CARES Act Creates Potential Employer Incentives to Maintain Payroll

By Jennifer Divine and Michael Porter
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Employer obligations and opportunities under federal law continue to rapidly evolve. The stimulus bill (the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act")), is now law as President Trump signed the bill late afternoon March 27, 2020. The CARES Act creates programs that may affect how employment decisions are made during the current national health crisis. In particular, small and midsize private employers, including nonprofits and tribal businesses, with fewer than 500 employees[1] should be aware of increased availability of government-backed loans (and loan-forgiveness programs) under the CARES Act and how employment decisions over the next few months may affect repayment obligations.

WHAT SHOULD EMPLOYERS CONSIDER IN LIGHT OF THE CARES ACT?

Crisis Loan Eligibility for Small Employers

Broadly speaking, under its "Paycheck Protection Program" provisions, the CARES Act eases credit restrictions and makes Small Business Administration-backed loans of up to $10 million available to qualifying businesses if the funds have been or will be used to retain workers and continue operations during the current COVID-19 emergency. The maximum loan amount is equal to 2.5 times a business's average total monthly payroll costs and requires a good-faith certification by the borrower that the loan is necessary for COVID-19-related economic conditions and that the funds will be used to cover payroll costs, mortgage, rent, and/or utility payments.

Loan Forgiveness Based on Workforce Retention or Rehire

The CARES Act also includes a loan-forgiveness component. An employer taking out a loan under the Paycheck Protection Program may be able to have the loan partially or totally forgiven if the employer has maintained its workforce or is able to rehire laid-off employees and restore pay and work hours to pre-crisis levels of employment over the next three months. The loan is eligible to be forgiven in an amount equivalent to the borrower's payroll, rent, and certain other operating expenses incurred in the eight-week period after origination. Payroll costs for employee compensation above $100,000 in annualized wages are not eligible for forgiveness, and the total amount forgiven may not exceed the principal amount of the loan. But the amount forgiven will be reduced if the employer does not maintain its workforce at levels comparable to the prior year's employment, and will include reductions proportional to any pay reductions greater than 25 percent compared to the prior year. Employers that have already been forced to lay off workers or cut hours will not be penalized. Loan forgiveness up to the full amount will be available if workforce levels are restored by the end of the relevant period.

The benefits and costs arising out of the potential loans will vary from employer to employer. Employers that take advantage of the program will want to carefully engage with their financial and banking advisers to assess how the impact of workforce reductions and possible rehires over the next three months will affect their loans and repayment terms.

Availability of Emergency Family Leave for Employees Rehired After Layoff

The CARES Act's primary direct impact on day-to-day leave practices is the provision of paid leave for COVID-19 reasons. As everyone in HR knows by now, emergency paid sick leave and paid family leave benefits will be available for employees to take beginning April 1, 2020. (Here is a chart reflecting the key components, and

our COVID-19 page has guides to E-PSL and E-FMLA as well as a summary concerning posting and notification requirements.) The CARES Act changes the definition of "eligible employee" under E-FMLA to allow an employee who was laid off after March 1, 2020, and then rehired, to have access to the paid family leave benefit despite not being employed for the full 30 days before requesting leave (as long as the employee had worked for the employer for at least 30 days before being laid off).

TAKING IT ALL IN

Every day is a new day, and employers are having to make fluid, fast-paced decisions. Many employers have temporarily laid off employees in response to or anticipation of worsening economic conditions. The stimulus is designed to reduce or avoid layoffs or other workforce reductions and to encourage employers to rehire laid-off workers and restore wages as much as possible over the next three months. When making decisions and assessing the impact on the workforce, employers need to think through:

- Impact on potential relief under the CARES Act;
- Eligibility of employees for unemployment benefits, including for short-term work reductions or hours reductions;
- Availability of leaves for COVID-19-related reasons under federal law, state and local sick leave laws, and state leave acts;
- Wage-and-hour issues related to reductions and issues such as timing of wage payments during reductions, salary issues for exempt employees, calculations of rates for leave acts, and other issues related to pay; and
- Almost daily regulatory and interpretive adjustments.

The employment team at Miller Nash Graham & Dunn LLP and other attorneys throughout our firm are working to assess and assist in the implementation of statutory and regulatory changes and help clients make critical decisions that will enable them to survive both the current public health crisis and the difficult economic recovery period afterward. For further information about ongoing developments related to COVID-19, visit Miller Nash Graham & Dunn's resource library.

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[1] The CARES Act may provide benefits for employers with up to 1,000-1,500 employees in certain industries if the Secretary of the Treasury expands the eligibility list.

Disclaimer: This article is not legal advice. It is provided solely for informational and educational purposes and does not fully address the complexity of the issues or steps business must take under applicable laws.

Jennifer Divine has over twenty years experience defending and advising public and private employers in a wide range of cases, including discrimination, sexual harassment, wrongful discharge, whistleblower/retaliation, and wage-and-hour claims. She counsels clients on a variety of employment law issues, such as executive contracts and compensation, severance agreements, noncompetition and nonsolicitation restrictions, disability accommodations, FMLA and other leave rights, and misconduct investigations.

Direct: 206.777.7447 | **Email:** jennifer.divine@millernash.com

Michael Porter is a partner in the employment law and labor relations and education law practice teams. Since 2000, Mike has worked with public and private employers in all areas of labor and employment law, providing strategic advice and counsel to reduce the risk of employment claims and representing employers in court and in front of administrative bodies.

Direct: 503.205.2330 | **Email:** michael.porter@millernash.com