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# The FFCRA and CARES Act: Key Provisions Affecting Nonprofit Organizations

**Tax Talks Blog** on **April 6, 2020**

On March 18, 2020, President Trump signed into law the Families First Coronavirus Response Act ("FFCRA") (H.R. 6201), and on March 27, 2020, he signed into law the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") (H.R. 748). This alert summarizes certain loan and tax-related provisions of these new laws that are most relevant to nonprofit organizations.

**I. Sick and Family Leave Credits**.

- Beginning April 1, 2020, nonprofit organizations with fewer than 500 employees are required to pay employees (i) their full wage, (up to $511/day or $5,110 total) if the employees are unable to work because of COVID-19-related (self-)quarantine or because they have COVID-19 symptoms and are seeking medical help, or two-thirds of their regular wage (up to $200/day or $2,000 total) if they take time off to care for a family member that is in (self-)quarantine because of COVID-19 or following a child's school closing, in each case for up to 10 days, and (ii) two-thirds of their regular wage (up to $200/day or $10,000 total) if the employees are unable to work because they need to care for a child.
- An employer's obligation for paid sick leave ends when the employer has either paid the employee for the number of hours that the employee generally works within a two-week period (up to 80 hours), or when the employee has returned to work. To be eligible for paid leave, the employee must have worked for the employer for at least 30 days (i.e., been on payroll). An employee who is laid off on or after March 1, 2020 and rehired by the same employer before the end of the year is eligible for paid leave without having to satisfy the 30-day requirement after being rehired so long as the employee satisfied this requirement before being laid off.
- A refundable payroll tax credit is available to employers through 2020 to cover wages paid to employees while they take time off under these new sick and family leave programs. The sick leave credit is for wages up to $511/day or $200/day if the sick leave is to care for a family member or child following the child's school closing. The family leave credit is for wages up to $200/day (or a $10,000 total)

while the employee is receiving paid family leave. The credit can be claimed each quarter. The credit is not available for employers receiving a credit for paid family and medical leave under the 2017 Tax Cut and Jobs Act (the "TCJA").

- The instructions to Form 7200, *Advance Payment of Employer Credits Due to COVID-19,* provide that employers may use the sick and family leave credits to offset all federal employment taxes (including federal withholding tax, and the employer's and the employee's share of social security and Medicare taxes), and any excess credits are refundable. The IRS has posted further guidance on its website on how to obtain it.[1]

## II. Cares Act Loans Available To Nonprofits

**Paycheck Protection Program ("PPP") Loans**.

The CARES Act expands the Small Business Administration's (SBA) existing 7(a) loan program to help eligible businesses and nonprofits pay rent, mortgage payments, payroll (including paid sick or medical leave), health benefits, insurance premiums and certain other operational costs. Loan amounts may be forgiven under the expanded program (as further described below).[2]

- Section 501(c)(3) organizations and section 501(c)(19) veterans' organizations in existence on February 15, 2020 (with paid employees/independent contractors) and with 500 or fewer employees[3] are eligible for the emergency 7(a) loans. "Employees" for this purpose includes "individuals employed on a full-time, part-time, or other basis." Independent contractors do not constitute employees for the purposes of PPP loan calculations; however, independent contractors are able to apply for their own individual PPP loans. The loans are available from February 15, 2020 until June 30, 2020 (the "7(a) loan period").
- Loan proceeds may be used to cover certain operational needs, such as payroll costs (including paid sick or medical leave), health care benefits and insurance premiums, rent, utilities and mortgage interest payments (but not prepayments or payments of principal on a mortgage), interest on any other debt obligations that were incurred before the 7(a) loan period, and refinancing an economic injury disaster loan (discussed below) (discussed below) received from January 31, 2020 through April 3, 2020.[4] At least 75% of the PPP loan proceeds must be used for payroll costs.
- The size of the loan available to a nonprofit is based on the organization's prior average monthly payroll costs and may not exceed $10 million.

- If an eligible nonprofit was operational between February 15, 2019 and June 30, 2019, the maximum loan amount is equal to (i) 250% of the organization's average total monthly payroll costs during the one-year period prior to the loan being made, plus (ii) the amount of any outstanding EIDL, received between January 31, 2020 and April 3, 2020 (less any EIDL advance). The salary portion of payroll costs is capped at $100,000/year for each employee. [5]
- If an eligible nonprofit was **not** operational between February 15, 2019 and June 30, 2019 then, at the request of the organization, the maximum loan amount would instead be equal to (i) 250% of the organization's average monthly payroll costs between January 1, 2020 and February 29, 2020, plus (ii) the amount of any outstanding EIDL received between January 31, 2020 and April 3, 2020 (less any EIDL advance).

- An organization that received an economic injury disaster loan ("EIDL") (discussed below) between January 31 and April 3, 2020 and that used the EIDL funds for payroll costs is required to refinance any outstanding amounts under such EIDL with the proceeds of a PPP loan and such amounts count towards the $10 million maximum that a borrower is allowed to borrow under the PPP.
- The Interim Final Rule provides that the actual interest rate to be charged on all loans under the PPP will be 1% (the statute provides that the interest rate cannot exceed 4%). No collateral or personal guarantees are required. The loans may be prepaid without penalty. Loan fees are waived.
- During the 7(a) loan period, lenders are required to provide complete payment deferment relief (including payment of principal, interest and fees) for 6 months, but **interest will continue to accrue over this period**.
- An organization that receives a PPP loan is ineligible for the employee retention tax credit (described below). As a practical matter, a tax-exempt organization eligible for a PPP loan should determine whether the forgiveness on the PPP loan (described below) would be greater than the employee retention tax credit. If the forgiveness on the PPP loan would be greater, then the tax-exempt organization would take out a PPP loan, and not claim the employee retention tax credit. In our experience, PPP loans generally provide greater benefits than employee retention credits, but the determination must be made on a case-by-case basis.
- **PPP Loan Application Process**
  - The SBA began accepting PPP loan applications on April 3, 2020. Eligible nonprofits can apply for PPP loans through any existing SBA lender or through any federally-insured depository institution, federally-insured credit union, or

Farm Credit System institution that is participating in the PPP.[6]  However, due to the quick speed at which the program is moving, very few lenders are prepared to begin accepting applications.

- An eligible borrower must submit a completed application form and the required documentation, including payroll documentation, to an approved lender that is available to process the application **by June 30, 2020**. The application can be accessed here. An eligible borrower will be permitted to receive one loan and for this reason should consider applying for the maximum loan amount.
    - Although the program is open until June 30, 2020, an eligible borrower should **apply as quickly as possible** because there is a funding cap (loans will be granted on a first-come, first served basis) and lenders need time to process the loan. Nonprofits are encouraged to consult with their local lender as to whether the lender is participating in this program.

- As part of application, the eligible borrower will have to make certain good faith certifications, including that the uncertainty of current economic conditions makes necessary the loan request to support its ongoing operations, the funds will be used to retain workers and maintain payroll or to make mortgage, lease, and utility payments in accordance with PPP purposes, not more than 25% of the loan forgiveness amount may be used for non-payroll costs, and that the borrower has not applied for or received, and will not apply for or receive, another loan under the PPP program.[7]

**PPP Loan Forgiveness**

- PPP loan recipients will be entitled to loan forgiveness (up to the full principal amount and accrued interest on the loan) in an amount not to exceed the sum of payroll costs (as determined under the PPP), interest payments on any mortgages existing before February 15, 2020, rent payments with respect to leases in place before February 15, 2020, and utility payments for which services began before February 15, 2020, in each case, incurred or paid within eight weeks from the loan origination ("covered eight-week period"). Not more than 25% of the forgiven amount may be for non-payroll costs. The SBA is expected to issue further guidance on PPP loan forgiveness.

- Any amount remaining after the partial loan forgiveness must be repaid in accordance with the terms of the loan. Although the CARES Act provides that PPP loans could have a maturity of up to 10 years, the PPP Information Sheet states that all loans under the PPP program will have a term of 2 years.

- The loan forgiveness amount is subject to reduction as follows in connection with reductions in employment and employee compensation that are not restored by June 30, 2020:
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    - reduced proportionally to any reduction in the monthly average number of full-time equivalent employees during the eight-week period following PPP loan origination as compared to the monthly average in a prior period selected by the borrower (either February 15 to June 30, 2019 or January 1 to February 29, 2020); and
    - with respect to any employee who earned $100,000 or less in 2019, reduced by any reduction in pay during the eight-week period following PPP loan origination in excess of 25% of their compensation during the most recent full quarter in which they were employed prior to the origination of the PPP loan.
- Loan forgiveness is not automatic. Borrowers must request forgiveness by submitting certain documentation to their lenders.[8]
- The lender must make a decision on the forgiveness within 60 days of the submission of the request for loan forgiveness.
- The payroll tax deferral is not available to an employer whose PPP loan has been forgiven.

**Emergency Economic Injury Disaster Loan (EIDL) and Emergency Economic Injury Advances**

The CARES Act expands the SBA's existing 7(b) emergency loan program to help eligible businesses and private nonprofits pay payroll and operating expenses that could have been paid had the COVID-19 public health emergency not occurred. The term "private nonprofits" is not defined by the statute, but likely includes some private nonprofit organizations that are ineligible for a PPP loan (e.g., social welfare organizations and certain other organizations not described in section 501(c)(3) or section 501(c)(19)).[9]

- The EIDL program provides private nonprofits with a low-interest loan of up to $2 million.
- The interest rate for private nonprofit organizations is 2.75%. Loan terms will be determined on a case-by-case basis, depending on each borrower's ability to repay, and may have a maturity of up to 30 years.
- The loans may be used for: fixed debts, payroll, accounts payable, employee sick leave, rent or mortgage payments, and other bills that cannot be paid by borrowers

due to the COVID-19 pandemic.

- The loans may **not** be used for: refinancing debts incurred prior to the COVID-19 outbreak, make payments on other loans owned by another federal agency or SBA, pay tax penalties or non-tax criminal/civil fines, or repair physical damage.
- The applying nonprofit would need to supply supporting documentation that could include the organization's most recent tax returns, a financial statement and a schedule of liabilities that lists all current debts of the organization.
- While an application for an EIDL is pending, a private nonprofit may request an advance on the loan of up to $10,000. The advance will be paid to the organization within three days of the SBA's receipt of the application. The $10,000 advance is not required to be repaid even if the organization is ultimately denied an EIDL. However, if the organization also received a PPP loan, the amount of any advance will be subtracted from the amount forgiven under the PPP loan.
- Loans and advances received under the EIDL program may not be used for the same purpose as proceeds from a PPP loan (i.e., no duplication of costs).
- According to the U.S. Senate Committee on Small Business & Entrepreneurship – "*The Small* Business *Owner's Guide to the CARES Act"* an EIDL is not available for nonprofit organizations that are principally engaged in teaching, instructing, counseling, or indoctrinating religion or religious beliefs, whether in a religious or secular setting, or primarily engaged in political or lobbying activities. This restriction does not appear in the statute.
- Small businesses in New York seeking an EIDL are first encouraged to contact a representative from the New York Small Business Development Center (SBDC). There are over 22 campus-based centers and outreach offices across New York to assist with the loan application (http://www.nysbdc.org/locations.html).
  - More information can be found here and here.

**Economic Stabilization Fund**

While the PPP (and the EIDL) summarized above are the primary loan programs for small nonprofits with less than 500 employees, the Economic Relief and Taxpayer Protections (Section 4003) provisions of the CARES Act provide the largest potential impact with up to trillions of dollars available to provide liquidity to covered businesses. The program would provide $454 billion in financing to banks and other lenders that make direct loans or guaranties to certain eligible businesses on market terms.

- The CARES Act provides for the establishment of a loan program for mid-sized businesses, including nonprofit organizations "to the extent practicable", with between 500 and 10,000 employees. Many of the details of this new program are still to be determined. The term “nonprofit organization” is not defined by the statute. Therefore, it’s unclear whether organizations other than section 501(c)(3)s will be eligible for the program.

- The interest rate for these loans will be capped at 2% and all principal and interest payments will be deferred for at least six months.
- Loan forgiveness is **not** available for this program.
- Eligible borrowers must agree to cap employee compensation (including salary and bonuses) for a period ending one year after the loan is repaid. During that period, officers or employees whose annual 2019 compensation exceeded:
    - $425,000, cannot receive (i) compensation in excess of their 2019 compensation in any consecutive 12 month-period or (ii) severance pay or other benefits upon termination of more than twice their 2019 compensation; and
    - $3 million, cannot receive total compensation in any consecutive 12 month-period in excess of (i) $3 million plus (ii) 50% of the excess over $3 million.
- An eligible borrower will need to certify that loan proceeds will be used to retain at least 90% of its workforce, at full compensation and benefits, until September 30, 2020, and that the borrower intends to restore not less than 90% of its workforce that existed before February 1, 2020, and to restore all compensation and benefits to workers, no later than four months after the declared COVID-19 public health emergency is over.[10]

## III. Other CARES Act Provisions Relevant To Nonprofits

### Employee Retention Credit

- The CARES Act provides an eligible employer with a refundable payroll tax credit for the employer portion of the Social Security tax. The amount of the credit is equal to 50% of “qualified wages” (including certain health plan expenses) paid to employees beginning March 13, 2020 through December 31, 2020 if the employer is engaged in a trade or business in 2020 and the wages are paid:
    - (i) while operation of the trade or business is fully or partially suspended due to a governmental order related to COVID-19 or
    - (ii) during the period beginning in the first quarter in which gross receipts for that trade or business are less than 50% of gross receipts for the same calendar quarter of 2019 and ending at the end of the first subsequent quarter in which gross receipts are more than 80% for the same calendar

quarter of 2019.

- The statute provides that clauses (i) and (ii) apply to all operations of a section 501(c)(3) organization. It is unclear what this phrase means. It may mean that if either fundraising or program operations (or any other operations) are partially or fully suspended, then the section 501(c)(3) organization may qualify for the employee retention credit. Alternatively, it may mean that all section 501(c)(3) organizations automatically qualify.
- For employers with more than 100 employees, "qualified wages" are limited to wages paid with respect to which an employee is not providing services due to COVID-19 related circumstances. For employers with 100 or fewer employees, all wages are taken into account regardless of whether the employees are continuing to provide services.
- Section 501(c) organizations are eligible for the credit, but governmental entities and employers receiving an emergency 7(a) loan under the PPP are not.
- The credit is capped at $5,000 (50% of the first $10,000 of qualified wages) per employee for all calendar quarters.
- An employer may elect to not take this credit for any calendar quarter.
- The instructions to Form 7200, *Advance Payment of Employer Credits Due to COVID-19,* provide that employers may use the employee retention credit to offset all federal employment taxes (including federal withholding tax, and the employer's and the employee's share of social security and Medicare taxes), and any excess credits are refundable.

**Payroll Tax Deferral**

- An employer can delay payment of the 6.2% employer share of the Social Security payroll tax (but not the employer's share of FUTA[11] or the 1.45% employer share of the Medicare tax) otherwise payable during the period beginning on March 27, 2020 and ending on December 31, 2020.
- The tax is payable over the following two years with one-half due by December 31, 2021 and the other half due by December 31, 2022.
- This deferral is not available to employers whose emergency 7(a) loan is forgiven under the PPP.

**Self-Funded Nonprofits and Unemployment**

- The federal government will make grants to state unemployment programs to reimburse self-funded nonprofit organizations for one-half of the costs they incur from March 13, 2020 until December 31, 2020 to pay unemployment benefits to their laid-off employees.

**Information for Donors: $300 “Above the Line” Charitable Contribution Deduction and Relaxation of the Charitable Contribution Limitation.**

- The CARES Act allows a permanent “above the line” charitable contribution deduction for up to $300 of cash contributions to certain section 501(c)(3) public charities (but excluding supporting organizations and donor advised funds) beginning in 2020 by individuals who do not itemize their deductions.
- The CARES Act suspends the 60% adjusted gross income limitation for charitable contributions by individuals in 2020 (so that individuals could receive a charitable contribution deduction for up to 100% of their 2020 adjusted gross income), and increases to 25% (from 10%) the taxable income limitation on charitable contribution deductions for corporations.
- The CARES Act temporarily increases the cap on deductions for charitable contributions of food in 2020 from 15% to 25% of the donor’s taxable income (in the case of a donor that is a C corporation) or the donor’s aggregate net income for all relevant trades or businesses (in the case of a donor that is an individual).

[1] IRS guidance on the sick and family leave credits can be found here: https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#how_to_claim.

[2] On April 2, 2020, the SBA issued an Interim Final Rule implementing the PPP loan program.  The Interim Final Rule is immediately effective and the program requirements of the PPP identified in the Interim Final Rule temporarily supersede any conflicting requirements contained in the statute.

On March 31, 2020, the Treasury Department released a “Paycheck Protection Program (PPP) Information Sheet” (the “PPP Information Sheet”) for borrowers. The CARES Act allows for some flexibility in the terms of PPP loans; however, the PPP Information Sheet states that “[a]ll loan terms will be the same for everyone.”  Presumably this means that all terms (other than the amount of the loan) will be standardized.  The PPP Information Sheet can be found here: https://home.treasury.gov/system/files/136/PPP%20Borrower%20Information%20Fact%20 . On April 3, 2020, the Treasury Department also released an updated Paycheck Protection Program Application Form, (the “PPP Application Form”) (the original form was released on March 31, 2020).  The PPP Application Form can be found here: https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Application-3-30-2020-v3.pdf.

[3] Certain affiliation rules apply for purposes of determining the number of employees of an organization. In addition, organizations in certain industries can have more than 500 employees if they meet applicable SBA employee-based size standards for those industries. Additional detail on the industry size standard can be found at https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev

[4] The PPP Information Sheet provides that if the loan proceeds are used for fraudulent purposes, the U.S. government will pursue criminal charges against the borrower.

[5] “Payroll costs” include the sum of payments of any compensation with respect to employees whose principal place of residence is in the United States that is a (i) salary, wage, commission, or similar compensation (capped at $100,000 on an annualized basis for each employee); (ii) payment of cash tips or equivalent; (iii) payment for vacation, parental, family, medical, or sick leave; (iv) allowance for dismissal or separation; (v) payment required for the provisions of group health care benefits, including insurance premiums; (vi) payment of any retirement benefits; or (vii) payment of state or local tax assessed on the compensation of employees.  Payroll costs do not include (i) federal wage withholding taxes and certain federal employment taxes for the period 2/15/20 – 6/30/20; (ii) compensation for employees with a principal place of residence outside the U.S.; and (iii) qualified sick or family leave wages for which a credit is allowed under the FFCRA.  Adjustments are made to “payroll cost” calculations for seasonal employers.  It is unclear whether housing allowance or qualified tuition reduction would qualify as payroll costs.

[6] Other regulated lenders will be available to make these loans once they are approved and enrolled in the program. A list of SBA lenders can be found on www.sba.gov, and the 100 most active 7(a) loan lenders are listed at https://www.sba.gov/article/2020/mar/02/100-most-active-sba-7a-lenders.

[7] The PPP Application also requires each borrower to certify (i) the accuracy of the information provided in the application and that it will provide the lender with documentation verifying certain of its expenditures during the 7(a) covered loan period, (ii) that it will comply, whenever applicable, with the civil rights and other limitations in the application, (iii) to the extent feasible, it will purchase only American-made equipment and products, and (iv) it is not engaged in any activity that is illegal under federal, state or local law.

[8] Information required to be submitted to the lender with a request for loan forgiveness include: (i) documentation verifying the number of full-time equivalent employees on payroll and pay rates (including payroll tax filings and unemployment insurance filings); (ii) documentation verifying payments on covered mortgage, lease and utility obligations; and (iii) a certification that the amount requested for forgiveness was used to retain employees and make mortgage, interest, rent and utility payments.

[9] According to the U.S. Senate Committee on Small Business & Entrepreneurship – "*The Small* Business *Owner's Guide to the CARES Act"* an EIDL is available to a private nonprofit with an effective ruling letter from the IRS granting tax-exemption under section 501(c), (d) or (e) of the Internal Revenue Code of 1954, or that is able to provide evidence from a state that the non-revenue producing organization or entity is a nonprofit one, organized or doing business under state law.  As mentioned below, the guide also states that certain organizations principally engaged in religious instruction are not eligible for an EIDL.

[10] Eligible borrowers will also be required to certify that: (i) loan support is necessary to support ongoing operations because of current conditions; (ii) the borrower is a U.S. entity with significant U.S. operations; (iii) the borrower is not in bankruptcy; (iv) the borrower will not pay dividends or other capital distributions and will not repurchase listed stock of recipient or any parent company while a loan is outstanding, except as required by contract as in effect on the date of the enactment of the CARES Act; (v) the borrower will not outsource or offshore jobs for two years after loan repayment; (vi) the borrower will remain neutral in any union organizing effort during term of loan; and (vii) the borrower will not abrogate its collective bargaining agreements for the term of the loan and 2 years following loan repayment.

[11] Section 501(c)(3) organizations are not subject to FUTA.

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