SUMMARY: CARES Act for Non-Profits

April 3, 2020

Below is a summary of a variety of recent federal and state responses to the COVID-19 pandemic, with a focus on certain provisions of the CARES Act passed on March 27, 2020, which contain many provisions to provide relief for nonprofits, as well as for-profit businesses, and their employees. Many of the provisions are limited to public charity organizations described in Sections 501(c)(3) and 509(a)(1) and (2) of the Internal Revenue Code) and certain specialized nonprofits. Currently, there is limited guidance on how these rules apply to organizations with pending applications for recognition of exemption or to the unrelated trades or businesses of public charities.

Federal and state guidance and guidelines are being modified constantly, and so many of the information below may be subject to change.

1. ASSISTANCE FOR NONPROFITS AND SMALL BUSINESSES

Grants and Loans from the Small Business Administration

A major focus of the legislation is geared towards providing financial assistance to help businesses and specific nonprofits, such as public charities and veterans groups (Section 501(c)(19) organizations), keep workers on the payroll during the physical and economic shutdown. Organizations with 500 employees or fewer qualify; the existing SBA affiliation rules apply in determining the number of employees.

Paycheck Protection Program

These financial assistance provisions include a $350 billion Paycheck Protection Program (PPP), administered through the Small Business Administration (SBA), that will provide eligible entities with loans to cover the costs of payroll, healthcare benefits, mortgage interest, rent, utilities, and certain other obligations. The maximum amount of each loan is $10 million, with the actual permitted amount tied to the borrower's payroll costs[1] (and effectively limited to 2.5x the average monthly payroll incurred over the one year prior to the loan, with exceptions for seasonality). Compensation in excess of $100,000 per employee is not included in the calculation. The covered loan period begins on February 15, 2020, and ends on June 30, 2020. When paired with an eight-week loan forgiveness program, the PPP will effectively serve as a federal grant to eligible entities to keep employees on the books (or rehire employees that were recently laid off[2]) for at least a near-term period. The loan forgiveness will not be treated as gross income for tax purposes.

The PPP Application Process:

The SBA on April 2, 2020, issued a revised form of PPP application and guidance under the Paycheck Protection Program which can be found at the following link (https://home.treasury.gov/policy-issues/top-priorities/cares-act/assistance-for-small-businesses).

The application process is still somewhat in flux as the lenders are formulating their procedures. Lenders have indicated that, at a minimum, borrowers will be required to provide the following information: 2019 payroll information and returns; health insurance premiums paid under a group health plan; and retirement plan funding paid for by the company.

Emergency Injury Disaster Loan (EIDL) Program

The SBA-administered Economic Injury Disaster Loan Program (EIDL Program) that was passed by Congress on March 6, 2020, serves as an alternative to the PPP, as EIDL program is not specifically limited to Section 501(c) organizations and veteran organizations but is available to "private nonprofit organizations", and includes $10 billion in funding that would provide an immediate grant of up to $10,000 to entities that choose to pursue assistance under the earlier EIDL Program. The $10,000 grant does not need to be repaid.

Additionally, the EIDL program allows the SBA to make loans of up to $2 million to organizations for the relief of economic losses resulting from state declared emergencies and direct COVID-19 impacts. Appropriate uses of the EIDL loans include the payment of debts, payroll, and accounts payable.

Unlike the PPP, EIDL loans must be repaid by the organization and the SBA will require security for loans in excess of $200,000.

Emergency Unemployment Relief

The Act provides emergency unemployment relief by making federal funds available for the sole purpose of reimbursing Section 501(c)(3) organizations, government agencies and Indian tribes for fifty percent (50%) of amounts paid for unemployment benefits between March 13, 2020, and December 31, 2020.

Changes Affecting Retirement Plans

Nonprofit organizations should be aware that the legislation includes other provisions affecting employers related to the postponement of certain ERISA filing deadlines, retirement plan distributions, and delaying the due date for single-employer pension plan contributions.

First, to the extent a nonprofit retirement plan is subject to ERISA, the legislation expands the Secretary of Labor's authority to extend ERISA deadlines for up to a year in the event of a public health emergency declared by the Secretary of Health & Human Services.

Second, the legislation also creates "coronavirus-related distributions" of up to $100,000 per participant from retirement plans. These distributions are not subject to the 10% early withdrawal penalty. The distributions will be taxed over a three years (rather than in the year of receipt), or the participant may repay the distributions over three years. Participants may self-certify that they are eligible if they, a spouse or dependent has been diagnosed with coronavirus, or if they experience adverse financial consequences from coronavirus-related quarantine, furlough or layoff, from being unable to work or telework due to lack of child care, or from closing or reduction of hours in the participant's own business.

The legislation also increases the maximum loan amount for retirement plans from $50,000 to $100,000 and allows loans calculated based on the full account balance, rather than 50% of the account balance. Additionally, any outstanding retirement loan payments due through December 31, 2020, may be delayed for one year.

Furthermore, the legislation extends the due date for 2020 minimum required contributions for single-employer pension plans. The new due date is January 31, 2021, and the amount due is increased by interest accrued since the original due date, calculated at the plan's regular rate of return. Also, for purposes of Section 436 of the Code, the Act allows single employer pension plans to apply the most recently-ended plan year's adjusted funding target attainment percentage (AFTAP) on a going-forward basis, for plan years which include 2020.

The legislation also allows defined contribution plans and IRAs to suspend required minimum distributions due in 2020. For retirement plan beneficiaries who do not need the income, this creates a deferral opportunity and an opportunity to avoid having to sell assets within a retirement plan at depressed values to fund required distribution.

Tax Code Adjustments Impacting Businesses and Nonprofits

In addition to expanded unemployment benefits and tax rebates for individuals, the Act provides targeted adjustments to the tax code for nonprofits and other businesses. Again, to encourage organizations to keep workers on the payroll, the legislation provides a refundable payroll credit to those employers whose operations were either suspended due to a shutdown order or whose gross receipts declined by more than 50% during a calendar quarter. The legislation also defers the employer share of payroll taxes evenly over two yearsin subsequent tax years (2021 and 2022). This credit is not available to organizations that receive a PPP loan. This creates a choice of what form of relief an employer wishes to pursue.

The legislation also adjusts the tax code to allow for certain net operating losses (NOLs) to be carried back to the previous five years which could potentially allow taxpayers to eliminate their tax liability or obtain refunds for tax paid in those years and temporarily removes the 80% taxable income limitation for years before January 1, 2021, to allow for such losses to fully offset the taxpayer's taxable income. Again, this will particularly help industries experiencing significant losses this year.

Other tax code adjustments include an increase to the business interest expense limitations (from 30% to 50% of EBITDA) to allow for additional interest deductions in taxable years beginning in 2019 or 2020. It is not clear how these adjustments to NOL provisions will apply to the unrelated business taxable income generated by charities and other non-profits.

Modifications to Charitable Contribution Limitations

The Act endeavors to promote charitable giving by relaxing the limitations related to charitable contributions for both businesses and individuals. For cash contributions made during 2020, individuals can deduct up to 100% of adjusted gross income. In 2020, taxpayers who do not itemize their deductions may deduct cash gifts to public charities of up to $300. The group of taxpayers who do not itemize increased substantially following the 2017 tax reform legislation. For cash and food inventory contributions made during 2020, corporations candeduct up to 25% of taxable income.

It is important to note, however, that these relaxed limitations do not apply to noncash gifts, such as publicly-traded stock. Additionally, these higher limitations do not apply to gifts to private foundations, supporting organizations and donor-advised funds. To the extent that a donor makes cash gifts both to public charities eligible for the 100% deduction and other types of charitable gifts, the donor's overall income tax deduction is still limited to 100% of adjusted gross income. In other words, the donor cannot offset more than his or her entire income.

ADDITIONAL ASSISTANCE FOR CORPORATIONS

1. **Corporate Lending Facilities**

Of particular relevance to nonprofits, the legislation directs Treasury to "endeavor to implement" a special lending facility under section 13(3) of the Federal Reserve Act targeted at providing financing to lenders that make direct loans to nonprofits and businesses with 500 to 10,000 employees – subject to certain conditions, including that the funds must be used to retain 90% of the workforce with full compensation and benefits through Sept. 30, 2020, a ban on stock buybacks and dividends on common stock of for-profit businesses until the loan is repaid and the recipient will not outsource or offshore jobs until two years after the loan is repaid.

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1. **Real Estate Financing:**

The legislation seeks to protect against certain foreclosures and evictions, which may be of interest to nonprofits. (Note that these provisions are in addition to any protections enacted by states and municipalities.)

Foreclosures are prohibited for a 60-day period beginning on March 18, 2020, for any mortgage loan purchased by Fannie Mae or Freddie Mac, insured by HUD, the VA or USDA, or made directly by the USDA. Furthermore, any borrower with such loans experiencing financial hardship due to COVID-19 may apply for and receive forbearance on that loan for a period of up to 180 days, which period may be extended for up to 180 additional days.

Multifamily landlords with federally-backed mortgage loans (i.e. loans to real property designed for 5 or more families purchased, insured, or assisted by Fannie Mae, Freddie Mac, or HUD) that are experiencing financial hardship due to COVID-19 are eligible for up to a 90-day forbearance but may not evict or charge late fees to tenants for the duration of the forbearance period.

More broadly, any landlord with a mortgage that is insured, guaranteed, supplemented, protected, or assisted by HUD, Fannie Mae, Freddie Mac, or certain other programs is temporarily prohibited for 120 days from eviction filings or late fees or other penalties for nonpayment of rent.

OTHER ASSISTANCE IMPACTING CLIENTS

1. **Relief Funding to States and Municipalities**.

The legislation provides states and local governments with $150 billion in funding to offset expenses caused by the pandemic.

1. **Appropriations to the Executive, Legislative, and Judicial Branches**.

The legislation appropriates $340 billion to the federal government to deploy, much of which goes to state and local governments. Significant provisions include funding for hospitals ($100 billion) and educational institutions (including $14.25 billion in funding to higher education institutions), as well as funding for transit infrastructure grants ($25 billion). Smaller appropriations are specifically targeted at rental assistance for low-income, seniors, and other disadvantaged groups, including Section 8 voucher rental assistance ($1.25 billion), Section 202 elderly housing assistance ($500 million), Section 811 disability housing assistance ($15 million), and $1 billion in "project-based rental assistance" funding for reduced tenant payments as a result of the crisis. The appropriations also include funding for economic development grants for states and communities ($1.5 billion), child care and development block grants ($3.5 billion), community services block grants ($1 billion), community development block grants ($5 billion), and homeless assistance grants ($4 billion). Finally, appropriations also include $150 million to the NEA and NEH to maintain continued access to cultural organizations and institutions of learning.

Additional COVID-19 Relief Measures and Information

Form 990 Filing Deadlines are NOT Extended:

Although the federal (and several states) income tax filing and tax payment deadlines have been automatically extended until July 15, there has been no automatic extension for informational returns such as the Forms 990, 990PF and 990EZ. Currently, organizations will need to file Form 8868 to apply for the automatic 6-month extension.

It is important to note that Form 990-T, the Exempt Organization Business Income Tax Return does benefit from the automatic extension.

Massachusetts Nonprofit Corporate Governance – Emergency Powers

Massachusetts General Laws Chapter 180, the Massachusetts corporate statute governing nonprofits, does not currently provide for emergency powers included in many of the model nonprofit acts adopted in other states. As a result, with the current social distancing and stay home orders, many nonprofits are unable to hold meetings or conduct necessary business. For example, member meetings are generally required to be held in person. Massachusetts public companies have the same limitation. On Friday, April 3, Governor Baker signed legislation to provide emergency powers to address several of these operational and governance obstacles immediately.

The new emergency legislation allows a board of directors to take the following actions (unless the articles of organization provide otherwise) but only for the duration of the governor's March 10 state of emergency and 60 days thereafter:

1. provide notice of a board meeting only to those directors it is practicable to reach and in any practical manner;
2. cancel a meeting of the board by giving notice in any practical manner

3. allow directors and officers whose terms would otherwise have expired to continue in such capacities until such person’s successor is elected, appointed or designation and takes office;
4. allow directors to participate in meetings through any form of communication that allows all directors to simultaneously communicate;
5. allow members to vote in person or by proxy and any member voting by proxy shall be considered present for all quorum requirements;
6. appoint successors to any of the officers, directors, employees;
7. relocate the principal office or designate alternative offices; and
8. allow members to participate in meetings by remote participation and members so participating shall be deemed to be present at such meeting but only if reasonable verification measures are implemented to ensure that (a) such persons are in fact members or proxy holders, and (b) such members or proxy holders have a reasonable opportunity to participate in the meeting including an opportunity to hear or read the proceedings, comment and ask questions. It is important to note that unlike directors, members are **not** required to be able to simultaneously communicate.

The Boston Bar Association has established a Working Group to draft a revised Chapter 180 which is expected to include some elements of the emergency legislation.

[1] Note that payroll costs exclude certain compensation, including compensation in excess of $100,000 per employee.

[2] Employers should be aware that another provision of the stimulus package provides some rehired employees who were let go after March 1, 2020 with access for paid family and medical leave, with limits on the paid and emergency sick leave amounts.