

## Overview of the CARES Act for Employers

### Related Practices

COVID-19 Task Force

### By Peabody & Arnold on April 20, 2020

As part of the federal government's response to the COVID-19 pandemic, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) provides financial assistance and relief programs for eligible employers and employees. Below is a brief overview of key aspects of the CARES Act for employers.

#### **PAYCHECK PROTECTION PROGRAM**

The Paycheck Protection Program (PPP) authorizes the Small Business Administration (SBA) to provide up to \$349 billion in forgivable loans to small businesses on a first-come, first-served basis to assist them with maintaining payroll and similar costs during the COVID-19 crisis. Although the SBA recently reported that available appropriations funding for the PPP has been exhausted, Congress is reportedly considering whether to allocate additional funds to the program in the near term. Therefore, employers who could potentially benefit from the PPP should consult with their financial advisors, banking institutions, and counsel now so that they are prepared in the event additional PPP funds become available.

#### **Eligibility**

To be eligible, a business must have been operational as of February 15, 2020. In general, businesses who employ 500 or fewer employees can apply for a PPP loan. The number of employees employed by a business includes all full-time and part-time employees whose principal place of residence is in the United States, as well as all U.S.-based employees of an employer's affiliated businesses.<sup>[1]</sup> A business with more than 500 employees may also be eligible if it meets the definition of a "small business concern" under Section 3 of the Small Business Act.<sup>[2]</sup> Additionally, there are expanded eligibility criteria for employers operating in specified industries. For example, certain food services and accommodations businesses with more than 1 physical location that employ no more than 500 employees at each location may qualify for a PPP loan.

Sole proprietors, independent contractors, and self-employed individuals, such as "gig economy" businesses, are also eligible for loans under the PPP.

#### **Amount of Funding Available**

The maximum amount of funding available to eligible employers under a PPP loan is the *lesser* of either 250% of the employer's average monthly payroll costs during the one-year period before the loan is made *or* \$10,000,000.

#### **Use of Funding**

Employers may use the funds received as part of a PPP loan for certain authorized business purposes, which include:

- Payroll costs, including employee salaries, commissions or similar cash-compensation, up to a cap of \$100,000 on an annualized basis per employee; payments for paid time off (but not for paid leave where there is a credit available under the Families First Coronavirus Response Act); severance allowances; and employee benefit costs, such as group health insurance programs, health insurance premiums, and retirement programs;
- Interest payments on any mortgage obligations (but not mortgage prepayments or principal payments) or interest payments on any other debt obligations that were incurred prior to February 15, 2020;
- Rent and utility payments;
- Refinancing an SBA Economic Injury Disaster Loan (EIDL) that was made between January 31, 2020 and April 3, 2020; and
- State and local taxes.

### **Loan Forgiveness**

The PPP loan may be forgiven in its entirety, including the principal amount and any accrued interest, if the following conditions are all satisfied:

- The loan proceeds are used for the PPP-specified business purposes described above during the 8-week period immediately after the date on which loan is made;
- The full-time employee headcount is maintained;
- Employees earning less than \$100,000 annually continue to receive the same level of compensation; and
- Not more than 25% of the total forgiveness amount is used for non-payroll costs.

In the event that these conditions are not satisfied in full, or if a business does not use the full amount of the PPP loan during the 8-week period after the loan is made, then a portion of the loan will *not* be forgiven and must be repaid by the employer. The amount of forgiveness will be reduced proportionately by any reduction in the number of employees from the prior year. Likewise, the amount of forgiveness will be reduced proportionately if an employer decreases salaries and wages by more than 25% for any employee that made less than \$100,000 in 2019.

Employers have until June 30, 2020 to restore the number of employees and salary levels for any changes made between February 15, 2020 and April 26, 2020, without having the loan forgiveness amount reduced.

The outstanding loan amounts will be subject to 1% interest rate and a 2-year maturity date. There is also a 6-month deferment period during which interest will continue to accrue.

Additional guidance and information about the PPP is available in the [Final Interim Rule](#) issued by the SBA and a corresponding [FAQs](#) document.

### **EMPLOYEE RETENTION PAYROLL TAX CREDIT**

The CARES Act also provides a fully refundable tax credit (Employee Retention Credit) for certain employers who continue to pay wages to employees during the COVID-19 crisis. The Employee Retention Credit is available to employers who were carrying on a business or trade during the calendar year of 2020 and either (1) fully or partially suspended operations in any calendar quarter of 2020 due to orders from a governmental authority limiting commerce, travel or group meetings due to the COVID-19 crisis, or (2) the employer's gross receipts declined by more than 50% when compared to the same quarter of the previous year.

The Employee Retention Credit is limited to 50% of the "qualified wages," as defined under the CARES Act, paid or incurred in a calendar quarter from March 13, 2020 through December 31, 2020. The maximum amount of qualified wages for each employee for all calendar quarters is \$10,000.

Additional information about the Employee Retention Credit available to employers under the CARES Act is available at the [FAQs](#) website maintained by the IRS.

Employers who believe they might benefit from an Employee Retention Tax Credit should consult with their financial advisors and tax professionals for additional information.

## **UNEMPLOYMENT PROGRAMS**

### **Federal Pandemic Unemployment Compensation (FPUC) Program**

The FPUC Program allows states to provide an additional \$600 weekly benefit, which is fully funded by the federal government, to individuals who are eligible for regular unemployment benefits from state governments or from other federal unemployment compensation programs. The temporary \$600 additional benefit applies in full regardless of whether the individual is collecting total or partial unemployment benefits.

The \$600 additional benefit is payable for weeks of unemployment or furlough during the disaster assistance period beginning on or after the date that the relevant state enters into an agreement with the U.S. DOL. In Massachusetts, the \$600 benefit will be added to all eligible weeks of benefits retroactive to March 29, 2020 and continuing until July 31, 2020.

Additional information about the FPUC program is available [here](#).

### **Pandemic Unemployment Assistance (PUA) Program**

The PUA Program provides qualified individuals who are not covered under traditional unemployment insurance programs (such as self-employed, independent contractors, gig-economy workers) with up to 39 weeks of unemployment benefits if they are unemployed due to COVID-19 related circumstances.<sup>[3]</sup>

Individuals whose hours and/or pay have been reduced due to lack of work may also be eligible for a reduced benefit amount under the PUA Program.

Although eligibility for benefits under the PUA Program is broadly defined, it is not available for individuals who are able to telework with pay.

Additional information about the PUA Program is available [here](#).

### **CARES ACT AND UNEMPLOYMENT FOR MASSACHUSETTS EMPLOYERS**

The Massachusetts Department of Unemployment Assistance (DUA) has released a set of [Frequently Asked Questions](#) that provides guidance on the CARES Act implementation in the Commonwealth.

Benefits under the FPUC and PUA Programs will be federally funded. Notably, according to the DUA, benefits and administrative expenses under these emergency benefits programs will be paid without additional contributions from employers who pay into the unemployment insurance fund. However, the DUA guidance states that employers who are self-insured will be required to pay 50% of the benefits. Moreover, it is unclear at this time how payment of expanded unemployment benefits for COVID-19-related reasons will impact employer contribution rates, if at all. To the extent rates are impacted, the DUA has noted in a separate set of [Frequently Asked Questions for Employers](#), that rates will not change until January 2021.

### **FURTHER INFORMATION**

The legislative and regulatory response to the COVID-19 pandemic, with its related impact on employers, is constantly changing as federal and state governments work to keep up with the evolving nature of the crisis. Employers are encouraged to consult with a member of Peabody & Arnold's Employment Law and Litigation Practice Group for further information.

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[1] There are four tests that govern whether concerns and entities are affiliates—each dependent on whether one controls or has the power to control the other, or a third party, or parties, controls or has power to control both. See 13 C.F.R. §§ 121.106(a), and 121.301(f); see also SBA Affiliation Rules, available [here](#).

[2] A “small business concern” is defined at 15 U.S.C. § 632. Please see the SBA's [size standards](#) for further information about whether a business is considered to be small under the Small Business Act.

[3] The U.S. DOL provides specific examples of qualifying COVID-19 related circumstances under the PUA in its [Directive](#) issued on April 5, 2020.