MARCH 31, 2020

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- **THE CARES ACT**

THE CARES ACT – WHAT YOU NEED TO KNOW NOW!

On March 27th, Congress passed the Coronavirus Aid, Relief, and Economic Security Act - the CARES Act - a giant $2 trillion stimulus bill, which the President quickly signed into law. This bill is intended to help shore up the economy and provide relief for businesses, including small businesses, and most individuals. Congress designed many of the provisions to free up cash so that businesses can keep their workforces employed while the business navigates and weathers the impact of the coronavirus. Below we will highlight some of the most important provisions or those that may require your immediate attention. The next several alerts will go into more depth on the most important sections of this massive 895 page bill. This alert is not intended to be a detailed analysis of the entire bill.

PROVISIONS FOR INDIVIDUALS

Rebate Checks

Under the CARES Act, most Americans will receive tax free rebate checks - $1200 for individuals with adjusted gross income (AGI) of up to $75,000, $2,400 for married couples with AGI of up to $150,000 and an additional $500 for each dependent child under 17. Except for children under 17, any person who is claimed on another person’s tax return (for example children over 17) will not be eligible for a rebate check. The rebate amounts are phased-out for individuals with AGIs between $75,00 and $99,000 and married couples with AGIs of between $150,000 and $198,000 and are not available for anyone with AGI’s over those amounts. In most cases these payments will be made automatically through direct deposit.

No Required Minimum Distributions (RMDs) for 2020

Participants in defined contribution plans (profit sharing plans and 401(k) plans) and IRA owners or their beneficiaries will not be required to take RMDs in 2020. In 2021, the RMDs will start up again but the missing 2020 RMDs do not have to be made up. No RMDs for 2020 are required from 403(b) plans and 457(b) plans sponsored by governmental entities either but will be required from defined benefit plans. The purpose of this provision is to avoid forcing individuals to sell stocks being held by the plans or IRAs at a low value in order to pay out an inflated RMD calculated on the account balance as it stood on December 31, 2019.

Individuals who do not need their RMDs should consider converting some of their traditional IRA to a Roth IRA inasmuch as they will not be bringing their RMD into their taxable income. The amount of income is determined at the time of conversion. So a conversion in-kind from a traditional IRA to a Roth IRA of depressed stocks will give rise to a larger value Roth when the market turns around. Roth IRAs are more advantageous than a regular IRA because once the Roth owner turns 59 ½ and the Roth IRA has been in existence for 5 years, all the funds coming out of the Roth, including income, come out tax free.

Participants Can Receive a Penalty Free Distribution of up to $100,000 from their Retirement Plan

Plan participants (or their spouses or dependents) who have been diagnosed with COVID-19, or who have suffered financial consequences directly because of the coronavirus, can receive a distribution of up to $100,000 from the plan. This distribution would be exempt from the 10% early withdrawal penalty which generally applies to distributions taken before age 59 1/2. This distribution can be repaid over 3 years or if not repaid, can be taken into income over a 3 year period. The employer can rely upon self-certification by the participant that the conditions for eligibility of this distribution exist.

More guidance by IRS will be needed – for instance, it is not clear whether retirement plans are required to make these COVID-19 distributions available or if this provision is optional, or even whether an interest factor would be imposed on repayment (unlikely, but possible). It is also not clear how fast the major brokerage house and major retirement plan platforms are going to be able to implement this new provision.

Temporary Increase in Plan Loan Limit and One Year Delay in Plan Loan Repayment

Plan participants (or their spouses or dependents) who have been diagnosed with COVID-19, or who have suffered financial consequences directly because of the coronavirus, within 180 days after enactment of the CARES Act, can take a plan loan up to $100,000 or their vested account balance in the plan, whichever is less. This is an increase from the general limits on plan loans which are the lesser of $50,000 or 50% of the vested account balance (note a plan is not required to offer plan loans and some plans provide for loans up to $10,000 regardless of the vested account balance). Again, it is not clear whether this is an optional provision employers can choose to adopt and it is not clear how soon the plan providers can implement it. The CARES Act also postpones for one year any loan repayment that is due after the Act's enactment and before December 31, 2020. The IRS will need to provide guidance on whether a plan participant will be forced to delay repayment even if the participant wants to continue to pay the loan.

MAJOR PROVISIONS FOR SMALL EMPLOYERS

Paycheck Protection Program (PPP)

The program that requires immediate attention by small businesses (generally 500 employees or less) is the Paycheck Protection Program which will provide significant benefits to many small businesses. In short, this is a federal loan program which is intended to help small businesses keep their employees on the payroll and to provide funds to operate their businesses. To cut through all the technicalities, small businesses can get a Paycheck Protection Program loan ("PPP Loan") from their bank and use it to pay payroll, health care benefits, rent, interest on an existing mortgage, utilities and interest on debts incurred before February 15, 2020. Even better is that, if the business meets certain requirements, a portion of the loan can be forgiven with no tax consequences. In short, the government is will pick up a significant portion of the business' payroll expense and rent for eight weeks. Now the details:

- Loans can be made up to the lesser of 2.5 times the prior 12 months average "payroll expense" or $10 million.
- Loans are term loans with up to 10 year maturity.
- The loans will carry a 4% fixed interest rate and payments are deferred from 6 to 12 months.
- No origination fees will be charged to borrowers and no collateral or personal guarantees will be required.
- Loans made under SBA's Disaster Loan Program on or after January 31, 2020 may be folded into the PPP Loan.

- With appropriate documentation, an amount equal to 8 weeks of post loan closing "payroll expense," mortgage interest on real estate or equipment loans, rent and utility payments can be forgiven without tax consequence to the borrower, subject to the employer maintaining certain employee and compensation thresholds. The SBA is working on guidance and details on the forgiveness program. In particular, the CARES Act provides that businesses that reduce their compensation or employment rolls between February 15 and April 26, may still be eligible for loan forgiveness without reduction in the forgiveness amount if they get back to their compensation and employment levels by June 30, 2019. The details on the requirement for such a course correction will be among the additional information that we will be looking for in the coming weeks.

- For purposes of determining the PPP Loan and amount of debt forgiveness, "payroll expense" includes state and local (not federal) payroll taxes, commissions and tips, leave, group health costs, paid retirement benefits, salary (wages but not to exceed $100,000 for any single employee) and independent contractor costs. Utility payments include electricity, gas, water, transportation, telephone and internet.

- Loans will be available through SBA approved lenders.

The SBA is currently working on additional guidance for the PPP loans, however, it appears some community banks are already prepared to accept, approve and fund loan applications immediately.

Our SBLC member, the Independent Community Bankers Association (ICBA) has updated resources on the PPP on its website - ICBA.org.

A word of caution for those business borrowers with existing commercial financing facilities that are considering PPP Loans - be sure to review your existing loan agreement restrictions on additional debt. Similarly, all business borrowers with existing financing agreements will need to review their ability to comply with financial covenants as a consequence of the current business disruptions. It is anticipated that many businesses will need to reach out to their current lenders to obtain appropriate compliance waivers for either, or both, the new PPP Loans and/or their impaired financial performance during these unsettled times.

Employee Retention Tax Credit

The law provides a refundable tax credit against the employer's social security taxes for a business opting against a PPP Loan (this would seem to be a rare circumstance unless the 350 billion dollars allocated to this program by the CARES Act has run out) or who is too large to apply for a PPP Loan, which has had to shut down or experienced a significant decline in revenue due to the coronavirus. The Employee Retention Tax Credit (ERTC) is equal to 50% of the first $10,000 of wages paid to an employees between March 13, 2020 and December 31, 2020, up to a maximum credit of $5,000 per employee. For employers with 100 or fewer employees, all employee wages and payments made for health care coverage (subject to the $10,000 limit) paid during a period in which there was a severe coronavirus impact, can be included in the credit calculation. For employers with more than 100 employees, only wages paid to employees not performing any services (whether in person or remotely) to the company due to the virus can be included in the calculation. The severe impact standard necessary to qualify for the payroll tax credit is either more than 50% reduction (compared to the same quarter in the prior year) in gross receipts or the business has fully or partially suspended its operations due to orders from an applicable government authority due to the coronavirus.

Payroll Tax Payment Deferred

Small businesses that did not have part or all of a PPP Loan forgiven can defer payment of the employer's share of payroll taxes on wages paid for the period ending December 31, 2020. Payment of the deferred amounts is staged over two years – 50% is due December 31, 2021 and the balance is due on December 31, 2022. People who are self-employed will also have the opportunity to take advantage of this deferral.

Coming up in future alerts – net operating loss deduction, Economic Injury Disaster Loan (EIDL) Grants, and student loans relief in the CARES Act.

UPCOMING LEGISLATIVE MEETINGS

- **May 27, 2020**, 10:00 am – Noon, EST – ICBA offices – 1615 L Street, NW, Suite 90 or by Telephone
- **July 30, 2020**, 10:00 am – Noon, EST – By Telephone
- **September 24, 2020**, 10:00 am – Noon, EST - ICBA offices – 1615 L Street, NW, Suite 900

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