

The \$2 Trillion Federal CARES Act: The Key Financial Assistance Provisions, Key Legislative Changes, and Next Steps

Monday, March 30, 2020

The Coronavirus Aid, Relief, and Economic Security Act (“[CARES Act](#)”) is a comprehensive economic relief plan designed to stabilize and uplift the American economy during the COVID-19 pandemic. It is unique not only because of the total amount of funding made available (over \$2 trillion), but also because of the breadth of industries, sectors, and individuals eligible to receive some form of federal grant aid or federally-backed loan assistance through the stimulus legislation.

This alert summarizes: 1) the key financial assistance provisions of the Act, 2) the key legislative changes of the Act, and 3) key changes the Act makes to employment laws in specific. **Detailed industry-specific summaries are also available at the links provided at the end of this alert.** This alert also looks ahead, previewing the process of how many of these new major federal grant and loan funds are likely to be disbursed.

- In terms of **financial assistance**, the Act acknowledges the direct and indirect effects of the virus on most aspects of the economy and provides both temporary relief and longer-term support for dozens of American industries/sectors. These include healthcare (with specific attention given to providers, biopharmaceutical companies, laboratories and diagnostic companies), education (with specific attention given to institutions of higher education and student debt), transportation, real estate, small business, and many others.

In addition, the Act provides significant financial assistance to states and municipalities to combat the spread of the virus on the local level as they exhaust their own resources, and makes available significant loan funds to almost all American businesses, both large and small. The Act also provides for direct financial assistance (cash payments) to many Americans and expands temporarily unemployment insurance eligibility to individuals not previously covered.

- In terms of **legislative changes**, the Act makes changes in numerous areas in an effort to ease the pressures that the COVID-19 emergency has imposed on certain industries and individuals. For example, certain legislative changes make it easier for healthcare providers to provide care in non-traditional ways (e.g., expanded telehealth flexibilities) in response to the stresses and shortages currently afflicting hospitals and physicians across the nation. At the individual level, certain legislative changes create relief for individuals unable to make mortgage, rent, or student loan payments as a result of financial hardships caused by the COVID-19 emergency.

- In terms of **employment law changes**, the Act augments traditional unemployment benefits, provides support for short-term compensation programs, and establishes assistance for non-traditional employees. The Act also creates new obligations—and opportunities—for employers, including implementing payroll tax relief and modifying paid sick leave and FMLA provisions.

By coupling legislative changes with significant financial stimulus funds, Congress believes the Act will place American industry and the American public on firmer ground for the next several months. We also expect additional legislative responses in the coming months as this public health crisis continues to emerge.

Key Financial Assistance

The Act allocates approximately \$2 trillion in emergency relief to mitigate the economic impact of COVID-19 on individuals, businesses, and local governments. **Our industry-specific summaries provide a more detailed review of the various appropriations.** Overall, some of the most significant financial assistance provisions include:

Support for Businesses

Lending to Eligible Businesses and Local Governments: The Act provides \$454 billion in low-interest loans, loan guarantees, and other investments in programs or facilities established by the Federal Reserve to support lending to eligible businesses, States, or municipalities. The legislation includes a directive to the Secretary of Treasury to establish a program from these funds to provide low-interest loans to mid-sized businesses with between 500 and 10,000 employees. All businesses receiving loans under this program must agree to certain conditions including maintaining 90% of their workforce on payroll through September 2020, restricting dividends or stock repurchases while the loan is outstanding, and restricting outsourcing or offshoring for two years after completing repayment of the loans.

Airlines and National Security: In addition to the \$454 billion in loans available to businesses generally, the Act includes specific loans, operating under similar terms, for airlines and businesses involved in maintaining national security. The Act designates \$25 billion in loans and loan guarantees for commercial airlines, and another \$4 billion for cargo air carriers. National Security businesses are allocated \$17 billion for loans and loan guarantees.

Paycheck Protection Program for Small Businesses: The Act allots approximately \$350 billion to help small businesses, including non-profits, maintain their payrolls for eight weeks. The legislation authorizes the Small Business Administration to provide businesses with fewer than 500 employees loans of up to \$10 million per business to cover payroll and other authorized expenses. The Government will forgive, on a tax-free basis, the loans for businesses that maintain their payroll and only use the funds to cover authorized expenses. The program is available until June 30, 2020.

Employee Retention Credit for Employers: Congress created a refundable payroll tax credit that generally is equal to 50% of the qualified wages, up to a maximum of \$10,000, paid to each employee per calendar quarter. Eligible employers generally are those that have had their operations fully or partially suspended by governmental order due to the COVID-19 pandemic or have seen their gross receipts drop by more than 50% for the same quarter from the prior year. Eligibility subsequently will terminate after the employer has seen a calendar quarter with gross receipts that are more than 80% of the gross receipts for the same quarter from the prior year. For employers with more than 100 full-time employees, “qualified

wages” generally are wages that the employer pays employees who are not providing services due to the suspension of the business or a drop in gross receipts. For employers with 100 or fewer full-time employees, all wages paid to employees during the applicable period of a suspension of business or a drop in gross receipts generally are qualified wages. The refundable payroll tax credit only applies to qualified wages paid after March 12, 2020 and before January 1, 2021. An employer that receives a loan pursuant to the Paycheck Protection Program for Small Businesses (described above) is not eligible for this refundable payroll tax credit.

Limited Payroll Tax Deferral: The payment of an employer’s share of social security taxes that otherwise would be due between March 27, 2020 and January 1, 2021 generally can be deferred and paid in 2021 and 2022. An employer that receives any loan forgiveness under Section 1106 or Section 1109 of the Act with respect to a loan received under the Paycheck Protection Program for Small Businesses (described above) is not eligible for this tax deferral.

Funding for Health Care and Disease Prevention

Healthcare Providers: In order to allow hospitals, physicians, and other healthcare providers to make the necessary expenditures and cover expenses incurred in order to treat COVID-19, Congress created a \$100 billion fund for these providers responding to the coronavirus. The Act also includes \$1.32 billion in immediate funding for Community Health Centers to help cover the costs of caring for COVID-19 patients.

Increased Funding for Critical Medical Supplies: In order to address the nationwide shortage of medical equipment needed to combat COVID-19, the Act allocates \$16 billion to Strategic National Stockpile to procure personal protective equipment, ventilators, and other medical supplies for federal and state response efforts.

Assistance for Individuals and Families

Recovery Rebate for Individuals: In order to provide additional security to individuals and families, the Act authorizes one-time payments to most lower and middle income Americans. The Recovery Rebate is not available to individuals who are dependents or nonresident aliens, and is also not available to trusts or estates.

- Individuals with an adjusted gross income (“AGI”) of no more than \$75,000 (\$112,500 in the case of an individual who files as a head of household) will receive a one-time payment of \$1,200.
- Married couples filing jointly with an AGI of no more than \$150,000 will receive \$2,400.
- Individuals and couples will also receive one-time payments of \$500 for each qualifying child under the age of 17.

The Recovery Rebates phase out for individuals with an AGI of more than \$75,000 and up to \$99,000, for heads of households with an AGI of more than \$112,500 and up to \$136,500, and for married couples filing jointly with an AGI of more than \$150,000 and up to \$198,000. In each case, the AGI at which the Recovery Rebates are totally phased out increases by \$10,000 for each qualifying child under the age of 17.

In general, eligibility for the one-time payments will be determined by reference to the individual’s AGI for the 2019 tax year (or 2018 in the event a 2019 tax return has not been filed); however, to the extent an individual does not receive a one-time payment due to a 2019 (or 2018, if applicable) AGI that exceeds the

applicable limits, an individual's 2020 AGI will be used to determine whether they should receive a refundable credit on their 2020 tax return as a result of a lower 2020 AGI.

Expanded Unemployment Insurance: The Act seeks to provide expanded relief to individuals who lose their jobs as a result of the economic impacts of COVID-19. As described in further detail below, the Act includes expanded unemployment insurance for workers and expands unemployment benefits to many individuals that would not have previously qualified.

Key Legislative Changes

In addition to making available billions of dollars in grant and loan funding to mitigate the impacts of COVID-19 on various sectors of the economy, the Act also makes numerous, significant legislative changes that will better equip distressed sectors, including healthcare, education, real estate and transportation, to rebound in the coming months. The Act also includes certain consumer protection measures that aim to protect the public during this national emergency. Below are some notable examples of the key legislative changes included in the Act, categorized by affected sector.

Healthcare

Unsurprisingly, a plurality, if not majority, of the legislative changes included in the Act are directed at buoying the nation's healthcare system, which has been threatened most acutely by the COVID-19 epidemic.

Encouraging Telehealth: The Act reduces barriers to the provision of healthcare services through telehealth (providing healthcare services remotely). The Act expressly encourages the use of telecommunications systems or home health services furnished during emergency period. In that regard, the Secretary of Health and Human Services is authorized to revise or clarify existing guidance for telehealth provided to Medicare beneficiaries and conduct any outreach necessary to advance the utilization of telehealth in the US. This is no doubt intended to relieve the some of the existing strain on the hospital system and also reduce the need for vulnerable patients to travel to medical facilities where they could be at greater risk of exposure to COVID-19. The Act also waives the requirement of face-to-face visits between home dialysis patients and physicians. Reimbursement for telehealth services is also at the heart of these significant legislative changes.

Coverage for COVID-19-related Healthcare Services: With an eye towards expanded COVID-19 testing and, eventually, treatments for combating the virus, the Act includes provisions governing the coverage of and reimbursement for COVID-19 diagnostic testing and vaccines. In the private healthcare market, a group health plan or health insurer providing for coverage of a COVID-19 diagnostic test must reimburse the provider as follows: 1) according to the negotiated rate before the public health emergency; 2) if such rate did not exist, an amount that equals the cash value for the diagnostic test as listed by the provider on a public internet website. Regarding potential vaccinations, once a COVID-19 vaccine is licensed under section 351 of the Public Health Services Act, the vaccine will be covered under Medicare Part B without any cost sharing. The Act also increases Medicare payments to inpatient hospitals treating COVID-19 patients.

Prescription Drug Refills: Recognizing the travel limitations caused by recommended social distancing and the relative vulnerability of the population enrolled in Medicare Part D, the Acts requires Medicare prescription drug plans to allow for 3-month fills and/or refills of covered part D drugs during the COVID-19 emergency, notwithstanding existing utilization management requirements.

Enhancing Emergency Preparedness: Attempting to avoid in the future the current dire shortage of critical healthcare equipment, the Act requires that the strategic national stockpile include personal protective equipment (“PPE”), ancillary medical supplies and other applicable supplies required for the administration of drugs, vaccines and other biological products, medical devices and diagnostic tests. Likewise, the Act increases reporting requirements for drug manufacturers in response to certain drug shortages. Manufacturers of certain drugs or active pharmaceutical ingredients or any associated medical device used for preparation or administration included in the drug, are required to develop, maintain, and implement, as appropriate, a redundancy risk management plan that identifies and evaluates risks to the supply of the drug. Such manufacturers make those plans available to the Federal government.

Relaxing Privacy Rules: Because contact tracing is key to preventing or restricting the spread of the virus, the Act also includes provisions impacting HIPAA and the restrictions on disseminating personal health information. Notably, the Secretary of Health and Human Services is required to, within 180 days of enactment of the Act, issue guidance on the sharing of protected health information during the COVID-19 emergency.

Education

Student Loans: Perhaps most critically for college students and their families, the Act provides for certain student loan repayment and Federal grant forgiveness. For example, the Act suspends all payments for student loans due under Part D and Part B of Title IV of the Higher Education Act of 1965 through September 30, 2020 and interest shall not accrue on such loans during the deferral period. The Act also waives the amounts that a student is required to return with respect to Pell Grants or other federal grant assistance if the student withdraws from an institution of higher education as a result of a qualifying emergency. In addition, the Act cancels a borrower’s obligation to repay certain loans associated with a payment period for a loan recipient if the recipient withdraws from the institution of higher education during the payment period as a result of a qualifying emergency.

Assisting Students with Grant Funding and Work-Study: With students across the nation being asked to leave college campuses to reduce the risk of community spread of COVID-19, the Act permits institutions of higher education to make payments to affected work-study students during a qualifying emergency for the period of time the students could not work (not to exceed one academic year). The Act also excludes from the Federal Pell Grant duration limit, any semester that a student does not complete due to a “qualifying emergency” such as COVID-19.

Non-Federal Share Waivers: At the institutional level, the Act allows for institutions of higher education to seek waivers of institutional matching requirements for the years 2019-20 and 2020-21, but such waivers are not available to private, for-profit institutions.

Real Estate

Forbearance Moratorium: The Act acknowledges the direct and indirect impacts of the COVID-19 epidemic on housing security and seeks to keep adversely impacted individuals, both homeowners and renters, in their homes for at least the next several months. In that regard, any borrower of a federally-backed mortgage loan who is experiencing financial hardship because of the COVID-19 emergency may request a forbearance of up to 180 days. A borrower is required to provide only an attestation of hardship and is not required to provide any other supporting documentation. No interest will accrue on the loan during the forbearance period.

Eviction Moratorium: The Act also provides temporary protection to renters. For certain covered properties, the Act imposes a temporary moratorium on eviction filings or attempting to recover possession of property from a tenant as a result of a tenant's failure to pay rent during the 120-day period following enactment of the Act. Covered landlords are also prohibited from charging late fees or penalties for late payments of rent during the 120-day period.

Transportation

Airline Requirements and Relief: Air carriers have no doubt struggled since the outbreak of the COVID-19 emergency in the US with demand dropping sharply in the last two months. In response, air carriers have slashed schedules and begun to lay off employees. The Act conditionally expands Federal authority over the operations of these carriers, while simultaneously attempting to support the long-term financial viability of the industry. The Act authorizes the Secretary of Transportation to require an air carrier receiving loans and loan guarantees under the act to maintain scheduled air transportation service as the Secretary deems necessary to any point served by that carrier before March 1, 2020. However, the Act also provides significant assistance to air carriers, including in the form of a temporary reprieve from certain excise taxes for the period beginning after March 27, 2020 and ending before January 1, 2021.

Consumer Protection

Temporary Assistance Measures: The Act extends temporary assistance for needy families and related programs extended through November 30, 2020 in the manner that such programs were authorized for fiscal year 2019. The Act also authorizes the Federal Deposit Insurance Corporation to establish a debt guarantee program during the COVID-19 crisis, provided that any such program and any such guarantee must terminate not later than December 31, 2020.

Bolstering Federal Oversight: The Department of Housing and Urban Development, the Securities and Exchange Commission and the Commodity Futures Trading Commission are now authorized to hire and make appointments to unfilled positions on an expedited basis upon a determination that those expedited procedures are necessary and appropriate to enable the agencies to prevent, prepare for, or respond to COVID-19. The Act also includes certain consumer credit protections during the COVID-19 emergency.

With over 3 million American workers having filed for unemployment benefits this week alone and employers in all industries facing difficult decisions regarding operations and staffing, the Act includes numerous provisions to address the concerns of employers and employees.

Key Changes in Employment Laws

While the biggest headline items and biggest monetary outlays involve direct government aid to workers, the Act also greatly expands unemployment benefits and creates new benefits and obligations for employers.

Changes in Unemployment Benefits

Augmenting Traditional Unemployment Benefits: The federal government will fund increases in both the duration and amount of traditional state unemployment benefits. States that choose to begin paying benefits immediately, instead of waiting one week, will see their costs for doing so reimbursed. The federal government will also provide an additional 13 weeks of benefits after state benefits would otherwise expire. State benefits will be augmented by an additional \$600 per week of federal money.

Support for Short-Term Compensation Programs: States with existing short-term compensation programs (where employees who see their hours reduced, but do not lose their employment, receive pro-rated unemployment benefits) will see benefits paid out under such programs reimbursed fully by the federal government. States without such programs may establish them and receive full compensation for benefits paid. Alternatively, states that do not establish such programs in law may enter into agreements under which the state will temporarily pay short-term compensation benefits and receive 50% reimbursement from the federal government.

Help for Non-Traditional Employees: For “gig workers,” independent contractors, the self-employed, and others not eligible for traditional unemployment benefits, the Act creates a new Pandemic Unemployment Assistance program to provide benefits on the same terms. Like existing state unemployment benefits, Pandemic Unemployment Assistance benefits will be augmented by \$600 per week from the federal government.

For Employers

Payroll Tax Relief: Employers may be eligible for the payroll tax relief described above in the sections of this alert on Employee Retention Credit for Employers and Limited Payroll Tax Deferral.

Student Loan Repayment Assistance: As part of, and subject to, the maximum \$5,250 in tax-free educational assistance benefits employers may provide to employees prior to the Act, employers may now provide student loan repayment assistance for an employee’s qualifying educational expenses. Any such assistance must be provided pursuant to a plan that satisfies all of the pre-existing requirements for tax-free educational assistance benefits. This provision applies to qualifying payments made by an employer after March 27, 2020 and prior to January 1, 2021.

Paid Sick Leave and FMLA Clarifications: The CARES Act modifies the new paid sick leave requirements of the Family First Coronavirus Response Act (“FFCRA”) passed last week. Under the FFCRA, paid sick leave was capped at \$511 per day (\$5,110 aggregate) for workers who are quarantined or showing signs of COVID-19 and \$200 per day (\$2,000 aggregate) for workers who are taking time off to care for a sick family member or a child at home due to a school closure. The CARES Act retains these numbers but, instead of prohibiting higher rates entirely, provides that employers will not be required to pay higher rates. The CARES Act also clarifies that the paid FMLA benefits provided for by the FFCRA must be extended to employees who were laid off after March 1, 2020 but subsequently rehired (provided that they had been employed for more than 30 days prior to being laid off).

Looking Forward

As described above, the Act includes a number of economic stimulus measures, each designed to protect employers or employees during the current period of expected economic decline.

In many cases, these provisions are self-implementing, meaning they are effective as of the signing the Act by the President and require no further action. For example, the Medicare sequester, which reduces payments to physicians by 2%, would be automatically lifted from May 1, 2020 through December 31, 2020. Similarly, educational institutions will be permitted to award additional supplemental education opportunity grants to students impacted by COVID-19, and the loan provisions discussed below will go into effect as of the date of enactment.

However, other provisions will explicitly require rulemaking or guidance from government agencies to enable and ensure full implementation, meaning that immediate relief may be days or weeks away. For example, the Secretary of HHS will need to develop an application and process for healthcare providers seeking access to a new \$100 billion relief fund, and the Secretary of Education will be provided with waiver authority to provide waivers from certain provisions of the Elementary and Secondary Education Act, other than civil rights laws. Your Foley Hoag attorney is available to assist and advice in the coming days, weeks, and months as the stimulus package rolls out.

Summarized below is some practical information regarding likely implementation for some of the major loan and grant programs, including the conditions placed on stimulus dollars and likely time frames for availability.

Next Steps: Loans Available to All Eligible Businesses. As noted above, the Act provides for \$454 billion in support of the Federal Reserve's lending facilities to eligible businesses, states, and municipalities. "Eligible businesses" include a U.S.-domiciled business that has not otherwise received adequate economic relief in the form of loans or grants provided by the Act. Generally, all borrowers of funds must maintain current employment levels until September 30, 2020, to the extent practicable, and at least 90% of its employees. The duration of the loans should be as short as possible, and not more than five years, and may not be forgiven. Certain of these loan funds will be targeted at nonprofit organizations of between 500 and 10,000 employees, and would be subject to additional loan criteria. In addition, the Act provides for direct lending to passenger air carriers and related businesses (\$25 billion); cargo air carriers (\$4 billion); and businesses important to maintaining national security (\$17 billion). Under these loan provisions, the Secretary of the Treasury is authorized to take the actions deemed necessary to carry out the provision, including but not limited to: hiring employees; entering into contracts; establishing vehicles authorized to purchase, hold, and sell assets and issue obligations; and issue regulations and guidance as necessary or appropriate to facilitate the loans.

Because the Secretary of the Treasury must publish application procedures and minimum requirements for loans within 10 days of enactment, we expect clarifying guidance from the Treasury on accessing these loans in the coming days.

Next Steps: Tax Credits Available to All Eligible Employers. Congress created a refundable payroll tax credit generally equal to 50% of the qualified wages (up to a maximum of \$10,000), paid to each employee per calendar quarter. Eligible employers generally are those that have had their operations fully or partially suspended by governmental order due to the COVID-19 pandemic or have seen their gross receipts drop by more than 50% for the same quarter from the prior year. Eligibility subsequently will terminate after the employer has seen a calendar quarter with gross receipts that are more than 80% of the gross receipts for the same quarter from the prior year.

For employers with more than 100 full-time employees, "qualified wages" generally are wages that the employer pays employees who are not providing services due to the suspension of the business or a drop in gross receipts. For employers with 100 or fewer full-time employees, all wages paid to employees during the applicable period of a suspension of business or a drop in gross receipts generally are qualified wages. The refundable payroll tax credit only applies to qualified wages paid after March 12, 2020 and before January 1, 2021. An employer that receives a loan pursuant to the Paycheck Protection Program for Small Businesses (described above) is not eligible for this refundable payroll tax credit.

The Secretary of the Treasury shall issue guidance, on an unspecified timeline, to implement this provision, including with respect to providing such credits in the short term.

Next Steps: Loans Available to Qualifying Small Businesses. Certain qualifying small businesses are eligible for a federal-guaranteed emergency Paycheck Protection Program, which provides for loans with an annual fixed-interest rate not to exceed 4% for business interruption due to COVID-19. Loans are generally available to help cover payroll costs and working capital expenses. Eligible borrowers include businesses and non-profits that employ not greater than 500 employees, or, if applicable, the Small Business Administration's size standard for employees, sole proprietors/independent contractors/self-employed people, and food service businesses with multiple locations but that employ not more than 500 people per location. The loans are available for qualifying businesses operational February 15, 2020 through June 30, 2020. The total amount appropriated for these loans is approximately \$349 billion. Importantly, a qualifying small business shall be eligible for loan forgiveness equal to: 1) payroll costs; 2) interest payments on a mortgage obtained prior to February 15, 2020; 3) rent payments obligated before February 15, 2020; and 4) utility payments for services begun prior to February 15, 2020, made during the eight weeks beginning on the date of origination of a loan provided under this provision.

Qualifying small businesses that are: 1) located in a designated disaster area; 2) have suffered substantial economic injury as a result of COVID-19; and 3) are a "small business" under SBA guidelines may be eligible for the SBA Economic Injury Disaster Loan Program. This program provides for up to \$2 million in Disaster Loans with an annual fixed-interest rate of 3.75% that may be used for working capital and to cover payroll and sick leaves costs. The SBA has been appropriated \$10 billion to carry out these loans. Additional loan subsidies and guarantees are available for Community Advantage, 504, and microloan products.

Pursuant to the Act, the SBA must issue regulations related to these loans within 15 days after enactment. Importantly, the regulations promulgated by the SBA shall be made without regard to the notice-and-comment requirements contained in the Administrative Procedures Act, meaning eligible businesses and non-profits will have the opportunity to apply for and access these funds in relatively short-order.

Next Steps: Funds Available to Nonprofits and State Governments. The Act provides payment to state governments to reimburse nonprofits, government agencies, and Indian tribes for the half the costs they incur through December 31, 2020 to pay unemployment benefits. Under this provision, Secretary of Labor may issue clarifying guidance to the states. Additionally, the Act provides funding to supplement state unemployment benefits, including by providing an additional \$600/week for each recipient of unemployment insurance or Pandemic Unemployment Assistance for up to 4 months, as well as funding to states to pay the costs of the first week of unemployment benefits through December 31, 2020 for states that choose to pay recipients upon becoming unemployed rather than waiting one week before the individual becomes eligible.

To access such funds, a state must enter into and participate in an agreement with the Secretary of Labor. Such agreements may be terminated upon 30 days' written notice to the Secretary of Labor.

Next Steps: Funds Available to Healthcare Providers. The Act appropriates \$100 billion to reimburse, through grants or otherwise, eligible healthcare providers for healthcare-related expenses or lost revenue attributable to COVID-19. Under this provision, "eligible healthcare providers" means public entities, Medicare or Medicaid enrolled suppliers and providers, and other for-profit and non-profit entities as the Secretary of HHS may specify, that provide diagnoses, testing, or care for individuals with possible or

actual cases of COVID-19. These funds are available for building or constructing temporary structures, leasing property, medical supplies and equipment, increased workforce and training, emergency operation centers, retrofitting facilities, and surge capacity.

To be eligible for these funds, a healthcare provider must submit an application to the Secretary of HHS, which we expect HHS to develop in the coming days.

Foley Hoag has formed a firm-wide, multi-disciplinary [task force](#) dedicated to client matters related to the novel coronavirus (COVID-19). For more guidance on your COVID-19 issues, visit our [Resource Page](#) or contact your Foley Hoag attorney. For guidance on CARES Act issues, please contact [Tad Heuer](#), [Colin Zick](#), or [Christopher Feudo](#).