



CARES Act: Legal Summaries

Important updates and what you need to know

SMITH HULSEY & BUSEY

Smith Hulsey & Busey is focused on supporting you and your business during these difficult and unprecedented times. Our attorneys have been closely reviewing the new CARES Act legislation and its ramifications for companies, employers, health care providers and others.

We've summarized important issues regarding the new legislation that may pertain to our clients in the following categories:



**PAYCHECK PROTECTION
PROVISIONS**



**TAX CREDIT
ISSUES**



**CHANGES TO LABOR
PROVISIONS**



**PROVISIONS SPECIFIC
TO HEALTH CARE**

Please feel free to reach out to our team with any questions you may have. [We're here to help in any way we can.](#)

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Paycheck Protection Program

► Who is eligible?

- Businesses with 500 or fewer employees (or that meet the applicable SBA size standard if it permits more employees)
 - › Any individual employed on a full-time, part-time, or other basis is counted as an employee for purposes of the size determination
- Sole proprietors, independent contractors, and self-employed individuals
- Certain nonprofits, including 501(c)(3) organizations, with 500 or fewer employees
- Must have been in operation on February 15, 2020.

► Amount of loan

- Up to **250% of average monthly payroll costs** during the 1-year period preceding the date on which the loan is made (seasonal businesses use a different reference period), **plus the value of any existing Economic Injury Disaster Loan** received after January 31, 2020, capped at \$10 million
- For purposes of calculating payroll costs, the following amounts are **excluded**:
 - › Compensation paid to any individual employee in excess of a \$100,000 annualized amount
 - › FICA taxes, railroad retirement taxes and income taxes withheld
 - › Compensation paid to employees residing outside of the United States

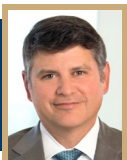
- › Qualified sick leave and family leave wages for which a credit is allowed under the Families First Coronavirus Response Act (FFCRA)
- Payroll costs **include**:
 - › Salary, wage, commission or similar compensation
 - › Cash tips or equivalent
 - › Payment for vacation, parental, family, medical or sick leave
 - › Allowance for dismissal or separation
 - › Payment required for the provision of group health care benefits, including insurance premiums
 - › Retirement benefits
 - › State and local taxes assessed on the compensation of employees

► Permissible uses of loan

- Payroll costs (including group health costs and insurance premiums)
- Mortgage interest (but not principal) and rent payments
- Utility payments
- Interest on existing debt obligations

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Questions about paycheck protections and other business law issues?



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Paycheck Protection Program *(continued)*

▶ Loan forgiveness

- The portion of a loan used to pay payroll costs, mortgage interest, rent or utility payments during the 8-week period beginning on the date of origination of the loan (the “covered period”) is eligible to be forgiven (without incurring cancellation of indebtedness income). To be eligible for loan forgiveness, mortgage interest, rent and utility payments must relate to obligations incurred prior to February 15, 2020.
- To incentivize the retention of employees at existing salaries, the amount of a loan that is eligible for forgiveness is reduced by:
 - › Any reduction in the average monthly full-time equivalent (“FTE”) employees during the covered period as compared to one of two reference periods selected by the borrower (either February 15, 2019 through June 30, 2019 or January 1, 2020 through February 29, 2020)
 - For example, if the loan recipient had an average of 95 FTE employees during the covered period and an average of 100 FTE employees during the chosen reference period, then the recipient would only be entitled to 95% of the loan forgiveness that would otherwise be available
 - › The amount of any reduction in total salary or wages of any employee during the covered period in excess of 25% of the total salary or wages of the employee during the most recent full quarter during which the employee was employed (taking into account only employees who did not receive, during any single pay period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000)

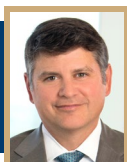
▶ How long is this available?

Until June 30, 2020

▶ Other terms

- Interest rate: No higher than 4%. Expected to be 0.5%.
- Maturity: Expected to be 2 years
- No collateral or personal guarantees required, and loan fees waived
- Nonrecourse against owners of borrower, unless an owner misuses loan proceeds
- All payments on Paycheck Protection Program loans will be deferred for at least 6 months and possibly up to 1 year

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Tax credit issues

► Employee Retention Credit for employers subject to closure due to COVID-19

- **Eligible employers** are allowed a refundable credit against payroll taxes in an amount equal to 50% of **qualified wages** paid to each employee during the period from March 13, 2020 through the end of 2020.
- **Who is eligible?**
 - › Employers whose trades or businesses (1) have been fully or partially suspended due to government order related to COVID-19, or (2) who have experienced a significant decline in gross receipts.
 - An employer has experienced a significant decline in gross receipts if gross receipts for a calendar quarter are less than 50% of the gross receipt compared to the same quarter from 2019.
- **How are “qualified wages” defined?**
 - › For employers with an average of **more than 100 full-time employees** in 2019:
 - Wages paid to employees who are not providing services due to business operations being fully or partially suspended or due to a significant decline in gross receipts
 - › For employers with average of **100 or fewer full-time employees** in 2019:
 - All wages paid to employees, whether the employer is subject to a shutdown order or open for business
 - › **Note for ALL employers**
 - Qualified wages are capped at \$10,000 per employee

- Qualified wages do not include wages that the employer has taken into account for purposes of the tax credit provided by the Emergency Family And Medical Leave Act expansion or the Emergency Paid Sick Leave Act

► Delay of payment of employer payroll tax payments

- Employers may defer payment of their portion of social security taxes incurred during the period beginning on the date of enactment of the Act and ending on December 31, 2020.
- Deferred taxes must be paid 50% by December 31, 2021 and the remaining 50% by December 31, 2022.

► Modifications for net operating losses

The rules limiting the carryback and carryforward of net operating losses are relaxed:

- Removes 80% taxable income limitation applicable to net operating loss carryforwards
- Allows losses incurred in 2018, 2019 and 2020 to be carried back 5 years

► Business interest deduction

- Increases limitation on business interest deduction from 30% of adjusted taxable income to 50% of adjusted taxable income (as that term is defined in section 163)

Questions about tax law issues?



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Changes to labor provisions

► Emergency family and medical leave

Revised Emergency Family and Medical Leave Expansion Act (contained within the FFCRA) to clarify:

- The \$200/day, \$10,000 aggregate cap applies per employee and applies only to paid FMLA leave (so that the paid sick leave also provided under the FFCRA is not subject to this cap)
- Employees who have worked for employer for at least 30 calendar days are qualified to receive paid FMLA leave
- **Employees who were laid off after March 1, 2020 but who worked for the employer at least 30 of the 60 calendar days prior to being laid off, are eligible for paid FMLA leave if rehired**
- The Director of the Office of Management and Budget may exclude certain United States Government and other government employees from the definition of “employees”

► Emergency paid sick leave

Revised Emergency Paid Sick Leave Act (contained within the FFCRA) to clarify:

- A per employee cap of \$511/day and \$5,110 aggregate applies to paid sick leave necessitated by the employee’s own illness or quarantine order;

- A per employee cap of \$200/day and \$2,000 aggregate applies to paid sick leave necessitate by the employee’s obligation to care for another (including a child whose school is closed); and
- The obligation to provide paid sick leave to a particular employee expires when the earlier of two events occurs:
 - › **The employer has paid the employee for the equivalent of 80 hours of paid sick leave; or**
 - › **Upon the employee’s return to work after taking paid sick leave**
- The Director of the Office of Management and Budget may exclude certain United States Government and other government employees from the definition of “employees”

► Emergency unemployment insurance

Revised the Emergency Unemployment Insurance Stabilization and Access Act of 2020 Amendments to the Social Security Act:

- A state must ensure that applications for unemployment compensation, and assistance with the application process, are accessible in person, by phone, or online

**Questions about
labor and employment
law issues?**



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Provisions specific to health care

DIVISION A – TITLE III, SUBTITLE A

► Clinical supply shortages

- Requires the National Academies of Sciences, Engineering, and Medicine to examine the security of the American clinical supply chain
- Specifies that the Strategic National Stockpile shall include personal protective equipment (PPE), items required for the administration of vaccines, drugs, and biologicals, medical devices, and diagnostic tests
- Plans for mitigating emergency drug shortages through FDA prioritizing and expediting drug applications, strengthening reporting obligations and requiring risk management plans of pharmaceutical manufacturers with respect to drugs in short supply
- Plans for mitigating shortages in 'life-supporting, life-sustaining' medical devices through FDA prioritizing and expediting medical device inspections, strengthening reporting obligations for medical device manufacturers with respect to discontinuances or interruption in manufacturing of such devices, requiring the Secretary of Health & Human Services to maintain a list of medical devices in short supply

► COVID-19 diagnostic testing

- Expand the types of diagnostic tests that must be covered by federal and state health care plans and commercial health insurance

- Includes diagnostic tests not yet approved by the FDA, but meet certain qualifications (i.e., manufacturer has submitted FDA application, state has reported to Secretary of Health & Human Services its willingness to assume responsibility for test validity)
- Health plans must pay providers a full negotiated rate or, if the provider and plan do not have a rate negotiated, a cash price for the service.
- Providers furnishing COVID-19 testing must post a cash price for COVID-19 testing on a public website; failure to do so may result in civil monetary penalties.
- Health plans must also cover qualifying COVID-19 preventive services, such as immunizations, when they become available

► COVID-19 supplemental awards

- Appropriates \$1.32 billion for eligible health care entities, for the detection, prevention, diagnosis, and treatment of COVID-19

► Specific grant programs

- Extends grant programs for telehealth development and rural health care services outreach and network development

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**Questions about
health care law issues?**



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Provisions specific to health care *(continued)*

► Limitation on volunteer liability

- A health care professional cannot be held liable under federal or state law for any harm caused by an act or omission by the health care professional, if responding to the COVID-19 public health crisis, and following criteria are met:
 - › Professional is acting as a volunteer
 - › Act or omission occurs in the course of providing COVID-19 health care services

- › Professional must be acting within scope of license, registration, or certification
- › Professional must act with good faith belief that patient is in need of COVID-19 related health care services
- Does not absolve acts or omissions constituting willful or criminal misconduct, gross negligence, reckless misconduct, or conscious and flagrant indifference to safety
- Limitation on volunteer liability sunsets when COVID-19 public health crisis ends

DIVISION A – TITLE III, SUBTITLE D

► Medicare coverage and payment for COVID-19 services

- Increases payments to urban and rural Inpatient Prospective Payment System (IPPS) hospitals for treatment of COVID-19 patients (increases the weighting factor of the patient's diagnosis-related group by 20%)
- Expands the Medicare hospital accelerated payment program so it will apply to children's hospitals, cancer hospitals and critical access hospitals (CAHs) in addition to IPPS hospitals
 - › May request accelerated payments for inpatient services covering a period of up to 6 months
 - › Accelerated payment may be up to 100% (125% for CAH) of what hospital would have otherwise received and may be periodic or lump sum
 - › Extends timeframe for recoupment to up to 120 days before claims offset and up to 12 months before outstanding balance due

- Clarifies that COVID-19 tests do not have to be FDA-approved to be covered by Medicare
- When a COVID-19 vaccine is developed, it will be covered by Medicare and Medicare Advantage without the Medicare beneficiary cost sharing

► Provides post-acute care waivers to increase health care system capacity

- Waives inpatient rehabilitation facility 3-hour rule (i.e. during COVID-19 public health crisis, patients need not receive at least 3 hours of therapy per day, 15 hours per week, to occupy inpatient rehabilitation facility bed)
- Waives the long-term care hospital site-neutral IPPS payment rate and 50% rule provisions

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Provisions specific to health care *(continued)*

► Encourages use of telehealth

- Increases Medicare telehealth flexibility by eliminating the requirement that a provider or member of the provider's group treated the patient in the last 3 years (this requirement was added by the Coronavirus Preparedness and Response Supplemental Appropriations Act – H.R. 6074)
- Will increase Medicare telehealth flexibility for Federally Qualified Health Centers and Rural Health Clinics by allowing them to serve as distant sites to provide telehealth services to patients in their homes or other eligible locations (needs to be confirmed in a Section 1135 waiver)
- Creates an IRS safe harbor for high deductible insurance plans that do not charge a deductible for telehealth or remote care

► Requires longer prescription refills for Medicare beneficiaries

- Medicare prescription drug plans and MA-PD plans must allow fills and refills for covered Part D drugs up to a 3-month supply

► Increases flexibility for home health services

- Relaxes face-to-face requirements for:
 - › Physician evaluation of home dialysis patients
 - › Recertification of eligibility for hospice care (may be done via telehealth)

- Encourages use of telecommunications systems for home health services, including remote patient monitoring
- Expands ability to certify and document home health services to nurse practitioners, clinical nurse specialists and physician assistants
- Expands ability to provide home and community-based services in acute care hospitals to facilitate transitions of care

► Clarifies Medicaid coverage option for uninsured created in Families First Coronavirus Response Act

- States that did not expand Medicaid can use option to cover individuals who would have been covered by expansion
- Applies to groups with limited Medicaid coverage (low income pregnant women, individuals with certain health conditions)

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Provisions specific to health care *(continued)*

DIVISION A – TITLE III, SUBTITLE E

► Medicare and Medicaid program and policy extensions

- Certain Medicare and Medicaid programs and policies have been extended, including:
 - › Work Geographic Practice Cost Index (GPCI), to December 1, 2020
 - › Funding has been extended through November 30, 2020 for Medicare's quality measure endorsement, input, and selection program, state health insurance programs, local councils on aging, and aging and disability centers
 - › Money Follows the Person demonstration program, \$337.5 million from January 1, 2020 to September 30, 2020, and then a pro-rata of the amount appropriated for FY 2020 through November 30, 2020
 - › Spousal impoverishment protections under Medicaid, to November 30, 2020

- › Certified Community Behavioral Health Clinics demonstration program, to November 30, 2020, with planned expansion of the demonstration to two additional states
- › Sexual Risk Avoidance Education Program, to November 30, 2020
- › Personal Responsibility Education Program, to November 30, 2020

► Disproportionate share hospitals

- Eliminates the \$4 billion in disproportionate share hospital cuts in FY 2020, and reduces the cut for FY 2021 from \$8 billion to \$4 billion
- Implementation of the FY 2021 cuts are delayed until December 1, 2020

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