
Hughes Hubbard & Reed

CARES Act Developments and Newly Proposed Fiscal Stimulus Legislation as of May 28, 2020

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May 28, 2020 –This week the Small Business Administration issued extensive guidance addressing a number of issues relating to forgiveness of Paycheck Protection Program loans. On Capitol Hill, bipartisan bills were introduced to expand the CARES Act employee retention tax credit significantly and to extend the Paycheck Protection Program while loosening some of its restrictions. Meanwhile, congressional representatives debated the extent to which businesses should be protected from liability relating to the coronavirus, with some bipartisan support developing for at least some degree of protection.

CARES Act Developments

SBA Provides Additional Guidance on PPP Loan Forgiveness

On May 22, 2020, the Small Business Administration (SBA) issued two interim final rules regarding forgiveness of PPP loans. The first rule, titled “Paycheck Protection Program – Requirements – Loan Forgiveness,” reiterates guidance previously provided in the PPP loan forgiveness application and instructions and adds new guidance, including:

1. Payroll costs and non-payroll costs are generally eligible for forgiveness if they are incurred during the 8-week covered period and are paid by the next regular payroll date or billing period;
2. Payroll costs for furloughed employees are eligible for forgiveness;
3. Hazard pay and bonuses are eligible for forgiveness;
4. Advanced payments of interest on covered mortgages are ineligible for forgiveness;
5. To avoid double penalization, borrowers do not count a terminated employee’s salary/wages in calculating the salary/wage reduction calculation;

6. Clarifications regarding the FTE employee reduction calculation and employees who refuse an offer to be rehired;
7. Borrowers should calculate the salary/wage reduction on an individual employee basis rather than an aggregate basis; and
8. New safe harbors protect borrowers from a reduction in FTE employees due to an employee's actions (including being fired for cause, voluntarily resigning or voluntarily requesting reduced hours), which will not count in the calculation of loan forgiveness.

The second rule, titled "Paycheck Protection Program – SBA Loan Review Procedures and Related Borrower and Lender Responsibilities," explains the SBA's procedures for reviewing PPP loan applications and PPP loan forgiveness applications. It also covers borrower and lender responsibilities for responding to the SBA's review of those applications.

- Interim final rule addressing requirements: <https://www.sba.gov/sites/default/files/2020-05/IFR%20Forgivenss%20FINAL.pdf>
- Interim final rule addressing procedures: <https://www.sba.gov/sites/default/files/2020-05/IFR%20-%20SBA%20Loan%20Review%20Procedures%20FINAL.pdf>

FinCEN Warns Financial Institutions About Rising COVID-19 Fraud

On May 18, the Financial Crimes Enforcement Network (FinCEN) issued an advisory alerting financial institutions to rising medical scams related to the COVID-19 pandemic, including frauds related to the CARES Act. The advisory identifies red flags that may indicate fraudulent transactions; it describes COVID-19 related medical scams; and it provides information on reporting suspicious activity. FinCEN also issued a companion notice that provides detailed filing instructions for financial institutions.

- Press release: <https://www.fincen.gov/news/news-releases/fincen-issues-advisory-medical-scams-related-covid-19-and-companion-notice>
- Advisory: <https://www.fincen.gov/sites/default/files/advisory/2020-05-18/Advisory%20Medical%20Fraud%20Covid%2019%20FINAL%20508.pdf>
- Compliance notice: https://www.fincen.gov/sites/default/files/shared/May_18_Notice_Related_to_COVID-19.pdf

Legislative Proposals

This week Congressional Democrats and Republicans debated the extent to which businesses should be protected from liability relating to the coronavirus. Senate Majority Leader Mitch McConnell (R-KY) and House Minority Leader Kevin McCarthy (R-CA) said that broad immunity protections for businesses were "absolutely essential" in order for Republicans to support another coronavirus relief bill. While most Democrats oppose such immunity, some moderate Senate Democrats support some form of liability protection, including Senators Christopher Coons (D-DE), Doug Jones (D-AL), Joe Manchin (D-WVA) and Tom Carper (D-DE), among others. In related news, over the past few months some 20 states have limited the coronavirus-related liability of nursing homes, including New York, Illinois and Pennsylvania. California's Democratic Governor Gavin Newsom is expected to issue an executive order soon limiting nursing homes' civil liability.

- Press coverage: <https://www.politico.com/news/2020/05/26/nursing-homes-coronavirus-lawsuits-281654>
- Press coverage: <https://thehill.com/homenews/senate/499639-democratic-unity-starts-to-crack-in-coronavirus-liability-reform-fight>

S. 3806: Local Community Emergency Relief Act of 2020

On May 21, Senator Cindy Hyde-Smith (R-MS) introduced legislation that would require the Federal Emergency Management Agency (FEMA) to provide a 100 percent cost share for all federal emergency declarations during the 2020 calendar year, eliminating 25 percent cost-share payments required of struggling states and communities.

- Press release: <https://www.hydesmith.senate.gov/hyde-smith-introduces-bill-eliminate-fema-cost-share->
- Text of bill: <https://www.hydesmith.senate.gov/sites/default/files/2020->

S. 3793: Paycheck Security Act

On May 21, Senators Mark Warner (D-VA), Bernie Sanders (I-VT), Doug Jones (D-AL), and Richard Blumenthal (D-CT) introduced legislation that would expand the CARES Act employee retention tax credit by providing qualifying businesses and non-profits with a refundable annual tax credit of up to \$90,000 per employee. The tax credit would fund the salaries, wages and health benefits of employees who are furloughed or laid off and rehired. Eligible employers would include any business that experiences at least a 15% drop in quarterly revenues compared to 2019 same-quarter revenues. The bill would also provide such employers who have less than \$45 million of 2019 gross receipts with an additional credit of 5% of such receipts to pay fixed operating costs, including rent, mortgages, utilities and debt service. Participating employers would have to agree to not buy back stock, not pay dividends, protect collective bargaining agreements, stay neutral in union organizing efforts, and cap CEO compensation at 50 times the median wage of their workforce. The program would last for two quarters and end in December 2020.

- Press release: <https://www.warner.senate.gov/public/index.cfm/pressreleases?ID=384799E4-5040-4671->
- Summary of bill: https://www.warner.senate.gov/public/_cache/files/c/2/c295296f-ec7a-44ab-80a6-
- Text of bill: https://www.warner.senate.gov/public/_cache/files/3/1/31a8632d-c660-4ec6-bbc1-

H.R. 7010: Paycheck Protection Program Flexibility Act of 2020

On May 26, Representative Dean Phillips (D-MN) introduced bipartisan legislation that would extend the forgiveness period of the Paycheck Protection Program from eight to twenty-four weeks, reduce the 75 percent payroll ratio requirement, eliminate the two-year loan repayment restrictions for future borrowers, allow payroll deferment, and extend the June 30 rehiring deadline. Representative Phillips also released a list of 55 national and regional organizations that supported the legislation. Senators Angus King (I-ME) and Steve Daines (R-MT) introduced companion legislation in the Senate. The House will likely vote on the PPP extension on Thursday, May 28.

- Press release: <https://phillips.house.gov/media/press-releases/phillips-roy-announce-coalition-supportbehind->
- Text of bill: <https://maloney.house.gov/sites/maloney.house.gov/files/PRIA%20bill%20text.pdf>

H.R. 7011: Pandemic Risk Insurance Act of 2020 (PRIA)

On May 26, 20 Democrats joined Representative Carolyn Maloney (D-NY) to introduce legislation that would require insurance companies to offer business interruption insurance policies that cover pandemics. The legislation would also create a Pandemic Risk Reinsurance Program to ensure that the federal government had the capacity to cover future pandemic-related losses.

- Press release: <https://maloney.house.gov/media-center/press-releases/rep-maloney-joins-with-industryand->
- Text of bill: <https://maloney.house.gov/sites/maloney.house.gov/files/PRIA%20bill%20text.pdf>

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