THE CARES ACT

IMPACTS ON NONPROFIT ORGANIZATIONS

With this 2 Trillion Dollar stimulus bill signed into law, aiming to help all Americans weather the storm of the COVID-19 outbreak, how will the CARES Act assist nonprofit organizations facing uncertainty?

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Passed by the Senate on March 25th, 2020 and then passed by the House on March 27th, 2020 and signed into law, the Coronavirus Aid, Relief and Economic Security (CARES) Act is a 2 Trillion Dollar stimulus bill aimed at helping all Americans to weather the storm of the COVID-19 outbreak.

While many of the provisions were, for lack of a better term, “targeted” at assisting businesses, many of the proposed programs will also assist nonprofit organizations facing fiscal uncertainty from this shutdown.

SBA Loan Programs
The CARES Act implemented a new loan program (Paycheck Protection Program or PPP) and augmented existing Economic Development Injury Loan programs. The PPP Loans are available to “nonprofit organizations,” which are defined as any organization described in Section 501(c)(3) and exempt from tax under Section 501(a). The PPP loans offer potential forgiveness and have easy underwriting and no guarantees, so these will figure to be most popular with nonprofits.

What are Paycheck Protection Program Loans?
A PPP Loan is a new loan program that is designed to help organizations during this outbreak and related economic effects maintain payroll and certain other fixed costs. The loans are 100% backed by the SBA and will be originated through existing SBA Lenders, such as your current bank.

What is a “covered loan”? What is the period for these loans?
A covered loan is a loan made between February 15, 2020, and June 30, 2020, under this program.

What are the terms of this loan?
These loans are for a maximum of the following

a. 2.5 times total average monthly payroll costs incurred in the one-year period before the loan is made, OR
b. $10,000,000
The loans will have a maximum term of 10 years and a rate of 4%. The loans will offer a forgiveness component related to amounts spent during the initial 8 weeks of the loan. The permissible uses of the loans are as follows:

a. Payroll Costs
b. Rent/lease payments
c. Payments of interest on mortgage obligations
d. Utilities
e. Interest on debt costs

It is important to note that permitted uses only cover the interest on debt obligations, not the principal. Uses of this loan for non-permitted purposes may change the recourse obligation to the organization. Care should be taken for any recipient of this loan to only use for permitted purposes.

*What are Payroll Costs?*

Per the law's definition, payroll costs are

a. Salary, wage, commission or similar compensation
b. Payment of cash tip or equivalent
c. Payment for vacation, parental, family, medical or sick leave
d. Allowance for dismissal or separation
e. Payment required for group health care benefits
f. Payment of any retirement benefits
g. Any State or Local Tax assessed on compensation
h. Payments of any compensation of a sole proprietor or independent contractor that is net earnings from self-employment. (not applicable for nonprofits)

These payroll costs are limited to a salary of up to $100,000 per year per employee. Any amount above this is ineligible.
Additionally, payroll taxes (FICA) do not appear to be included as a covered payroll cost. The text of the bill refers to Chapter 24 of the Internal Revenue Code, which deals with withholding at the source. It is unlikely, however, that the PPP will only cover net payroll. We will keep an eye out for this in the regulations that follow.

Who is eligible for these loans?
An organization is eligible for these loans if they employ less than 500 employees.

Where and how do nonprofits apply for these loans?
Unlike with traditional SBA loans, these PPP loans will be generally available from whatever banking institution you currently use for your primary relationship. If your current bank does not offer these loans, we will leverage our network to find a lender that can provide these loans for you.

As of right now, the SBA and banks are currently working on a beta test of an online lending platform to allow for rapid approval and application on these loans. There is currently no application available, though, based on public comments and information within the law, it is expected that the application process will be relatively simple and straightforward.

Consideration for getting these loans
The CARES Act provides that lenders will have a delegated authority to make these loans and that the following are used for consideration for eligibility for these loans
a. Was the nonprofit in operation by February 15, 2020?
b. Did the nonprofit have employees to whom salaries and payroll taxes were paid?
Additionally, borrowers will be required to self-certify, as part of the lending process

a. A Good Faith Determination that the loan is necessary because of economic uncertainty as a result of the COVID-19 outbreak.

b. Acknowledgment that the funds will only be used for permitted purposes.

c. The borrower is not receiving this loan and another SBA Loan (Economic Injury Disaster Loans) for the same uses during the period (February 15, 2020, to December 31, 2020)

Unlike other SBA programs, there will be **NO** personal guarantee or collateral required. Board members will have **NO** recourse on these loans, except for cases where the proceeds were used for non-permitted purposes. Additionally, the SBA will make these loans without regard to the “Credit Elsewhere” requirement, which typically requires the SBA to function as a lender of last resort. There will be no fees for the borrower to apply, all fees will be paid directly to financial institutions by the SBA, depending on loan size.

We are eagerly awaiting more guidance from the SBA and lenders as to what documentation will be necessary for these loans. We anticipate that you will need to provide some proof of prior payroll costs and calculations as to the maximum amount allowable. In addition, lenders will have forms to sign for the certifications.

*Loan Deferments*

The program allows for a deferment of up to 1 year, but not less than 6 months, on any payments of interest and principal. There will be more regulations forthcoming on these provisions. It is due and expected within 30 days.
**Loan Forgiveness**

One of the most popular provisions of this program is loan forgiveness. In summary, the loan proceeds that are used within 8 weeks of the origination of the loan are eligible for forgiveness, subject to the following:

a. The loan proceeds are used for permitted purposes (except for non-mortgage debt interest).

b. The loan recipient maintains a certain salary level for staff, subject to limits.

c. The loan recipient maintains a certain number of full-time equivalent employees.

**Calculation of the Loan Forgiveness**

Loan forgiveness will be allowed for the following uses of the loans incurred and paid within 8 weeks of loan origination:

a. Interest on a mortgage originated prior to February 15, 2020

b. Lease or rent in place prior to February 15, 2020

c. Utility payments for the following which were in place prior to February 15, 2020

a. Electricity

b. Gas

c. Water

d. Transportation

e. Telephone

f. Internet Access

d. Payroll Costs (not in excess of $100,000 per employee, prorated).

The limit of forgiveness is calculated as follows:

a. The loan amount

b. A reduction for the number of employees

c. A reduction for the salary and wages
Reduction for the number of employees is based on the number of Full-Time Equivalent employees (FTEEs) in a prior period (either per month from February 15, 2019, to June 30, 2019, or January 1, 2020, to February 29, 2020) in ratio to the number of FTEEs per month in the eight-week covered period.

The number of FTEEs is divided by the number of base FTEEs and will be used to only reduce the payment amount, not increase. The act says the FTEEs will be calculated by the average number of FTEEs per pay period. No guidance was given on how FTEEs will be determined yet; given other references in the CARES Act, it is likely the calculation will be similar to the ACA calculations, but this is not confirmed.

The reduction for salaries and wages is calculated by a straight reduction in excess of 25% for any employee salary during the eight-week period. So, for example, if an employee’s wages are reduced by 20% (can either be as part of a plan or because of lack of supplemental wages like commissions), there is no reduction; however, if the employee reduction is 27%, the forgiveness will be reduced by 2%, (27% - 25%). As the wages are limited to $100,000, any such employee that earns more than this in an annualized rate of pay is excluded from this reduction.

The above reductions can be mitigated by a rehire to FTEE levels or salary by June 30, 2020, if the reductions occurred between February 15, 2020, and 30 days after the enactment of the CARES Act (assumed to be April 27, 2020, if the act is passed and signed by March 27, 2020).

*Application for Loan Forgiveness*

Borrowers will be required to submit to lenders an application for the loan forgiveness. The application (not released or prepared as of yet) will require the following information.
a. Documentation verifying the number of FTEEs and pay rates, including payroll tax filings
b. Documentation, including canceled checks, receipts, transcripts of accounts or other documents for payments on covered mortgage applications
c. A certification from the company that the data provided is true and the amounts were used for permitted purposes of forgiveness
d. Other documentation as required by the SBA, to be determined.

The regulations will be key in determining the timing and manner of providing this information, as well as individual applications and forms from banks. For now, we wanted to highlight what future information may be necessary. Lenders will be required to issue a decision on forgiveness within 60 days of the application.

The regulations for loan forgiveness are expected within 30 days.

Interactions with other CARES Act provisions
Any recipient of these loans under the CARES Acts will NOT be eligible for either the employee retention credit or the deferral of payroll taxes as allowed under the business tax provisions.

Expansion of Economic Injury Development Loans
The SBA Economic Injury Development Loans (EIDL) program has historically provided loans when there are Federally declared disasters. This program has been expanded to include an advance grant and relaxed underwriting. The program is typically done with private nonprofits and will likely not prove to be popular or available with organizations.
Employment Tax-Related Provisions

The CARES Act also implemented 2 employer payroll tax provisions that are available for all employers, including nonprofit organizations.

Employee retention credit for employers

One of the major provisions for employers that are trying to weather this storm, from a tax perspective, is the Employee Retention Credit (ERC). In a broad sense, the law is providing a credit against the applicable employment taxes (6.2% Social Security Tax only!) for 50% of the qualified wages of each employee of an employer for each calendar quarter.

Qualified wages are capped at $10,000 for all quarters, on a per-employee basis. At this point, there have been multiple interpretations seen in the media and in senate materials, however, our and the most common interpretation is that the cap is on wages, and the credit is for 50% of these wages, making the maximum credit $5,000.

The credit can offset applicable employment taxes (the employer’s 6.2% social security tax) in any calendar quarter in which the credit is earned. Any amount in excess of this tax is treated as an overpayment and is therefore refundable to the taxpayer.

The credit is designed to help keep employees on payroll during this shutdown and would fully cover 50% of wages (including amounts paid for insurance. Senator Toomey said this “is exactly equivalent to a 50 percent cut in their payroll. That is going to enable a lot of medium and large businesses to retain their workforce.”
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The ability to claim these credits depends on if you are an eligible employer, meaning the following:

1. The employer must have carried on a trade or business during the calendar year 2020, AND
2. For each quarter, the trade or business is either
   a. Fully or partially suspended due to orders from an appropriate governmental authority limiting commerce, travel OR
   b. Gross receipts are less than 50% during the same quarter in the prior year. This period continues until gross receipts for a calendar quarter are greater than 80% of gross receipts of the prior-year quarter.

For eligible employers (who should be nearly everyone), the next key factor will be the number of full-time employees (determined in the same manner as ACA calculations).

*Employers with less than 100 employees*

For employers with less than 100 employees, all wages during any such period above are considered qualified wages, regardless of if the employee can provide services or not.

*Employers with more than 100 employees*

For employers with more than 100 employees, qualified wages are limited to wages paid to employees who were unable to provide services as a result of condition a. or b. above.

The regulations and forms for this specific credit will be crucial to understanding and confirming this interpretation of how this credit functions. They will also be very crucial in helping to understand recordkeeping requirements, documentation, and certifications needed and other key issues. Until these are released, we will be in a holding pattern. As more information is released, such as regulations or forms & mechanisms used to claim these credits, the more we will be able to advise and act & plan on these provisions and work with payroll processors to claim these credits.
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The passed law includes that any credits belong to the company itself and not to a Certified PEO, similar to credits for increasing R&D Credits. Hence, being on a PEO will not preclude any taxpayers from taking advantage of this credit.

Per the Joint Tax Committee Report, this credit is effective for wages paid after March 12, 2020, through December 31, 2020.

It is also important to note that this credit will not be available for any taxpayer who takes any Small Business Interruption loan.

A final, and somewhat underpublicized & interesting note is that the law allows for the issuance of regulations that will allow for an advance payment of this credit. As more details on this potential advance payment become available, we will share.

*Delay of payment on Employer Payroll Taxes*

The CARES act provides a temporary liquidity measure by allowing for the deferral of applicable payroll taxes (the 6.2% employer Social Security liability). 50% of the amount is due on December 31, 2021, and 50% of the amount is due on December 31, 2022. There will likely be additional forms and regulations related to how to pay these forthcoming, as well as work to do with payroll processors to implement.

Employers who work via a Certified PEO relationship will also be eligible for this deferral. The business will have to direct the PEO to defer payment; the mechanism of this will likely need to be covered between you and your processor. We are sure they will be diligent on the communication of this and we will work to assist accordingly.
The CARES Act impacts on nonprofit organizations

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Any Trust Funds are held harmless per the statute, which should mitigate any trust fund recovery penalty concerns.

Very important to note: any employer that takes out a payroll protection loan will not be eligible for this deferral, as noted above.

**Other Miscellaneous Provisions**

The CARES Act also includes 2 changes to charitable giving, which should assist organizations in obtaining more public support.

*Allowance for “Above the Line” Charitable Contribution*

The Act allows for a new, up to $300, “above the line” charitable donation deduction. This is available only for taxpayers who do not itemize their deductions.

*Modification of Limits on Charitable Giving*

Taxpayers are generally, per the TCJA, limited to 60% of their Adjusted Gross Income, for contributions to public charities. This limit has been lifted for 2020, allowing for up to 100% of AGI to be covered by Charitable Giving. This increase is limited to organizations as described in Section 170(b)(1)(A), which means generally public charities like churches, educational organizations and other 501(c)(3) organizations. A private foundation is generally not going to be eligible unless it is a Private Operating Foundation. There is a specific exclusion for the establishment of a new or maintenance of an existing donor-advised fund.
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Unemployment Insurance Assistance

The CARES Act allows for nonprofits who self-fund their unemployment obligations to receive reimbursement for half of any unemployment claims made. A review of the bill indicates this will be done via a Federal reimbursement to the State on behalf of the organization, but the regulations and future information will provide more clarity on mechanics.

Loans for Larger Organizations

The SBA Loans above are targeted at organizations with less than 500 employees. The CARES Act includes a specific provision instructing the secretary to ensure nonprofit organizations with between 500 and 10,000 employees with access to a specific loan facility. The rate will be 2% per year with a six-month deferral and self-certification that it is necessary to support ongoing operations and the borrower will retain 90% of its workforce until September 30, 2020 and will not outsource or offshore jobs for 2 years. This will also include the provisions related to executive compensation caps. Regulations and applications for these are expected in 10 days which will provide more clarity.

Considerations for Deficit Funded Organizations

For organizations that receive support via deficit funding, some of these programs may not be ideal given the nature of your funding sources. It is anticipated that any funds received through payroll tax reductions or loan forgiveness would not also be able to be reimbursed under deficit funded programs. This could also impact special education tuition rates and the calculation of base year rates for OPWDD funded programs. Further guidance is needed in these areas.