

Jessica L. Roe
Attorney

612-351-8305 (D)
612-810-1807 (C)
jroe@roelawgroup.com

60 South Sixth Street
Suite 2670
Minneapolis, MN 55402
612-351-8300 (O)
612-351-8301 (F)
www.roelawgroup.com

Coronavirus Aid, Relief, and Economic Security Act (CARES Act) FAQs for Employer

On March 27, 2020, the U.S. House of Representatives approved the [Coronavirus Aid, Relief, and Economic Security Act](#) (CARES Act or Act), a \$2+ trillion aid and stimulus package, which includes a broad range of financial assistance and other relief for employers and employees affected by the coronavirus (COVID-19) crisis.

There are a number of provisions relevant to employers that we will review such as:

- measures (tax credits) to help ensure that employers can meet their financial obligations to provide paid family and sick leave benefits pursuant to the Families First Coronavirus Response Act (“FFCRA”);
- a 50-percent tax credit for qualified wages paid during the crisis;
- short-term, enhanced unemployment benefits for affected workers; and
- forgivable loans for qualified employers.

What Employers Should Do Now

In connection with the CARES Act, employers should:

1. Establish procedures and policies to:
 - a. ensure compliance with family and sick leave obligations under the FFCRA; and
 - b. obtain “reimbursement” through retention of eligible payroll taxes and application for additional reimbursement from the federal government, as necessary and allowable.
2. Determine whether the wage-related tax credit and one of the available loan programs will allow you to retain (or bring back) employees during this crisis.
3. Understand employees’ rights to UI under both state law and the Act. If seeking a loan, evaluate if such layoffs will impact the amount of any loan eligibility or forgiveness or if there is some way to bring employees back and take advantage of the loans.

Tax Credits for FFCRA Leave

The FFCRA provides a 100-percent refundable tax credit, capped at the same amounts as the leave benefit limits plus the cost of continuing to provide health insurance for employees on FFCRA leave. Two days after enactment of FFCRA, the U.S. Department of Labor (“DOL”), the U.S. Department of the Treasury (“Treasury”), and the Internal Revenue Service (“IRS”) [issued joint guidance](#) to allow covered employers to “swiftly” recover the costs of FFCRA leave (including health insurance). Employers may take “immediate advantage” of the paid leave credits, by “retain[ing] and access[ing] funds” that they would otherwise pay to the IRS in payroll taxes.

Employers may simply retain, as their FFCRA credit, otherwise-owed payroll taxes up to an amount equal to the costs they incurred in providing FFCRA leave (i.e., leave pay plus the cost of health insurance for employees on leave), up to the mandated caps. Per the joint guidance, if such retention of payroll taxes is insufficient to cover the costs of FFCRA leave, “employers can seek an expedited advance from the IRS by submitting a streamlined claim form” (which will be released shortly).

Of note, the joint guidance also advises that the DOL will issue a 30-day “non-enforcement order” to allow employers time to come into compliance with the FFCRA.

Finally, the Act directs the Treasury to waive any penalty an employer may have been subject to for failure to pay sufficient payroll taxes, if the Treasury “determines that such failure was due to the anticipation of the credit allowed” under the FFCRA.

Tax Credits Regarding Retention

On March 31, 2020, the U.S. Senate Finance Committee released a set of “frequently asked questions” (FAQs) prepared by the committee’s Republican staff to address the *employee retention credit provisions* included in the “Coronavirus Aid, Relief, and Economic Security Act” (CARES Act) (Pub. L. No. 116-136). The FAQs include a disclaimer that they are “for informational purposes and should not be relied on for legal advice.”

- 1. What businesses qualify for the employee retention credit?** Any employer, regardless of size, is eligible for the credit during calendar year 2020 if the business: (1) is fully or partially suspended due to a governmental order related to COVID-19; or (2) experiences a significant decline in gross receipts (i.e., a reduction of 50 percent of gross receipts from the same quarter in 2019). The credit also applies to tax-exempt organizations if the operation of the organization is fully or partially suspended due to the circumstances described in (1) above. The credit generally does not apply to governmental employers, including the U.S. Government, state and local governments, or any agency of the foregoing.
- 2. Is the credit limited to businesses affected by COVID-19?** Yes. The credit only applies to qualified wages paid by a business whose operations have been fully or

partially suspended pursuant to a governmental order related to COVID-19, or have experienced a significant decline (i.e., 50 percent) in gross receipts, as described above, during the period from March 13, 2020 through December 31, 2020.

- 3. Does the credit only apply to small businesses?** No. For eligible employers with 100 or fewer full-time employees, the credit applies to all employee wages. In contrast, eligible employers with greater than 100 full-time employees may only take into account qualified wages paid to employees when they are not providing services due to a governmental order related to COVID-19.
- 4. How much is the credit? How is it calculated?** The credit is equal to 50 percent of the qualified wages paid by the employer with respect to each employee. The amount of qualified wages with respect to any employee for all calendar quarters in 2020 cannot exceed \$10,000. In other words, there is a \$5,000 total cap on the credit per employee for the 2020 tax year.
- 5. How much of an employee's compensation counts toward the credit? Do health care costs count?** The definition of qualified wages differs depending on the size of the business. For employers with more than 100 full-time employees, qualified wages include wages paid to employees when they are not providing services due to a governmental order related to COVID-19. If an employee is performing services on a reduced schedule, wages paid to the employee are only treated as qualified wages if they exceed what the employee would have otherwise been paid for the services performed. In that case, employers will receive a credit for the difference between the total wages paid to the employee and the amount the employer would have paid for the reduced hours or services actually provided by the employee.

For eligible employers with 100 or fewer full-time employees, all employee wages qualify for the credit, whether or not the employee is providing services to the employer.

Regardless of business size, qualified wages include certain healthcare costs paid by an employer to maintain a group health plan.

Qualified wages do not include wages taken into account for purposes of the payroll tax credit for required paid sick leave or paid family leave as provided in Division G of H.R. 6201, the Families First Coronavirus Response Act (FFCRA). This exception prevents both credits from applying to the same wages paid by an employer.

- 6. Does it matter if the business is a corporation? Does it apply to limited liability companies (LLCs), S corporations, partnerships, and sole proprietors?** The credit is available to corporations as well as pass-through entities, such as LLCs, S corporations, partnerships, and sole proprietors. The

credit also is available to most tax-exempt organizations. Although the credit is available to all entity types, the business must meet the eligibility requirements.

- 7. Do I have to wait until my business files its 2020 tax return to claim the credit?** No. The tax credit may be claimed against the employer portion of employment taxes, including Social Security and Railroad Retirement payroll taxes. To the extent the credit exceeds the employer portion of employment taxes due, the credit is treated as an overpayment and is refundable to the employer. The IRS is expected to provide guidance regarding the process for claiming the credit and receiving the refund. See [Coronavirus Tax Relief](#) on the IRS.gov website.
- 8. Does the business have to pay back the credit?** No. As long as the employer meets the requirements for the credit (described in the Q&As above), the employer does not have to repay the credit or the resulting refunds.
- 9. What if the business claims the FFCRA credit for mandatory sick leave and/or family leave?** If the business claims the FFCRA credit for mandatory sick leave and/or family leave, the wages associated with the FFCRA credit are not eligible as qualified wages for the employee retention credit. This prevents both credits from applying to the same wages paid by an employer.
- 10. Is the credit available if the business receives one of the new SBA loans under the CARES Act?** The credit is not available to employers receiving a small business interruption loan under the SBA's Paycheck Protection Program (CARES Act section 1102).
- 11. How long is the credit available?** The credit is available for qualified wages paid from March 13, 2020 through December 31, 2020.
- 12. Where can I get more information on the Employer Retention Credit?** The IRS is expected to provide guidance regarding the credit, which will be available on the IRS.gov website.

Unemployment Benefits Available Under the CARES Act

Under the Act, nearly all individuals receiving unemployment insurance (“UI”) benefits will get a temporary emergency weekly benefit *increase* of \$600. This increased benefit is fully funded by the federal government and available until July 31, 2020. This supplemental benefit will not have a retroactive effect for any unemployment checks already distributed by a particular state.

In practical terms, some UI recipients will receive more than double their normal weekly benefit (and, in some instances, triple) for up to 18 weeks. As a result, during this period, some recipients will likely be receiving more money than they earned when they were employed.

Section 2102 also provides relief for individuals who (i) have exhausted their UI benefits, (ii) are not eligible for emergency UI under Section 2107, and (iii) are not otherwise traditionally eligible to receive UI benefits (i.e., those who are self-employed and independent contractors, as well as individuals who were scheduled to begin working at a job but are now unable to because of COVID-19). Such individuals who are unemployed between January 27, 2020, and December 31, 2020, because of COVID-19 will receive a weekly benefit equal to the amount that would normally be provided under state law (with a minimum equal to 50 percent of the average weekly payment of regular compensation in the state), plus \$600 (as provided by Section 2104), and any post-enactment additional increase that may be provided.

For the self-employed, residents of territories other than Puerto Rico or the District of Columbia, and others who would not normally be eligible, the weekly benefit amount is the weekly minimum (50 percent of the average regular compensation in the state) plus \$600. The result is that many who historically could not obtain unemployment compensation are now eligible to receive up to 39 weeks of benefits fully funded by the federal government.

Finally, the Pandemic Emergency Unemployment Compensation program (Section 2107) provides for an additional 13 weeks of benefits for those individuals who have exhausted the maximum UI benefits available for the benefit year under the state program (for example, 26 weeks in New York, or 12 weeks in Florida), so long as the individual is able to work, available to work, and is actively seeking work. The weekly benefit mirrors Section 2104 (the state amount plus the additional \$600). These additional 13 weeks of benefits are at no cost to employers or the state, as they will be funded by the federal government.

The Forgivable Loan Program

As part of its “paycheck protection” program, the Act provides \$349 billion in assistance through federally guaranteed loans to small businesses and nonprofit organizations. *To encourage companies to bring back workers who have already been laid off, the program is retroactive to February 15, 2020, and extends to June 30, 2020.* The loan can be used broadly for business purposes, including payroll costs, mortgage and rent payments, or utility payments, as well as:

- payment for vacation, parental, family, medical, or sick leave;
- dismissal or separation payments;
- payment for group health care benefits, including insurance premiums; or
- payment of retirement benefits.

The maximum loan amount is the lesser of (i) \$10 million or (ii) two-and-a-half months’ payroll (salaries, leave, taxes, insurance, etc.), calculated by the business’s average total monthly payments for payroll costs incurred during the previous one-year period.

While, generally only small businesses that employ fewer than 500 employees (including sole proprietors, independent contractors, and other self-employed individuals) are eligible for this program, there are exceptions. For example, restaurants and hotels that employ not more than 500 employees per physical location also are eligible to receive a single loan if they operate under the North American Industry Classification System (“NAICS”) code 72. The loan may also be available to other businesses in certain industries that otherwise meet the definition of “small business concern” under the Small Business Administration Act. In certain instances, those businesses can have up to 1,500 employees and still be deemed a “small business concern.”

This program would remove the “credit elsewhere” test. That test can be onerous because it requires a company seeking a loan to establish that it cannot obtain the requested funds from alternative sources without undue hardship.

No collateral or personal guarantee will be required for the loan. Companies must only provide a good faith certification of economic conditions that make the loan necessary.

As an incentive to bring employees back to work, companies are eligible for loan forgiveness equal to the amount they spend over the eight-week period after the origination date of the loan. Those “forgiven” amounts include payroll costs (up to \$100,000 of wages as prorated for the covered period), utility payments, and rent and mortgage interest payments in force or incurred before February 15, 2020. The amount of loan forgiveness can be reduced if the loan recipient fails to substantially maintain existing employment and compensation levels, according to specific calculations set forth in the Act. Companies that rehire previously laid-off workers will not be penalized for having a reduced payroll at the beginning of the loan period.

Companies will be required to provide documentation to their lenders of their payments during this relevant period.

The loans have a maturity date of a maximum of 10 years from the date loan forgiveness is applied for, and the interest can be no greater than 4 percent (but banks may set lower interest rates).

FAQs for CARES Paycheck Protection Program

- 1. Who can use the Program?** The Paycheck Protection Program (PPP) of the CARES Act provides relief primarily to businesses and nonprofits with up to 500 employees. To be eligible, companies must have been substantially impacted by COVID-19 and in business as of February 15, 2020. Borrowers must certify that the funds will be used for approved purposes and that they are not receiving assistance for these items from another source.
- 2. What is the Paycheck Protection Program?** The PPP expands loan eligibility under the Small Business Administration’s (SBA) 7(a) program with the intention of assisting businesses up to 500 employees with covering costs related to payroll

(including healthcare and certain related expenses), mortgage interest, rent, leases, utilities and interest on existing debt.

- 3. What size business can qualify for a PPP loan?** To qualify, the business must have no more than 500 employees (or, if applicable, the SBA's size standard for that industry). The SBA typically counts anyone on the payroll as one employee, regardless of hours worked or temporary status. The SBA typically considers the employees of affiliated businesses in the total calculation, so if the business and its affiliates in aggregate employ more than 500 people, the business typically won't qualify. The CARES Act creates exceptions for businesses with a NAICS code beginning with 72 (accommodation and food services) and no more than 500 employees, franchisees assigned a franchise identifier code by the SBA, and businesses backed by a small business investment company (SBIC).
- 4. I am a franchisee; can I still qualify?** Yes. A business operating as a franchise that is assigned a franchise identifier code by the SBA can qualify for the PPP.
- 5. If my company has funding from a private equity (PE) firm or other financial sponsor, can I still participate?** PE portfolio companies typically have difficulty getting 7(a) loans because the SBA's affiliation rules may require the total number of employees across all of the sponsor's portfolio companies to be 500 or fewer. The CARES Act waives the affiliation rules for businesses with a NAICS code beginning with 72 (accommodation and food services) and no more than 500 employees, franchisees assigned a franchise identifier code by the SBA, and businesses backed by an SBIC.
- 6. What is the maximum size of the loan?** The maximum loan amount is the lesser of 2.5 times the business's average monthly payroll costs and \$10 million. For non-seasonal employers, average monthly payroll is the average total monthly payments for payroll during the one-year period preceding the date of loan origination.

For seasonal employers, average monthly payroll is the average total monthly payments for payroll for the period from February 15, 2019, to June 30, 2019 (or March 1, 2019–June 30, 2019, at the election of the borrower).

For businesses that were not in operation during February 15, 2019–June 30, 2019, average monthly payroll is the average total monthly payments for payroll for the period from January 1, 2020, to February 29, 2020.

- 7. What can the loan be used for?** Loans can be used for payroll costs (excluding amounts above a prorated annual salary of \$100,000 for employees who make more than that amount), mortgage/debt interest, rent and utilities.

- 8. How are payroll costs calculated?** The CARES Act defines payroll costs as: The compensation of an employee (whose principal residence is in the United States), including:
- Salary, wage, commission or other compensation (not to exceed \$100,000 per year, as prorated for the covered period)
 - Cash tip or equivalent
 - Payment for vacation, parental, family, medical or sick leave (unless the employer receives a credit under the Families First Act)
 - Allowance for dismissal or separation
 - Group healthcare benefits, including insurance premiums
 - Retirement benefits
 - State/local payroll taxes (not federal payroll taxes); and
 - Payments to independent contractors (not to exceed \$100,000 per contractor per year, as prorated for the covered period).
- 9. Is there a limit on the amount of compensation I can include in my payroll costs?** Yes. When calculating average payroll costs, an employer may not consider any amounts paid as compensation to an employee in excess of \$100,000 per year, as prorated for the covered period, or any compensation of an employee whose principal place of residence is outside of the United States.
- 10. Is there a loan forgiveness provision under the PPP?** Yes. There is the potential for the loan principal (and interest accrued) to be forgiven up to the amount spent on payroll costs, mortgage interest, rent and/or utilities during the eight weeks after the issuance of the loan. Mortgages, leases and service contracts must have originated prior to February 15, 2020, for payments to be eligible. The amount of the loan forgiveness will be reduced if there is a reduction in the number of employees or wages in excess of 25% of total wages during the period.
- The Department of the Treasury expects high subscription and has said that it is anticipated that not more than 25% of the forgiven amount may be for non-payroll costs. The SBA will issue additional guidance by April 26 on how the loan forgiveness provision will function.
- 11. If I already laid off workers, am I still eligible to apply for a PPP loan?** Yes, for the period that you had people employed. Also, if you bring people back during that period, you will also be entitled to a PPP loan.
- 12. What is a NAICS code? Where do I find the NAICS code for my business?** The federal government uses the North American Industry Classification System (NAICS) to classify businesses by the type of economic activity in which they engage. These six-digit numbers are used to identify the industry in which a business operates.
- 13. Are these loans also available for nonprofits?** Yes. As long as they meet all of the SBA's criteria.

14. What impact does a PPP loan have on my ability to qualify for other forms of relief under the CARES Act? The CARES Act creates a special payroll tax credit to encourage businesses affected by COVID-19 to keep staff on payroll. The CARES Act also allows businesses to defer the payment of employer payroll taxes they incur between March 27, 2020, and December 31, 2020. A business that receives a PPP loan is not permitted to claim the employee retention credit, and a business that receives a PPP loan and has a part of it forgiven is not eligible for the payroll tax deferral.

15. Accessing the Paycheck Protection Program. Please expect that the PPP access may be overloaded. You will want to work with your lender to process this application. The Department of the Treasury has released an information sheet for interested [borrowers](#) and a standard [application](#).

Borrowers will be required to submit payroll documentation along with their application. We strongly encourage clients to prepare ahead by having the following items on hand:

- a. The date they started the business
- b. The business's mailing address
- c. The most recent IRS Form 941—Employer's Quarterly Federal Income Tax Return
- d. Expense information to help determine loan sizing, specifically:
 - i. Determine which employees are paid more than \$100,000 per year
 - ii. Calculate the total payroll for employees paid during the applicable base period, excluding amounts paid above a prorated annual salary of \$100,000
 - iii. Gather documentation on the business's payroll, mortgage, rent and utilities payments for the previous 12-month period
 - iv. Complete 2019 financials, including the business's profit/loss and balance sheet.

On the application, borrowers will be required to certify the following in good faith:

- a. Current economic uncertainty makes the loan necessary to support the borrower's ongoing operations.
- b. The funds will be used to retain workers and maintain payroll or to make mortgage, lease, and utility payments.
- c. The borrower has not and will not receive another loan under this program.

The borrower will provide to the lender documentation that verifies the number of full-time equivalent employees on payroll and the dollar amounts of payroll costs,

covered mortgage interest payments, covered rent payments, and covered utilities for the eight weeks after getting this loan.

Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities. Due to likely high subscription, it is anticipated that not more than 25% of the forgiven amount may be for non-payroll costs.

All the information provided in the borrower's application and in all supporting documents and forms is true and accurate. Knowingly making a false statement to get a loan under this program is punishable by law.

16. What will be the interest rate and term of the loan? The Department of the Treasury has said that the rate for all borrowers will be 0.5% per year with a term of two years. By law, payments of principal and interest will be deferred for at least six months and may be deferred for up to one year. There is no prepayment penalty.

17. What is the deadline to apply? The CARES Act creates a deadline of June 30, 2020 to apply for PPP loans. However, the total amount of PPP loans the Act authorizes for the entire country is \$349 billion (an amount that could be increased by future legislation).

18. Is there a personal guarantee or will it affect my credit? There are no personal guarantees or collateral required for a PPP loan, so participation in this program generally should not adversely impact your credit.

For additional information, please visit:

The U.S. Treasury [CARES website](#), which also includes information for [borrowers](#) as well as an [application](#) (for informational purposes only)

U.S. Chamber of Commerce [Combatting the Coronavirus website](#), including its [Emergency Loans Small Business Guide and Checklist](#)

Please note that these are fast-moving times, and the information provided is only accurate as of the day posted (April 1, 2020). The information provided does not, and is not intended to, constitute legal advice; instead, all information is prepared and provided for general informational purposes only.

Copyright © 2020 Roe Law Group, PLLC, All rights reserved.