CARES Act Relief Checklist: Considerations in Deciding What Relief is Right for Your Business

April 8, 2020

The Coronavirus Aid, Relief, and Economic Security Act (the **"*CARES Act*"**) offers relief to businesses affected by COVID-19 through various programs, including forgivable loans and federal income tax credits. However, the CARES Act prevents businesses from claiming certain benefits that are considered duplicative. The following checklist outlines key considerations for businesses when selecting among the Paycheck Protection Program (the **"*PPP*"**), the Employee Retention Tax Credit, the Employer Social Security Tax Deferral, and Work Opportunity Tax Credit. Certain industries, such as aviation, have specialized relief, which is beyond the scope of this checklist.

In deciding what relief is appropriate, businesses should consider, as discussed in detail below, employer size, what may be best for the business's employees, and the business's long-term prospects. While this checklist is designed as a tool to assist businesses in choosing the proper relief, the best way to determine which option is optimal for a particular business is to apply the business's current and historic numbers and run alternative calculations.

This checklist does not dive into the specific details of each program. To learn more about the PPP, see our Client Alerts on our COVID-19 Advisory webpage, including: Relief for Employers and Workers under the CARES Act, here, Employee Benefits/Executive Compensation Changes Made by the CARES Act, here, and Bridging the Gap - An Overview of SBA Loans under the Paycheck Protection Program, here.

1. ***Does the business employ 500 or fewer employees within the United States?***
    - If yes, then the PPP may be an option for the business.

    - If no, the business generally will not qualify for the PPP. However, the business may qualify despite having more than 500 employees if: (i) there is a higher employee number standard for the business's industry set by the SBA; or (ii) the business has a North American Industry Classification System code beginning with 72 [Accommodation and Food Services] at which point the employee number is based on per physical location.

      If the business does not qualify for the PPP, the business may still qualify for the Employee Retention Tax Credit or the Employer Social Security Tax Deferral. See questions 4, 6, and 7 below.

      The midsize business loan program established under Title IV of the CARES Act may also be an option. See question 8 below and our Client Alert, SBA Releases Interim Final Rule Outlining Additional Details on Paycheck Protection Program Loans here for additional information about this program.

      For more information on how to determine whether the business employs 500 or fewer employees, see our Client Alert, SBA Releases Interim Final Rule Outlining Additional Details on Paycheck Protection Program Loans here.

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2. ***Is the business currently operating or does the business plan to restart operations before June 30, 2020?***
    - If the business is still operating or plans to restart operations before June 30, 2020, the business may consider participating in the PPP.

      Businesses looking for an alternative to laying off or furloughing employees may choose to use a PPP loan to cover certain payroll and other related costs to make it through the financial stress of the COVID-19 pandemic. Generally, if the business does not reduce employee headcount or pay under the parameters set forth by the PPP, the portion of the loan used to cover payroll costs, lease payments, and utilities for an 8-week period may be completely forgivable. See our Client Alerts Relief for Employers and Workers under the CARES Act here and Bridging the Gap - An Overview of SBA Loans under the Paycheck Protection Program here for more information regarding what constitutes payroll costs.

    - If the business is not operating, or the business needs to furlough any of its employees, the PPP may not be the best option for the business. Before deciding to use the PPP, the business should evaluate the impact any termination or furlough of employees would have on available relief with respect to the amount of the loan that can be taken or forgiven.

    - The business also should consider the unemployment benefits expanded by the CARES Act, including the $600 in Federal Pandemic Unemployment Compensation and, in some instances, subsidies of state weekly unemployment benefits. See our Client Alert Relief for Employers and Workers under the CARES Act here for more information regarding expanded unemployment benefits.

3. ***Is the business a type of business deemed ineligible for the PPP (ineligible businesses are defined as financial businesses primarily engaged in the business of lending (including mortgage companies engaged in the business of making loans) and investing, certain businesses that are majority-owned by individuals other than U.S. citizens or legal permanent residents, private clubs not classified as 501(c)(3) nonprofit organizations, and businesses primarily involved in gambling, life insurance, or speculation)?***
    - If yes, then the business cannot apply for the PPP.

    - If no, then the PPP may be an option for the business. See our Client Alert, SBA Releases Interim Final Rule Outlining Additional Details on Paycheck Protection Program Loans here for more information.

4. ***If the business receives a small business loan under the PPP, can the business also obtain relief under the Employer Social Security Tax Deferral?***
    - If yes, but only if the business intends to (and actually does) pay back all of the loan it received under the PPP. Then the business can obtain relief under the Employer Social Security Tax Deferral. See our Client Alert Employee Benefits/Executive Compensation Changes Made by the CARES Act here for more information.

    - If no, if any portion of the loan is forgiven, the business will not qualify for relief under the Employer Social Security Tax Deferral.

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5. ***If an applicable state's shelter-in-place order continues, does the business anticipate reducing employee headcount or pay after June 30, 2020?***
    - If no, a loan under the PPP may be a good option for your business, because under the parameters set forth by the PPP, the loan will be forgivable up to the amount spent during the 8-week period following receipt of the loan proceeds on payroll costs, lease or mortgage payments and utilities.

    - If yes, a loan under the PPP may not be the best option for your business, because the portion that is forgivable under the PPP program will be reduced by a percentage equal to the percentage of headcount reduction.

6. ***If the business did not qualify for a small business loan under the PPP (or did not otherwise obtain such a loan), has the business's (i) operations been fully or partially suspended due to a COVID-19-related government shut-down order, or (ii) gross receipts declined by more than 50% compared to the same quarter in 2019?***
    - If yes, then the business may be eligible for the Employee Retention Tax Credit.
    - If no, then the business is not eligible for the Employee Retention Tax Credit.

7. ***Does the business intend to claim the Work Opportunity Tax Credit with respect to employees who are members of the targeted employee groups covered by this tax credit?***
    - If yes, the business cannot claim both the Work Opportunity Tax Credit and the Employee Retention Tax Credit. The Work Opportunity Tax Credit is a credit against an employer's federal income tax that is available to an employer if it employs individuals from certain targeted groups (*e.g.,* veterans, ex-felons, SSI recipients, SNAP recipients, individuals on long-term family assistance, vocational rehabilitation referrals, etc.) You can find more information regarding the Work Opportunity Tax Credit here.

    - If no, then the business may be eligible for the Employee Retention Tax Credit.

8. ***Is there any other relief available to businesses that they should consider?***

    If the business is ineligible for any of the relief described above, as mentioned in question 1 above, the business may be eligible for assistance under Coronavirus Stabilization Act of 2020 under Title IV of the CARES Act. Title IV authorizes $500 billion to the Treasury's Economic Stabilization Fund in an effort to provide businesses, states and municipalities access to sources of liquidity in the form of loans and loan guaranties in order to maintain solvency during the COVID-19 crisis. See our Client Alerts, An Overview of the Midsize Business Loan Program under Title IV of the CARES Act here, and SBA Releases Interim Final Rule Outlining Additional Details on Paycheck Protection Program Loans here for additional information about this program.

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