CARES Act Summary

Contains Massive Relief and Stimulus Provisions for Nonprofits

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Reflects changes based on SBA "interim final rule" released on April 2, 2020

Reflects changes based on additional SBA "interim final rule" and FAQ document for faith-based organizations released on April 3, 2020

Reflects changes based on Treasury Department FAQs issued April 6, 2020

Reflects changes based on Internal Revenue Service FAQs issued April 13, 2020 (related to deferral of employment tax deposits and payments)

Reflects substantive changes resulting from the Paycheck Protection Program Flexibility Act of 2020, which became law on June 5, 2020

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.

Certain provisions of the CARES Act (particularly, provisions related to the Paycheck Protection Program) were modified by the Paycheck Protection Program Flexibility Act of 2020 (hereinafter referred to as "the Flex Act"), which became law on June 5, 2020.

Key Provisions Relevant to Nonprofit Organizations

The information contained herein is based on the author's understanding of the topics covered at the time the information was prepared and may contain inaccuracies. All information herein is subject to correction and/or clarification as more complete and reliable guidance and interpretations regarding the law become available. The information contained herein is for informational and educational purposes only and does not constitute professional advice. For professional advice regarding the subject matter addressed herein, the services of a competent professional should be obtained.

"Paycheck Protection Program" (PPP) Loans/Grants

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

1. Employers with 500 or fewer employees whose principal place of residence is in the United States 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. The latest guidance indicates that the headcount is determined by calculating the "average employment" during either the calendar year 2019 or the 12-calendar-month period preceding the date of the loan
        - Alternatively, the headcount can be made using the SBA-authorized method of calculating the average number of employees per pay period in the 12 completed calendar months prior to the date of the loan application (full-time and part-time employees each count as one employee)
    b. Special rules for determining employee count apply to organizations with affiliates
        - SBA guidance states that affiliation rules do not apply to religious organizations whose affiliations exist as part of their religious exercise
        - Lenders are not required to verify borrowers' certifications about their affiliate relationships
    c. Each entity that has a federal employer identification number and employees (and that is not subject to the affiliation rules) will apply for its own loan
        - For entities that are subject to the affiliation rules, it is not clear whether the SBA permits one entity within an affiliated group to make a single application covering the applicant and other entities in the group
2. Eligible recipients include 501(c)(3) tax-exempt organizations
    a. SBA guidance clearly acknowledges and affirms participation by churches and religious organizations
        - An FAQ document issued by the SBA contains explicit assurances to faith-based organizations about matters related to religious exercise
        - The SBA's guidance does not include a requirement to submit a copy of the applicant's 501(c)(3) determination letter
            - An FAQ issued by the SBA explicitly states that churches and their integrated auxiliaries are not required to have or obtain an IRS 501(c)(3) determination letter
3. 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. SBA guidance permits use of either the 2019 calendar year or the 12-calendar-month period preceding the date of the loan for measurement purposes
    b. Special rules for measuring average monthly payroll costs apply to seasonal employers
    c. Special rules for measuring average monthly payroll costs apply to employers not in existence for a full year prior to the loan date
    d. Based on SBA guidance, BMWL believes that a reasonable method for calculating payroll costs for purposes of calculating the maximum loan amount is to include the following (This is for a loan application made in April 2020. We do not take the position that this is the best method or the only acceptable method.)
        - Gross wages from the calendar year 2019 or the 12-month period ended March 31, 2020 (before deductions for employee deferrals such as 401(k); health insurance; etc.)

            - We believe it is reasonable to include clergy housing allowance in gross wages for this purpose, but individual lenders and future guidance could dictate otherwise
            - Do not include in this amount more than $100,000 of cash compensation for any employee
                - Employer-paid benefits described below may be included for employees with cash compensation in excess of $100,000 in addition to the $100,000 of cash compensation
            - Do not include in this amount any compensation paid to employees whose principal residence is outside the United States
            - Do not include in this amount emergency sick leave or emergency family leave payments that qualify for a credit under the Families First Coronavirus Response Act
        - Employer-paid group health care benefits
        - Employer-paid retirement benefits
        - Employer-paid state and local taxes assessed on employee compensation (if any)
    e. Payments to individual independent contractors of the type typically reported on Form 1099 are <u>not</u> to be included in an organization's measurement of "payroll costs"
    f. The SBA guidelines provide some examples of the types of documentation required to be submitted to the lender to establish eligibility for a PPP loan, including payroll processor records and payroll tax filings
        - Payroll records from a Professional Employer Organization (PEO) are acceptable for a borrower whose employees are paid through a PEO
        - If the borrower doesn't have the above records, other supporting documentation may be submitted such as bank records, sufficient to demonstrate the qualifying payroll amount

4. Loan funds may be used for
    a. Payroll costs (as defined above – limited to $100,000 in annualized cash compensation per person, plus employer-paid group healthcare benefits, employer-paid retirement benefits, and employer-paid state and local taxes assessed on employee compensation (if any))
        - Based on provisions of the Flex Act, at least 60% of PPP loan funds must be used for "payroll costs"
    b. Mortgage interest (but not principal)
    c. Interest on other debt obligations incurred before February 15, 2020
    d. Rent
    e. Utilities
        - Consider utilizing a separate bank account for administration of loan funds to facilitate tracking the use of the funds
5. Loan underwriting requirements
    a. Borrower was in operation on February 15, 2020
    b. Borrower had employees for whom it paid salaries and payroll taxes 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
         - The SBA has announced that for loans of less than $2 million, borrowers will be deemed to have made the required certification concerning the necessity of the loan request in good faith
      - Acknowledging that loan funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments and specifically certifying that not more than 40% of loan proceeds may be used for non-payroll costs
      - Acknowledging that the applicant will provide sufficient information to the lender in order for the lender to calculate loan forgiveness
      - 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
6. Loan forgiveness
   a. All or part of the PPP loan amount may be forgiven
   b. See our extensive **PPP Loan Forgiveness Summary** available here
   c. Loan forgiveness is not taxable income
7. Terms of repayment for amount not forgiven
   a. Payments deferred until the loan forgiveness amount is funded by the SBA
   b. If a borrower has not applied for forgiveness within 10 months after the end of their "Covered Period" (see our PPP Loan Forgiveness Summary [linked above] for details), payments must begin on the date that is 10 months after the end of its Covered Period.
   c. Loan maturity is 2 years for loans made prior to June 5, 2020, the effective date of the Flex Act. For loans made on or after that date, the loan maturity is a minimum of 5 years and a maximum of 10 years. (The SBA will likely set a fixed maturity period for loans made after the effective date of the Flex Act, as it did for loans made prior to the Flex Act becoming law. Additionally, the Flex Act allows borrowers and lenders to modify the maturity date of any PPP loan made prior to June 5, 2020, but neither borrowers nor lenders are apparently under any legal obligation to extend the maturity dates of existing loans.)
   d. 1% interest rate per annum
      - Accrued interest will be forgiven in proportion to the portion of the loan amount that is forgiven
   e. No prepayment penalty

Economic Injury Disaster Loans and Grants (EIDL)

1. Overview
   a. Lending program administered by the SBA to help organizations overcome the loss of revenue caused by disasters or emergencies
   b. Organizations can be eligible for both an EIDL and a PPP loan

   c. Loans of up to $2 million
   d. Proceeds may be used to pay fixed debts, payroll (but see bullet below), accounts payable, and other bills that cannot be paid due to a decline in revenue
      - Proceeds from an EIDL cannot be used to pay the same expenses as those paid with Paycheck Protection Program loan funds
   e. Funds cannot be used to refinance other long-term debt or to expand facilities
   f. Most nonprofits are eligible without regard to size
2. Emergency grant also available
   a. Up to $10,000
   b. Can be used to pay for any allowable purpose for a loan as discussed above
   c. Repayment of grant not required, even if loan application is subsequently denied
   d. PPP loan recipient who also receives $10,000 EIDL emergency grant must reduce the forgivable portion of the PPP loan by $10,000
   e. Grant program expires December 31, 2020
3. Repayment terms
   a. Interest rate for nonprofits fixed at 2.75% per annum
   b. Repayment terms up to a maximum of 30 years
      - SBA guidance indicates that payments are automatically deferred for one year
   c. Loans are not forgivable
4. SBA guidance removes any doubt about whether churches and other religious organizations are eligible to participate
   a. Guidance affirms that such organizations will not be sacrificing their First Amendment or statutory rights if they request or receive a loan
5. Underwriting
   a. Loans up to $200,000 can be issued without a personal guarantee
   b. SBA may approve an applicant based solely on the credit score of the applicant
   c. Demonstrate economic injury as a result of COVID-19
   d. May be required to pledge collateral

Expanded Unemployment Benefits

1. Provides federal funding of expanded unemployment benefits
   a. Provides a flat amount of $600 per week in addition to what an individual may qualify for under state unemployment systems
      - 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)
      - Expanded benefits funded by the federal government are 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. Expanded benefits funded by the federal government are 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 (March 27, 2020) and through December 31,2020 may be deferred
   a. The deferrable portion of employer payroll taxes is limited to the 6.2% Social Security tax and does <u>not</u> 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

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
8. IRS guidance on the Employee Retention Credit is available here

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. 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 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

1. Nonprofits with an employee base of more than 500 employees may be eligible for loans from the Federal Reserve under a program separate from the Paycheck Protection Program.
2. Colleges and universities (and possibly other educational organizations) should evaluate the significant provisions of the CARES Act that uniquely apply to educational organizations. Such provisions are separate from the topics addressed in this Alert.