Surviving the Coronavirus:
An Employer’s Guide to Addressing Some of the Most Pressing Employee Issues – Part 2

By Joseph T. Bartulis, Esq.

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My previous article detailed the most significant employment law aspects of the second phase of the federal government’s response to the COVID-19 Pandemic. That law was called the “Families First Coronavirus Response Act.” When the legislation was enacted, Congress indicated that there would be additional legislation passed to alleviate the economic chaos resulting from the pandemic. Yesterday Congress passed, and the President signed, the third phase of coronavirus legislation: the “Coronavirus Aid, Relief, and Economic Security Act” (The “CARES Act” for short). It is estimated that the CARES Act will provide approximately $2.2 trillion dollars in economic aid to taxpayers and other individuals.

Here I will focus on the provisions in the CARES Act that address the employment law question posed by employers across the Commonwealth and across the country -- namely, “What aid or assistance will employers get for keeping employees on the payroll rather than laying them off or furloughing them?” The answer to this question is found in three key provisions of the CARES Act:

1. Employer payroll tax provisions;
2. Refundable credit for employee retention;
3. The Small Business Administration’s (SBA) Small Business Interruption (SBI) loan program.

First, I’ll cover key elements of each of these provisions of the CARES Act. Then, I’ll conclude with some additional guidance recently issued by the US Department of Labor regarding its short-term enforcement considerations as employers try to navigate the nuances of the paid sick leave and paid family leave provisions of the Families First Act passed last week.

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

1. Employer Payroll Tax Provisions: Delayed Payroll Tax Payments

Employers pay a payroll tax for each of its employees. Referred to as FICA taxes (because they are required under the Federal Insurance Contribution Act), each employer must pay its portion of the Social Security taxes (which is 6.2% of the wages paid) and its portion of the Medicare taxes (which is 1.45%) for all wages it pays to employees. Collectively, an employer’s FICA taxes amount to 7.65% of employee wages paid. Employer payroll taxes are customarily due each quarter.

Under the federal CARES Act passed yesterday, employers of all sizes may elect to defer payment of its employer-paid portion of their Social Security tax obligation, the 6.2%, from March 27, 2020 through December 31, 2020.

The deferred payment of the Social Security tax due will be paid in 2021 in two equal, pro rata installments.

The first installment for half of the deferred tax payment tied to the remainder of 2020 will be due on December 31, 2021 and the second half of the deferred Social Security tax tied to 2020 will be due on December 31, 2022.

While beyond the scope of this article, I do want to mention the following: employers that have received SBI loans which are being forgiven under the CARES Act will not be eligible to defer the payment of the payroll taxes as described above.

2. Refundable Credit for Employee Retention

To create an incentive for employers to keep their employees on the payroll during the pandemic, the CARES Act includes a refundable employer payroll tax credit for qualified wages paid by an employer that either:

• shuts down or partially shuts down after being directed to do so by the government as a precaution in light of the COVID-19 outbreak. Readers will recall such an order was issued by Massachusetts Governor Charlie Baker on Monday March 23rd, effective March 24th. (This order qualifies as the government directive to be eligible for this credit); or
• suffers as significant decline in the employer’s gross receipts year-over-year for the same quarter. Under the Act, a significant decline in in gross receipts occurs if gross receipts are reduced by fifty (50) percent or more for any quarter of 2020 in comparison to that same quarter in 2019.

An employer that meets one or both eligibility requirements will be entitled to receive a payroll tax credit for wages and employer-paid employee health benefits during the period between March 13, 2020 and December 31, 2020.

As to what constitutes “qualified wages” to which the payroll tax credit will apply, the answer turns on how many full-time
employees the employer has, on average. If the employer has more than one hundred full-time employees, qualified wages are only those wages paid to an employee when he or she is not working due to the COVID-19 pandemic. If the employer has one hundred or fewer employees, all wages the employer pays its employees between March 13th and December 31st are considered “qualified wages” for purposes of this payroll tax credit.

There is a cap on the size of the credit. The CARES Act provides that the credit is equal to fifty percent (50%) of the wages paid to an employee during the above described window of time to a wage cap of $10,000 per employee – which, accordingly, means the credit realized by employers will be capped at $5,000 per employee.

Interestingly, unlike some other tax credits employers and business owners receive which are limited to the amount of payroll tax owed by the employer, this credit is also refundable. This means that if the credit amount is greater than the employer’s payroll tax obligations the employer will receive a refund for that excess.

3. Forgivable Small Business Interruption Loans

One item that has understandably piqued the keen interest of employers across the country is the CARES Act provisions regarding what is called the Small Business Interruption (SBI) Loan Program. Administered through the SBA, these loans may be sought immediately from SBA certified lenders. The key elements of the new loan program are as follows:

Eligibility

- This loan program will be available to any business which averages five hundred or fewer employees between March 1, 2020 and December 31, 2020.
- To remain eligible for the SBI program, an employer is required maintain current employee staffing and payroll levels through December 31, 2020.

Loan Amount Available

It is the lesser of:

- Two and one-half (2.5) times an employer’s average monthly payroll costs during calendar year 2019; or
- Ten Million Dollars

The definition of “Payroll” for purposes of calculating loan eligibility amounts include:

- Employee wages (up to $100,000 per year per employee)
- Employer-paid leave time
- Employer-paid expenses for group health care benefits
- Employer-paid retirement contributions such as a 401k match

The Permitted Uses of Loan Proceeds

Businesses may use the SBI loan proceeds to cover the following:

- Payroll expenses incurred for an eight-week period (commencing on the date on which the loan is originated) on each employee's wages – including expenses tied to paid leave (e.g. paid sick time, paid family medical leave, etc.) up to $100,000 annualized per employee. (For more information on paid sick and paid family medical leave pursuant the federal coronavirus relief legislation please see the article I prepared last week, dated March 20, 2020.)
- Rent/mortgage payments
- Utilities

Repayment Provisions

- The portion of the loan used to cover payroll expenses will be forgiven and need not be paid back, in most instances.
- The portion of the loan proceeds that are not forgiven may be deferred for one (1) year and the loan's maturity date may be up to ten (10) years from the date of the application.
- Given that the purpose of the SBI program is to discourage layoffs, there are penalties under the SBI program if an employer decreases its number of full-time employees during the covered period.


In apparent recognition of the complexities with complying with the new federal paid sick leave and paid family sick leave provisions in the Families First coronavirus relief legislation passed last week (phase two of the emergency relief legislation), I understand the US Department of Labor has issued a memo indicating that it will not pursue legal action against employers between now and April 17th for an employer's failure to correctly comply with, or correctly implement, the paid employee and/or the paid family sick leave provisions of the law -- so long as the employer can establish that it has made “reasonable efforts” to comply with the act’s provisions.

Please note there are nuances to each portion of the legislation that are beyond the scope of this article. For a more in-depth discussion of these items or any other employment topic related to the coronavirus pandemic, I suggest readers give me a call.