Federal Response to COVID-19 / Coronavirus – CARES Act

03.27.2020

Today, March 27, 2020, within the last few hours, the U.S. House of Representatives passed the unprecedented over $2 trillion federal stimulus package referred to as the "Coronavirus Aid, Relief, and Economic Security Act" or the "CARES Act" that was passed by the U.S. Senate this past Wednesday. President Trump has already indicated that he will sign the CARES Act into law immediately. The CARES Act, which totals 880 pages, provides emergency assistance and health care response for individuals, families, and businesses affected by the 2020 coronavirus pandemic. Businesses, particularly those with less than 500 employees, should be aware of the significant relief measures available to them under the CARES Act.

Paycheck Protection Program

During the period from February 15, 2020 through June 30, 2020, employers with not more than 500 employees are eligible to receive a payment protection program (PPP) loan with forgiveness features under section 7(a) of the Small Business Act (SBA). Unlike other SBA loans, there is no requirement that the employer be unable to obtain credit elsewhere. Priority to processing and disbursement of such loans is given to small business concerns as defined under the SBA and businesses in operation for less than 2 years.

The maximum amount of the PPP loan is the lesser of (i) the sum of (a) 2.5 times the average monthly payments for the business's "payroll costs" (as defined below) incurred during the 1-year period before the date on which the loan is made and (b) the outstanding amount of any economic injury disaster (EID) loan under section 7(b)(2) of the SBA made after January 31, 2020 being refinanced by the PPP loan or (ii) $10 million. Alternative metrics are used in determining the maximum loan amount for seasonal employers and employers that have not been in business for more than 1 year.

During the PPP "covered period" which began on February 15, 2020 and ends on June 30, 2020, the proceeds of the PPP loan may be used for "payroll costs," mortgage payments, rent, utilities and interest on any other debt obligations incurred before the covered period, in addition to the uses already allowed under the SBA. The term "payroll costs" *includes* employee compensation (*i.e.*, salary, wages, commission, payment of cash tip or equivalent, paid vacation, sick, medical, or family leave, costs related to the continuation of group health care benefits, including insurance premiums, payment of any retirement benefits, and payment of state or local taxes assessed on employee compensation) and the sum of payments of any compensation to a sole proprietor or independent contractor that is a wage, commission, or similar compensation in an amount not more than $100,000 in 1 year as prorated for the covered period (*i.e.*, $37,500), but does *not include* individual annual employee compensation exceeding $100,000 as prorated for the covered period (*i.e.*, $37,500), certain federal taxes, compensation of employees whose principal place of residence is outside of the United States, and qualified sick or family leave

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wages for which a credit is allowed under the Families First Coronavirus Response Act.

Of critical importance, businesses are eligible for forgiveness of indebtedness under a PPP loan in an amount equal to the sum of the following costs incurred or payments made during the 8-week period beginning on the date of the origination of the PPP loan: payroll costs, mortgage interest payments, rent, and utilities. In order to take full advantage of this 8-week forgiveness period, businesses taking out a PPP loan should do so no later than May 5, 2020 (*i.e.*, 8 weeks before the end of the "covered period" on June 30, 2020). Amounts that are forgiven that would otherwise be includible in gross income for federal income tax purposes are excluded from gross income.

Eligibility for forgiveness is conditioned on providing certain documentation, including verification of the number of full-time employees on payroll and pay rates, mortgage interest payments, rent and utilities. The amount of indebtedness forgiven is reduced for reductions in the average number of full-time employees or compensation for certain employees during such 8-week period. Reductions to employees and compensation made during the period from February 15, 2020 through 30 days after the CARES Act has been enacted are exempted from this calculation provided that the employer has eliminated such reductions by June 30, 2020.

As regards any portion of the PPP loan remaining after reduction based on the loan forgiveness feature, the following loan terms apply: The loan has a maximum maturity of 10 years from the date of the borrower's application for loan forgiveness. The PPP loan will bear interest not to exceed 4%. Amounts owed may be deferred for a period of not less than 6 months and not more than 1 year.

Additional features of the PPP include the following: As alluded to above, an EID loan under section 7(b)(2) of the SBA made after January 31, 2020 may be refinanced as part of a PPP loan. The PPP loan is non-recourse to the extent the proceeds are used for permitted purposes and no personal guarantee or collateral is required. Additional benefits of a PPP loan include waivers of fees and prepayment penalties that would otherwise apply to other loans under the SBA.

Emergency EID Loan Grants

In addition to instituting the PPP, the CARES Act expands the economic injury disaster (EID) program under section 7(b)(2) of the SBA. During the "covered period" beginning on January 31, 2020 and ending on December 31, 2020, businesses with not more than 500 employees are eligible for an EID loan, in addition to other business concerns already eligible under the SBA.

During such covered period, certain requirements previously in effect under the SBA have been waived, including the rules related to personal guarantees on advances and loans of not more than $200,000, the requirement that the applicant be in business for 1 year before the disaster (except that the business must have been in operation on January 31, 2020), and the requirement that the applicant be unable to find credit elsewhere.

In advance of receiving approval for an EID loan, applicants may request an emergency grant "advance" of up to $10,000 to pay for certain costs, including paid sick leave to employees unable to work due to the direct effect of COVID-19, payroll to retain employees during business disruptions or substantial slowdowns, making rent or mortgage payments, and repaying obligations that cannot be met due to revenue losses. Although categorized as an "advance," there is no requirement that the applicant repay advanced amounts, even in the event such applicant is subsequently denied an EID loan. Advances are to be funded within 3 days of application. Any such advanced amount reduces the amount of forgiveness under a PPP loan.

Tax Relief

<u>Employee Retention Credit</u>. Eligible employers are entitled to a credit against payroll tax in an amount equal to 50% of the first $10,000 in wages per employee paid after March 12, 2020 and before January 1, 2021. Eligible employers consist of any employer that carried on a trade or business during the calendar year 2020 and either (i) has had its trade or business fully or partially suspended due to governmental authority orders in response to COVID-19 or (ii) experienced a year-over-year reduction in gross receipts of at least 50% (until gross receipts exceed 80% year-over-year). Employers receiving a PPP loan are not eligible for this credit.

Delay of Payment of Employer Payroll Taxes. The due date of an employer's share of Social Security tax for its employees that would otherwise be due for the period from the enactment of the CARES Act through January 1, 2021 is delayed, with 50% of such amounts due on December 31, 2021 and the other 50% of such amounts due on December 31, 2022.

Modifications for Net Operating Losses. The CARES Act suspends the Tax Cuts and Jobs Act's 80% of taxable income limit on net operating loss carryovers for the tax years beginning in 2018, 2019, and 2020, such that net operating loss could be used to fully offset taxable income. The CARES Act also provides that net operating losses arising in 2018, 2019 and 2020 can be carried back 5 years.

Modification of Limitation on Business Interest. The CARES Act temporarily increases the limitation on interest deductions under the Tax Cuts and Jobs Act from 30% of adjusted taxable income to 50% of adjusted taxable income for the taxable years beginning in 2019 and 2020.

Advance Refunding of Credits. The CARES Act provides clarification that employers and the self-employed can receive tax credits in advance for paid family leave costs.

Stone Pigman lawyers are ready and available to assist businesses with navigating and taking advantage of the massive and unprecedented relief measures available to businesses under the CARES Act during these times.