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CARES Act: Shumaker Legal & Legislative Summary

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Shumaker is focused on supporting you and your business through this difficult time. We have implemented a 24/7 COVID-19 legal & legislative helpline (1-800-427-1493) and continue to answer questions around the clock. We have been providing daily updates on local, state and federal developments during these changing, challenging moments. Our team spent hours poring through the CARES Act and we closely monitored the presidential signing of the Act. While you may have received countless updates, we take our role as your partner and advisor seriously and aim to provide you accurate information in the following categories:

- SBA Loans
- Real Estate
- Tax
- Benefits
- Employment
- Health Care

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For the most up-to-date legal and legislative information related to the coronavirus pandemic, please visit our Shumaker COVID-19 [Client Resource Center](#).

SBA LOANS

PAYCHECK PROTECTION PROGRAM – SBA LOAN PROGRAM

The Coronavirus Aid, Relief, and Economic Security (“CARES”) Act has passed the Senate, the House, and has been signed into law by the President on March 27, 2020. The Act includes a significant expansion of the Small Business (“SBA”) Loan Program in the form of a new 7 (a) loan titled the Paycheck Protection Program (“PPP”) to provide relief to certain businesses impacted by the Coronavirus pandemic. The loans are available to many businesses that may not otherwise qualify for a SBA loan, streamlines the loan process, and provides that the loans may be converted to a grant by virtue of a loan forgiveness program.

WHO IS ELIGIBLE FOR A PPP LOAN:

Any business, non-profit organization 501(c)(3), veteran’s organization, and tribal organization that

- Has 500 employees or fewer (full and part-time); or
- Is the size established by the SBA for certain industries

There are special rules for hospitality or dining businesses:

- If more than one location, the business must have 500 employees or fewer per location and
- Is assigned to Section 72 of NAICS (Accommodation & Dining)

CARES waives SBA affiliation regulations for:

- Franchise businesses with an SBA Franchiser Identification Code
- Businesses receiving financial assistance under 301 of the Small Business Investment Act
- Hospitality and dining businesses as mentioned above

CARES waives the requirement that the borrower be unable to obtain a loan elsewhere. Sole proprietors, independent contractors, and self-employed individuals eligible for sick pay under the Families First Coronavirus Response Act (“Families First Act”) may qualify.

BORROWER REQUIREMENTS:

The loan must be used for the following limited purposes

- To continue operations during COVID-19 emergency
- To retain workers and maintain payroll
- Make mortgage, lease, and utility payments

Additionally, the applicant cannot have any other application pending for the same purpose, and cannot receive multiple loans under this program. The applicant may also apply for the 7 (b) Economic Injury Loan, but the two loans cannot be used for the same purpose. To begin the loan process, the applicant should consult with a loan officer in a bank offering SBA loans. The application is submitted by the lender online with information provided by the applicant. For an idea of what type of information will need to be provided,

here is the link to the borrower's information Form 1919. Additional guidelines from the SBA regarding how to apply for PPP loans, are expected, which will include information on how to find a qualified lender. Borrowers with outstanding SBA loans should contact their existing lenders to inquire about applying for loans under the PPP.

MAXIMUM LOAN AMOUNT:

The maximum that may be borrowed under the program is:

- 2.5 times total monthly payroll costs, measured upon previous year's payroll
- Plus any outstanding amount of a SBA Disaster Loan made between January 31, 2020 and date of refinance
- Not to exceed \$10 million
- There are special rules for seasonal businesses or businesses not in business for one year

OTHER LOAN TERMS:

- Interest rate not to exceed 4 percent
- Repayment is deferred for six months to one year
- No collateral or personal guarantee required (or permitted)
- No recourse against individual, shareholder, member, or partner for non-payment unless loan proceeds are used in an unauthorized manner
- No prepayment penalty after the forgiveness period
- Fees are waived
- May refinance an existing loan from under SBA Disaster Loan Program made on or after January 31, 2020
- Repayment on amounts not forgiven is 10 years

PERMISSIBLE USES:

The loan proceeds may be used for the following specific purposes:

- Mortgage interest payments
- Rent payments
- Utilities
- Interest on debt obligations previously incurred; or
- Payroll costs
 - All compensation, including salary, wages, commissions, tips, PTO, and severance
 - State and local payroll taxes
 - Compensation to sole-proprietors or independent contractors
 - Up to \$100,000 per employee in one year (pro-rated)
 - Health insurance premiums, retirement plan contributions

The borrower must certify that the loan is necessary to fund ongoing operations.

The loan may not be used for the following purposes:

- Individual employee compensation over \$100,000 per year (pro-rated)
- Certain federal taxes
- Compensation to employees not residing in the United States
- Sick and family leave wages already credited under FFCRA

- Inventory loss

LOAN PROCESS

- Funding will be available next week
- Non-certified SBA lenders will be included as lenders (for example American Express)
- Loans are processed by lenders under delegated authority
- Application is streamlined
- Application is through ETRAN, by the lender with information from the applicant, one application at a time
- More than \$325 billion available to fund by June 30, 2020
- Guidelines for making, servicing and forgiveness will be issued by SBA
- If the CARES Act is silent on a loan requirement, the standard 7 (a) loan requirements apply.

FORGIVENESS PROVISIONS:

Borrowers are presumed to be eligible for loan forgiveness. The Borrower must have been operating and paying employees or independent contractors on February 15, 2020. Loans of not less than 6 months nor more than 1 year may be forgiven. The following amounts may be forgiven:

- Sum of all payments for all permissible uses
- Reduced by
 - Decreases in full time employees
 - Decreases of more than twenty-five (25%) percent in compensation to employees making less than \$100,000 (Annualized)
- No decrease related to reductions in numbers of employees or compensation incurred between February 15, 2020 and thirty (30) days after enactment of CARES; if employment is restored or if wage reductions are made up by June 30, 2020

CARES requires the following documentation for forgiveness:

- Verification of payroll costs
- Verification of mortgage, lease, and utility costs
- Certification by officer of above costs and appropriate use of proceeds

TAX CONSEQUENCES:

- Forgiveness of the loan amount is not taxable income

DISASTER LOAN 7(b) – Economic Injury Disaster Loan (EIDL)

1. Eligible Businesses

(a) In addition to other prerequisites, to be eligible, the applicant must be a small business, small agricultural cooperative, or a private nonprofit organization.

(b) The principal office of the operating company must be located in a county/state that has an Economic Injury Disaster Loan declaration.

(c) The business must be determined as creditworthy by the guidelines set forth by the SBA. Loans that exceed \$25,000 must be secured by collateral to the extent possible and, if the business has no collateral,

businessowner's assets may need to be pledged as collateral.

(d) Applicants must show that they have the ability to repay all loans.

(e) Under the CARES Act expansion provisions, EIDL assistance is available to a business with 500 or fewer employees; sole proprietorships, with or without employees, and independent contractors; cooperatives with 500 or fewer employees; ESOPs with 500 or fewer employees; and Tribal small business concerns.

2. Economic Injury Disaster Loan Details

(a) EIDLs are loans issued to eligible businesses following a state or territory's governor declaration that the businesses in their respective area have been adversely affected by the COVID-19 pandemic.

(b) EIDL are loans designed to pay fixed debts, payroll, accounts payable, and other liabilities of a business. The loans cannot be used to replace lost sales or revenue. The actual amount of each loan is limited to the economic injury suffered by the business as determined by SBA. Currently the maximum amount is \$2 million; however the maximum can be waived, provided that the business is a major source of employment.

(c) The test for "economic injury" is that the business must be unable to meet its obligations and to pay its ordinary and necessary operating expenses.

(d) EIDL loan proceeds may not be used for lost sales or revenue – these types of losses are not an economic injury under the SBA guidelines.

(e) The applicant may also apply for the Paycheck Protection Program 7(a) loan, however, the funds must not be used for the same purpose.

(f) The maximum interest rate is 3.75 percent for small businesses.

(g) Repayment terms are determined on a case-by-case basis, but, in order to keep the payments low, Disaster Assistance Loans are generally amortized over a long term (maximum of 30 years).

(h) Obtaining a Disaster Assistance Loan involves three steps:

(1) Application (online, in person at disaster center or by mail)

(2) Determination of eligibility, based upon review of credit and economic impact

(3) Closing/execution of Loan Documents

Generally, an initial disbursement of loan funds is made within five days after closing.

Both the PPP and EIDL loans are funded and guaranteed by the SBA. The CARES Act also includes expansion of eligibility for Emergency EIDL Grants and requires waiver of the personal guarantee in specified circumstances together with other applicant favorable enhancements.

It is anticipated that future legislation will further provide borrower friendly provisions related to the requirements of the EIDL.

REAL ESTATE

The CARES Act contains significant provisions affecting foreclosures and forbearance, and a temporary

moratorium on eviction filings, on all Federally backed mortgage loans for residential properties. These provisions can be found in Sections 4022, 4023, and 4024 of the CARES Act.

Section 4022: Foreclosure Moratorium and Consumer Right to Request Forbearance.

This section prohibits foreclosures on all Federally backed mortgage loans for a 60-day period beginning on March 18, 2020. A Federally backed mortgage loan is defined to include any loan which is secured by a first or subordinate lien on residential real property (including individual units, like condominiums and cooperatives) designed for occupancy by one to four families, that is purchased by Fannie Mae or Freddie Mac, or insured by HUD, VA, or USDA.

Additionally, this section provides for up to 180 days (which may be subsequently extended for an additional 180 days, for a total of 360 days) of forbearance for borrowers of Federally Backed Mortgage Loans who have experienced a financial hardship related to the COVID-19 emergency. No additional fees, penalties, or interest shall accrue on the borrower's account during the period of forbearance.

Finally, this section provides that, except with respect to vacant or abandoned property, a servicer of a Federally Backed Mortgage Loan may not initiate any judicial or non-judicial foreclosure process, move for a foreclosure judgment or order of sale, or execute a foreclosure-related eviction, or foreclosure sale for a 60 day period beginning on March 18, 2020.

Section 4023: Forbearance of Residential Mortgage Loan Payments for Multifamily Properties with Federally Backed Loans.

This section is largely a counterpart to the prior section 4023 and extends similar provisions to multifamily borrowers (i.e., residential real property designed for occupancy by five or more families). Such borrowers who were current on their loan as of February 1, 2020, may apply for an initial 30-day period of forbearance (which may be extended for two subsequent 30-day periods, for a total of 90-days). Borrowers receiving forbearance may not evict tenants or charge late fees or impose other penalties on tenants for non-payment of rent for the duration of the forbearance period. The provisions of this section terminate on the earlier of the termination date of the national emergency concerning the coronavirus or December 31, 2020.

Section 4024: Temporary Moratorium on Eviction Filings.

This section provides that for 120 days beginning on the date of March 27, 2020, landlords are prohibited from initiating legal action to recover possession of a rental unit or to charge fees, penalties, or other amounts related to the non-payment of rent where the landlord's mortgage on the property is Federally backed.

TAX

Section 2301 – Employee retention credit for certain employers impacted by COVID-19

As an incentive for employers to retain employees during a closure or significant reduction in business, the Act provides a refundable payroll tax credit for 50% of the wages paid by employers to employees after March 12, 2020 and before January 1, 2021. The credit is available to employers, including tax-exempt organizations, that are carrying on a trade or business during 2020 and that meet one of the following two tests:

- The employer's trade or business is fully or partially suspended due to orders from an appropriate governmental authority limiting commerce, travel or group meetings due to COVID-19; or

- The employer experiences a year-over-year reduction in gross receipts of at least 50% during a calendar quarter. If the employer meets this requirement, wages for which the credit can be taken extends through the end of the calendar quarter in which gross receipts exceed 80% year-over-year.

The credit is limited to the first \$10,000 of qualified wages paid to an employee, including an allocation of the amount the employer pays to maintain the employee's health benefits. For employers with greater than 100 full-time employees, qualified wages only include wages paid to employees who are not providing services due to COVID-19-related circumstances. For employers with 100 or fewer employees, qualified wages include all wages paid to all employees. Qualified wages excludes wages paid to related persons that directly or indirectly hold a 50% or more interest in the employer.

All employees of all corporations or partnerships that are under 50% or more common control shall be treated as employed by a single employer. Affiliated service groups are also treated as a single employer.

The credit is not available to employers taking a small business interruption loan under the Paycheck Protection Program (section 1102 of the Act) since the intent of obtaining this type of loan is to continue to fund payroll expenses.

Section 2302 – Delay of payment of employer payroll taxes

The Act allows employers and self-employed individuals to defer payment of the employer share of Social Security tax (6.2%) on employee wages and self-employment income earned in 2020. The Act requires half of the deferred amount to be paid by December 31, 2021, and the remaining half to be paid by December 31, 2022. The deferral relief does not apply to the Medicare tax (1.45%).

The delay in payment is not available to employers who have loans under the Paycheck Protection Program that are forgiven. Therefore, employers who obtain those loans should continue to deposit payroll taxes on the normal schedule.

If employers or clients direct their pay agents or Professional Employer Organizations to defer the payment of applicable employment taxes, then those employers or clients shall be solely liable for the payment of the deferred amounts by the due dates described above.

Sections 2204 and 2205 – Increased Charitable Deductions

The Act provides up to a \$300 above-the-line charitable deduction to taxpayers that claim the standard deduction, suspends the 50 percent charitable limitation on individuals that itemize deductions and increases the limitation for corporations from 10 percent to 25 percent for cash contributions made to charities in 2020 so long as the contributions are not made to supporting organizations or donor advised funds. The Act also increases the charitable limitation for items from the food inventory of a trade or business from 15 percent to 25 percent.

Section 2303 – Deduction of Net Operating Losses

The Act rolled back certain provisions of 2017's Tax Cuts and Jobs Act ("TCJA") that placed limitations on the deduction of net operating losses ("NOLs") for years 2018-2020. Under the TCJA, NOLs are subject to a deduction cap equal to 80 percent of a taxpayer's taxable income each tax year (the "Deduction Cap"). The Act eliminates the Deduction Cap for NOLs incurred in or carried forward into the 2020 tax year from prior years.

The TCJA also eliminated the ability to carry NOL deductions back into prior tax years. The Act allows NOLs

incurred in 2018, 2019, and 2020 to be carried back five years, again without being subject to the Deduction Cap. These provisions are meant to allow taxpayers to carry back NOLs and obtain refunds for tax paid in prior years as quickly as possible. Note that the special five-year carryback period is not available to REITs.

The TCJA taxed U.S. corporations with untaxed post-1986 foreign earnings at the end of 2017 as if they were repatriated to the U.S. in 2018 at a special, lower tax rate. Taxpayers could elect to recognize and pay tax on such income over a period of eight years. Under the Act, if an NOL is carried back to a year in which a taxpayer is subject to tax on income deemed repatriated under the TCJA, the taxpayer will be deemed to have made the election under Code Section 965(n) to not apply the NOL to the deemed repatriated income. In the alternative, a taxpayer may elect on their 2020 income tax return not to carry back an NOL to any year during the five-year carryback period in which the taxpayer has income taxable under Code Section 965.

The Act also makes certain technical corrections to the effective date of the NOL provisions of the TCJA to clarify its application to fiscal year-end taxpayers.

Section 2304 – Modification of Limitations on Losses for Taxpayers Other than Corporations

For taxpayers other than corporations, the Act suspends the limitation on excess farm losses of certain taxpayers and modifies limitations on taxpayers' excess business losses for tax years that begin after December 31, 2017 and before January 1, 2026 so taxpayers can utilize the excess business losses to increase current cash flow. In addition, the Act includes a technical correction to the TCJA clarifying that losses from the sale of capital assets are not included in the computation of excess business losses and the computation of taxable income for purposes of determining the cap on deduction of excess business losses against non-business income includes only the lesser of (i) capital gains from a trade or business or (ii) aggregate capital gain net income.

Section 2305 – Acceleration of AMT Credits

The TCJA repealed the corporate alternative minimum tax ("AMT"), but allowed AMT refundable credits to be taken over several years, ending in 2021. The Act accelerates the recovery of the AMT credits by permitting companies to claim a refund now to obtain additional cash flow.

Section 2306 Limitation on Business Interest Expense

The Act would temporarily increase the limitation on interest deductions imposed by the TCJA. Specifically, the Act would increase the 30 percent of adjusted taxable income (ATI) threshold under Section 163(j) to 50 percent of ATI, for tax years beginning in 2019 and 2020. Special tax year 2019 rules would apply to partnerships; note that ATI is essentially equivalent to EBITDA. Importantly, it would also allow a taxpayer to elect to use tax year 2019 ATI in lieu of tax year 2020 ATI for the purpose of calculating its tax year 2020 limitation. Taxpayers should consider this election if it allows for a larger deduction in 2020.

As background, under the TCJA, for tax years beginning after 2017, the 30 percent limitation identified above, applied to all taxpayers who had business interest expense, other than certain small businesses with three-years annual average gross receipts of less than \$25 million under Section 448(c) and certain excepted trades or business. Generally, the excepted trades or businesses include: the trade or business of providing services as an employee, certain real property trades or businesses making the proper election, certain farming businesses making the proper election, and certain regulated utility trades or businesses. Absent further legislation, these rules would apply for tax years beginning in 2021.

Section 2307 – Expensing of Qualified Improvement Property.

The TCJA provided for accelerated depreciation for property with a depreciable life of 15 years or less, including 100 percent expensing for property placed in service between September 17, 2017 and January 1, 2023. Due to a drafting error, there was some uncertainty whether certain types of qualified improvement property qualified for such treatment despite having a 20-year depreciable life. The Act includes a technical correction effective upon the original effective date of the TCJA that makes clear all 15-year property did and continues to qualify for accelerated depreciation.

Section 2308 – Exception to Excise Tax for Alcohol Used to Produce Hand Sanitizer.

The Act eliminates that excise tax on alcohol for alcohol used in the production of hand sanitizer during 2020.

BENEFITS

Retirement Plan Provisions

Pension Plan funding

The Act provides temporary relief from ERISA's minimum funding standards for defined benefit pension plans. Any minimum contributions the employer would otherwise have been required to make to the pension plan during 2020 will not be due until January 1, 2021. Further, the pension plan can now continue to rely on its 2019 "adjusted funding attainment percentage" (or "AFTAP") for the 2020 plan year, to delay when it must impose the restrictions on lump sum distributions and other restrictions mandated for underfunded pension plans under Code Section 436.

Authorization of distributions from retirement plans, waiver of excise tax

The Act allows tax-qualified retirement plans and IRAs to permit an early withdrawal of up to \$100,000 as a "coronavirus-related distribution" during the 2020 calendar year. A "coronavirus-related distribution" is a distribution to an individual who is diagnosed with the virus, who has a spouse or dependent diagnosed with the virus, or who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, having hours reduced, being unable to work to care for a child, or the closing or downturn of a business due to the virus. Regular income taxes would apply to the distribution, but the income tax can be paid evenly over the course of three tax years, beginning in the year of the distribution. The 10 percent penalty tax on distributions before age 59½ would not apply to a qualifying distribution, however.

The recipient can choose to repay all or part of the distribution within three years of the date on which the distribution was taken. The repayment can be made to the retirement plan from which the distribution was taken, or another qualified retirement plan or IRA that will accept the contribution. The amount that is repaid won't be subject to income taxes until they are again distributed from the plan to which the re-contribution was made.

Changes to Plan loan rules

The Act temporarily increases the maximum amount of a loan that a participant who is eligible to receive a coronavirus-related withdrawal (described above) can take from a qualified retirement plan from \$50,000 to \$100,000, and allows the participant to take up to 100 percent of his or her vested benefit as a loan, instead of the normal 50 percent limit. The Act also allows these individuals to defer any payments that are due on new and existing plan loans during the remainder of 2020 for one year, along with extending the end of the normal 5-year repayment period by about 9 months.

Waiver of required minimum distributions

The Act waives required minimum distributions from IRAs and tax-qualified defined contribution plans for 2020, including 2019 RMDs that are due to be paid by April 1, 2020. Any amounts that are not required to be distributed as RMDs in 2020 under this relief, but are still distributed, will be eligible for rollover. Congress provided similar RMD relief in 2009.

Plan amendments

Plan amendments for the coronavirus-related distributions, the changes to plan loan rules and the waiver of required minimum distributions must be made by December 31, 2022 for calendar-year plans (a later date will apply to non-calendar year plans).

Welfare Plan Provisions

Telehealth coverage under a high-deductible plan

The Act permits first-dollar coverage of telehealth services under a high-deductible health plan. As a result, employees who are covered by an HDHP will continue to be eligible to contribute to a health savings account. This applies until December 31, 2021 (or later for non-calendar plans). The Families First Act allowed for COVID-19 testing to be covered on a first dollar basis without risking the loss of the plan's status as an HDHP.

Group Health Plan Coverage of COVID-19 expenses

Under the Act, group health plans and health insurers will be required to begin covering certain vaccinations and other medical services which prevent or mitigate COVID-19 within 15 days after they are classified as "qualified coronavirus preventive services." This classification will be based on receiving a rating of A or B from the U.S. Preventive Services Task Force, or a recommendation by the CDC's Advisory Committee on Immunization Policies. These qualified coronavirus preventive services must be covered without co-insurance or other cost sharing. The Act also expands the definition of the coronavirus diagnostic tests, which must be covered by group health plans and health insurers to include certain additional diagnostic tests, which have not been yet authorized by the FDA in cases where the developer has applied or is applying for emergency use authorization or in which the diagnostic test has been approved by another government regulator. The Secretary of HHS can further expand the list in the future.

Miscellaneous

DOL can postpone reporting deadlines

The Act gives the Department of Labor the authority to postpone certain reporting deadlines due to a public health emergency. Therefore, we will likely see some deadlines being delayed in the coming weeks, much like the IRS pushed the income tax return filing date from April 15 to July 15, 2020.

Temporary income tax exemption for student loan benefits paid by employers

The Act allows employers to provide a student loan repayment benefit to their employees on a tax-free basis for the remainder of 2020. The benefit can be either a direct payment on the loan by the employer or a reimbursement of the payment to the employee. The maximum exclusion is \$5,250, which includes any other amounts (such as funding for tuition, fees and books) that the employer provides under an educational assistance program.

EMPLOYMENT

For employers facing layoffs and reduced hours, the Act has two provisions of particular note:

(1) an expansion of unemployment benefits and

(2) further amendments to last week's Emergency Family and Medical Leave Expansion Act and Emergency Paid Sick Leave Act.

Expanded Unemployment

In states that choose to participate in the unemployment expansion, employees who lose their jobs – and who are otherwise eligible for unemployment benefits – will also receive an extra \$600/week in addition to their regularly calculated benefits. Unemployment eligibility requirements remain unchanged. Typically, employees who quit are not entitled to unemployment benefits, unless they quit for particular reasons that vary from state to state, such as a certain percentage reduction in hours or pay rate.

This additional benefit is available to employees both totally unemployed and partially unemployed. As an example, an eligible employee in North Carolina, whose average earnings over the past two quarters was \$400/week, would normally be entitled to unemployment benefits of \$200/week for total unemployment.¹ Under the CARES Act, that employee may now receive \$800/week – twice his/her regular pay. If, instead, the same employee's hours were reduced due to furlough or other adjustments to her work schedule, such that the employee was now earning wages of only \$133.00/week, the employee would normally be entitled to partial unemployment benefits of \$107/week. Under the CARES Act, that employee may now receive \$707/week in unemployment benefits on top of his/her \$133/week new pay rate. Notably, as far as earnings are concerned, this employee is better off working than going on total unemployment.

The CARES Act also provides for a possible 13-week extension of benefits over regular state benefit cut-offs, which range from 13 weeks to 28 weeks, depending upon the state. Employers should note that COVID-19 related unemployment claims will not be chargeable against them. The additional unemployment benefits expire on July 31, 2020.

Finally, in addition to employees losing their jobs, workers who are not eligible for regular unemployment benefits, may be eligible for up to 39 weeks of Pandemic Unemployment Assistance through December 31, 2020. This includes self-employed workers, workers who have not been on the job long enough to receive benefits, and workers whose regularly available benefits have been exhausted. To be eligible, workers must show:

- They have been diagnosed with COVID-19 or have symptoms of it and are seeking diagnosis;
- A member of their household has been diagnosed with COVID-19;
- They are providing care for someone diagnosed with COVID-19;
- They are providing care for a child or other household member who can't attend school or work because it is closed due to COVID-19;
- They are quarantined or have been advised by a health care provider to self-quarantine;
- They were scheduled to start employment and do not have a job or cannot reach their place of employment as a result of a COVID-19 outbreak;
- They have become the breadwinner for a household because the head of household has died as a direct result of COVID-19;
- They had to quit their job as a direct result of COVID-19;
- Their place of employment is closed as a direct result of COVID-19; or

- They meet other criteria established by forthcoming Department of Labor regulations.

Benefit amounts will be calculated as under the existing federal Disaster Unemployment Assistance program.

Amendments to Emergency FMLA and Paid Sick Leave Acts

On March 18, 2020, the President signed the Families First Coronavirus Response Act, which included the Emergency Family and Medical Leave Expansion Act and the Emergency Paid Sick Leave Act, both of which will be effective on April 1, 2020. Detailed information on those Acts is available [here](#).

The CARES Act amends the Family Medical Leave Act (FMLA) and sick leave acts in a few important ways. Importantly, for both Acts, employers will be able to seek advance offsetting tax credits against payroll taxes, without having to wait until those payroll taxes are due. How that will work will be addressed in forthcoming Department of Labor regulations.

The amendments also provide:

- Clarification that the stated benefit caps under the Acts are per employee²; and
- That the definition of “eligible employee” under the expanded FMLA Act includes an employee who was laid off on or after March 1, 2020, had worked for the employer at least 30 of the previous 60 calendar days, and has since been rehired by the employer.

1 These calculations will vary from state to state, but the principles remain the same.

2 For the expanded FMLA, the caps are \$200/day and \$10,000 in aggregate. For paid sick leave, the caps are \$511/day and \$5,110 in aggregate for eligible leave associated with COVID-19 illness or quarantine orders and are \$200/day and \$2,000 in aggregate for other eligible leaves, such as caring for someone in quarantine or home due to school closures.

HEALTH CARE

LIMITATION OF LIABILITY FOR SOME PROVIDERS

The CARES Act limits the liability of health care professionals acting in good faith during the COVID-19 emergency response when the professional is providing health care services in a volunteer capacity in response to COVID-19 and the services are within the scope of the health care professional’s license.

TELEHEALTH COVERAGE

Through a number of provisions, the CARES Act expands access to telehealth services during the Covid-19 emergency period and, in some cases, beyond. During the emergency period, the CARES Act temporarily waives existing Medicare requirements for face-to-face visits between home dialysis patients and their physicians and face-to-face visits prior to recertification of eligibility for hospice care. Another provision expands Medicare reimbursement for telehealth services provided by federally qualified health centers and rural health clinics during the emergency period. With respect to high deductible health plans, the CARES Act creates a safe harbor for plans beginning on or before December 31, 2021, allowing such plans to provide pre-deductible telehealth and other remote care services. Thus, even after the emergency period, high deductible health plans will be able to provide plan members with covered telehealth and other remote care services before the member has met their deductible. The CARES Act also amends the Public Health Service Act (42 U.S.C. 254c-14) by authorizing \$29 million per year for fiscal years 2021 to 2025 for the National Telehealth Resource Center Program (“NTRC”). The NTRC provides grants to support, telehealth in rural and medically underserved areas, as well as training, support and technical assistance. Additionally, this requires the HHS Secretary to consider ways to encourage the use of telecommunications and remote

patient monitoring services (for example, services monitoring ECG, blood pressure, or glucose monitoring) during the emergency period, including by clarifying guidance and conducting outreach.

SUBSTANCE ABUSE AND MENTAL HEALTH PROVISIONS

The Medicaid community mental health services demonstration program, which provides coordinated care to patients with mental health and substance use disorders, is extended by the CARES Act through November 30, 2020. Previously, the program was set to expire on May 22, 2020. The CARES Act specifically allocates \$425 million to the Substance Abuse and Mental Health Services Administration to prevent, prepare for, and respond to the coronavirus, with a requirement that at least \$50 million of the total amount is available for suicide prevention programs. Additionally, a separate provision of the CARES Act implements changes to the federal statute governing disclosure of substance use records (42 U.S.C. 290dd-2) in an effort to harmonize requirements related to records disclosure, privacy practices, release of de-identified information to public authorities, and breach notifications with correlating requirements under HIPAA.

HEALTH CARE PROVIDER AND SUPPLIER FUNDING

The CARES Act allocates \$100 billion to hospitals, Medicare enrolled providers, public entities, and other and suppliers to cover costs related to coronavirus. The funds will be channeled through the HHS Secretary for health care related expenses as well as lost revenues directly attributable to coronavirus. Eligible entities include hospitals, Medicare or Medicaid enrolled suppliers, public entities, and other eligible providers to be specified by the HHS Secretary. The \$100 billion in funds cannot be used to reimburse expenses or losses that are reimbursable from other sources. This may lead to issues on whether certain losses should be covered under insurance or other programs.

The \$100 billion of allocated funds are available for a wide variety of uses, including constructing temporary structures, leasing property, medical supplies and equipment (including PPE), testing supplies, increased workforce and training expenses, emergency operations centers, retrofitting facilities, and surge capacity. Recipients must apply for payments, submit reports, and maintain documentation as determined by the HHS Secretary. Shumaker will provide additional updates when any information about the specifics of this program become available.

FUNDING FOR RESEARCH AND SUPPLIES

The CARES Act allocates an additional \$27 billion through the Biomedical Advanced Research and Development Authority (BARDA) for research into vaccines, treatment, and diagnostic testing. This includes \$16 billion to be used for the "Strategic National Stockpile" of pharmaceuticals, personal protective equipment, ventilators, and other supplies. There are additional allocations of \$45 billion for FEMA and \$4.3 billion to the CDC.

FUNDING FOR FEDERAL HEALTH CENTERS, RURAL HEALTH NETWORKS, COMMUNITY HEALTH CENTERS, AND TEACHING HOSPITALS

The CARES Act allocates \$1.32 billion for FY 2020 to federal health centers which focus on providing care to low-income individuals. An additional \$79.5 million is allocated for 2021-2025 for expanded delivery of health care services and integrated networks in rural areas. The CARES Act increases the funding from \$2.5 billion to \$4 billion for community health centers and the national health services corps.

FUNDING FOR INFECTION CONTROL AT NURSING HOMES

The ACT will provide \$200 million for CMS to assist nursing homes with infection control along with efforts

by states to prevent the spread of coronavirus in nursing homes.

MEDICARE AND MEDICAID RELIEF FOR HOSPITALS

Medicare: The CARES Act lifts a 2 percent Medicare cut set for May 1 until December 30, 2020. Additionally, the CARES Act increases Medicare payments for treating COVID-19 patients by 20 percent based upon a 20 percent add-on to the DRG rate for patients with COVID-19. The 20 percent add-on will apply to patients treated at both rural and urban inpatient prospective payment system (IPPS) hospitals.

The CARES Act temporarily expands the existing Medicare accelerated payment program. The program allows hospitals to receive accelerated Medicare payments if the hospital has significant cash flow problems resulting from unusual circumstances of the hospital's operation. Most types of hospitals are eligible and may elect to receive payments on a periodic or lump sum basis; increase the amount of payment that would otherwise be made; or extend the period that accelerated payments cover so that it covers up to a six-month period. Claims may be offset to recoup the accelerated payment after 120 days, and the outstanding balance must be paid in full within one year of the date of receiving the first accelerated payment.

Medicaid: The CARES Act delays cuts to Medicaid Disproportionate Share Hospital (DSH) payments through November 30, 2020.

MEDICARE PART D- PRESCRIPTION DRUGS

Because prescriptions may be difficult to obtain in a health system overwhelmed by a pandemic, the CARES Act mandates that Medicare Part D plans provide a 90-day supply of prescription medication when requested.

MANDATORY COVERAGE OF COVID-19 RELATED TREATMENT AND TESTING BY INSURANCE COMPANIES

Health insurance plans must cover the following without any cost-sharing (including deductibles, copayments, and coinsurance): 1) vaccines or preventative therapeutics once they are developed and 2) lab testing which includes in vitro diagnostic products that detect COVID-19 along with items and services furnished to an individual during health care provider office visits that relate to furnishing or administering a diagnostic test including the evaluation of such individual.

ASSORTED PUBLIC HEALTH PROGRAMS

The CARES Act reauthorizes and provides funding through November 2020 for Community Health Centers, the National Health Services Corps, and programs that award grants to fund HIV/STD prevention or teen pregnancy prevention.

MEDICAID'S "MONEY FOLLOWS THE PERSON PROGRAM"

The CARES Act continues to fund a program for Medicaid enrollees with chronic conditions and disabilities transitioning from institutions back into the community.

SUPPLY SHORTAGES

Obviously supply chain shortages have been widely reported. The CARES Act requires manufacturers to report supply chain interruption. The FDA is mandated to prioritize and expedite drug applications and inspections related to coronavirus.

BLOOD SUPPLY

HHS must engage in a public awareness campaign to raise the blood supply.

TECHNOLOGY-ENABLED EDUCATION

The CARES Act provides reimbursement to a state that provides technology-enabled training for health care professionals related to responses in a public health emergency.

FDA OVER THE COUNTER DRUG REGULATIONS

The FDA can now approve changes to OTC drugs administratively rather than through full notice and comment rulemaking. The CARES Act grants an 18-month exclusivity period to incentivize companies that bring new OTC products to market.

HIPAA CHANGES COMING

The HHS Secretary must provide guidance within 180 days about the sharing of patient information during the COVID-19 public health emergency.

SHUMAKER ADVISORS

The CARES Act – Inside the Legislative “Sausage Making”/A Political and Policy Perspective

Summary.

The Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act” or “CARES”)¹, a historic economic relief measure, was passed by the U.S. Congress and signed by President Trump on Friday, March 27, 2020, in response to the coronavirus pandemic and its vast economic and social impacts in the United States. Never before has Congress passed such a large and sweeping economic stimulus package. The size of the package – roughly \$2.2 trillion and 800-plus pages – is more than twice the size of the stimulus package signed by President Obama in the wake of the 2008 financial crisis, the “American Recovery and Reinvestment Act of 2009”² (approximately \$830 billion). It is a historic measure, by any measure.

In addition, the massive bill was compiled in an incredibly brief amount of time. CARES is the third of three (3) federal bills enacted in response to the coronavirus. The Senate cleared the second of the three bills, H.R. 6201, the “Families First Coronavirus Response Act”³, on March 18, 2020. President Trump signed it the same day. The Senate started working almost immediately on CARES as it became clear how deep the economic impact from the coronavirus would be. A mere nine (9) days later, on March 27, the House passed, and the president signed, the CARES Act by voice vote. Credit should go to the congressional, agency and White House staff, and the members of the U.S. House and Senate, for such quick action and hard work on an incredibly complicated, high-stakes piece of legislation over many late nights, while many were working remotely. I can say, from first-hand experience, they felt a patriotic call to respond, in the best way possible, to the pain, anguish, and fear facing so many of their fellow Americans.

Political background.

Many fear that bipartisanship in Washington is dead. The decisiveness with which Congress has acted in response to the coronavirus, I believe, shows otherwise. When Congress needs to respond and address a true national issue or crisis, it can put partisanship aside and do it. Were there some policy differences and hang-ups in the process?

Sure, including two failed “cloture” procedural votes in the Senate, and a last-minute push in the House on Friday to get a sufficient number of members to return for a quorum. While there were of course philosophical differences among Democrats and Republicans along the way on *how* to address the problem and keep America working – as there always is when the two sides bring their respective solutions to the table – there was a strong bipartisan consensus that Congress and the President needed to act – and act quickly. As a result, within the span of just 22 days – from March 5 (when Congress passed the first coronavirus response legislation⁴ by a nearly unanimous House vote of 415- 2, and 96-1 in the Senate) to March 27, 2020 when the House passed the bill by voice vote (in the Senate it passed 96-0) – Congress passed three major pieces of legislation. Neither side saw the measure as perfect, but it shows that Congress can and does work the right (and bipartisan) way on behalf of the American people.

Bill overview.

With a bill of this size and impact, it will take days, maybe weeks, to fully understand the impact and operation of each of its elements. Shumaker Lawyers, through this client update, have done a “deep dive” on many of the most important parts of the law, interpreting the statutory language and helping our clients understand what it means for them given their unique circumstances. Through the below summary, I provide a very high-level, “30,000 foot” view of the major provisions for a more macro-level look at the policies Congress enacted through this bill.⁵

In general, CARES began and was crafted in the Senate with the input and involvement of Senate Democrats. Senate Majority Leader Mitch McConnell (R-KY) appointed four (4) bipartisan task forces to work on its various elements. He described the final product as a “Republican-leaning bill” that meets his “four pillars”: 1) aid to small businesses, 2) direct cash payments, 3) loans to companies in distressed industries, and 4) money to fund the medical response to the coronavirus crisis. Senate Democrats were able to secure changes to the legislation that better reflected their priorities after successfully blocking two procedural votes in the Senate. In contrast, the second coronavirus bill, passed earlier (March 18, 2020), had been crafted primarily by House Democrats, originated in the House, and was ultimately accepted by the Senate after some last-minute changes forced by Senate Republicans.

A Topline Summary:

Division A – Keeping Workers Paid and Employed, Health Care System Enhancements and Economic Stabilization

Title I: The Keeping American Workers Paid and Employed Act (approximately \$377 billion). Contains approximately \$377 billion to provide a lifeline to small businesses through various programs, including a new “Paycheck Protection Program,” which provides 100 percent federally guaranteed loans to employers with fewer than 500 employees (or the applicable size standard).

Title II: Assistance for American Workers, Families and Businesses (estimated at \$560 billion). Contains direct payments to individual Americans, a further buildout of the unemployment insurance program, and various tax provisions targeted to businesses, including a refundable payroll tax credit for half of the wages paid by employers who were severely impacted during the pandemic and a provision to allow employers and self-employed individuals to defer payment of the 6.2 percent employer share of the Social Security tax for up to two years.

Title III: Supporting America’s health care system in the fight against the coronavirus. Contains six (6) subtitles addressing health care, education, and labor/employment issues (e.g. leave and pensions), among others, including provisions to bolster critical health care supplies, increase testing, vaccines and telehealth

services, provide colleges and schools flexibility for students, relax payment requirements for student loans, enhance health care provider payments, and provide increased program flexibility to help Medicare and Medicaid beneficiaries.

Title IV: Economic stabilization and assistance to severely distressed sectors of the U.S. economy (approximately \$500 billion). Provides \$500 billion to the Treasury Department's "Exchange Stabilization Fund" for loans, loan guarantees, and other investments to eligible businesses, states, and municipalities for coronavirus losses. It allocates approximately \$60 billion for passenger and cargo air carriers, part of which is set aside for wages, salaries, and benefits. It provides \$454 billion to back emergency Federal Reserve lending programs for loans, loan guarantees, and investments, with certain conditions placed on businesses that take the direct loans.

Title V: Coronavirus relief funds. Provides \$150 billion to state, tribal, and local governments to cover costs incurred due to the public health emergency caused by Covid-19. Each state will receive funds based on population.

Title VI: Miscellaneous provisions. Provides up to \$10 billion in borrowing authority for the U.S. Postal Service (USPS) if it determines that due to the coronavirus crisis, it will not be able to operate without assistance. Several days ago, the House Government Reform and Oversight Chairwoman, Carolyn Maloney (D-N.Y.), had raised concerns that due to a drop in mail volume, the USPS might not survive the summer.

Division B: Emergency Appropriations for Coronavirus Health Response and Agency Operations (approximately \$340 billion). This division, the bill's appropriations portion, would direct \$339.86 billion in emergency funding to government agencies and programs. According to the Senate Appropriations Committee, 80 percent of the funds would go directly to state and local governments. It includes \$117 billion for hospitals and veterans' health care; \$11 billion for vaccines, therapeutics, diagnostics, and other preparedness needs; \$4.3 billion for the Centers for Disease Control; \$16 billion for the Strategic National Stockpile; and \$45 billion for FEMA disaster relief.

What's next?

There is already talk in Washington, D.C., of a fourth relief package to fill in the gaps left in this package, and to address other economic issues that may arise as the crisis continues and potentially deepens. A fourth package would also present an opportunity to fix any technical or other problems in the CARES Act – nothing crafted so quickly can be done perfectly.

Most importantly, now federal agencies will begin working furiously to implement Congress's instructions and the various programs authorized under the bill –and to get the money out the door and in the hands of all eligible individuals and businesses as quickly as possible. In addition, agencies will begin crafting and publishing the guidance and regulations necessary to implement particular provisions of the bill.

What should I do?

In short – call us if you need help understanding the law, or how it may impact you, or if you have questions. This historic legislation is designed to shore up our economy, provide a lifeline to families and individuals, keep small, medium, and large-sized business impacted by the crisis open and running, and ensure that our nation and our economy can recover quickly once the disaster passes. It's safe to say it touches virtually every business and every American in some way. And it's an example of the importance of being involved and being engaged with your elected officials at the state and local level, so you have an avenue to affect change in the policies that affect you.

You may have important questions now such as:

- How does a particular provision work in practice? Am I eligible?
- What programs are available that will help me keep the doors of my business open?
- Are there requirements for receiving funds? What are they?
- How can I influence or impact any additional legislation Congress may consider next in response to the coronavirus?
- How will federal agencies interpret and implement the law? If I'm concerned about how something will be interpreted, or that it might negatively impact my business, can I change or influence it?

1 H.R. 748 (116th Congress)

2 P.L. 111-5, February 17, 2009.

3 P.L. 116-127, March 18, 2020, in short the "Second Coronavirus Response Package."

4 The Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020, P.L. 116-123

5 This is a very brief overview. There are many, many provisions in the bill. I encourage you to reach out to SLK or Shumaker Advisors if you have specific questions, or want to dive more deeply into the bill.

For the most up-to-date legal and legislative information related to the coronavirus pandemic, please visit our Shumaker COVID-19 Client Resource Center at shumaker.com. We have also established a 24/7 Legal & Legislative Helpline at 1.800.427.1493 monitored by Shumaker lawyers around the clock.