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ACT NOW ADVISORY

New COVID-19 Stimulus Measure Provides More Aid for Small Businesses, Health Care Providers, and Testing

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By John D. Barry, Arthur J. Fried, and Andrew Kaplan

On the heels of its passage by the U.S. Senate two days earlier, the Paycheck Protection Program and Health Care Enhancement Act (the "Act") was approved by the U.S. House of Representatives on April 23, 2020, and signed into law by the president on April 24. The Act amends the recently enacted Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"). Among its key provisions, the Act authorizes: (i) additional funding for the CARES Act's Paycheck Protection Program; (ii) more money for disaster loans and grants; (iii) further financial aid for certain health care providers; and (iv) funding for various federal and state/local COVID-19 testing programs.

Notably, this new, roughly $480 billion stimulus and relief package comes as the staggering economic fallout of shutdown orders aimed at controlling the spread of COVID-19 continue to mount, placing increasing pressure on state governments to seek "return to work" strategies that allow for the resumption of at least some "non-essential" economic activity while continuing to protect the health and safety of a nation still in the midst of a deadly pandemic.

Additional Funding for the Paycheck Protection Program

The CARES Act created the Paycheck Protection Program ("PPP"), which is a $350 billion "forgivable" loan program administered by the Small Business Administration ("SBA") aimed at providing relief to small businesses within the U.S. that have been adversely affected by the COVID-19 pandemic. The original funding for the PPP was quickly depleted, leaving many small businesses unable to obtain a loan. The Act injects an additional $310 billion into the program. Of note, $60 billion of this new funding is earmarked to be loaned only through certain smaller community banks, credit unions, and other specified lenders. Presumably, this is intended to provide access to loans for very small businesses, which may use smaller lending institutions or otherwise lack access to the larger, traditional SBA lenders participating in the PPP.

Importantly, the Act does not otherwise change existing PPP provisions. Small businesses may still only apply for one loan under the program, and thus, businesses that already received a PPP loan are not eligible for another loan. The money will still be loaned on a first-come, first-served basis, and many ambiguities existing under the current law and regulations remain, including those regarding application of the forgiveness provisions of Section 1106 of the CARES Act.

Initial interim final regulations regarding the PPP were issued on April 2, 2020.[1] Substantial questions remain after those regulations were issued, and new guidance continues to be released on a rolling basis. Notably, PPP "Frequently Asked Questions" ("FAQs") are updated regularly on the Department of Treasury website,[2] and additional formal regulations (particularly with respect to loan forgiveness) are anticipated. As a result, businesses that have already received a loan have had to (or will need to) start spending the funds based on the limited guidance available. Small businesses that missed out on the original $350 billion pool of funds and now apply for this second wave of funding, however, may arguably be in a better position. Any additional FAQs guidance and the forthcoming regulations may help such businesses properly allocate the funds from the start of their particular loan. Similarly, it remains to be seen how the continually-evolving guidance from the Department of Treasury and SBA will impact loan forgiveness and even potential SBA audits.

Disaster Relief Funding

The Act also provides more funding for the Emergency Disaster Relief Loan ("EIDL") program and clarifies that agricultural institutions are eligible for an EIDL loan. The EIDL program provides low-interest loans to businesses injured by disasters, including the COVID-19 pandemic. Under the Act, an additional $10 billion has been allotted for EIDL grants and another $50 billion for disaster loans.

Emergency Funding for Health Care Providers

Bolstering the $100 billion previously appropriated in the CARES Act for the Department of Health and Human Services Public Health and Social Services Emergency Fund, the Act provides an additional $75 billion for reimbursement to eligible health care providers for covered expenses and lost revenues arising from the COVID-19 pandemic. The Act does not change any of the definitions or eligibility criteria set forth in the CARES Act.[3]

Funding for Testing

The Act's funding for testing programs – which may help develop and implement safe "return to work" strategies – may be its most significant appropriation. As the Centers for

[1] A copy of the regulations is available here.
[2] The Department of Treasury FAQs are available here.
[3] For a discussion of the health care provisions of the CARES Act, please see our Advisory titled "The CARES Act: Key Provisions for Health Care Providers."

Disease Control and Prevention, in conjunction with the White House, make clear in their Guidelines for Opening Up America Again, a "[r]obust testing program for at-risk healthcare workers, including emerging antibody testing" is a threshold criterion for a local government's plan to loosen or lift shelter-in-place or other shutdown orders. The Act includes $25 billion for COVID-19 testing—$11 billion to expand the capacity of states and local governments to administer such tests, with the remainder going to a number of federal agencies for various purposes, including research and approvals.

This funding, and likely more, will be critical if states are to be in a position to meet the reopening requirement that they have the "[a]bility to test [symptomatic] persons for COVID and track contacts of COVID+ results." Equally as important is the availability of reliable COVID-19 antibody testing and data regarding its effectiveness in predicting immunity (or at least resistance) to the virus, which employers across the board are recognizing as a key to a comprehensive return-to-work strategy.

What Employers Should Do Now

- Employers that may be eligible for the SBA forgivable loan or a disaster grant or loan should apply as soon as possible. Those businesses that do not have relationships with traditional SBA-approved lenders should explore new avenues under the Act for applying for such loans, for example, via community-based and other types of lenders designated in the Act.
- Covered health care providers should determine if they qualify for additional assistance pursuant to the fresh appropriation of monies under the Act for eligible providers.
- All employers should continue to monitor applicable state and local "return to work" developments, including the creation and expansion of testing programs. We will be providing a more extensive analysis of "return to work" issues and initiatives in an upcoming report.

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For more information about this Advisory, please contact:

John D. Barry
Newark
973-639-8264
jdbarry@ebglaw.com

Arthur J. Fried
New York
212-351-4710
afried@ebglaw.com

Andrew Kaplan
Princeton
609-455-1543
ankaplan@ebglaw.com

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