
MEMORANDUM

TO: Clients and other interested parties
FROM: Cornerstone Government Affairs
SUBJECT: Nonprofits and CARES Act Phase III, FFCRA Phase II
DATE: March 30, 2020

Several provisions of both the CARES Act (“Phase III”) and the Families First Coronavirus Response Act (“FFRCA” / “Phase II”) contains a number of interrelated provisions on taxes, unemployment insurance, and loans that affect nonprofits in different ways than for-profit business enterprises. The following analysis summarizes those provisions while highlighting their impacts on nonprofits.

Payroll Tax Credits Affecting Nonprofits

CARES Phase III and FFCRA Phase II contain an interrelated set of payroll tax credits that benefit non-profit and for-profit employers, first by refunding payroll tax liability created by OASDI (6.2% out of the overall 7.65% of payroll taxes; the remainder is 1.45% for Medicare/HI) and with the excess, if any, treated as a refund of overpayment of taxes and directly payable to the employer.

Eligibility for these credits overlaps in some circumstances, but any specific dollar of wages may be accounted for only once – for example, if an employer claims the leave mandate credits with respect to an employee and later switches over to the retention credit, the retention credit is reduced by the value of leave mandate credits already claimed. General fund transfers backfill lost payroll tax revenue, preventing damage to social security trust funds. More details are below:

- **Employee retention payroll tax credit (CARES § 2301)**
 - Payroll tax credit for a fixed percentage (50%) of eligible wages, up to \$10,000 per employee for 2020;
 - Excess of credit over payroll tax liability are refundable, similar to payroll credits in COVID-II;
 - Available for employers with a business that was already carrying on a trade or business in calendar year 2020; and
 - (1) has been fully or partially suspended during a calendar quarter in 2020 due to an order from a governmental authority related to COVID-19; or
 - (2) during a period beginning with the first quarter in which gross receipts for the business were less than 50% relative to the same quarter in 2019, and ending on the first quarter for which gross receipts exceed 80% relative to that quarter in 2019;
 - **Tax-exempt 501(c) organizations are explicitly included (CARES § 2302(c)(2)(C));**
 - Wages receiving the Phase II FMLA and Emergency Leave credits or the prior law § 45S credit for paid family leave are ineligible for the retention credit;
 - Employers receiving SBA 7(a) loans are ineligible for the retention credit.



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- **FMLA and Emergency Leave Payroll Tax Credits (FFRCA Division G §§ 7001-7005, incorporating Division C & Division E by reference):**
 - **Payroll tax relief** (Division G): Payroll tax relief would generally be provided to businesses subject to the mandates, to partially offset the cost of those mandates.
 - **Payroll tax credits** would offset 100% of wages imposed by both mandates in Divisions C & E, subject to caps.
 - For qualified emergency sick leave wages (Division E), the credit is limited to \$511 per day per employee (for emergency COVID-related leave) or \$200 per day (for family care leave), with a maximum of \$5,110 (or \$2,000) per employee;
 - For qualified family and medical leave wages (Division C), the credit is limited to \$200 per day per employee, with a maximum of \$10,000 per year (\$2,500 per quarter) per employee;
 - Mechanically, the credit first offsets OASDI payroll taxes (6.2%) then the excess is refundable to the employer up to the thresholds above.
 - Although the credit does not directly offset the Medicare/HI portion (1.45%) of payroll taxes, the exclusion (described below) has that effect.
 - No double-dipping with current law § 45S credit for paid family leave;
 - **Payroll tax exclusion:**
 - Employer-side OASDI payroll taxes (6.2%) would not be charged on wage payments required to be paid by Divisions C & E;
 - Medicare/HI taxes (1.45%) would still technically be charged on these wages, but those amounts would then (indirectly) plus up the credits described above - never actually reducing amounts in the Medicare/HI trust funds, but working to offset OASDI liability and then refundable.
 - **Emergency sick leave mandate** (Division E): Employers with fewer than 500 employees would generally be required to provide paid emergency sick leave during a public health emergency.
 - Full-time: Employers would generally be required to provide 10 days (80 hours) of emergency sick leave for full-time employees,
 - Part-time: And a pro-rated number of hours to part-time employees based on the number of hours such employee works, on average, over a 2-week period.
 - **Family and Medical Leave Expansion** (Division C): Employers with fewer than 500 employees would generally be required to provide limited paid family and medical leave for up to 12 weeks, expressly for the purpose of caring for a child:
 - The first 10 work days would be covered by the emergency sick leave mandate described above, while work-weeks 3-12 would be covered by this policy, making it a 10-work-week requirement in practice rather than a 12-work-week requirement;
 - Employees would be eligible for this benefit only for the one-year period following enactment of this legislation;
 - Full-time and part-time employees would be covered under terms similar to FMLA generally;
 - **Hardship exemptions:** In one of the last changes to the bill before passage, DOL would be allowed to issue regulations exempting:

- Small businesses with fewer than 50 employees only from the mandates if such requirements “would jeopardize the viability of the business as a going concern” and
- Certain health care providers and emergency responders from FMLA requirements more broadly.

Other Tax Provisions Affecting Nonprofits

- **Temporary charitable contribution deduction enhancements, only for tax year 2020 (CARES §§ 2204 and 2205):**
 - Only in tax year 2020, temporary above-the-line charitable deductions are available for non-itemizing taxpayers up to \$300;
 - Also for 2020, income-based limits on the charitable contribution deduction are suspended for individuals, and increased for corporations from 10% (non-food) and 15% (food) to 25% of income.
 - *Note: The non-profit community continues to advocate for expansions to this provision, by either increasing or waiving the \$300 limit.*
- **Temporary waiver for required minimum distribution rules (CARES § 2203)**
 - For non-profits maintaining defined contribution plans, waives required minimum distribution rules during calendar year 2020 for funds that would otherwise be required to make distributions due to broader economic conditions caused by COVID-19.
- **Delay of all employer-side OASDI payroll taxes (CARES § 2302)**
 - OASDI payroll taxes (6.2%, and not the Medicare/HI 1.45%) are deferred, and payable over two years with half due by 12/31/21 and the remainder due by 12/31/22.

Unemployment Insurance

Both CARES Phase III and FFCRA Phase II contain significant expansions to Unemployment Insurance, highlights from which are summarized below. **CARES (§ 2103)** provides federal funding from 3/13/20 through 12/31/20 for approximately **one-half the costs incurred by non-profits** (and local governments, neither of which typically pay into state UI funding systems) for state reimbursements of Unemployment Insurance.

- **Emergency eligibility expansion (Sec. 2102):** Expansion during 2020 for UI to cover individuals not otherwise covered by UI under a variety of conditions, including:
 - COVID-19 diagnosis of the individual or a family member, family care obligations and school closures, or self-quarantine advice from a health provider;
 - Notably, eligibility includes individuals who are unable or unavailable to work (but not actually laid off or unemployed) because their place of employment is closed “as a direct result of the COVID-19 public health emergency”;
 - Does not include employees who can telework with pay or who are receiving paid leave benefits.
- **Emergency increase (Sec. 2104):** For both regularly eligible individuals and those covered by the expansion, weekly UI payments are increased by \$600 per week through July 31, 2020 (often described as a “four month” expansion);

Small Business Administration Loans and Grants (CARES §§ 1101 – 1114)

CARES Phase III expands SBA section 7(a) Paycheck Protection Program loans by approx. \$350 billion. For loans made pursuant to the program between February 15 and December 31, 2020, loans are available for 250% of an employer (who employs 500 or fewer workers) monthly payroll cost, up to \$10 million. These loans are eligible to cover amounts used to cover payroll costs, qualified benefits, insurance premiums, and payments for mortgages, rent, and utilities, and are generally eligible for forgiveness if used on such amounts.

Loan forgiveness is generally reduced proportionately to the reduction in number of employees retained compared to last year and reduced by the reduction in pay of any employee greater than 25% compared to last year.

Affiliation: Non-profits are specifically made eligible for 7(a) loans. CARES amendment to 15 U.S.C. 636(a)(36)(D) provides SBA with significant regulatory flexibility on how to apply employee-count affiliation rules:

- **Industry standard exception:** Non-profits are eligible provided they employ not more than the greater of 500 employees, OR the size standard in number of employees established by the SBA for the industry in which the non-profit operates.
- **Franchise & NAICS 72 exception:** General SBA affiliation rules in 13 C.F.R. 121.103 are waived for any entity “operating as a franchise that is assigned a franchise identifier code” by the SBA, or entities operating under NAICS code 72 (accommodation and food services).
- **SBA is working now to determine how to interpret and administer these affiliation rules. More details may be available as soon as Wednesday, April 1.**

Treasury Emergency Stabilization Fund (ESF) Loan Program

CARES Phase III establishes (Title IV) \$500 billion in loans administered by the Department of the Treasury for employers with 500 or greater employees, with \$25 billion allocated for passenger air, \$4 billion for air cargo, \$17 billion for businesses critical for national security, and the remaining \$454 billion available for other businesses.

Nonprofits and mid-size businesses with between 500 and 10,000 employees are explicitly carved into the \$454 billion allocated for stabilization loans, with a new program to be stood up carrying a specific set of restrictions:

- Interest on loans not to exceed 2%, with no principal or interest payments due within 6 months;
- Funds required to be used to maintain at least 90% of recipient’s workforce, at full compensation and benefits, through 9/30/20;
- Within 4 months of termination of the public health emergency, a commitment to restore 90% of the workforce as it existed on 2/1/20;
- Majority of employees must be based in United States and the recipient will agree not to outsource jobs for the term of the loan plus two years;
- Recipient will pay no dividends and perform no share buybacks during the term of the loan;
- Recipient will not abrogate collective bargaining agreements for the term of the loan plus two years and will remain neutral in union organizing efforts during the term of the loan.