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COVID-19 Legislation Applicable to Small Businesses

Loan Programs:

SBA Economic Injury Disaster Loan ("EIDL")

Small businesses as determined by number of employees and/or gross annual receipts per your NAICS code in the SBA system that has suffered substantial economic injury qualify for loans up to $2 million under this program. Loan amount will be based on actual economic injury and company's financial needs. This program has its own distinct affiliation rules.

Repayment terms will not be longer than 30 years and the interest rate will not exceed 4%. Personal guarantees are waived on loans not more than $200,000.

Application requests personal financial statements, business financial statements, and personal and business tax returns. SBA can approve loans based solely on credit score without requiring submission of a tax return, or other methods necessary to determine applicant ability to pay. The whole process is conducted via a link on the SBA's website.

Applicant is allowed to request an advance, separate from the loan, in an amount not to exceed $10,000 within three days after SBA receives an application. An advance may be used to maintain payroll, provide sick leave related to COVID-19, and meet costs due to interrupted supply chains, among other provisions.

Paycheck Protection Program Loan ("PPP")

Any business, nonprofit organization, veterans' organization, or Tribal business, which employs not more than 500 employees, unless the covered industry's SBA size standard allows more than 500 employees qualify for loans up to $10 million under this program. Generally, the loan amount will be determined by multiplying 2.5 times the average monthly payroll costs incurred during the 1-year period before the date on which the loan is made.

"Payroll costs" are defined to include payments for salary, wage, commission, or similar compensation; payments for cash tip or equivalent; payments for vacation, parental, family, medical, or sick leave; allowance for dismissal or separation; payment required for the provisions of group health care benefits; payment of any retirement benefit; payment of state or local tax assessed on the compensation of employees; payments of any compensation or income of a sole proprietor or independent contractor that is an amount not more than $100,000 in 1 year, as prorated for the covered period. "Payroll costs" do not include the compensation of an individual employee in excess of an annual salary of $100,000, as pro-rated for the covered period; taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code; compensation of an employee whose principal place of residence is outside of the United States; and qualified sick leave wages or qualified family leave wages for which a credit is already allowed under the Families First Coronavirus Response Act.

This program has its own distinct affiliation rules that could combine related businesses based on common ownership, common control, and other factors.

Repayments terms will not be longer than 10 years and the interest rate will not exceed 4%. There are no personal guarantees. Payments of principal and interest can be deferred for a period of six months to one year. No prepayment penalties. A business that obtains an Economic Disaster Injury Loan, the business cannot obtain a loan under the Paycheck Protection Program for the same purpose. A business obtaining a loan through the Paycheck Protection Program will not be able to use the payroll tax credits available under the Families First Coronavirus Act for employee retention or the deferral of employer-side social security payroll taxes under the CARES Act.

Loan funds can be used for payroll costs; cost related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums; interest payments on any mortgage; rent and utility payments; and interest payments on any other debt obligations that were incurred before February 15, 2020.

The loan may be forgiven to the extent of business expenses incurred over an 8 week period following the loan origination date in the following categories: Payroll costs; Interest on real or personal property mortgage obligations in existence before February 15, 2020 and incurred in the ordinary course; Rent under a lease agreement in force before February 15, 2020; and Utility payments, including electricity, gas, water, transportation, telephone or internet, for which service began before February 15, 2020.

The amount of loan forgiveness is subject to reduction based on a business's decline in headcount or wages. Declines in headcount or wages between February 15, 2020 and April 26, 2020 will not trigger a reduction in loan forgiveness if the business reverses the decline and returns to pre-decline levels by June 30, 2020. Loan forgiveness will not be included in a business's taxable income.

Practical Commentary

The Paycheck Protection Program loan appears to be the best option among the loan programs and payroll tax options available to most small businesses. Contact your bank or SBA lender and get in line as soon as possible. It may be a week or two before they have an application process and form available, but at least you can get in line with them ahead of others who may wait. They should be able to keep you up to speed as they receive information. If you feel like they are not responsive or not knowledgeable on the topic, do not hesitate to reach out to other SBA lenders.

If you qualify for both the EIDL and the PPP, apply for them both. There will be a rush of businesses trying to borrow from these programs. The EIDLs appear to be funding faster and the PPP will take 3 to 4 weeks, if not more, to fund. While you can't borrow from both the EIDL and the PPP at the same time, you can roll your EIDL loan that is funded first into your PPP as a refinancing.

You should consider applying for the PPP whether you think you need the money or not, or if you are still considering your options between the EIDL and Payroll Tax benefits. There is no fee or prepayment penalty associated with the PPP. Thus, you can back out or pay off the loan at any time. On the other hand, if you wait until later and decide you want to participate in the PPP, you just subjected yourself to an unnecessary delay in receiving the funds. In addition, the fund pool for the PPP loans will run out. Those who hesitate may miss out on the funding.

If you are part of a related group of companies, reach out to your SBA lender or legal counsel to determine how the affiliation rules apply to your situation.

Payroll Tax Benefits

FFCRA Payroll Tax Credit

The Families First Coronavirus Response Act ("FFCRA") requires private employers with fewer than 500 employees to provide paid sick leave and family leave for certain COVID-19 related absences. The 500 employee rule is subject to FMLA integrated employer regulations and distinct aggregation rules. The FFCRA includes payroll tax benefits to help offset the cost associated with these employee benefits.

Employers covered by FFCRA will be allowed a credit against the Social Security tax for each calendar quarter in an amount equal to 100 percent of the qualified sick leave wages paid per employed individual per day. The credit amount is generally limited to 10 days in total per individual and capped at (i) $511 per day for an individual who is quarantined or self-quarantined due to COVID-19 or seeking a medical diagnosis for COVID-19 symptoms and (ii) $200 per day for an individual caring for either a quarantined or self-quarantined individual or for a child due to COVID-19 related school or childcare disruptions. The amount of this credit is increased by the amount of tax imposed by the Medicare tax on qualified sick leave wages.

Employers covered by FFCRA will also be allowed a credit against the payroll tax imposed for each calendar quarter in an amount equal to 100 percent of the qualified family leave wages paid per employed individual per day. This amount is generally capped at a per individual amount of $200 per day and $10,000 in total for all calendar quarters. The amount of this credit is increased by the amount of Medicare tax on qualified family leave wages.

Payroll tax credits are not available to businesses that take out a loan under the PPP.

Employee Retention Credit

Under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") eligible employers are allowed a refundable credit against the employer component of employment tax (Social Security and Railroad Retirement) equal to a maximum of 50 percent of qualified wages paid after March 12, 2020, through and including December 31, 2020, for each employee. The total wages attributed to an employee is capped at $10,000 (including health benefits), resulting in a maximum credit of $5,000 per employee.

Eligible employers include any employer carrying on a trade or business during the 2020 tax-year whose business operations are fully or partially suspended due to orders from a governmental authority limiting commerce, travel, or group meetings due to the COVID-19 pandemic, and employers with gross receipts that are less than 50 percent of their gross receipts for the same quarter in the prior year are also eligible to claim the employment tax credit, until their gross receipts exceed 80 percent of their gross receipts for the same calendar quarter in the prior year.

Further, for eligible employers with 100 or fewer full-time employees, all employees' wages up to $10,000 for each employee are eligible for credit. For employers with more than 100 full-time employees, qualified wages are limited to wages paid to employees who are unable to provide services due to the COVID-19 pandemic.

Businesses are precluded from obtaining both the retention credit under the CARES Act and either a "Work Opportunity Tax Credit" under Internal Revenue Code (IRC) Section 51 or an "Employer Credit for Paid Family and Medical Leave" under IRC Section 45S.

Business can take both the Employee Retention Credit and the FFCRA credit.

The Employee Retention Credit is not available to businesses that take out a loan under the PPP.

Payroll Tax Deferral

Under the CARES Act eligible employers can postpone payment of the employer payroll taxes they do owe for 2020. Unless modified before enactment, the CARES Act would permit 50 percent of employer payroll taxes for 2020 to be payable on December 21, 2021, with the other 50 percent to be payable on December 31, 2022.

The payroll tax deferral is not available to businesses that receive loan forgiveness under PPP.

Practical Commentary

Businesses who borrow money through the PPP loan program cannot take advantage of either of the payroll tax credits. Businesses that receive loan forgiveness through the PPP loan program cannot take advantage of the payroll tax deferral. It is a math exercise to determine whether the PPP loan or the payroll tax benefits are more beneficial to your situation. An analysis should be done to make that determination.

Your payroll provider should be able to guide you through the steps to take to obtain the payroll tax credits and the deferral.

Employee Benefits

The FFCRA requires private employers with fewer than 500 employees to provide paid sick leave and family leave for certain COVID-19 related absences. The FFCRA applies to most private employers with less than 500 employees. Per guidance from the DOL, employers should calculate the coverage count at the time an employee requests the leave. This means that employees with a workforce that fluctuates around the 500-employee mark may fluctuate in and out of coverage. For purposes of the employer coverage calculation, the DOL advises that the employers should count all active employees, full- and part-time, as well as employees on leave, temporary employees who are jointly employed with another employer, and day laborers supplied by a temporary agency. Independent contractors should not be included in the employer coverage calculation. The aggregation rules related to this 500 employee count are not the same as the affiliation rules applied to the PPP program.

Emergency Paid Sick Leave Act ("PSLA")

Employees who work for covered employers are eligible for leave regardless of their tenure with the organization or full- or part-time status. The Emergency Paid Sick Leave Act (PSLA) requires covered employers to provide two weeks of paid sick leave if an employee is unable to work (or telework) due to a need for leave because the employee: Is subject to a federal, state or local quarantine or isolation order related to COVID-19; Has been advised by a health care provider* to self-quarantine due to concerns related to COVID-19; Is experiencing symptoms of COVID-19 and seeking a medical diagnosis; Is caring for an individual who is subject to an order as described in bullet point one or has been advised to self-quarantine as described in bullet point two; Is caring for his or her son or daughter because the school or place of care has been closed, or the child care provider is unavailable due to COVID-19 precautions; or Is experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Full-time employees are entitled to up to 80 hours of paid leave for the reasons listed above. Part-time employees are entitled to paid leave up to the average number of hours they would work in a two-week period for the reasons listed above. Once the 80-hour entitlement is exhausted, no additional leave under the PSLA is available, even if the employee experiences another qualifying event.

The rate of pay for sick leave is the employee's regular rate of pay, the minimum wage under the Fair Labor Standards Act (FLSA), or the state or local minimum wage, whichever is greater. If an employee is taking paid sick leave for a use described in bullet points four, five or six above, the employee's pay entitlement is reduced to two-thirds of the rate of pay.

PSLA limits the amount an employer is required to pay to an employee each day, consistent with the tax credits permitted under the FFCRA, as follows: $511 per day ($5,110 in aggregate) for a use described in bullet points one, two or three above; and $200 per day ($2,000 in aggregate) for a use described in bullet points four, five or six above.

Employers may not require employees to exhaust their current sick leave before using leave under the PSLA.

Emergency Family and Medical Leave Expansion Act ("EFMLA")

The EFMLA expands leave under the FMLA to provide leave for employees who need to care for their child due to the closure of schools and childcare facilities as a result of the COVID-19 public health emergency (referred to as a Qualifying Need Related to a Public Health Emergency).

Under the EFMLA, both full-time and part-time employees who have worked for the employer for at least 30 calendar days will be entitled to take up to 12 weeks of job-protected leave for a Qualifying Need Related to Public Health Emergency. For purposes of determining employee coverage, the DOL has advised that the 30-days of employment calculation is made as of the day leave would commence. As a result, employees hired during 2020 will become eligible for leave after 30 calendar days of employment.

Under the EFMLA, the first two weeks of such FMLA may be unpaid. During this 10-day period, an employee may choose to substitute accrued vacation leave, personal leave or other medical or sick leave, but an employer may not require an employee to do so.

After the two weeks of unpaid leave, employers must provide up to 10 weeks of paid FMLA leave at a rate of no less than two-thirds of the employee's regular rate of pay**. The EFMLA caps the paid leave entitlement at $200 per day ($10,000 in aggregate).

Practical Commentary

These provisions may require some unexpected expenses for your business during a period in which cash flow may be constrained. The payroll tax credits and deferral as well as the loan programs are intended to offset some of the costs. However, there may be a timing difference between when the business is required to make these payments versus when they would receive the cash from a payroll tax credit or loan.

We strongly suggest you contact your employment counsel to determine the application of FFCRA and related legislation to your business.