply directly with the Small Business Administration at this website:

<https://covid19relief.sba.gov/#/>.

2. When small businesses submit their applications for the EIDL loan, they can indicate they are interested in the emergency grant at the same time.

3. Can apply based on credit score alone.

4. Self-certification by applicant under penalty of perjury.

5. The approval time is three days for the Advance Grant, and 3+ weeks for the first loan disbursement.

6. The Economic Injury Disaster Loan advance funds will be made available within days of a successful application, and this loan advance will not have to be repaid.

E. Payment Terms

1. Maximum loan amount - \$2,000,000

2. Interest Rate – 3.75% for businesses, 2.75% for non-profits.

3. Loan Term – 30 years

4. Deferment – Up to 1 year

5. Collateral - Business assets and potential personal assets from a more than 20% owner.

6. Personal Guarantee – For loans \$200,000, or less - none required; for loans over that amount – 20% owners must provide personal guarantees.

7. Prepayment Penalty - None

F. Impact on Other Programs

1. An applicant may receive an EIDL Loan and loans under other programs (such as the PPP) as long as the basis of the loan is different.
2. No double dipping.

IV. **The SBA Debt Express Bridge Loan**

A. Overview

1. The Express Bridge Loan Pilot Program allows small businesses who currently have a business relationship with an SBA Express Lender to access up to \$25,000 quickly.
2. Pursuant to its authority under the Small Business Act, the U.S. Small Business Administration (“SBA” or the “Agency”) provides direct loan assistance to small businesses located in communities impacted by Presidentially-declared disasters and disasters declared by SBA under its own authority.
3. As originally announced, the EBL Pilot Program authorizes SBA Express Lenders to provide expedited SBA-guaranteed bridge loan financing on an emergency basis in amounts up to \$25,000 for disaster-related purposes to small businesses located in communities affected by Presidentially-declared disasters while those small businesses apply for and await long-term financing (including through SBA’s direct Disaster Loan Program, if eligible).
4. Effective March 25, 2020, (announcement by publication of a notice in the Federal Register will follow), SBA expanded program eligibility to include small businesses nationwide adversely impacted under the Coronavirus Disease (COVID-19) Emergency Declaration issued by President Trump on March 13, 2020.
5. If a small business has an urgent need for cash while waiting for decision and disbursement on an Economic Injury Disaster Loan, they may qualify for an SBA Express Disaster Bridge Loan.

B. Use of Proceeds - EBL loan proceeds must be used exclusively as working capital to support the survival and/or reopening of the small business.

C. Terms

1. SBA Express Lenders may only make EBL loans to eligible small businesses with which the Lender had an existing banking relationship on or before the date of the applicable disaster.
2. The small business must have been operational when the declared disaster commenced and must meet all other 7(a) loan eligibility requirements.
3. As with all 7(a) loans, EBL applicants must demonstrate the need for the desired credit (i.e., they must meet the SBA’s “credit elsewhere” requirements).

4. The maximum gross loan amount under the EBL Pilot Program is \$25,000, the loan is structured as a term loan, with a maximum term of 7 years; however the Lender may require the EBL borrower to pay the EBL loan in part or in full if the borrower is approved for long-term disaster financing (including an SBA Direct Disaster loan) that allows loan proceeds to be used for EBL loan reimbursement; the lender may charge up to 6.75% annual interest.

V. SBA Debt Relief

A. Overview - As part of SBA's debt relief efforts:

1. The SBA will automatically pay the principal, interest, and fees of current 7(a), 504, and microloans for a period of six months.

2. The SBA will also automatically pay the principal, interest, and fees of new 7(a), 504, and microloans issued prior to September 27, 2020.

B. Additional Debt Relief

1. For current SBA Serviced Disaster (Home and Business) Loans: If your disaster loan was in "regular servicing" status on March 1, 2020, the SBA is providing automatic deferments through December 31, 2020.

2. What does an "automatic deferral" mean to borrowers?

- Interest will continue to accrue on the loan.
- 1201 monthly payment notices will continue to be mailed out which will reflect the loan is deferred and no payment is due.
- The deferment will NOT cancel any established Preauthorized Debit (PAD) or recurring payments on your loan.
- Borrowers that have established a PAD through Pay.Gov or an OnLine Bill Pay Service are responsible for canceling these recurring payments.
- Borrowers that had SBA establish a PAD through Pay.gov will have to contact their SBA servicing office to cancel the PAD.
- Borrowers preferring to continue making regular payments during the deferment period may continue remitting payments during the deferment period. SBA will apply those payments normally as if there was no deferment.
- After this automatic deferment period, borrowers will be required to resume making regular principal and interest payments.
- Borrowers that cancelled recurring payments will need to reestablish the recurring payment.

3. If you have questions about your current loan and whether or not your loan is automatically deferred, please contact your Loan Servicing Office directly using the following information:

Birmingham Disaster Loan Servicing Center:

Phone: 800-736-6048

Email: BirminghamDLSC@sba.gov

El Paso Disaster Loan Servicing Center:

Phone: 800-487-6019

Email: EIPasoDLSC@sba.gov

Employment Retention Credit and Other Tax Issues

I. Employment Retention Credit

A. Overview - The CARES Act is a one-year only credit against the employer's 6.2% share of Social Security payroll taxes for any business that is forced to suspend or close its operations due to COVID-19, but that continues to pay its employees during the shut-down.

B. Eligibility

1. A business is eligible for the credit in one of two ways:

a. The operation of the business was fully or partially suspended during any calendar quarter during 2020 due to orders from an appropriate government authority resulting from COVID-19, or

b. The business remained open, but during any quarter in 2020, gross receipts for that quarter were less than 50% of what they were for the same quarter in 2019.

2. The business will then be entitled to a credit for each quarter, until the business has a quarter where it's recovered sufficiently that its receipts exceed 80% of what they were for the same quarter in the previous year.

C. The Tax Credit

1. Calculation - For each eligible quarter, the business will receive a credit against its 6.2% share of Social Security payroll taxes equal to 50% of the "qualified wages" paid to EACH employee for that quarter, ending on December 31, 2020.

2. Definition of Qualified Wages

a. The business's qualified wages depend on its size; if there were more than 100 employees during 2019, the qualified wages are limited ONLY to those wages that were paid by the employer during the quarter for the period of time the business was shut down.

b. If there were less than 100 employees for 2019, however, qualified wages include not only those paid to employees during a shut-down, but also wages paid for each quarter that the business has suffered a sharp decline in year-over-year receipts, as described in #2 above.

c. In both cases, qualified wages include any "qualified health plan expenses" allocable to the wages, such as amounts paid to maintain a group health plan. In either case, however, the amount of qualified wages for EACH employee for ALL quarters may not exceed \$10,000.

Note : As you might expect, any wages taken into account in determining the new payroll tax credit for family medical leave or sick leave as part of the Coronavirus Relief Act may not be taken into account in determining qualified wages for the employee retention credit.

3. The credit is refundable if it exceeds the business's liability for payroll taxes, a likely outcome given the two new payroll tax credits mentioned immediately above that were created as part of the Coronavirus Relief Act late last week.

4. Finally, if an employer takes out a payroll protection loan under Section 7(a) of the Small Business Act as detailed above in this article, no employee retention credit will be available.

II. Delay of Payment of Employer Payroll Tax and Self-Employment Tax

A. Overview –

1. In addition to the various new payroll tax credits created by the Coronavirus Relief Act and the CARES Act, the new law would again seek to alleviate the burden on employers struggling to make payroll by allowing the employer's share of the 6.2% Social Security tax that would otherwise be due from the date of enactment through December 31, 2020, to be paid on December 31, 2021 (50%) and December 31, 2022 (50%).

2. Similarly, a self-employed taxpayer can defer paying 50% of his or her self-employment tax that would be due from the date of enactment through the end of 2020 until the end of 2021 (25%) and 2022 (25%).

B. Effect of the Delay

1. This means an employer that incurs its 6.2% share of Social Security tax in 2020 may (1) defer payment of that tax until 2021 and 2020, but (2) receive an immediate credit against those yet-to-be paid payroll taxes via the sum of the emergency medical leave credit, sick leave credit, and new employee retention credit.

2. Also note, this deferral is not available to any business that takes out a payroll protection loan forgiven as discussed earlier in this article.

III. How Companies Can Get Quick Cash Back From the IRS

A. Overview

1. A corporation that overpays its estimated tax can obtain a quick refund of the excess estimated tax before it files its tax return.

2. A corporation can obtain a "quick refund" only if the amount of the refund equals or exceeds 10% of the amount estimated by the corporation on its application as its income tax liability for the tax year and is at least \$500.

B. Form 4466

1. The application is filed on IRS Form 4466, Corporation Application for Quick Refund of Overpayment of Estimated Tax. The application must be filed after the end of the tax

year and on or before the 15th day of the fourth month after the end of the tax year, or the date the tax return is filed, if earlier. Thus, for a calendar year taxpayer, the application should be filed by April 15.

2. The IRS generally must act on the application within 45 days. Any refund is first credited against any unpaid taxes owed by the corporation, and any remainder is refunded to the corporation.

IV. Retroactive Changes

A. Overview

1. The Tax Cuts and Jobs Act made a number of changes to the Internal Revenue Code which were effective for tax years beginning with 2018.

2. The CARES Act retroactively amended several of these changes allowing taxpayers to amend their 2018 and 2019 tax returns and claim refunds for the tax originally due.

3. The provisions impacted by the CARES Act are the following:

a. A reduction in the useful life of “qualified improvement property” to 15 years, allowing improvement costs to qualify for 100% bonus depreciation.

b. The TCJA altered the NOL rules, disallowing all carrybacks related to post-2017 losses, providing for an indefinite carryforward period, and limiting the use of post-2017 losses when carried forward to 80% of taxable income. The CARES Act reverses these changes temporarily.

c. The TCJA placed a limitation on an individual’s ability to use losses from a business. The CARES Act puts a temporary halt this limitation; not only for 2020, but retroactive to January 1, 2018.

d. As a part of the TCJA, new Section 163(j) limited a business’s ability to deduct its interest expense to 30% of “adjusted taxable income,” with any excess interest expense carried forward. The CARES Act would increase that limit to 50% of adjusted taxable income for 2019 and 2020.

B. Qualified Improvement Property Fix

1. As part of the 2017 Tax Cuts and Jobs Act (TCJA), Congress intended to (greatly) speed up the depreciation on “qualified improvement property” (QIP); generally defined as any improvement made to the interior portion of a nonresidential building any time after the building was placed in service.

2. The depreciable life of QIP was to be reduced from 39 to 15 years, and with 100% bonus depreciation being available for all assets with a life of 20 years or less, a taxpayer who, say, spent \$3 million in 2018 renovating their chain of restaurants should have been entitled to an immediate \$3 million tax deduction.

3. In the TCJA, Congress inadvertently neglected to give QIP a 15 year life. As a result, the life remained 39 years, and thus the property was not eligible for 100% bonus depreciation. As a result, a taxpayer who spent that \$3 million on improvements to the interior of its non-residential property instead of a \$3 million deduction, was limited to depreciating the \$3 million over nearly four decades.

4. The CARES Act provides a much-needed technical correction to the QIP problem by giving it its intended 15 year life, while making the change retroactive to January 1, 2018. Thus, taxpayers should be entitled to file amended returns to reap the benefits of accelerated depreciation in 2018 and 2019

5. *Example.* The client above claimed only \$75,000 of depreciation related to the \$3 million of improvements made to their Arby's chain in 2018.

6. Client may file an amended return to take an additional deduction of \$2.925 million in 2018, and under rules discussed below, any net operating loss generated by the additional depreciation may be carried back for up to five years to recover taxes previously paid.

C. Changes to the Net Operating Loss Rules

1. Prior to 2018, net operating losses of a business or individual could be carried back two years and forward 20, and when carried forward, they could offset 100% of taxable income.

2. The TCJA altered these rules, disallowing all carrybacks related to post-2017 losses, providing for an indefinite carry-forward period, and limiting the use of post-2017 losses when carried forward to 80% of taxable income.

3. Congress temporarily reversed the TCJA changes:

4. Losses from 2018, 2019 and 2020, will be permitted to be carried back for up to five years. As was previously the case, a taxpayer will be permitted to forgo the carryback, and instead carry the loss forward.

5. *Example.* In 2015 and 2016, X Co. broke even. In 2017, X Co. reported taxable income of \$1 million and paid federal income tax of \$350,000. In 2018, X Co. reported taxable income of \$2 million and paid tax of \$420,000. In 2020, X Co. recognizes a net operating loss of \$3 million. X Co. may carry \$1 million of the loss back to 2017 and recover the taxes paid (subject to the alternative minimum tax), and then carry the remaining \$2 million loss to 2018 and recover that \$420,000 as well.

D. Temporary (and Retroactive) Removal of Section 461(l):

1. As part of the TCJA, Congress added a fourth limitation on an individual's ability to use losses from a business. New Section 461(l) provides that the amount of "net business loss" an individual may use in a year to offset other sources of income is capped at \$250,000 if single (\$500,000 if married, filing jointly). Any excess loss is converted into a net operating loss, which as

we discussed above, was — prior to the passage of the CARES Act — subject to more stringent utilization rules than prior to the TCJA.

2. The latest legislation, however, puts a temporary halt on Section 461(l); not only for 2020, but retroactive to January 1, 2018. As a result, taxpayer who found a loss limited by the provision in 2018 or 2019 can file an amended return to claim a refund.

3. It's not ALL good news with regard to Section 461(l), however. The CARES Act clarifies that when the provision kicks back in for 2021 and beyond, wages will NOT be considered business income. This will, in many cases, result in significantly more loss being limited.

E. Changes to the Interest Limitation Rules

1. The TCJA amounted to (at least) a \$1.5 trillion tax cut over ten years. On the domestic side of things, there were only three significant revenue raisers — the NOL changes, Section 461(l), and new Section 163(j) — and the CARES Act largely reverses all three.

2. With respect to the final change, as part of the TCJA, new Section 163(j) limited a business's ability to deduct its interest expense to 30% of "adjusted taxable income," with any excess interest expense carried forward.

3. The CARES Act would increase that limit to 50% of adjusted taxable income for 2019 and 2020, and perhaps more importantly given that most businesses will not HAVE taxable income in 2020, the business can elect to use its 2019 adjusted taxable income in computing its 2020 limitation.

4. Thus, if a business had ATI of \$10 million in 2019 but a negative ATI in 2020, it could elect to deduct \$5 million of interest expense in 2020 (50% of \$10 million), generate a bigger loss, and then use the favorable new net operating loss provisions to carry back the loss to 2019 and recover taxes paid in that year.

5. A partnership does not get to use the 50% limit of ATI for 2019. Instead, any interest disallowed at the partnership level is passed out to the partners, and is suspended at the partner level under the normal rules.

6. In 2020, however, 50% of the suspended interest "frees up," and will be fully deductible, while the other 50% will remain suspended until the partnership allocates excess taxable income or excess interest income to the partner (or the partnership is no longer subject to Section 163(j)).

Families First Coronavirus Response Act: Employer Paid Leave Requirements

I. Overview

A. The Families First Coronavirus Response Act (FFCRA or Act) requires certain employers to provide their employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19.

B. The Department of Labor's (Department) Wage and Hour Division (WHD) administers and enforces the new law's paid leave requirements. These provisions will apply from the effective date through December 31, 2020.

II. What You Must Do

A. Generally, the Act provides that covered employers must provide to all employees:

1. Two weeks (up to 80 hours) of paid sick leave at the employee's regular rate of pay where the employee is unable to work because the employee is quarantined (pursuant to Federal, State, or local government order or advice of a health care provider) and/or experiencing COVID-19 symptoms and seeking a medical diagnosis; or

2. Two weeks (up to 80 hours) of paid sick leave at two-thirds the employee's regular rate of pay because the employee is unable to work because of a bona fide need to care for an individual subject to quarantine (pursuant to Federal, State, or local government order or advice of a health care provider), or care for a child (under 18 years of age) whose school or child care provider is closed or unavailable for reasons related to COVID-19, and/or the employee is experiencing a substantially similar condition as specified by the Secretary of Health and Human Services, in consultation with the Secretaries of the Treasury and Labor.

B. Additional Benefit A covered employer must provide to employees that it has employed for at least 30 days up to an additional 10 weeks of paid expanded family and medical leave at two-thirds the employee's regular rate of pay where an employee is unable to work due to a bona fide need for leave to care for a child whose school or child care provider is closed or unavailable for reasons related to COVID-19.

III. Covered Employers

A. The paid sick leave and expanded family and medical leave provisions of the FFCRA apply to certain public employers, and private employers with fewer than 500 employees.

B. Most employees of the federal government are covered by Title II of the Family and Medical Leave Act, which was not amended by this Act, and are therefore not covered by the expanded family and medical leave provisions of the FFCRA. However, federal employees covered by Title II of the Family and Medical Leave Act are covered by the paid sick leave provision.

C. Small businesses with fewer than 50 employees may qualify for an exemption from the requirement to provide leave due to school closings or childcare unavailability, if the leave requirements would jeopardize the viability of the business as a going concern.

IV. Qualifying Reasons for Leave:

A. Under the FFCRA, an employee qualifies for paid sick time if the employee is unable to work (or unable to telework) due to a need for leave because the employee:

- is subject to a Federal, State, or local quarantine or isolation order related to COVID-19;
- has been advised by a health care provider to self-quarantine related to COVID-19;
- is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
- is caring for an individual subject to an order described in (1) or self-quarantine as described in (2);
- is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19; or
- is experiencing any other substantially-similar condition specified by the Secretary of Health and Human Services, in consultation with the Secretaries of Labor and Treasury.

B. Under the FFCRA, an employee qualifies for expanded family leave if the employee is caring for a child whose school or place of care is closed (or childcare provider is unavailable) for reasons related to COVID-19.

V. Duration of Leave:

A. For reasons (1)-(4) and (6): A full-time employee is eligible for up to 80 hours of leave, and a part-time employee is eligible for the number of hours of leave that the employee works on average over a two-week period.

B. For reason (5): A full-time employee is eligible for up to 12 weeks of leave at 40 hours a week, and a part-time employee is eligible for leave for the number of hours that the employee is normally scheduled to work over that period.

VI. Calculation of Benefit:

A. For leave reasons (1), (2), or (3): employees taking leave shall be paid at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).

B. For leave reasons (4) or (6): employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).

C. For leave reason (5): employees taking leave shall be paid at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$12,000 in the aggregate (over a 12-week period—two weeks of paid sick leave followed by up to 10 weeks of paid expanded family and medical leave).

VII. Tax Credits:

A. Covered employers qualify for dollar-for-dollar reimbursement through tax credits for all qualifying wages paid under the FFCRA.

B. Qualifying wages are those paid to an employee who takes leave under the Act for a qualifying reason, up to the appropriate per diem and aggregate payment caps.

C. Applicable tax credits also extend to amounts paid or incurred to maintain health insurance coverage. For more information, please see the Department of the Treasury's website.

VIII. Notice and Enforcement

A. Employer Notice:

Each covered employer must post, in a conspicuous place on its premises, a notice of FFCRA requirements.

B. Prohibitions:

Employers may not discharge, discipline, or otherwise discriminate against any employee who takes paid sick leave under the FFCRA and files a complaint or institutes a proceeding under or related to the FFCRA.

C. Penalties and Enforcement:

1. Employers in violation of the first two weeks' paid sick time or unlawful termination provisions of the FFCRA will be subject to the penalties and enforcement described in Sections 16 and 17 of the Fair Labor Standards Act. 29 U.S.C. 216; 217.

2. Employers in violation of the provisions providing for up to an additional 10 weeks of paid leave to care for a child whose school or place of care is closed (or childcare provider is unavailable) are subject to the enforcement provisions of the Family and Medical Leave Act.

3. The Department will observe a temporary period of non-enforcement for the first 30 days after the Act takes effect, so long as the employer has acted reasonably and in good faith to comply with the Act.

4. For purposes of this non-enforcement position, "good faith" exists when violations are remedied and the employee is made whole as soon as practical by the employer, the violations were not willful, and the Department receives a written commitment from the employer to comply with the Act in the future.

Employment Law Implications

I. Overview

- A. Preparing for and responding to a pandemic raises numerous employment law issues.
- B. Employers who implement pandemic preparation procedures must do so in a way that is consistent with the law.
- C. Employers are expected to make their best efforts to obtain public health advice that is contemporaneous and appropriate for their location, and to make reasonable assessments of conditions in their workplace based on this information.

II. Americans with Disabilities Act (ADA)

A. Overview

- 1. The US Equal Employment Opportunity Commission (EEOC) has issued guidance for implementing pandemic preparation strategies in a manner that is consistent with the ADA.
- 2. Generally, seasonal flu is not a disability under the ADA, but complications arising from pandemic coronavirus may lead to the condition becoming an ADA-covered disability.
- 3. ADA-covered employers must make reasonable accommodations for an employee with a disability, including providing leave or adjusting attendance requirements. Implementing pandemic measures impacts two important issues regulated by the ADA: (1) inquiring about medical information and conducting medical exams, and (2) reasonable accommodations.

B. Inquiring About Medical Information and Conducting Medical Exams

- 1. Before the Pandemic
 - a. Before a pandemic is declared, employers may not ask employees to disclose health conditions that might make them more susceptible to contracting the virus.
 - b. Employers are permitted to ask questions related to non-medical reasons an employee may miss work during a pandemic, such as a public transportation shutdown or school closure.
 - c. Various factors, both health and non-health-related, that may cause an employee to miss work during a pandemic may be listed in a one-page form, with instructions to employees to provide a single yes or no answer as to whether any of the reasons listed would make the employee unable to come to work in the event of a pandemic.
- 2. During a pandemic, employers may:

a. Ask employees whether they are experiencing influenza-like symptoms and send employees home if they are. Employees may be told to stay home and not come to work until at least 24 hours without symptoms.

b. Take employees' temperature to determine whether they have a fever.

c. Ask whether employees are returning from locations where the coronavirus is present, even if the travel was personal.

d. Make a disability-related inquiry or require a medical examination if the employer reasonably and objectively believes that the employee's medical condition either impairs the employee's ability to perform essential job functions or poses a direct threat to the health or safety of the employee or others.

3. Whether coronavirus poses a "direct threat" under the ADA will depend on the severity of the virus, so employers should stay updated on the latest information from the CDC and state and local health departments about the severity of coronavirus.

4. Any information gathered about an employee's health must be kept separate from their general employment file and treated as a confidential medical record. In providing information to the workforce about the spread of the virus, it is important to do so without disclosing the names of those workers who may be infected.

C. Reasonable Accommodations and Telework

1. Employers may require employees to telework as an infection-control strategy, and employees with disabilities that put them at high risk for complications of coronavirus may request telework as a reasonable accommodation.

2. If an employee with a disability has accommodations at work, the employer should provide the same accommodations for telework unless it would be an undue hardship.

3. For example, a disabled employee who has a voice recognition program on his work computer as a reasonable accommodation should be provided a similar accommodation if required or permitted to telework.

III. **Wage and Hour**

A. Non-Exempt Employees.

1. Non-exempt employees need only be paid for time that they are working.

2. Employers can generally reduce scheduled hours or hourly pay without violating wage and hour laws; however, certain laws and local ordinances may require "reporting time" pay if non-exempt employees are called off their shift either after reporting or without sufficient advance notice.

3. If non-exempt employees are permitted to work from home, employers must make sure that those employees accurately track all time worked; are paid overtime according to state and federal law; and are provided meal and rest periods in accordance with state and federal law.

B. Exempt Employees.

1. Exempt employees must generally be paid the same minimum weekly salary regardless of how many hours they work. Employers who fail to pay exempt employees' full weekly salary risk altering their exempt status and making them eligible for overtime pay.

2. Employers can avoid this risk in one of three ways:

a. *Unpaid furlough.* Employers may impose unpaid furloughs. However, exempt employees cannot perform any work while on furlough. Employers must make sure that furloughed employees do not respond to email, take calls or otherwise perform work duties. If an exempt employee works during furlough, they must be paid for the full week.

b. *Mandated Vacation.* Employers may require employees to use vacation time or PTO rather than treating a furlough as unpaid.

c. *Fixed Salary and Base Hours Reduction.* Employers may implement a fixed reduction in future salaries and base hours due to a bona fide reduction in the amount of work an employee can do during a pandemic. Employers taking this route should be careful, as the Department of Labor and federal courts have concluded that this practice is only acceptable so long as it is occasional and due to long-term business needs or economic slowdown.

IV. Workers' Compensation

A. For an illness to be compensable under a workers' compensation system, it must generally be contracted in the course and scope of an employee's employment and be specific to the work performed by that employee. So, for example, an attorney who catches coronavirus from a coworker is not likely to have a cognizable workers' compensation claim. But a health care worker who contracts the virus while treating infected patients at work probably does.

B. Employers whose employees are likely to encounter novel coronavirus in the scope of their employment should evaluate whether they have adequate workers' compensation insurance coverage and coverage limits that include occupational diseases.

C. If an employee contracts coronavirus and it is not occupationally related, the employee may be entitled to disability benefits if the employer provides such benefits.

V. Family and Medical Leave Act (FMLA)

A. Employers who are covered by the federal FMLA must provide job-protected leave and other benefits to an eligible employee who misses work due to his or her own serious health condition, or to care for a close family member who has a serious health condition. While the common flu is typically not a serious health condition, pandemic coronavirus may be if it causes hospitalization or incapacitation.

B. Many states have similar state leave laws.

C. The following absences do not qualify as protected leave under the FMLA:

- Missing work to care for a healthy child whose school is closed.

- Staying home to avoid exposure to the coronavirus.

D. There may be state laws that protect caring for a sick family member that would protect an employee who stays home to care for a family member with COVID-19.

VI. Unionized Workforces

A. For those employers with a unionized workforce, making changes to wages, hours, and terms and conditions of employment will usually require the employer to provide notice to the union and an opportunity to bargain, unless the issue is already covered by the current collective bargaining agreement.

B. The novel coronavirus situation is developing rapidly, and preparation by employers at this stage is key to keeping employees safe and avoiding legal missteps if and when it comes time to respond to coronavirus in your area.

VII. Occupational Safety and Health Act (OSHA)

A. Overview –

1. OSHA requires employers to provide employees a safe place to work. Employers may be responsible for workplace safety violations related to the coronavirus outbreak under OSHA's "general duty" clause. In a pandemic, an employer could be cited for a general duty clause violation where, for example,

- The pandemic virus was present in the workplace and the employer's efforts to control exposure were insufficient.
- Employees were required to perform tasks that exposed them to the hazard of pandemic coronavirus.

2. Employers are required to take feasible steps to eliminate or mitigate recognized hazards. Employers should anticipate protecting employees by implementing controls, changing work practices, and, where appropriate, providing personal protective equipment.

3. Contagious diseases that are contracted at work (with the exception of the common cold or flu) are subject to OSHA's recordkeeping requirements and must be recorded. An employee's refusal to come to work for fear of contracting coronavirus may be protected activity, triggering OSHA's anti-discrimination provisions.

4. Most US states have analogous state laws requiring employers to provide employees with a safe working environment.

B. OSHA Guidance

1. The Occupational Safety and Health Administration has issued guidance to employers to protect workers during a pandemic.

See <https://www.osha.gov/Publications/OSHA-FS-3747.pdf>.

2. OSHA has also recently issued guidance for employers on preparing their workplaces for COVID-19, which divides employees into four risk levels and makes recommendations to limit the risk of exposure to all four groups.

- For employees, regardless of responsibilities, best practices include providing a clean and hygienic workplace (e.g. disinfecting surfaces, providing disposable tissues, alcohol-based hand sanitizers, cleaning agents and antiseptic wipes, having soap available for regular handwashing, encouraging regular handwashing, increasing the frequency of surface cleaning, encouraging sick or symptomatic employees to stay at home, urging social distancing strategies, and providing and sterilizing personal protective equipment) and trying to minimize the spread of contagious illnesses.
- Reducing nonessential business travel in all respects, and particularly to highly affected regions, and eliminating in-person meetings is also recommended.
- Telecommuting should be encouraged whenever possible to reduce the transmission of the virus.
- Employers may have duties to comply with protected leave of absence laws, which vary significantly by state, but even if state law does not require paid sick leave or medical absence protection, prudence suggests allowing employees time away from work for at least 14 days (the suspected incubation period) when they are ill or recently have been exposed to the virus, or someone who is known to be infected with the virus, in order to reduce its spread.
- Although employers are ordinarily advised not to treat employees differently based on assumptions of illness or disability, the Equal Employment Opportunity Commission (EEOC) has issued COVID-19 guidance recommending that employees who appear to be ill with symptoms consistent with COVID-19 be sent home and be required to stay at home until recovered or cleared by a health care professional.
- Employees who call in sick may be asked if their symptoms are consistent with the coronavirus. Such information should be kept confidential but it should inform procedures with respect to other co-workers who may have been exposed.

3. The EEOC has also relaxed rules permitting employers to conduct non-invasive screening for fevers (albeit of limited value due to the range of potential symptoms) before allowing employees to work. When employees who have been out due to symptoms consistent with the virus return to work, they may be required to provide a doctor's note certifying they are fit to return to work, but the EEOC has encouraged flexibility with the usual forms for such matters since doctor's offices and urgent cares are overwhelmed with pressing patient needs.

Coronavirus Raises Novel Business Insurance Issues

I. Overview

A. As the novel coronavirus continues its march across the U.S., the bottom line for all businesses and workers is that it will be some time before we return to “business as usual.” This new reality begs the question many businesses are asking: “Do I have any insurance for this?”

B. Some businesses, such as restaurants, bars, and gyms, have been shuttered pursuant to orders by state and local governments, while others have voluntarily scaled back and/or have moved to a remote work structure, making use of remote access to work from home.

C. Most businesses have insurance programs in place to guard against unforeseen circumstances. Businesses may have a program that includes commercial general liability, employment practices, director and officers and business interruption. Some companies may even have specialty policies such as event coverage, fiduciary coverage, errors and omissions, kidnap and ransom, and, perhaps, product tampering and product contamination.

D. Whether this coverage will cover or help to defray the effects of the Covid-19 pandemic largely depends on the terms and conditions of the specific policy. Thus, it is important for businesses to consult with their brokers and attorneys to determine what, if any, insurance coverage is available and under what circumstances coverage might be triggered.

E. Below is general guidance on the coverages offered by carriers and raises issues for businesses to consider when examining if their insurance policies cover the losses caused by the outbreak of Covid-19. It’s imperative for business owners to understand that insurance coverage can be highly fact driven, but we offer some general statements to assist businesses as they review their insurance program.

II. Business Interruption and Contingent Business Interruption

A. Business interruption coverage, also called business income coverage, is designed to cover financial loss caused by an interruption in operations. It is triggered by a covered cause of loss that results in slowed or suspended revenue generation. Extra expense coverage often goes hand-in-hand with business interruption, as it provides reimbursement for additional expenditures incurred in the course of resuming business operations.

B. The covered causes are often specifically delineated and require a designated peril to trigger them, such as fire, earthquakes, or other specified incidents. Policies often also require “direct physical loss” to the property and proof of causation. As a result, Covid-19 presents unique coverage questions because it may not fulfill these policy requirements.

C. For example, if a business were to close voluntarily but was otherwise still habitable, it probably has not suffered a “direct physical loss” even if such closure was a reasonable response to Covid-19.

D. By contrast, if property becomes uninhabitable due to a contamination, there might be a basis to claim a “direct physical loss” though the coverage may be limited to the time and expense to sanitize the property, as opposed to the extended time of shutdown many businesses are currently facing.

E. Government-mandated closures present their own unique questions, such as whether such shutdown is ordered or merely recommended, and whether a particular policy includes such eventuality as a named peril triggering coverage.

F. For example, Pennsylvania Gov. Tom Wolf (D) ordered that restaurants and bars close their dine-in facilities, but only urged “non-essential” businesses such as gyms, hair salons, and movie theaters to do the same. Municipal, county, and state-wide closures are changing daily, so it is important to stay abreast of the news. Careful attention to policy provisions specifically addressing government action is warranted.

G. Additionally, many policies contain express exclusions for “communicable or infectious disease” or “virus.” Policies may also require mitigation of losses, though whether the extra expense incurred in doing so is covered depends on the policy language.

H. Finally, even if business interruption and extra expense coverage exists, the scope is likely up for debate. For example, a fitness studio closes and suffers the loss of drop-in customer revenue, but purchases equipment and software to stream video workouts to monthly customers who continue to pay. What is covered in such a scenario? It is vital for businesses to work closely with brokers and attorneys to answer these kinds of questions.

III. Event Cancellation and Nonappearance Insurance

A. Insurance policies covering event cancellations or nonappearance of key persons generally provide coverage for losses beyond the control of the policyholders, organizers, and/or attendees.

B. Such policies are commonplace in the entertainment, music, sports, and event-planning industries and are purchased to cover losses beyond the policyholder’s control, such as weather events—including hurricanes, tornadoes, major storms, earthquakes, and wildfires—as well as terrorism, labor strikes, non-appearance of key people, and unavailability of the venue due to fires, floods, or power outages.

C. Generally, event-cancellation policies exclude infectious disease coverage, which is offered only via an optional rider or endorsement for an additional charge.

D. This type of coverage has become increasingly relevant in the wake of Covid-19. Indeed, as the lights on Broadway flicker out for the time being and the NBA, MLB, and PGA suspend all sporting events, questions as to coverage for such postponements and cancellations abound.

E. Insureds who purchased the optional coverage for infectious or communicable diseases before January 2020 may be covered for losses caused by the outbreak; however, it is being reported that such optional coverage is no longer being offered. And many insurers are including specific coronavirus exclusions in newly issued event-cancellation policies.

F. Insureds should carefully review their event-cancellation policies with their attorneys or insurers to determine if they purchased optional coverage that may cover Covid-19 losses.

IV. Commercial General Liability ('CGL') Insurance

A. Commercial general liability policies may provide defense and indemnification for claims asserted by third parties for bodily injury or property damage arising out of the Covid-19 outbreak.

B. For instance, consider the lawsuit recently filed in a federal court in California: Weissberger et al. v. Princess Cruise Lines Ltd. There, the plaintiffs, Ronald and Eva Weissberger, were passengers on the Grand Princess cruise liner that was docked off the coast of California for several days because its passengers and crew had been exposed to Covid-19.

C. The Weissbergers allege that Princess Cruise Lines had actual knowledge that two other passengers had symptoms of Covid-19 and placed profits over the safety of its other passengers by choosing to continue its regular business operations. At some point, it is likely that the question will arise as to whether the losses alleged by the Weissbergers are covered under the CGL policy of Grand Princess Cruise Lines.

D. Policyholders should review their CGL policies and the exclusions contained therein to determine if losses, such as those described above, are covered, and whether any exclusion, such as for communicable diseases, bars coverage for such third-party claims.

V. State Actions

A. Some states are already taking action to protect policyholders. The New Jersey Assembly is currently considering Bill A-3844, which “concerns business interruption insurance during coronavirus disease 2019 state of emergency.”

B. The draft bill provides, in relevant part: “Notwithstanding the provisions of any other law, rule or regulation to the contrary, every policy of insurance insuring against loss or damage to property, which includes the loss of use and occupancy and business interruption in force in this State on the effective date of this act, shall be construed to include among the covered perils under that policy, coverage for business interruption due to global virus transmission or pandemic concerning the coronavirus disease 2019 pandemic.”

C. In New York, the Department of Financial Services issued a call to all property and casualty insurers to examine their policies and prepare an explanation of benefits for each policy type to be sent to policyholders, which should “explain the coverage each policy offers in regard to Covid-19—both presently and as the situation could develop to change the policyholder’s status (i.e., is there any potential for coverage as a result of Covid-19).”

D. Other states may choose to follow in the footsteps of New Jersey and New York in order to protect businesses, especially given concerns about the economic impact of the Covid-19 outbreak.

E. In these uncertain times, businesses should stay on top of the news—including governmental closures, recommendations, and potentially helpful legislation and orders. Small businesses in particular should carefully track extra expenditures and consult resources such as the U.S. Small

Business Administration for guidance and capital loans, which may fill in gaps where insurance coverage is not available.

F. Legal guidance is especially important in determining duties and obligations under the law and under insurance policies, including best practices in the event that coverage is applicable at some point in the future.