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MEMORANDUM

RE: Federal Small Business Relief Legislation Related to Covid-19

DATE: April 1, 2020

The following is a brief summary of the new Federal legislation related to COVID-19 in a question and answer format. The new legislation is quite extensive, and this memorandum is meant to address common and frequently asked questions. Other provisions of the legislation may be applicable or beneficial for your company. **Please consult with an attorney or a financial institution for personalized advice.** Harrison Steck stands ready to assist you with these and other construction-related matters.

Q. I have heard about 3 relief bills? What are they? How do they help me?

A. The first package does not help small businesses or individuals. It was an \$8.3 billion package for treating governmental spending to help treat the virus. The second package helps individuals with sick pay and leave pay and affects small businesses. The third package helps both individuals and small businesses.

Q. I don't want to pay all that new Covid-19 sick and leave pay. My business can't afford it. Do I have to?

A. Those are the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act that the second bill created and the answer is probably, with a few exceptions. If you have over 500 employees, the new law does not apply to you. If you have fewer than 50 employees, here are the scenarios where you might be exempt. These come from the Department of Labor. There are 59 questions and answers listed here. <https://www.dol.gov/agencies/whd/pandemic/ffcrqa-questions> This Q&A should answer most of your questions dealing with the new act. Questions 58 and 59 deal with possible exemptions and are listed below:

58. When does the small business exemption apply to exclude a small business from the provisions of the Emergency Paid Sick Leave Act and Emergency Family and Medical Leave Expansion Act?

Response: An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care

provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business's expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

59. If I am a small business with fewer than 50 employees, am I exempt from the requirements to provide paid sick leave or expanded family and medical leave?

Answer: A small business is exempt from certain paid sick leave and expanded family and medical leave requirements if providing an employee such leave would jeopardize the viability of the business as a going concern. This means a small business is exempt from mandated paid sick leave or expanded family and medical leave requirements only if the:

1. employer employs fewer than 50 employees;
2. leave is requested because the child's school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons; and
3. an authorized officer of the business has determined that at least one of the three conditions described in Question 58 is satisfied.

Q. 58 and/or 59 apply to my business. How do I get the exemption?

A. We aren't sure yet. Guidance should be out any day now.

Q. I'm worried I will get fined for non-compliance without knowing if I receive the exemption. What do I do?

A. There is a 30 day non enforcement period as long as you act in good faith. If you believe you will qualify for an exemption, the guidance will be out shortly. Presumably, you will get a determination within 30 days.

Q. That makes me nervous. What else can I do?

A. Compliance isn't as hard as you might think and it is free. You might be out some cash flow but probably not.

Q. Okay, I'm listening. Tell me more.

A. When you pay your payroll tax, you submit employee withholding, the employee and employer share of social security and Medicare tax. If you paid \$10,000 in sick leave and you had \$15,000 in remittance owed to the IRS, you would just remit \$5,000 and retain the \$10,000 as your credit. If your sick and leave payments did exceed the remittance owed, you could file for an immediate refund. This is detailed more in the following IRS notice:

<https://www.irs.gov/newsroom/treasury-irs-and-labor-announce-plan-to-implement-coronavirus-related-paid-leave-for-workers-and-tax-credits-for-small-and-midsize-businesses-to-swiftly-recover-the-cost-of-providing-coronavirus>

Q. But I need that employee and I will go under without that employee.

A. If you are under 50 employees, you will need an exemption.

Q. What do I need to do now?

A. Put this poster up in a conspicuous place. Presumably, put in next to the other posters you already have up that are required by law. You may also e-mail it you your employees.

https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf

Q. Posters?

A. Time to consult a lawyer.

Q. What about the free money? I heard I can pay payroll for 4 months and get a free loan from the government to do it.

A. The original bill had 4 months in it. The bill that passed, the CARES Act, has something called the Keeping American Workers Paid and Employed Act. It allows for the payment of certain expenses, defined in the bill as payroll costs and a few other items, for a period of 8 weeks from the date of the loan origination that can be forgiven.

Q. So how do I get it?

A. If you have less than 500 employees (there are some exceptions for companies with more in the food industry), you are eligible to apply for a SBA loan. Start with your bank if it is a SBA lender.

Q. How much can I get?

- A. You can receive up to two and half times the average total monthly payments by the applicant for “payroll costs” incurred during the 1-year period before the date on which the loan is made plus an amount already received for an EIDL (these are emergency disaster loans) or \$10,000,000, whichever is less.

Q. What are “payroll costs?”

- A. The term “payroll costs” means the sum of payments of any compensation with respect to employees that is a salary, wage, commission, or similar compensation; payment of cash tip or equivalent; payment for vacation, parental, family, medical, or sick leave; allowance for dismissal or separation; payment required for the provisions of group health care benefits, including insurance premiums; payment of any retirement benefit; or payment of State or local tax assessed on the compensation of employees; and the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount that is not more than \$100,000 in 1 year, as prorated for the covered period (February 15, 2020-June 30-2020).

There are exclusions for compensation of employee pay in excess of \$100,000, sick and leave pay wherein you receive a credit under the prior bill referenced, and payments to non-US citizens.

Q. In English please.

- A. If you have 5 employees who make over \$100,000, their pay is \$100,000 each for a total of \$500,000. Take all employees below \$100,000 and add up their total compensation. Add up all the health insurance premiums you paid over the last year. Add in your employer contributions for retirement accounts for the last year. Then divide by 12. That gets you a monthly average.

Example: You have 6 employees. One made \$125,000, one made \$105,000, two made \$55,000 and two made \$35,000. You paid health insurance premiums of \$25,000 on your employees for the year. You contributed \$15,000 for retirement benefits. The total is as follows:

$$100,000 + 100,000 + 55,000 + 55,000 + 35,000 + 35,000 + 25,000 + 15,000 = \$420,000$$

The total compensation for the year is \$420,000.

Divide the total compensation for the year by 12 = \$35,000 average monthly payroll costs.

Then multiply your average monthly payroll costs, by 2.5 This is your maximum loan amount.

In this example, the maximum loan amount is \$87,500.

Q. What can I spend the loan money on?

A. Payroll costs plus rent or interest on mortgage obligations, utilities and other debt interest incurred prior to February 15, 2020. The section also lists health insurance premiums, salaries and wages, which seem duplicative to the previously defined “payroll costs”. As this bill was rushed, we can’t know if there is some sort of distinction until we get more guidance from Treasury.

Q. How is this free?

A. There are no origination fees. Interest is deferred for 6 months. The interest rate on the loan is .5%. Yes, the decimal is in front of the 5. The interest rate is one-half percent, pursuant to recently released guidance from the Treasury. The loan will be forgiven to the extent expenses for the 8-week period from the date of loan origination are for payroll costs, rent, mortgage interest and utilities. The lease or mortgage has to be in effect prior to February 15, 2020.

Q. How do I determine the loan forgiveness amount?

A. The bill uses the words costs incurred and payments made during the 8-week period. There needs to be some clarification on this as you might not pay 2 rent payments in that 8-week period or you may make 3 payments. We would assume it will end up being the costs incurred over the 8-week period as long as those costs are proved to be paid. But the bill does not say that. It could mean all costs incurred plus payments made during the 8-week period, which would seemingly create a bizarre result of excessive forgiveness depending on the timing of payments made.

There are also special rules to the extent you have reduced employee wages for employees who make less than \$100,000 in the prior quarter or the number of employees you have now versus the number of employees you had in 2019. You have the ability to restore those wages and employees and receive full forgiveness. The rules are complex.

Q. How much should I borrow?

A. That is up to you. The maximum amount available will most likely be higher than the loan forgiveness amount. Worse case, you pay back the amount in excess of the loan forgiveness amount and pay .5% interest on it. Of course, if everyone borrows more than can be forgiven, there will be less money to go around.

Q. Won’t that be a cancellation of debt and I will get a 1099-C?

A. No. The forgiveness is not includable in taxable income. Your government loves you.

Q. What about a personal guarantee? Aren’t those required for a SBA loan?

A. The bill states for loans during the covered period (until June 30), with respect to a covered loan (i) no personal guarantee shall be required for the covered loan; and (ii) no collateral shall be required for the covered loan.

Q. But what about if I still owe money after June 30?

A. It is not clear although the guidance treasury gave also says these loans will not require a personal guarantee. The loan is commonly referred to as the Paycheck Protection Program.

Here is a link with more information from SBA:

<https://www.sba.gov/page/coronavirus-covid-19-small-business-guidance-loan-resources>

Q. When can I get this loan?

A. Banks can start processing them April 3.

Q. The sample application uses the term average monthly payroll. That is less than the defined payroll costs? What do I do?

A. The form came out yesterday. The law, as written and described above, uses the term “payroll costs.” There may be a clarification today or tomorrow. There may not be. If the amount of your payroll times 2.5 exceeds the forgiveness amount and that is all the money you need under the program, just use that amount.

Q. What is the term of the loan?

A. The law states a maximum of 10 years. The term sheet yesterday from Treasury said the loans will be for two years.

Q. What is the catch?

A. You will need to certify in good faith the following as part of your application:

1. Current economic uncertainty makes the loan necessary to support your ongoing operations.
2. The funds will be used to retain workers and maintain payroll or to make mortgage, lease, and utility payments.
3. You have not and will not receive another loan under this program.
4. You will provide to the lender documentation that verifies the number of full-time equivalent employees on payroll and the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight weeks after getting this loan.
5. Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities. Due to likely high subscription, it is anticipated that not more than 25% of the forgiven amount may be for non-payroll costs.
6. I further certify that the information provided in this application and the information that I have provided in all supporting documents and forms is true and accurate. I realize that knowingly making a false statement to obtain a guaranteed

loan from SBA is punishable under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a Federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.

7. You acknowledge that the lender will calculate the eligible loan amount using the tax documents you submitted. You affirm that the tax documents are identical to those you submitted to the IRS. And you also understand, acknowledge, and agree that the lender can share the tax information with the SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

Q. What about those disaster loans everyone is talking about?

A. You have to pay those back. Why would you want to do that?

Q. I heard something about payroll tax credits for wages up to \$10,000 per employee. Tell me about those.

A. If you do those, you can't do the loan that is forgivable under the CARES Act. You do not want to do that if you can get free money.

Q. I'm hearing at a 4th bill. Should I wait for that?

A. No, the funds are finite under the CARES Act. There is \$349,000,000 available, which seems like a lot but it will run out fast.

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