

Opportunities For Small Business in the CARES Act of 2020

This is an updated version of a previously published Brownstein client alert, based on various guidance issued since the date of original publication.

The Coronavirus Aid, Relief, and Economic Security (CARES) Act provides assistance to small businesses impacted by COVID-19. Congress did not, however, provide a one-size-fits-all solution. Instead, small businesses must determine their eligibility for various assistance programs. This guide outlines the provisions in the Act to help small businesses determine whether to proceed with an application for a loan, how to claim an elective tax incentive, and how to comply with certain changes in the tax code.

In addition to the CARES Act, President Trump signed into law the Families First Coronavirus Response Act (FFCRA) of 2020, which imposes a mandate on many small businesses to provide paid sick leave and paid expanded Family and Medical Leave Act benefits. Qualified wages under these programs are eligible for a 100% refundable payroll tax credit to help small businesses cover most of the costs. This document also provides information on the mandates and tax credits in the FFCRA.

For more information on any of these provisions, contact the Brownstein COVID-19 Small Business Team.

Contents

I.	Liquidity: What Programs are Available to Help Small Businesses Struggling with Liquidity Issues?	2
	A. Paycheck Protection Program.....	2
	B. Economic Injury Disaster Loans (EIDL) and Emergency Economic Injury Grants.....	5
	C. Small Business Debt Relief / Subsidy for Certain Loan Payments.....	6
	D. Deferred Employer Payroll Taxes	6
	E. Main Street Fund for Larger Businesses.....	7
II.	Employee Retention: What Other Assistance is Available to Help Retain Employees?	8
	A. Employee Retention Tax Credit.....	8
	B. Unemployment Benefits (UI).....	12
	C. Short-Time Compensation (STC) Arrangements.....	13
	D. Advance Payment of Tax Credits for Qualified Sick and Qualified Family Leave Wages and Employee Retention.....	14
III.	Employee Benefits: What New Benefits are Created by the Law?	15

A. Paid Sick Leave.....	15
B. Paid Family and Medical Leave (FMLA) Act.....	16
C. Access to Defined Contribution Retirement Funds.....	17
D. Exclusion of Employer Payments of Student Loans.....	17
IV. Acceleration of Tax Cuts: How Do I Accelerate and Take Advantage of New Tax Benefits?	18
A. Carryback of Net Operating Losses.....	18
B. Increased Deduction for Interest Expense.....	18
C. Accelerated Depreciation of Qualified Improvement Property.....	18
V. Individual Relief: What Other Relief is Available to Individuals?	18
A. Economic Impact Payments/Rebates.....	18

I. [Liquidity: What Programs are Available to Help Small Businesses Struggling with Liquidity Issues?](#)

A. [Paycheck Protection Program \(PPP\)](#)

1. [Who is eligible?](#)

To be eligible for a PPP loan, an applicant generally must (i) have fewer than 500 employees whose principal place of residence is in the United States; or (ii) be a small business under the applicable North American Industry Classification System (NAICS) code [employee size standard](#). Every industry is assigned a distinct NAICS code, which determines eligibility for small business loans.

Additionally, if your business is already considered a small business under the Small Business Act, then you are eligible for a loan. Eligibility for a loan is also extended to (i) I.R.C. sec. 501(c)(3) nonprofits; (ii) veterans organizations; and (iii) tribal small business concerns with 500 or fewer employees or based on the applicable size standard for the industry. Sole proprietors, independent contractors and other self-employed individuals may also participate in the program.

Prior to the COVID-19 pandemic, the SBA also implemented restrictions on the types of businesses that may receive SBA loans under 13 CFR sec. 120.110. Currently, only nonprofits have been exempted from this regulation.

2. [What if a business is affiliated with a larger company or has more than one location?](#)

The SBA also determines eligibility through the application of an affiliation test outlined in 13 CFR sec. 121.103. The SBA has specific rules that explain when another person, business or entity is considered an affiliate for size purposes. The affiliation test weighs a number of factors related to ownership and control of the small business. [Guidance](#) released on April 8, 2020 states that four tests for affiliation apply. These tests are (i) affiliation based on ownership – such as over 50% of voting equity; (ii) affiliation arising under stock options, convertible securities, and agreements to merge; (iii) affiliation based on management; and (iv) affiliation based on identity of interest with close relatives.

If a small business is determined to be an affiliate, then it might not meet the requirements to be classified as a small business for SBA lending purposes. However, this will depend on whether the combined employee count for all affiliates exceeds 500 or the applicable NAICS code size standard

(employee count or revenue threshold).

Example 1: Two affiliates each have 25 employees, for a combined employee count of 50. The entity would still be eligible for SBA loans because it meets the size standard requirement for small businesses.

Example 2: Two affiliates in the wireless telecommunications carriers industry each have 500 employees, for a combined employee count of 1,000. While the entity exceeds the 500 employee threshold, it still meets the applicable NAICS code size standard of 1,500 for the telecommunications industry. As a result, the entity still qualifies for an SBA loan.

Example 3: Two affiliates in the child care industry each have 500 employees, for a combined employee count of 1,000. The affiliates have \$7.5 million in combined revenue. While the entity exceeds the 500 employee threshold, it still meets the applicable NAICS code revenue standard of \$8 million for the child care industry. As a result, the entity still qualifies for an SBA loan.

The SBA's affiliation test is waived during the covered period for hospitality and restaurant industries (NAICS Code 72), franchises that are listed on the SBA's Franchise Directory and small businesses that receive financing through the Small Business Investment Company (SBIC) program.

NAICS Code 72 businesses with more than one physical location and 500 employees or less at each location are also eligible to apply on a location by location basis.

Additional guidance released in the form of an interim final rule on affiliation also exempts faith-based organizations if the application of the affiliation test would "substantially burden those organizations' religious exercise."

3. **What is the amount of the loan?**

The bill authorizes \$350 billion in small business interruption loans administered by the SBA. Due to the volume of applicants for the program, Congress is working to pass additional funds to replenish the program.

Loan amounts are 250% (2.5 times) of the average total monthly payroll costs (including health care and some other costs) incurred during the previous 12 months or from calendar year 2019, plus any outstanding balance of an Economic Injury Disaster Loan made after Jan. 31, 2020 and received before April 3, 2020. For more information on EIDL loans, see Section B below.

If you were not in business from Feb. 15, 2019 through June 30, 2019, then a loan amount is 250% (2.5 times) the average payroll costs incurred from Jan. 1, 2020 through Feb. 29, 2020, plus any outstanding balance of an Economic Injury Disaster Loan made after Jan. 31, 2020 and received before April 3, 2020.

Loans are capped at \$10 million. Payroll costs are the total of compensation such as employee salaries, wages, commissions or similar compensation as well as tips or equivalent compensation; vacation, parental, family, medical or sick leave; severance pay; health care benefits, including insurance premiums; retirement benefits; and state and local taxes paid on employee compensation.

Compensation in excess of \$100,000 per employee is not taken into account in computing total payroll cost (determined on a pro-rata basis for the covered period). The \$100,000 applies only to cash compensation, not to non-cash benefits such as retirement plans, health care coverage, and

state and local taxes. Additionally, the compensation of any employee whose principal place of residence is outside of the United States may not be included in the payroll calculation.

Borrowers, not lenders, must attest to the accuracy of their payroll calculations on the form and are responsible for calculation errors. However, the SBA recognizes that applicants may have submitted forms prior to additional guidance, and applicants will only be expected to comply with guidance available at the time of the application.

Lenders must allow interest payments on loans to be deferred for at least six months and up to one year. The interest rate on the loans is currently set at 1%. The current term of the loans is two years.

4. What can these loans be used for?

The program provides loans to small businesses for the covered period of Feb. 15, 2020 through June 30, 2020 to cover payroll costs, mortgage payments, rent, utilities, and interest on any other debt obligations that were incurred before the covered period.

5. Is there loan forgiveness?

Partial loan forgiveness is available for loan proceeds used to cover eight weeks of payroll costs (for U.S. employees), mortgage interest, rent, and utility payments. The eight weeks of covered payroll costs begin when the lender disburses the loan. Guidance from SBA and the Department of the Treasury (“Treasury”) has stated lenders must disburse loan proceeds within 10 days of approval of the loan. To qualify for forgiveness, funds used to cover non-payroll costs may not exceed 25%.

Employers who lay off employees or reduce employee compensation may have their forgiveness amounts reduced. The loan forgiveness reduction is based on (i) the number of full-time equivalent (FTE) employees in the eight-week period following the origination date of the loan compared to the number of FTE employees between Feb. 15, 2019 through June 30, 2019, or Jan 1, 2020 through Feb. 29, 2020, and (ii) the reduction in compensation by more than 25% for employees over the eight-week period following the origination date of the loan. If the employer has laid off employees or reduced wages by more than 25% between Feb. 15, 2020 and April 26, 2020, and by June 30, 2020 has rehired employees or reinstated wages, the earlier reduction will not be taken into account in determining loan forgiveness.

6. Where can I apply for a loan?

Participating SBA-approved lenders have the authority to make and approve the loans. The loans do not need to be approved by the SBA. SBA and Treasury are working to extend authority to make these loans to a much larger group of banks.

7. What are the borrower requirements and costs?

The borrower must certify (i) that the loan request is necessary to support ongoing operations because of the uncertainty of current economic conditions and (ii) the funds will be used for the allowable purposes listed above in “What can these loans be used for?”

Guarantee fees and yearly fees that normally apply to SBA loans are waived.

There is no requirement that the borrower must be unable to obtain credit elsewhere and no collateral or personal guarantee is required.

Additional requirements, such as providing a list of all owners of 20% or more of the business' equity, can be found on the [application form](#). Note that lenders may use their own application form to collect the same information.

8. **What are the documentation requirements?**

The [interim final rule](#) requires payroll processor records and payroll tax filings. For sole-proprietors Form 1099-MISC, or income and expenses are needed. If this documentation is not available, borrowers must provide other supporting documentation, such as bank records, sufficient to demonstrate payroll costs.

At the very least, prospective applicants should start to gather (i) payroll records dating as far back as Jan. 1, 2019; (ii) the last three months of mortgage statements; (iii) the last three months in rent payments/invoices if you don't own the property; and (iv) the last three months in utility bills.

9. **What Is the Maturity/Interest Rate/Deferral/Guarantee on the Loan?**

The maturity on loans is 2 years. The interest rate on the loan is 1%. A borrower may defer payment on a loan for at least six months and not more than one year. Loans are 100% federally guaranteed.

10. **How do I access a loan?**

Treasury has released additional information for borrowers and lenders that is updated frequently. You can access the Treasury guidance [here](#).

B. Economic Injury Disaster Loans (EIDL) and Emergency Economic Injury Grants

1. **What is the EIDL?**

The EIDL program is a pre-existing program available to certain small businesses located in areas subject to a presidential disaster declaration that have suffered a substantial economic injury as a result of the disaster. The EIDL has been extended to provide assistance to businesses affected by the COVID-19 pandemic.

2. **Who is eligible?**

Eligible entities are businesses, cooperatives, employee stock ownership plans (ESOPs), tribal small business concerns with fewer than 500 employees or within the applicable SBA size standard for their industry, whichever is higher. Eligible entities also include any individual operating as a sole proprietor or an independent contractor.

3. **What is the amount of the loan?**

The bill also provides \$10 billion in funds for EIDL grants. The EIDL grant allows small businesses to receive immediate cash payments of \$10,000 in three days and waive certain requirements on loans of less than \$200,000.

The maximum loan amount for an EIDL is \$2 million. EIDL loans are based on an applicant's actual economic injury as determined by the SBA.

Applicants may later convert to the larger SBA 7(a) loan program if an applicant applied for an EIDL

loan after Jan. 31, 2020 and received funds before April 3, 2020.

4. **What can the loan be used for?**

EIDL loans can be used to cover the following costs:

- Rent or mortgage payments;
- Maintaining payroll or paid sick leave or paid leave benefits to employees unable to work due to COVID-19;
- Working capital to continue other business operations;
- Increased supply costs; and
- Repayment of debt that cannot be otherwise repaid due to revenue losses.

5. **Are EIDL loans forgivable?**

EIDL loans are not generally eligible for forgiveness. However, under the CARES Act, EIDL loan advances up to \$10,000 are not required to be paid back. EIDL loans may also be refinanced under a PPP loan if EIDL loans were taken out after Jan. 31, 2020 and received before April 3, 2020.

6. **What is the interest rate?**

The interest rate for an EIDL is 3.75% for small businesses and 2.75% for nonprofit entities.

7. **Can I get an EIDL Grant and a Paycheck Protection Loan?**

Yes, under the CARES Act, a business that received an EIDL grant may later apply for an SBA 7(a) Paycheck Protection Program loan. The Paycheck Protection Program (PPP) allows the outstanding EIDL balance to be refinanced if an applicant applied for an EIDL loan after Jan. 31, 2020 and received funds before April 3, 2020.

C. **Small Business Debt Relief / Subsidy for Certain Loan Payments**

1. **Who is eligible for the program?**

This program will provide immediate relief to small businesses with non-disaster SBA loans, in particular 7(a) loans not made under the PPP, 504 loans, and microloans.

2. **How does debt relief under this program work with a Paycheck Protection Program loan?**

Borrowers may separately apply for and take out a PPP loan, but debt relief under this program will not apply to a PPP loan.

3. **What benefit is provided under this program?**

The SBA will cover all loan payments on these SBA loans, including principal, interest, and fees, for six months. This relief will also be available to new borrowers who take out eligible loans within six months of March 27, 2020.

D. **Deferred Employer Payroll Taxes**

1. **Who is eligible to defer payroll taxes?**

Generally, all employers are allowed to defer paying the employer portion of certain payroll taxes.

2. Under what circumstances is a taxpayer ineligible for payroll tax deferral?

A deferral is not available to employers who have debt forgiven through the PPP, described below. A deferral is also not available for taxpayers who have debt forgiven related to the financing of certain short-time compensation agreements. It is not clear how deferrals made prior to debt forgiveness related to short-time compensation agreements will be treated.

3. How does this provision work?

Employers may delay payment of 100% of the 6.2% employer-share of the old-age, survivors, and disability insurance (OASDI) portion of Federal Insurance Contribution Act (FICA) taxes due on wages paid after the date of enactment through the end of 2020. Similarly, self-employed individuals may delay the payment of 50% of the OASDI portion of SECA taxes on self-employment income earned after the date of enactment through the end of 2020.

4. When are the deferred amounts required to be paid back?

The deferred amounts are required to be paid in two installments: 50% on Dec. 31, 2021, and 50% on Dec. 31, 2022. No interest is owed on account of the deferral.

5. What tax payments are not delayed through this provision?

This provision does not delay the payment and deposit of (i) the employer's share of the hospital insurance (HI) portion of FICA, (ii) the employees' portion of any FICA taxes (OASDI and HI portions) that are required to be withheld from employee wages, or (iii) any of the HI portion of SECA imposed on self-employment income.

6. What happens if a PPP loan is forgiven after payroll taxes have been deferred?

Once a PPP loan has been forgiven, the employer is no longer permitted to defer payment of the 6.2% employer-share of OASDI taxes due on wages paid. Post loan forgiveness, those taxes must be deposited. However, employer taxes that had been deferred prior to the loan forgiveness will continue to be deferred and will be due, 50% on Dec. 31, 2021 and 50% on Dec. 31, 2022.

7. What is the benefit of this provision?

This provision frees up cash for all businesses and self-employed individuals to fund operations and support retaining employees. A deferral over the next two years also avoids lump sum payments, which could create cash flow difficulties for employers who take advantage of the payment deferral.

E. Main Street Fund for Larger Businesses

1. What other liquidity measures does the CARES Act contain?

The CARES Act gives \$454 billion to Treasury to be used to capitalize one or more loan facilities, established by the Federal Reserve (Fed), to make direct secured business loans to companies. The Act gives broad discretion to the Fed and Treasury to create the specific rules for the program.

On April 9, the Fed announced new lending facilities and expanded existing lending facilities for mid-sized "Main Street" businesses, larger investment grade businesses, capital markets and

municipal securities. Treasury and the Fed have not yet committed the full \$454 billion of CARES Act money allocated for credit support to lending facilities; more loan programs, or expansion of these now existing loan programs, could be forthcoming.

2. Who is eligible for this fund?

The Fed and Treasury have created four programs to date:

- **Primary Market Corporate Credit Facility (PMCCF):** Will purchase corporate bonds or syndicated loans issued by or made to any borrower that is rated at investment grade (BBB-/Baa3 or higher), as well as those assets with respect to a borrower that was investment grade as of March 22, 2020, and was subsequently downgraded to not lower than BB-/Ba3.
- **Secondary Market Corporate Credit Facility (SMCCF):** Will function similarly to PMCCF, but will facilitate liquidity in existing corporate bonds and syndicated loans.
- **Main Street New Loan Facility (MSNLF):** Will purchase 95% participations in new loans to businesses that have up to 10,000 employees or up to \$2.5 billion in 2019 annual revenue. Borrowers with more than 10,000 employees, but less than \$2.5 billion in 2019 revenue, may potentially qualify. The maximum loan size is the lesser of: (i) \$25 million or (ii) an amount that does not result in the borrower's pro forma leverage to exceed four times 2019 earnings before interest, taxes, depreciation and amortization (EBITDA). Borrowers must also make certain attestations, which may take the form of loan covenants, including an attestation that the proceeds will not be used to pay dividends or buy back stock while the loan is outstanding plus one year thereafter, or to increase certain executive compensation over 2019 levels.
- **Main Street Expanded Loan Facility (MSELF):** Eligible loans have the same characteristics as those eligible for purchase by the MSNLF, described above, except that the maximum loan size for this facility is the lesser of: (i) \$150 million; (ii) 30% of the borrower's maximum (including undrawn) bank debt; and (iii) an amount that does not result in the borrower's pro forma leverage exceeding six times 2019 EBITDA.

3. Who will administer the loan program?

The Fed loan program will be administered by the Federal Reserve Bank of New York. Loan agreements will be entered into and funds disbursed by commercial banks, which will present the loans to the Fed facility, which will buy the loans to ensure continued liquidity. When the loan program opens, eligible borrowers should inquire about eligibility and loan terms through their existing banking relationships.

II. Employee Retention: What Other Assistance is Available to Help Retain Employees?

A. Employee Retention Credit for Employers Subject to Suspension or Experiencing Economic Hardship

1. What is the amount of the credit?

The CARES Act provides a refundable tax credit, capped at \$5,000 per employee, for 50% of

qualified wages up to \$10,000 paid to employees from March 13, 2020 through Dec. 31, 2020.

2. Who is Eligible?

Any employer carrying on a trade or business during calendar year 2020 and with respect to any calendar quarter qualifies if:

- they are subject to a full or partial shut-down order due to the COVID-19 crisis; or
- they see gross receipts decline by more than 50% when compared to the same quarter in the prior year. In the event the qualifying event is a decline in gross receipts, the employer remains eligible for the credit during 2020 until the quarter following the 2020 quarter it reaches 80% of gross revenues compared to the prior year.

In addition, organizations exempt from tax under I.R.C. sec. 501(c) are eligible.

3. Who is an employer?

Generally, any active trade of business in 2020 treated as a common employer for tax purposes. This does not apply to government entities.

4. What constitutes fully or partially suspended operations?

The operation of a business may be suspended if an appropriate governmental authority imposes restrictions upon the business operations by limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19 such that the operation can still continue to operate but not at normal capacity.

5. What are qualified wages?

Greater Than 100 Employees. For businesses with an average of over 100 full time equivalent employees during 2019, qualified wages means wages paid to an employee who is not providing services when (i) the business is suspended for government orders related to COVID-19, or (ii) there is a significant decline in gross receipts. Note, the Senate Finance Committee has released guidance that if an employee is performing services on a reduced schedule, wages paid to that employee are treated as qualified wages to the extent they exceed what the employee would have otherwise been paid for the services performed. The term “qualified wages” does not include required paid sick leave or required paid family leave under the FFCRA, but does include qualified health plan expenses properly allocated to the qualified wages. Qualified wages for an employee may not exceed the amount such employee would have been paid for working an equivalent duration during the 30 days immediately prior to the period.

100 or Fewer Employees. For businesses with an average of 100 or less full time equivalent employees during 2019, qualified wages means wages paid to an employee (whether or not providing services) when (i) the business is suspended under COVID-19 government orders, or (ii) significant decline in gross receipts. The term “qualified wages” does not include required paid sick leave or required paid family leave under the FFCRA, but does include qualified health plan expenses properly allocated to the qualified wages.

There are also restrictions that prohibit (i) employee wages from being eligible for the credit if the employer is allowed a Work Opportunity Tax Credit with respect to the employee, and (ii)

any wages taken into account for the credit for being used to determine the Employer Credit for Paid Family and Medical Leave.

6. How are the credits refundable?

Pursuant to the text of the statute, the CARES Act provides that the credit is allowed against the employer's share of old-age, survivors, and disability insurance (OASDI) taxes.

However, through Notice 2020-22 and the instructions to Form 7200 (Advance Payment of Employer Credits Due to COVID-19), the Internal Revenue Service (IRS) expanded the credit to also allow it against (1) the employees' share of OASDI taxes, (2) the employees' share of Medicare, and (3) federal income taxes withheld from employees' wages.

The credit will be applied to offset any remaining tax liability on the employment tax return and the amount of any remaining excess will be reflected as an overpayment on the return. The overpayment will be subject to offset under I.R.C. sec. 6402(a) prior to being refunded to the employer.

Example: Employer pays \$10,000 in qualified wages to Employee A in Q2 2020, with the resulting tax obligations set forth in the below table:

ER Share OASDI	\$620
EE Share OASDI	\$620
ER Share HI	\$145
EE Share HI	\$145
EE Fed Income Tax WH	\$1,470
Total	\$3,000

In this case, if Employee A was the only employee, Employer would not send in any of these taxes. The ERTC available to Employer for the qualified wages paid to Employee A is \$5,000. This amount may be applied against the employer share of Social Security taxes that Employer is liable for with respect to all employee wages paid in Q2 2020, and then can be applied to the other employment taxes. Any excess over Employer's share of Social Security taxes is treated as an overpayment and refunded to Employer after offsetting the other tax liabilities in the table above and subject to any other offsets under I.R.C. sec. 6402(a).

7. How does an employer claim the credit?

Employers will report their total qualified wages and the related credits for each calendar quarter on their federal employment tax returns, usually quarterly on Form 941 (though I.R.C. sec. 6302 generally requires deposits of employment taxes to be made on a monthly or bi-weekly basis).

In anticipation of receiving the credits, employers can fund the credits with federal employment taxes, including withheld taxes, that are required to be deposited with the IRS or by requesting an advance of the credit from the IRS on Form 7200.

Practical Note: Employers should stop depositing employment taxes to the extent they will claim

the credit.

8. Can eligible employers claim the credit for qualified wages paid in March 2020?

Yes, an eligible employer can claim the credit for qualified wages paid as early as March 13, 2020. Credits claimed for March may be claimed on Form 941 (or other applicable employment tax return) for the second quarter of 2020 or through a request for advance payment on Form 7200.

9. May an employer reduce its federal employment tax deposit by the qualified wages that it has paid without incurring a failure to deposit penalty?

Yes, an eligible employer will not be subject to a penalty under I.R.C. sec. 6656 for failing to deposit federal employment taxes relating to qualified wages in a calendar quarter if:

- the employer paid qualified wages to its employees in the calendar quarter before the required deposit,
- the amount of federal employment taxes that the employer does not timely deposit, reduced by any amount of federal employment taxes not deposited in anticipation of the paid sick or family leave credits claimed under the FFCRA, is less than or equal to the amount of the employer's anticipated ERTC for the qualified wages for the calendar quarter as of the time of the required deposit, and
- the employer did not seek payment of an advance credit by filing Form 7200, Advance Payment of Employer Credits Due to COVID-19, with respect to any portion of the anticipated credits it relied upon to reduce its deposits.

10. May an employer receive both the tax credits for the qualified leave wages under the FFCRA and the Employee Retention Tax Credit under the CARES Act?

Yes, but not for the same wages. The amount of qualified wages for which an eligible employer may claim the ERTC does not include the amount of qualified sick and family leave wages for which the employer received tax credits under the FFCRA. This is because the FFCRA credits are refundable against employment taxes as well, and a double benefit is not permitted.

11. How does this interact with the SBA Paycheck Protection Program?

An eligible employer that receives a loan under the PPP is not eligible for the retention credit because those loans may be fully forgiven under circumstances related to COVID-19. However, unless and until a taxpayer is approved for a PPP loan, it can claim the retention credit. If a taxpayer claims the retention credit and later receives a PPP loan, the credit will be recaptured.

12. Will there be additional guidance forthcoming?

Brownstein's comprehensive Q&A Guide to the Employee Retention Tax Credit (with examples) can be found [here](#).

Additional guidance is expected. At a minimum, the CARES Act requires the secretary of the Treasury to issue instructions or guidance necessary (i) to provide for the recapture of the credit if such credit is allowed to a taxpayer who received a PPP Loan in a subsequent quarter, and (ii) for the application of "significant decline in gross receipts" in the case of any employer which was not carrying on a trade or business for all or part of the same calendar quarter in 2019.

B. Unemployment Benefits (UI)

1. What benefits are available to workers under the Pandemic Unemployment Assistance (PUA)?

This program is intended to provide coverage for those individuals not otherwise covered by traditional unemployment benefits. This includes business owners, self-employed individuals, independent contractors, gig workers and those with a limited work history and history of wages earned.

To obtain pandemic unemployment insurance coverage an individual will apply with the state agency and self-certify that they are otherwise able to work and available for work within the meaning of applicable state law except that the individual is unemployed, partially unemployed, or unable or unavailable to work as a direct result of one of the following circumstances:

- They have been diagnosed with COVID-19 or have symptoms of it and are seeking diagnosis;
- A member of their household has been diagnosed with COVID-19;
- They are providing care for someone diagnosed with COVID-19;
- They are providing care for a child or other household member who can't attend school or work because it is closed due to COVID-19;
- They are quarantined or have been advised by a health care provider to self-quarantine;
- They were scheduled to start employment and do not have a job or cannot reach their place of employment as a result of a COVID-19 outbreak;
- They have become the breadwinner for a household because the head of household has died as a direct result of COVID-19;
- They had to quit their job as a direct result of COVID-19; or
- Their place of employment is closed as a direct result of COVID-19.

Individuals who are able to telework with pay or who are receiving sick leave or other paid leave benefits are not eligible. Undocumented workers also do not qualify.

2. What is the amount of the monetary benefit under the PUA?

Generally, unemployed individuals are entitled to the state benefit amount for unemployment compensation.

However, pursuant to the CARES Act, all unemployed workers who receive at least \$1 of unemployment benefits will be entitled to an additional \$600 per week for up to a total of four months (through July 31, 2020) of unemployment related to COVID-19.

3. How long are benefits available under PUA?

For both individuals covered by pre-pandemic UI and those added under PUA, state unemployment benefits will be extended for a total of potential unemployment coverage of 39 weeks.

4. What is the Federal Pandemic Unemployment Compensation (FPUC) program and how does it work with PUA?

The CARES Act creates the Federal Pandemic Unemployment Compensation (FPUC) benefits

program, which provides individuals who are eligible to receive at least \$1 of underlying state unemployment benefits for the claimed week, with the full \$600 FPUC payment.

The FPUC is available for individuals receiving benefits under the following programs:

- Unemployment Compensation for Federal Employees (UCFE);
- Unemployment Compensation for Ex-Servicemembers (UCX);
- Pandemic Emergency Unemployment Compensation (PEUC);
- Pandemic Unemployment Assistance (PUA);
- Extended Benefits (EB);
- Short-Time Compensation (STC);
- Trade Readjustment Allowances (TRA);
- Disaster Unemployment Assistance (DUA); and
- Payments under the Self-Employment Assistance (SEA) program.

5. **Is the FPUC taxable?**

The \$600 FPUC is taxable. Therefore, states must include FPUC when preparing 1099Gs, and must, consistent with sec. 3304(a)(18), FUTA (26 U.S.C. sec. 3304(a)(18)), withhold taxes from the weekly benefit amount and from the \$600 FPUC, when an individual elects to have taxes withheld.

6. **What other benefits did the program provide?**

Traditionally, individuals who have been laid off or furloughed must wait a week to access state unemployment benefits. While many states have already waived this requirement, to help encourage the remaining minority of states that have not yet waived the waiting week requirement to receive unemployment, the CARES Act funds state coverage of the initial week of unemployment.

C. **Short-Time Compensation (STC) Arrangements**

1. **What is a short-time compensation program?**

Short-time compensation (STC) programs, also known as work sharing or shared-work programs, are an alternative to layoffs for employers experiencing a reduction in available work. STC preserves employees' jobs and employers' trained workforces during times of lowered economic activity. STC allows employers to reduce hours of work for employees rather than laying-off some employees while others continue to work full time. Those employees experiencing a reduction in hours are allowed to collect a percentage of their unemployment compensation (UC) benefits to replace a portion of their lost wages.

2. **Do these programs currently exist?**

Yes. Currently, 26 states have operational STC programs, including: Arizona, Arkansas, California, Colorado, Connecticut, Florida, Iowa, Kansas, Maine, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Nebraska, New Hampshire, New Jersey, New York, Ohio, Oregon, Pennsylvania, Rhode Island, Texas, Vermont, Washington, and Wisconsin. Program rules may vary state by state.

3. **Who is eligible?**

Generally, all employers, regardless of size, who have applied to their state's STC program and have had their arrangement approved.

For employees, eligible individuals generally include those who are unemployed, partially unemployed, or unable or unavailable to work because the individual has to quit his or her job as a direct result of COVID-19. This includes closures of the individual's place of work or situations where an employee may not be able to physically report to work and cannot telework.

In order to qualify, employees must have had their hours reduced by at least 10%, but not more than 60%.

4. **How does it work?**

Under the CARES Act, the federal government will temporarily provide full funding for states with existing STC programs. Typically states fund these programs. Employees are permitted to collect a percentage of their unemployment compensation (UC) benefits to replace a portion of their lost wages. Employers must still pay a portion of the employee's wages to the employee and employers must also reimburse the state for half of the amount of UC that the state pays. The federal government will provide funding to the states for the other half. Utilizing this program is a way to retain employees while avoiding layoffs due to reductions in business activity.

For states that do not currently have a STC program, the Act incentivizes the adoption of these programs by reimbursing the states for half the incurred costs.

5. **Are you eligible for STC benefits and the \$600 FPUC payment?**

Yes. If an individual is eligible to receive at least \$1 of underlying benefits for the claimed week, the claimant will receive the full \$600 FPUC.

D. **Advance Payment of Tax Credits for Qualified Sick and Qualified Family Leave Wages and Employee Retention**

1. **What is the benefit of this guidance?**

By filing Form 7200 (Advance Payment of Employer Credits Due to COVID-19), employers who pay qualified sick and family leave wages or qualified wages eligible for the employee retention credit, are eligible for advance payment of such credits to the extent not covered by their employment tax liability (withheld federal income tax, and employer and employee share of social security and Medicare taxes).

For example, if an employer is entitled to an employee retention credit of \$10,000 and was required to deposit \$8,000 in employment taxes, the employer could retain the entire \$8,000 of taxes as a portion of the refundable tax credit it is entitled to an advance payment for the remaining \$2,000 by filing Form 7200.

III. Employee Benefits: What New Benefits are Created by the Law?

A. Paid Sick Leave

1. **To whom does the new paid sick leave law apply?**

Employees who work for employers having fewer than 500 workers. There are certain exemptions for employers with less than 50 employees.

2. **How many hours of sick leave must be provided?**

Employers must provide at least 80 hours of paid sick leave to all full-time employees (10 days or two work weeks. For part-time employees, the number of paid hours provided will depend on the average number of hours worked, over a two-week period.) This paid sick leave applies to all employees regardless of how long they have worked for the employer.

3. **What is the rate of pay?**

The minimum rate of pay is the lesser of full pay or \$511/day, not to exceed \$5,110 for each employee. This rate applies to employees who: (i) are subject to state, federal or local quarantine; (ii) have been advised by a provider to self-quarantine; or (iii) are experiencing coronavirus and are seeking a medical diagnosis.

For employees who are unable to work because (i) they are caring for an individual who is quarantined, or self-quarantined; (ii) they are caring for a child (under the age of 18) due to a school or day care center closure; or (iii) the employee is experiencing a substantially similar condition specified by the Department of Health and Human Services (HHS) in consultation with Treasury and Labor because of COVID-19 precautions, the minimum rate of pay is the lesser of 2/3 of the normal rate of pay or \$200/day, not to exceed \$2,000 for each employee.

4. **What if my business is very small?**

The secretary of Labor can exempt small businesses with fewer than 50 employees if the application of paid sick would jeopardize the viability of their business as a going concern for paying sick leave to employees who are caring for child if school or daycare is closed. However, sick leave must still be provided for employees who are absent due to a diagnosis of or symptoms of COVID-19 or are caring for someone due to their diagnosis of or symptoms of COVID-19.

5. **Am I eligible for a credit for qualified paid sick leave wages?**

Payroll tax credits for the paid sick leave referenced in #3 above are 100% refundable. Credit amounts cannot exceed \$511/day for 10 days for employees who: (i) are subject to state, federal or local quarantine; (ii) have been advised by a provider to self-quarantine; or (iii) are experiencing coronavirus and are seeking a medical diagnosis.

Credit amounts cannot exceed wages of \$200/day for 10 days for employees who are unable to work because (i) they are caring for an individual who is quarantined or self-quarantined; (ii) they are caring for a child (under the age of 18) due to a school or daycare center closure; or (iii) an employee is experiencing a substantially similar condition specified by HHS in consultation with

Treasury and Labor as a result of COVID-19 precautions.

Pursuant to the text of the FFCRA and the CARES Act, the credit is allowed against the employer's share of OASDI taxes. However, through Notice 2020-22 and the instructions to Form 7200, the IRS expanded the credit to also allow it against (1) the employees' share of OASDI taxes, (2) the employees' and employer's share of Medicare, and (3) federal income taxes withheld from employees' wages.

The credit will be applied against these federal payroll and employment taxes and may be increased by qualified health plan expenses that are allocable to the qualified sick pay wages. Credit amounts exceeding the total payroll and employment tax liability are refundable through checks issued by the IRS.

6. What is the effective date for this provision and does it end?

The paid sick leave program begins on April 1, 2020 and sunsets on Dec. 31, 2020.

B. Paid Family and Medical Leave

1. To whom does the new paid Family and Medical Leave Act (FMLA) provision apply?

Employees who work for employers having fewer than 500 workers.

2. How many weeks of paid FMLA leave must be provided?

Paid FMLA leave up to 12 weeks must be provided. However, the first two weeks run concurrently with the paid sick leave noted in the paid sick leave section above. The first two weeks of FMLA leave are unpaid. The paid FMLA leave applies to all employees who have been employed by the employer for at least 30 calendar days.

3. What is the rate of pay?

The rate of pay is the lesser of 2/3 of the normal rate of pay or \$200/day, \$10,000 in the aggregate. Paid FMLA leave applies to employees who are unable to work because they are caring for a child (under the age of 18) due to a school or day care closure because of COVID-19 precautions.

4. What if my business is very small?

The secretary of Labor can exempt small businesses with fewer than 50 employees if the application of paid FMLA leave would jeopardize the viability of their business as a going concern.

5. What if my business laid off employees?

If an employee was laid off by the employer on March 1, 2020 or later, and was subsequently rehired, that employee may access the paid FMLA leave if they have worked for the employer at least 30 of the previous 60 calendar days.

6. Am I eligible for a payroll tax credit for qualified paid FMLA wages?

Payroll tax credits for paid FMLA for reasons referenced in #3 above are 100% refundable. Credit amounts cannot exceed wages of \$200/day or \$10,000 annually for employees who are unable to

work because they are caring for a child (under the age of 18) due to a school or day care center closure because of COVID-19 precautions.

Pursuant to the text of the FFCRA and the CARES Act, the credit is allowed against the employer's share of OASDI taxes. However, through Notice 2020-22 and the instructions to Form 7200, the IRS expanded the credit to also allow it against (1) the employees' share of OASDI taxes, (2) the employees' and employer's share of Medicare, and (3) federal income taxes withheld from employees' wages.

The credit will be applied against these federal payroll and employment taxes and may be increased by qualified health plan expenses that are allocable to the qualified paid family leave wages. Credit amounts exceeding the total payroll and employment tax liability are refundable through checks issued by the IRS.

7. What is the effective date of this provision?

The paid FMLA leave program begins on April 1, 2020 and ends on Dec. 31, 2020.

C. Access to Defined Contribution Retirement Funds

1. What changes does the CARES Act make to defined contribution retirement plans?

The CARES Act waives the 10% early distribution penalty for coronavirus-related distributions up to an aggregate \$100,000 from all eligible retirement plans in the plan sponsor's controlled group. Distribution amounts may be included in an individual's taxable income ratably over three years, subject to taxpayer election. The taxpayer may avoid taxation of the distribution by recontributing the funds to an eligible retirement plan in one or more payments within three years of distribution date and without regard to that year's cap on contributions. The provision applies to coronavirus-related distributions from Jan. 1 through Dec. 31, 2020.

2. What if I have a loan from my retirement plan, but cannot afford my monthly payment?

The legislation delays adverse tax consequences if unable to repay an outstanding loan due to layoff or termination. The legislation modifies requirements for participant loans from qualified plans as follows: for six months, the law increases the maximum plan loan amount available to participants to the lesser of (i) \$100,000; or (ii) the participant's vested account balance. The legislation delays by one year the due date of any outstanding loan payments otherwise due through Dec. 31, 2020; but repayments are to be adjusted to reflect the delayed due date and any interest accruing during the delay.

D. Exclusion of Employer Payments of Student Loans

1. How does this student loan benefit program work?

Under the CARES Act, employer payments during 2020 made to or on behalf of an employee with respect to the principal or interest on any qualified education loan held by the employee will be treated as educational assistance within the meaning of I.R.C. sec. 127 and will be excludible from the employee's gross income. All conditions under sec. 127 must be met, including:

- Total educational assistance program benefits during a calendar year remain limited to

\$5,250 per employee.

- Benefits need to be provided pursuant to a separate written plan of the employer.

IV. Acceleration of Tax Cuts: How Do I Accelerate and Take Advantage of New Tax Benefits?

A. Carryback of Net Operating Losses

1. What is the benefit of this provision?

The provision allows 100% of losses for tax years 2018, 2019, and 2020 (rather than 80%). The provision allows a five-year carryback for losses in tax years 2018, 2019 and 2020. This will allow businesses to carry back 100% of losses as far as 2013 to offset taxable income and access cash to support business operations in 2020 and future years.

The provision suspends the \$250,000 (\$500,000) limitation on individual losses for 2020. The limitation applies to NOLs from pass-through businesses, but also applies to other individual losses. In conjunction with the general NOL provision this will allow individuals a larger loss deduction for 2020 for all losses, and the ability to carry back NOLs from 2018, 2019, and 2020 for five years (from each year, so as far back as 2013).

B. Increased Deduction for Interest Expense

1. What is the benefit of this provision?

For 2019 and 2020, this provision increases the amount of interest expense that businesses (both corporations and partners in partnerships) are allowed to deduct, by increasing the limitation from 30% of adjusted taxable income to 50%. This provision allows businesses to increase liquidity with a reduced cost of capital.

Taxpayer may use 2019 adjusted taxable income, but 2020 interest expense for purposes of their 2020 return.

C. Accelerated Depreciation of Qualified Improvement Property

1. What is the benefit of this provision?

The Tax Cuts and Jobs Act of 2017 had a technical error which required the costs of qualified improvement property (improvements to the interiors of non-residential buildings) to be depreciated over the 39-year life of the building. This provision classifies qualified improvement property as 15-year life, which also allows such property to be eligible for bonus depreciation.

V. Individual Relief: What Other Relief is Available to Individuals?

A. Economic Impact Payments (EIP)/Rebates

1. Who is eligible for these payments?

U.S. residents with adjusted gross income up to \$75,000 (individuals) and \$150,000 (for joint filers) are eligible for a full \$1,200 rebate (\$2,400 for joint filers). An additional \$500 is available per child under the age of 17.

The EIP is reduced by \$5 for each \$100 that a taxpayer's income exceeds a phase-out threshold. The EIP is completely phased out for individuals with adjusted gross income of \$99,000 (\$198,000 for joint filers) with no children.

2. When will the payments be made?

The goal for making the first payments to taxpayers is the week of April 13. In 2008, when the government implemented a similar program, the payments went out in batches and it took about eight weeks for everyone to receive checks.

3. Are the checks taxable?

No, these payments are not subject to tax.

4. Do I have to file any forms to get the EIP?

As long as the taxpayer has filed a 2018 or 2019 tax return (Forms 1040 or 1099 series), the taxpayer should receive the rebate.

Eligibility is generally determined based on 2019 returns. If a 2019 return has not been filed, then eligibility will be based on 2018 tax returns.

5. What about people on Social Security?

People on Social Security retirement or disability are eligible to receive the EIP as long as their total income does not exceed the limit. Qualifying individuals on Social Security do not need to file a tax return, as long as they received an SSA-1099. People receiving Railroad Retirement benefits will also receive their payments automatically.

6. What about other people who are not required to file tax returns?

Treasury and IRS announced a web tool that will allow nonfilers to enter their names, addresses, Social Security numbers and dependent information online. They will also be able to provide banking or other information so that they can set up direct deposit payments, as opposed to receiving paper checks which could take up to five months in some cases.

7. Are there other online tools coming?

Yes, the IRS announced that another online tool will be available on April 17 that will allow people to provide bank account information to the agency if that information was not provided on their tax returns. This new tool will also allow taxpayers to check the status of their EIPs.

CARES Act Bases of Affiliation Under Paycheck Protection Program Loan Provisions

1) Stock Ownership.

a. Control of 50% or more of voting stock.

A person is an affiliate of a concern if the person owns or controls, or has the power to control, 50% or more of the concern's voting stock. This is a non-rebuttable basis for finding affiliation.

b. Voting stock is widely held.

Where a concern's voting stock is widely held and no one stockholder has a block of voting stock sufficient to give it control or the power to control the concern, any business controlled by the Board or by the CEO or president is an affiliate of the business concern in question, unless the Board and CEO or president can rebut this presumption.

c. Other affiliation based on stock ownership.

If the rules above do not apply, the Board or president or CEO (or other officers, managing members, or partners who control the management of the concern) are deemed to be in control of the concern. A minority shareholder is deemed to be in control, if that individual or entity has the ability, under the concern's charter, by-laws, or shareholder's agreement, to prevent a quorum or otherwise block action by the Board or shareholders.

2) Stock options, convertible securities, and agreements to merge.

Stock options, convertible securities, and agreements to merge are treated as exercised to determine the power to control. Unless the two companies have an agreement in principle, no affiliation arises between the two companies based on open and continuing discussions of merger alone. Discussions about the possibility of a future merger or buy-out, by themselves, are not sufficient to find affiliation.

3) Common management.

If one or more officers, directors, managing members, or general partners of a business concern control the Board and/or the management of another business concern, the concerns are affiliates. Control includes possessing veto rights over major decisions. Affiliation also arises where a single individual, concern or entity controls the management of the applicant concern through a management agreement.

4) Identity of interest between individuals or businesses, including family members.

Affiliation may be present among close relatives (spouse, parent, child or sibling, or the spouse of a child or sibling) with identical or substantially identical business or economics interest. However, individuals may seek to demonstrate that no affiliation exists by providing evidence establishing that apparently identical interests are, in fact, separate. Patterns of subcontracting, commingling of staff and/or facilities, and other veiled attempts to disguise the true nature of the relationship may evidence an identity of interest.

5) Newly organized concern.

A new concern is affiliated with an existing concern if:

- a) The former (or current) officers, directors, principal stockholders, managing members, or key employees of one concern organize a new concern;
- b) Both concerns are in the same or related industries or fields of operation;
- c) The individuals that organized the new concern serve as the new concern's officers, directors, principal stockholders, managing members, or key employees; and
- d) The one concern is furnishing or will furnish the new concern with contracts, financial or technical assistance, indemnification or bid or performance bonds, and/or other facilities, whether for a fee or otherwise.

The affiliation may be rebutted by showing that there is a clear fracture between the two businesses.

6) Parties to a joint venture.

The parties to a joint venture are affiliates of each other if any one partner seeks SBA financial assistance for use in connection with the joint venture.

Even if an exception to affiliation exists, a party to a joint venture must include in its total number of employees its proportionate share of joint venture employees when determining its own size.

A joint venture of two or more businesses will not be affiliated as long as each partner is small under the size standard.

7) Exceptions to general affiliation rules listed above.

No affiliation exists in certain circumstances described in the regulations, including the following:

- A business that is wholly owned or substantially owned by investment companies or development companies that are licensed or qualified under the Small Business Investment Act of 1958, are not considered affiliates of those investment companies or development companies.

- A business that leases employees from a business primarily engaged in leasing employees to other businesses or which enter into a co-employer arrangement with a Professional Employer Organization (PEO) is not affiliated with the leasing company or PEO solely because it leases or co-employs employees.
- The member shareholders of a small agricultural cooperative, as defined in the Agricultural Marketing Act, are not considered affiliated with the cooperative by virtue of their membership in the cooperative.

SUMMARY OF AFFILIATION

Category	Affiliation may be found if...
Ownership	<p>An individual, concern, or entity owns or has the power to control more than 50% of voting equity.</p> <p>If voting equity is widely held and no block is large as compared to all others, then the Board and CEO/President will be deemed to control.</p>
Options, convertible securities, agreements to merge (given <i>present effect</i>)	If an individual or entity has control with the exercise of options and/or convertible securities and agreements to merge; however, agreements that are open or merely continue negotiations about a possible merger are not given present effect.
Common management	<p>Officers, managing members, partners who control the management of the concern also control the management of another concern.</p> <p>Individuals or entities that control the Board of the concern also control the Board or management of another concern.</p>
Identity of interest	SBA may <i>presume</i> identity of interest among close relatives (spouse, parent, child or sibling, or the spouse of a child or sibling) with identical or substantially identical business or economic interests.
Newly organized concern	The firm's officers, directors, principal stockholders, managing members, general partners, or key employees <i>organize another concern</i> in the same or related industry or field, and serve in such capacity for the new concern and the one furnishes the other with contracts, or other assistance. The firm can rebut the presumption of affiliation by showing there is a clear line of fracture between the two.
Joint ventures	<p>Parties to a joint venture are affiliates of each other if any one partner seeks SBA financial assistance for use in connection with the joint venture.</p> <p>See exceptions to affiliation.</p>