

ANDERSON KILL EMPLOYMENT LAW INSIDER

ALERT

COVID-19: More of What Employers Need to Know

By Bennett Pine and John P. Lacey Jr.

In recent weeks, local, state and federal officials have been tirelessly working to alleviate COVID-19's unprecedented impact on the economy.

On March 27, 2020, President Donald Trump signed into law the CARES (Coronavirus Aid, Relief, and Economic Security) Act, which, in and of itself, is unprecedented. The CARES Act follows the Families First Coronavirus Response Act, which we discussed in our last Employment Law Insider Alert, and is geared toward stabilizing the economy by providing financial assistance to employers and employees across the country.

The CARES Act is a comprehensive, bipartisan measure that all employers should be aware of, as it could provide much needed long-term as well as short-term financial relief.

Unemployment Insurance Benefits: The Department of Labor Issues Guidance on Federal Pandemic Unemployment Compensation

On Section 2102 of the CARES Act broadens the availability of unemployment benefits to those individuals who are usually not eligible under regular state or federal unemployment programs, and have become unemployed or unable to work as a result of COVID-19. Those individuals include: self-employed workers, independent contractors, short term employees who have not had a long enough work history by ordinary standards, and part-time employees. The program offers up to 39 weeks of benefits and is available starting January 27, 2020, and ending on or before December 31, 2020.

Section 2104 of the CARES Act provides for a temporary emergency increase in unemployment compensation benefits, referred to in the CARES Act as the Federal Pandemic Unemployment Compensation (FPUC) program. This program provides eligible individuals \$600 per week *in addition* to the weekly benefit amount they receive from state unemployment compensation programs. These additional benefits are entirely funded by the federal government. In fact, states have been instructed not to charge employers for any FPUC benefits.

The Pandemic Emergency Unemployment Compensation program provides up to 13 weeks of additional benefits to those who have

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exhausted ordinary benefits. States must offer flexibility in "actively seeking work" requirements if an applicant's ability to do so is impacted by COVID-19.

The Paycheck Protection Program

Section 1102 of the CARES Act, referred to as the Paycheck Protection Program (PPP), amends Section 7(a) of the Small Business Act, and is designed to provide a direct incentive for small businesses to retain employees on their payroll. Specifically, the program provides guaranteed, virtually interest-free loans to small businesses and other eligible organizations that employ 500 or fewer employees and require financial assistance to pay employees and maintain business operations between February 15, 2020, and June 30, 2020.

The maximum loan amount is \$10 million, and the PPP provides a formula through which the loan amount is tied to payroll costs incurred by the business for up to eight weeks. Moreover, during the aforementioned "covered period", i.e., February 15, 2020, through June 30, 2020, an eligible recipient may also use the proceeds of the covered loan for:

- Payroll costs.
- Costs related to the continuation of group health care benefits during periods of paid sick, medical or family leave, and insurance premiums. Ignoring critical issues.
- Employee salaries, commission or similar compensations.
- Payments of interest on any mortgage obligation (which shall not include any prepayment or payment of principal on a mortgage obligation).
- Rent (including rent under a lease agreement).
- Utilities.
- Interest on any other debt obligations that were incurred before the covered period.

Paycheck Protection Program Loan Forgiveness

One of the key features of the PPP is loan forgiveness. The CARES Act provides that eligible businesses are entitled to loan forgiveness equal to the amount spent on any of the following items during the eight-week period (beginning on the date the loan originated) so long as the total amount does not exceed the loan amount:

- Payroll costs.
- Interest on a mortgage.
- Rent on a lease agreement.
- Utility payments.
- Additional wages paid to tipped employees.

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The key condition is that eligible businesses must spend at least 75% of the loan on payroll and retain the majority of their employees. The CARES Act also provides that loans will be eligible for deferred payment for at least six months and no more than a year.

The loan forgiveness amount, however, is subject to reduction if an employer reduces its number of full-time employees or decreases the salaries of certain employees beyond 25% of their prior year salaries. To the extent employers have already let employees go, employers are able to rehire employees before June 30, 2020, to avoid any reductions in loan forgiveness.

Personnel Decisions in View of the CARES Act: Furloughs v. Layoffs

As we indicated in our prior Employment Law Insider Alert, employers are generally free to engage in furloughs, layoffs and salary reductions unless employees are subject to individual employment or collective bargaining agreements.

Furloughs differ from layoffs in that furloughs inherently suggest that employees will return to work once the public health crisis is over. Generally, furloughed employees maintain their health benefits and are able to collect unemployment while out of work. Layoffs, on the other hand, inherently suggest an employee will not return to work even after the public health crisis has ended. If an employee is laid off, that employee will not retain their employment benefits, but will be eligible to collect unemployment benefits.

Certain employers are eligible for significant benefits under the CARES Act, and thus, should consider those benefits before making personnel decisions. For example, if an employer furloughs or lays off too many employees, that employer may not be eligible for loan forgiveness under the PPP because it does not have enough employees to allocate 75% of the loan to payroll. Thus, furloughs, layoffs and salary reductions are all decisions that should be made in view of the benefits provided for under the CARES Act.

In Sum

Eventually, the country will reopen, perhaps through incremental steps. In the meantime, the CARES Act, and more specifically the Paycheck Protection Program, can provide interim relief to those employers and employees in need of financial relief due to the perils created by COVID-19. All employers should at least consider whether the benefits provided under the CARES Act and the PPP meet their needs, and if so, how those benefits can be realized. Once an affirmative decision is made, compliance is imperative so that employers can maximize the available benefits.

Should any issues arise in connection with COVID-19, employers are welcome to reach out to counsel, particularly with any questions that relate to the CARES Act, including eligibility or otherwise. The situation remains fluid, and we will continue to update as to any and all developments that affect employers and employees, and advise of any new legislation as it is signed into law. ▲

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