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CARES ACT: Loan Forgiveness, Tax Credits, and Tax Obligations

The Coronavirus Aid, Relief, and Economic Security (CARES) Act, provides for numerous payroll-related forms of relief for employers that have been impacted by COVID-19. Two forms of relief under the CARES Act include a program for qualifying employers to acquire a forgivable loan to cover payroll costs, and a separate program to delay the payment dates for the employer portion of Social Security tax, that otherwise would be due for the remainder of 2020. Both programs under the CARES Act provide unique benefits for employers, however employers are encouraged to only choose one program, as employers that receive a forgivable loan that is forgiven in part or in full, may not delay Social Security tax payments.

A third program, called the employee retention tax credit program, allows eligible employers to acquire a refundable tax credit against the employer portion of the Social Security tax. Employers that apply for tax credits are not eligible to apply for a forgivable loan at all – whether or not, part or all of the loan will be forgiven. Based on the array of relief programs, it is essential to ascertain what program under the CARES Act, if any, will best suit your business needs.

Delayed Payment of Employer Portion of Social Security Taxes

Employers are required to pay a 6.2% Social Security tax on all employee wages to the federal government. However, the CARES Act allows eligible employers to delay these Social Security Payments for the period of March 27th through December 31st, 2020, with no penalties or interest charges. Employers will be required to pay half of the remaining balance of Social Security tax payments on December 31st, 2021, and the remaining half by December 31st, 2022. If the correct payments are made by the two deadlines, the employer will not incur any penalties.

Employers that elect to delay the employer portion of Social Security payments ***may not*** also acquire a forgivable loan and request that part or all of the loan be forgiven through the Paycheck Protection Program, described below. Delayed payment of the employer portion of Social Security taxes may be an attractive option for employers with a stable cash flow that wish to avoid paying interest on a new loan, while delaying Social Security tax obligations until the COVID-19 pandemic has passed.

Loan Forgiveness – Paycheck Protection Program

The Paycheck Protection Program ("PPP") discussed above, establishes a loan program for small businesses whose operations have been impacted by COVID-19. These emergency loans are designed to incentivize small business to refrain from laying off workers, and to rehire employees when business conditions stabilize by covering payroll and other costs.

Under the PPP, employers can receive a loan for 2.5 times their average monthly payroll costs for 2019, or $10 million – whichever is lesser. The loan has a maximum term of 10 years and a maximum interest rate of 4%. The loan can be used for salaries, employee benefits, rent, utilities, and interest on a mortgage or other debts. Payments of interest and principal on the loans may be deferred for six months to one year, beginning after the forgiveness period, which includes the costs incurred during the first eight weeks of the loan for payments made from payroll, mortgage interest, rent and utilities. Note however, that the forgivable loan cannot cover the costs of Social Security and Medicare taxes, and Social Security taxes must be paid on the normal schedule if you wish to apply for partial or full loan forgiveness.

Payroll Tax Credit – Employee Retention Credit

A third relief plan under the CARES Act is the employee retention tax credit program, which allows eligible employers to acquire a refundable tax credit against the employer portion of the Social Security tax. During 2020, eligible employers are able to receive a credit against their employment taxes equal to 50% of qualified wages – for up to $10,000 for each employee. Eligible employers are those that have experience a full or partial suspension of operations due to a COVID-19 related government order, or employers that have gross receipts that are less than 50% of their gross receipts for the same quarter in the prior year, until their gross receipts exceed 80% of their gross receipts for the same calendar quarter in the prior year.

The refundable amount of the credit is the amount – if any – by which an employer's payroll tax credit for a quarter with regard to retaining employees exceeds the employer portion of Social Security tax for the quarter, as reduced by up to four other credits against the employer portion of Social Security tax for that quarter. Employers *may not* however, apply for the employee retention credit against its payroll tax liability if the employer acquires a forgivable loan under the PPP – even if the employer did not receive forgiveness of all or part of the loan.

Conclusion

Ultimately, employers that receive a forgivable loan under the Payment Protection Program, may not be eligible for employee retention credits. Employers may also choose to both delay Social Security tax payments, and acquire a forgivable loan, however *no portion of the forgivable loan under the Paycheck Protection Program may be forgiven.* Thus, if you wish to utilize any, or multiple programs under the CARES Act, it is advisable to consult with your legal counsel to assess the debt and other liabilities your company may incur from the relief plans.

Your attorneys at Rock Fusco & Connelly, LLC are here to help you navigate how best to utilize the portions of the CARES Act that can benefit your business and support your employees at this uncertain time. Please contact us immediately so that we may assist you in structuring your payroll and loan application deliverables to maximize your loan amount. We can be reached via email at info@rfclaw.com, or phone at (312) 494-1000.