

MSF CLIENT ALERT

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Coronavirus Aid, Relief, and Economic Security Act ("CARES Act")

Keeping Workers Paid and Employed and Relief for Workers Affected by Coronavirus Acts

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") was signed into law. This Client Alert focuses on the provisions of the Keeping Workers Paid and Employed Act and the unemployment provisions of the Relief for Workers Affected by Coronavirus

Revised March 30, 2020

Keeping Workers Paid and Employed Act

The Keeping Workers Paid and Employed Act amends the Small Business Act. Under the Paycheck Protection Program, the Act provides loans to qualifying small businesses that may be eligible for one hundred percent forgiveness.

Eligibility:

Eligibility determinations will be made based on the company's North American Industry Classification System ("NAICS") code based on number of employees or annual receipts. Not-for profits, veterans organizations and Tribal businesses also may be eligible if they employ no more than the greater of 500 employees or the applicable size standard in number of employees established by the Small Business Administration for the applicable industry. Sole proprietors, independent contractors and eligible self-employed individuals also are eligible to receive a covered loan.

To be eligible, businesses must have been in operation on February 15, 2020 and had employees for whom the borrower paid salaries and payroll taxes or paid independent contractors.

Loan Amount:

In order to determine the amount of loan for which a company may be eligible, an employer must compile payroll costs for the one year period prior to the loan. The loan amount may be the lesser of (i) \$10,000,000; or (ii)

the sum arrived at by multiplying the average monthly payroll costs for the one-year period before the loan is made by 2.5. The loan amount also may include any outstanding loan made during the period beginning on January 31, 2020 and the date on which covered loans may be refinanced.

For determining the loan amount, "Payroll Costs" may include:

- Salary, wage, commission or similar compensation
- Payment of cash tip or equivalent
- Payment for vacation, parental, family, medical or sick leave
- Allowance for dismissal or separation
- Payment required for the provisions of group health care benefits, including insurance premiums
- Payment of any retirement benefit
- Payment of state or local tax assessed on the compensation of employees
- The sum of payments of any compensation to or income of a sole proprietor or independent contract that is a wage, commission, income, net earnings from self-employment or similar compensation not to exceed \$100,000 (as prorated for the covered period)

Payroll costs may not include:

- Compensation of an individual employee in excess of an annual salary of \$100,000 (prorated for the covered period)
- Certain federal taxes including Federal Insurance Contributions Act (FICA)
- Compensation of any employee whose principal place of residence is outside the United States
- Qualified sick or family leave for which tax credits are allowed under the Families First Coronavirus Response Act

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For eligible self-employed individuals, independent contractors or sole proprietorships, documentation will need to be submitted at the application stage to establish eligibility, including payroll tax filings reported to the IRS, Forms 1099-MISC and income and expenses from a sole proprietorship.

Allowable Uses for Covered Loans:

Although the determination of the amount of the loan is limited to payroll costs, the loan proceeds may be used for broader purposes, including to provide for:

- payroll costs
- salary, commission or similar compensation
- costs related to the continuation of group health care benefits
- insurance premiums
- interest on mortgage obligations (but not prepayment of interest or payment of principal)
- rent
- utilities
- interest on debt

Borrower Requirements:

The loan application will require no personal guarantee or collateral and will be a no-fee loan. However, the loan application will require the applicant to make a good faith certification, including that the:

- uncertainty of current economic conditions makes the loan request necessary to support ongoing operations
- funds will be used to retain workers and maintain payroll or make mortgage, lease or utility payments
- applicant does not have an application pending for a loan for the same purpose or duplicative amounts
- applicant has not received amounts during the period from February 15, 2020 through December 31, 2020 for the same or duplicative purposes.

The loan shall be a non-recourse loan except to the extent that the Small Business Administration determines that a shareholder, member or partner used the loan proceeds for an unauthorized purpose.

Loan Forgiveness:

An eligible recipient shall be eligible for loan forgiveness on a covered loan in an amount not to exceed the principal of the loan and equal to the sum of the following costs during the covered period (8 weeks from loan origination under this section of the Act):

- Payroll costs
- Interest on covered mortgage obligations (not including prepayment or payment of principal)
- Payment on any covered rent obligation
- Payment of covered utilities

Loan forgiveness may be for up to one hundred percent of the loan subject to certain offsets relating to reduction during the covered period: (i) in the number of employees; or (ii) in certain salary and wages.

The rent, utilities and interest on mortgage obligations must be incurred during the covered period.

- Reduction in Number of Employees

The amount of loan forgiveness shall be reduced if employers employ fewer employees during the covered period (8-week period following loan origination) than were employed in a prior comparison period. For the comparison period, an employer (other than a seasonal employer) has the choice between two timeframes (i) February 15, 2019 through June 30, 2019; or (ii) January 1, 2020 through February 29, 2020. Seasonal employers must use the comparison period of February 15, 2019 through June 30, 2019.

To determine the amount of the potential reduction employers will divide the:

Average number of full-time equivalent employees/month during the covered period (8 week period following loan origination)

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Average number of full-time equivalent employees/month during the prior period (either (i) February 15, 2019 through June 30, 2019; or (ii) January 1, 2020 through February 29, 2020)

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- Reduction in Salary and Wages

The amount of loan forgiveness also shall be reduced if an employee earning less than \$100,000 per year is subject to a salary reduction of greater than 25 percent of total salary or wages. The determination of whether the employee meets the \$100,000 threshold will be based on review of an employee's wages or salary in any single pay period in 2019 where wages or salary were not paid at an annualized rate of pay in an amount more than \$100,000. The reduction in the amount of salary or wages will be compared to the most recent full quarter during which the employee was employed before the covered period (8 week period following loan origination). In other words, if the loan originates in May 2020 and the employee worked during the entire 1st Quarter of 2020, the comparison period will be 1st Quarter 2020. However, if the employee did not work during the entire 1st Quarter 2020 (e.g., due to layoff), the comparison period is the most recent full quarter of employment prior to layoff.

- Exemption for Re-hires

The loan forgiveness provisions relating to reduction in number of employees and salary shall be disregarded in certain circumstances if the actions occurred between February 15, 2020 and April 26, 2020 (thirty days after the enactment of the Act) and are remedied by either re-employing employees or eliminating the salary reduction no later than June 30, 2020. For the purposes of this determination, the reduction in the number of full-time employees and the reduction in salary will be compared to the number of full-time equivalent employees and the salary in effect on February 15, 2020.

- Application for Loan Forgiveness

To be eligible for loan forgiveness the applicant will be required to submit an application, documentation of payroll tax filings, state income, payroll and unemployment filings and documentation of other covered obligations. The loan forgiveness application will require a certification that the documentation is true and correct, that the amount of forgiveness requested

was used to retain employees, pay interest on mortgage, cover rent or make covered utility payments. The lender has sixty days after an application is received to issue a decision on the loan forgiveness application.

The amount of the forgiven loan will be considered as cancelled indebtedness by the lender and may be excluded from gross income for tax purposes.

To the extent that any portion of the loan is not forgiven, the remaining balance will continue to be guaranteed by the Small Business Administration and shall have a maximum maturity of 10 years from the date of application for loan forgiveness and bear an interest rate of not greater than 4%. There are no penalties for pre-payment on a covered loan.

Conclusion:

Given the complexities of the Paycheck Protection Program under the Keeping Workers Paid and Employed Act, there are many considerations for employers in determining the amount of loan to request and the amount of loan forgiveness that may be available. If you need assistance in determining how best to proceed, attorneys in MSF's employment and taxation and estates groups are available to assist and provide guidance.

Relief for Workers Affected by Coronavirus Act

In order to address the unprecedented level of unemployment the country faces, the CARES Act includes the Relief for Workers Affected by Coronavirus Act which provides increased unemployment benefits and expands eligibility for unemployment to assist those individuals who are unemployed or underemployed as a result of the COVID-19 pandemic crisis. As noted below, this expansion appears to remove barriers to certain individuals who otherwise would not be eligible for unemployment benefits. Of specific note, it does not appear that applicants will be required to prove that they are seeking work. Moreover, applicants without prior working history (e.g. upcoming college graduates whose job offers may be rescinded or individuals who do not

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have a sufficient amount of wages number of quarters paid into the unemployment system or working time) and independent contractors now are considered eligible for the expanded Federal benefit.

Covered Individual:

In enhancing the scope of unemployment for covered individuals across the country, the Relief for Workers Affected by Coronavirus Act defines a covered individual as who is:

- not otherwise eligible for unemployment benefits but certifies that they are ready, able and willing to work and who is unemployed or partially unemployed because:
 - The individual has been diagnosed with COVID-19 or is experiencing symptoms and seeking a medical diagnosis
 - A member of the individual's household has been diagnosed with COVID-19
 - The individual is providing care for a family member or household member who has been diagnosed with COVID-19
 - The individual is the primary caregiver for a child or other person in the household who is unable to attend school or another facility as a direct result of COVID-19
 - The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of COVID-19
 - The individual is unable to work because a health care provider has advised the individual to self-quarantine due to COVID-19 concerns
 - The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of COVID-19
 - The individual has become the breadwinner or major support for a household because the head of household has died as a direct result of COVID-19
 - The individual has to quit their job as a direct result of COVID-19

- The individual's place of employment is closed as a direct result of COVID-19

- self-employed, seeking part-time work, does not have sufficient work history or who would not otherwise qualify for unemployment benefits. This category includes individuals who have already exhausted their entitlement to state unemployment benefits to allow them to collect the enhanced federal benefit.

Covered Individual does not include those who can work remotely with pay or who are receiving paid sick leave or other paid leave benefits.

Expanded Unemployment Benefits:

In addition to expanded eligibility, the Relief for Workers Affected by Coronavirus Act expands the length and amount of unemployment benefits. The Act:

- Extends unemployment insurance benefits to a maximum of 39 weeks. This is significant as most state programs are capped at 26 weeks. The additional 13 weeks of benefits terminates on December 31, 2020.
- Provides an enhanced weekly unemployment benefit of \$600 through July 31, 2020. This means that individuals can collect the benefit traditionally provided under state law plus an additional \$600 if they are a covered individual under the CARES Act. Individuals in New York who meet the state and Federal requirements for the unemployment benefits and who earned approximately \$50,000 year, may be eligible to collect over \$1,000/week in unemployment benefits (the state's maximum benefit (\$504/week) plus the enhanced Federal benefit of \$600/week).

Eligibility for such benefits will be determined by state unemployment programs. However, all states must provide benefits to all individuals deemed a covered individual under the CARES Act.

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Please contact an attorney in MSF's Employment or Taxation & Estates Groups if you need assistance with respect to these new obligations.



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