

CARES Act Signed Into Law

Contains Massive Relief and Stimulus Provisions for Nonprofits

By Mike Batts, CPA

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On March 27, 2020, the United States Congress passed and President Trump signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act – legislation that provides an unprecedented and massive array of relief, benefit, and stimulus measures designed to help Americans, businesses, nonprofits, and state and local governments amid the coronavirus crisis.

Key Provisions Relevant to Nonprofit Organizations

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“Paycheck Protection Program” Loans/Grants

Nonprofit organizations should consider all available types of relief available to them in addition to considering a Payroll Protection Program loan. Some types of aid/relief/loans are incompatible with obtaining a Payroll Protection Program loan or forgiveness of such a loan.

1. Employers with 500 or fewer employees are eligible for loans guaranteed by the federal government and facilitated by local banks and other authorized lenders; overseen by the Small Business Administration (SBA).
 - a. Measurement of the employee count is a straight headcount (full-time and part-time employees each count as one employee)
 - b. Special rules for determining employee count apply to organizations with affiliates where employees are employed by multiple organizations in the affiliated group
2. “Covered loans” are loans made under the Paycheck Protection Program during the period from the date of enactment through June 30, 2020.
3. Eligible recipients include 501(c)(3) tax-exempt organizations
 - a. There is no apparent restriction with respect to religious organizations
 - Lenders may have conflicting information about this
 - Churches without an IRS 501(c)(3) determination letter could potentially face challenges in the application process, subject to further SBA guidance

4. Maximum loan amount is 2.5x the average monthly payroll costs for the one-year period preceding the date of the loan or \$10 million, whichever is less
 - a. Special rules apply to seasonal employers
 - b. Special rules apply to employers not in existence for a full year prior to the loan date
 - c. Payroll costs include:
 - Salaries and other wages
 - Employer-paid health care benefits
 - Employer-paid retirement benefits
 - Employer-paid state and local payroll taxes
 - Differences of opinion exist as to whether the law includes 1099-type payments to individual independent contractors in the definition of “payroll costs”
 - We are hearing that the SBA is interpreting the law not to include independent contractor payments made by employers – check with your legal counsel or banker if that makes a significant difference to your organization.
 - TBD the types of documentation that will be required to support payroll costs
 - d. Payroll costs do not include:
 - Compensation of an employee in excess of an annual salary of \$100,000
 - Inclusion of the cost of health care benefits, retirement benefits, and state/local employer payroll taxes for such employees is unclear.
 - Federal payroll taxes
 - Compensation of an employee whose principal place of residence is outside of the United States
 - Emergency sick leave or emergency family leave payments that qualify for a credit under the Families First Coronavirus Response Act
5. Loan funds may be used for:
 - a. Payroll costs (see definition above)
 - b. Paid sick, medical, or family leave
 - c. Mortgage interest (but not principal)
 - d. Interest on other debt obligations incurred before February 15, 2020
 - e. Rent
 - f. Utilities
 - Consider utilizing a separate bank account for administration of loan funds to facilitate tracking the use of the funds
6. Loan underwriting requirements:
 - a. Borrower was in operation on February 15, 2020
 - b. Borrower had employees for whom it paid salaries and payroll taxes or independent contractors as reported on Form 1099-MISC as of February 15, 2020
 - c. No personal guarantees and no collateral required
 - d. No recourse to any individuals unless the loan funds are used for an unauthorized purpose
 - e. Borrower must make a “good faith certification”:
 - That the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the borrower

- Acknowledging that loan funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments
 - That the borrower does not have an application pending for a duplicative loan
 - During the period from February 15, 2020 through December 31, 2020, the borrower has not received a duplicative loan
7. Loan forgiveness
- a. Borrower is eligible for forgiveness of the loan
 - b. Amount eligible for forgiveness is the amount spent during the 8-week period beginning on the date of the loan for
 - Payroll costs (see definition above)
 - Mortgage interest payments for loans incurred before February 15, 2020
 - Rent for leasing arrangements in force before February 15, 2020
 - Utilities (including electricity, gas, water, transportation costs, telephone, or internet access for which service began before February 15, 2020)
 - Unverified reports exist that the SBA may allow some variation in the 8-week measurement period
 - c. Forgiveness amount is reduced by:
 - An amount calculated pursuant to a formula (with multiple variables) designed to measure whether the borrower reduced its workforce during a specific period in early 2020
 - (This is intended as an incentive to retain employees)
 - Special rules apply for seasonal employers
 - Re-hiring furloughed/laid off/terminated workers by June 30, 2020 can mitigate or eliminate the reduction in loan forgiveness that would otherwise apply due to a reduction in the work force
 - If salary or wages of an employee are reduced by more than 25% during the period February 15, 2020 through June 30, 2020, loan forgiveness is reduced by the amount of the salary or wage reduction in excess of 25%
 - d. Loan forgiveness is not taxable income**
8. Terms of repayment for amount not forgiven
- a. Payments deferred for at least 6 months...up to 1 year
 - b. Maximum maturity of 10 years
 - c. Interest rate not to exceed 4%
 - d. No prepayment penalty

Expanded Unemployment Benefits

1. Provides federal funding of expanded unemployment benefits
 - a. Appears to provide a flat amount of \$600 per week in addition to what an individual may qualify for under state unemployment systems
 - Details TBD – expanded benefits funded by the federal government will be administered by state unemployment agencies
 - b. Provides unemployment benefits to unemployed workers from churches, religious organizations, and small nonprofits where employment would not normally be

covered under state unemployment law (understanding confirmed by US Senator's office)

- Details TBD – expanded benefits funded by the federal government will be administered by state unemployment agencies
2. Provides federal funding to assist nonprofits that have elected the reimbursement method for participation in state unemployment coverage
 - a. Details TBD – expanded benefits funded by the federal government will be administered by state unemployment agencies

Deferral of Payment of Employer's Share of Social Security Taxes

1. Payment of employers' share of Social Security tax deposits due on or after the enactment date of the CARES Act and through December 31, 2020 may be deferred
 - a. It appears that the deferrable portion of employer payroll taxes is limited to the 6.2% Social Security tax and does not include the 1.45% Medicare tax
 - b. Half is due by December 31, 2021
 - c. Remainder is due by December 31, 2022
2. No apparent employer size restrictions apply to this deferral option
3. This provision is not available to an employer who has had its debt forgiven in connection with the Payroll Protection Program (described above)

Employee Retention Credit for Employers Subject to Closure or Substantial Revenue Loss

1. Provides eligible employers – including tax-exempt organizations – a refundable credit against the employer's share of payroll taxes
 - a. Eligible employers must have carried on a trade or business during 2020 and satisfy one of two tests (for tax-exempt organizations, all operations of the organization are considered a trade or business for this purpose):
 - Have fully or partially suspended business operations due to orders from a governmental entity limiting commerce, travel, or group meetings; or
 - Experience a reduction in gross receipts of at least 50%
 - In any calendar quarter of 2020 as compared to the same calendar quarter of 2019
 - Until gross receipts for a calendar quarter of 2020 exceed 80% of the amount for the corresponding quarter of 2019
2. Credit is 50% of the first \$10,000 in wages per employee (including value of health plan benefits)
3. Credit is reduced by any credits claimed for emergency sick pay or emergency family leave pay under FFCRA ([see separate Alert on FFCRA](#))
4. To the extent the credit exceeds the employers' Social Security tax due, the excess is considered a refundable overpayment
5. For employers with more than 100 full-time employees in 2019, only wages paid to employees who are not currently providing services are eligible for the credit

- a. Aggregation of employee counts of affiliated entities may be required
6. The employee retention credit is effective for wages paid after March 12, 2020, and before January 1, 2021
7. An employer who obtains a Paycheck Protection Program loan (described above) is not eligible for this credit

Above-the-Line Charitable Contribution Deduction

1. For the year 2020, individual taxpayers who do not itemize deductions may claim up to \$300 of charitable contributions made as a deduction in arriving at adjusted gross income

Charitable Contribution Deduction Limits Increased

1. Cash contributions made by individual taxpayers in 2020 to public charities are subject to a limit of 100% of adjusted gross income – not the 60% limit that regularly applies
 - a. It appears that cash contributions by individuals to private foundations also have a 100% of AGI limit for 2020
 - b. Contributions to supporting organizations or donor advised funds do not qualify for the increased limit
2. Cash contributions made by corporations in 2020 to public charities or private foundations are subject to a limit of 25% of pretax income – not the 10% limit that regularly applies
 - a. Contributions to supporting organizations or donor advised funds are not eligible for the increased limit
3. Excess contributions above these limits may be carried over
4. The limit on deductible food inventory contributions is increased from 15% to 25% of pretax income

Additional Information (per direct communication from a U.S. Senator's office)

1. Nonprofits with an employee base of more than 500 employees may be eligible for loans from the Federal Reserve
2. Consideration is given to non-public schools for education funding provisions

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