

BURR ALERT

Does the Coronavirus Relief Act Change Your Decision?

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The COVID-19 or coronavirus crisis has disrupted demand in many industries and is wreaking havoc on budgets and cash flow projections. Many businesses are now forced to consider furloughs, lay-offs, and reductions in pay to cope with the crisis. The Coronavirus Aid, Relief, and Economic Security Act (the CARES Act) was passed on March 27, 2020 and seeks to incentive employers to retain their employees and to provide enhanced unemployment benefit for employees who are not retained.

The CARES Act doesn't change the basic considerations when deciding whether furloughs, lay-offs, or reductions in pay will be implemented. Deciding whether to implement these measures still requires an employer to evaluate compliance with wage and hour laws, advance notice requirements under the federal Worker Adjustment and Retraining Notification Act (WARN) and the state corollaries, impacts on employee benefit plans (including compliance with the Affordable Care Act provisions and COBRA), and impacts the measures will have on the businesses ability to comply with its contractual obligations. Implementing a furlough, lay-off, or reduction in pay then presents its own challenges and must be undertaken thoughtfully to avoid discrimination or other legal claims.

The incentives provided by the CARES Act to incentive employers to retain their employees include forgivable loans, low-interest loans, and payroll related tax credits. Qualification for the incentives generally depends on employee headcount. Taking advantage of one incentive can preclude an employer from taking advantage of other incentives.

The biggest incentive provided under the CARES Act is a forgivable loan program known as the Paycheck Protection Program (the PPP). Qualifying businesses can obtain a loan that is equal to two and a half months of average monthly payroll. The loan is forgiven, without tax consequences, if the proceeds are used for payroll and certain other obligations (e.g. rent and utilities) and an employer maintains its headcount and does not reduce pay. Under this program, the government is essentially carrying a business's payroll for two months. Employers with 500 or less employees will generally qualify for the PPP program. Employers with more than 500 employees may also qualify based on size standards for their industry established by the Small Business Administration.

The CARES Act also sets aside \$500 billion to provide relief to businesses that are not eligible for the PPP. Some of these funds are earmarked for direct loans to specified businesses (e.g. airlines). The remaining funds are available for loans, loan guarantees, and other investments. The CARES Act provides a general framework for these loans and the Department of the Treasury is responsible for establishing the programs. Treasury has been instructed in the CARES Act to establish a low interest (no more than 2% annually) loan program for business with 500-10,000 employees to retain their workforce.

The CARES Act provides a couple of other forward looking incentives to businesses. If a business obtains a PPP loan, it will generally not be eligible for the additional incentives. The forward looking incentives include:

- **Employee Retention Tax Credit.** This credit provides a 50% tax credit for wages paid to employees, capped at \$5,000 per employee, when a business is impacted by the coronavirus crisis. For employers with more than 100 employees, the credit only available for wages paid to an employee who is not working.
- **Employer Share of Social Security Loan.** A qualifying employer may retain the employer share of required social security payments (6.2%) from March 27, 2020 through December 31, 2020. Half of the retained amount must be repaid on December 31, 2021 and the remaining half must be repaid on December 31, 2022.

The CARES Act also provides incentives to employers for prior tax years that could generate tax refunds. Net operating losses in 2018, 2019, and 2020 are permitted to be carried back up to 5 years under the CARES Act. Other technical tax changes are also provided in the CARES Act that can result in prior year tax refunds (e.g. changes to corporate AMT, modifications of business interest limitations, and qualified improvement property changes).

The CARES Act recognizes that many businesses may not be able to retain their workforce. Unemployment benefits for employees who are not retained are greatly enhanced under the CARES Act. Employees will generally be eligible for their state unemployment benefits, plus an additional \$600. When an employer is evaluating furloughs, lay-offs, or reductions in pay they should consider the impact the decision will have on an employee's eligibility to claim unemployment benefits. For example, an employee may not be eligible for unemployment benefits if pay is reduced. The reduced pay may be less than what the employee would receive in unemployment benefits.

This overview of the CARES Act is general in nature and designed to highlight some of the key issues that an employer should be considering. To discuss this further please contact the Burr & Forman attorney with whom you normally consult or any of the attorneys listed below:

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