



# CARES Act Overview

Coronavirus/COVID-19 Update

If you have any questions regarding the matters discussed in this memorandum, please contact the attorneys listed on the last page or call your regular Skadden contact.

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## CARES Act Provides Much-Needed Stimulus for U.S. Businesses, Individuals

On March 27, 2020, Congress is expected to approve the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) to provide financial assistance to individuals and businesses, which in aggregate greatly exceeds the financial package Congress previously enacted to address the 2008 financial crisis. The act, which is the third major piece of bipartisan legislation to address the crisis created by the COVID-19 pandemic, includes approximately \$2 trillion in assistance to individual and businesses. A total of \$500 billion is authorized for direct loans and guarantees, of which \$454 billion is provided to the Federal Reserve to support its lending facilities and \$29 billion will be for direct lending to passenger and cargo air carriers. An additional \$367 billion is available to assist small businesses through the Small Business Administration (SBA). In addition, the act contains a number of provisions aimed at granting temporary regulatory relief. Despite the enormity of the assistance provided by the CARES Act, additional financial assistance legislation is expected if the duration of the national emergency extends beyond a short period of time.

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## Loan Programs Central to CARES Act Stimulus

The CARES Act’s economic stimulus package includes more than \$500 billion of federal funding across three basic categories: (i) grants and direct lending dedicated to specific nonfinancial industries, such as the airline and national security sectors; (ii) a significant expansion of eligibility and other aspects of lending programs administered by the Small Business Administration, and (iii) funding for several lending programs administered by the Federal Reserve. Financings under these programs place a number of requirements on the businesses that receive federal aid.

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Loans, loan guarantees and other investments under the CARES Act will be subject to supervision, audits and investigation by a special inspector general who will keep Congress informed through quarterly reports. A congressional oversight committee also will be formed to monitor implementation of such financings under the legislation and to report to Congress on a monthly basis. Businesses will not be eligible to obtain loans or investments under the CARES Act if 20% or more (by vote or value) of the stock is owned by members of Congress, the Trump administration, or their immediate family members or spouses.

## Direct Lending and Grants to Specific Industries

The CARES Act gives the Secretary of the Treasury broad discretion to make loans and loan guarantees to air carriers (including eligible repair and inspection businesses and ticketing agents) and to businesses critical to maintaining national security. The loans are only available to eligible businesses (generally defined as air carriers and U.S. businesses that have not otherwise received adequate economic relief in the form of loans or loan guarantees under the CARES Act) that have incurred or expect to incur covered losses that jeopardize the business, and all recipients must be organized and conduct a majority of their operations in the U.S.

Loans under this program will include terms compensating the government for its investment. For example, the loans must be sufficiently secured or bear interest at rates determined by the Secretary of the Treasury that reflect the risk and are not less than the comparable pre-outbreak rates; the government must receive warrants, equity or, in certain cases, a senior debt instrument to benefit in gains of the business; and maturities must be as short as practicable and cannot exceed five years. The loans cannot be forgiven.

Loans under this program also will include limitations on the recipients of federal aid designed to protect the government's investment. Executive compensation and severance benefits will be limited for the term of the loan plus one year. Businesses are restricted from paying dividends and making other capital distributions with respect to their common stock, and businesses and their affiliates are prohibited from buying back public stock (unless contractually obligated prior to the enactment of the CARES Act), until one year after the loan is repaid. Employment levels must be retained until September 30, 2020, to the extent practicable, and in any case cannot fall by more than 10% from the March 24, 2020, levels. The Secretary of Transportation may require air carriers that receive loans under this program to maintain scheduled services to locations consistent with those provided prior to the COVID-19 outbreak.

## Federal Reserve Lending Programs

The CARES Act authorizes the Department of the Treasury to provide additional support to the Federal Reserve lending programs if such programs, among other things, restrict stock buybacks, dividends and capital contributions; limit executive compensation; and prohibit loan forgiveness. However, these requirements may be waived by the Secretary of the Treasury if necessary to protect government interests, subject to testimony before Congress regarding the rationale for the waiver. Treasury is also required to endeavor to seek the implementation of a Federal Reserve lending program that targets U.S.-eligible businesses (and, to the extent practicable, nonprofit organizations) with between 500 and 10,000 employees, subject to additional terms and conditions, including prohibitions on outsourcing and offshoring jobs for the term of the loan plus two years. The CARES Act also suggests that the Federal Reserve may establish a Main Street Business Lending Program or facility that supports lending to small and midsized businesses on such terms and conditions that are consistent with its authority under the Federal Reserve Act.

## Small Business Paycheck Protection Programs

The CARES Act expands the ability to obtain loans under Section 7(a) of the Small Business Act through a new \$349 billion Paycheck Protection Program. Under the program, small businesses, other business concerns, nonprofits and veterans organizations that generally have fewer than 500 employees; self-employed; sole proprietors; independent contractors; and businesses in the accommodation and food services sector with fewer than 500 employees per location, are eligible for small business loans to cover payroll; health care costs; mortgage interest payments, rent and utility payments; and interest on pre-existing debt obligations. The program also permits borrowers to refinance economic injury disaster loans made between January 31, 2020, and the date on which loans are made available under the program. The amount of the loan cannot exceed the sum of 2.5 times the average monthly payroll cost during the year prior to the loan and the amount of economic injury disaster loans being refinanced under the program; it must be capped at \$10 million and have a maximum interest rate of 4%. Loans are available to eligible borrowers under the program through June 30, 2020, fees are waived, payments are deferred by at least six months (but not more than one year), and the SBA's "credit elsewhere" test (the ability to obtain funding from other sources without undue hardship) is waived.

Loans under the program are fully guaranteed by the federal government, which is an increase to the existing guarantee percentages under the current SBA loan program. Collateral and personal guarantees are not required. To be eligible, a borrower must be in operation on February 15, 2020, and have paid

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employee salaries and payroll taxes. A business is not eligible to receive these loans if it receives an economic injury disaster loan for the same purpose.

Loans under the program are eligible for forgiveness up to the aggregate amount of payroll payments, interest payments on mortgage obligations, rent payments and utility payments made during the eight-week period following loan origination as long as the amount does not exceed the original principal. The amount forgiven is lowered by reductions in full-time employment and in situations where total salaries and wages fall by more than 25% from the applicable prior period, but this can be mitigated by rehiring employees. Amounts not forgiven continue to be guaranteed and will have a maximum maturity date of 10 years from the date the borrower applied for loan forgiveness.

## Stimulus Has Indirect Influence on Dealmaking

Any meaningful reduction in the magnitude or uncertainty of the COVID-19 pandemic should facilitate dealmaking; however, the risk will remain substantial, and the benefits of the legislation's programs will not be realized evenly among industries or among companies within specific industries. M&A practitioners must read the fine print. In performing due diligence on an acquisition target, buyers should carefully assess whether the target qualifies for direct assistance and the timing and terms of any such assistance. If it does not qualify for any direct assistance, buyers should consider whether the target will indirectly benefit from others receiving direct assistance (*e.g.*, customers or suppliers). Buyers also need to assess the conditions or restrictions attached to any such assistance and whether these would apply to the buyer's broader enterprise if it acquired the target. Companies that are already under contract to be sold and in need of the assistance provided by the stimulus should be mindful of the terms of their acquisition agreements. These agreements should be carefully reviewed to assess whether applying for, or receiving, assistance would breach any representation, warranty or interim operating covenant, and, importantly, the rights and remedies of the buyer for any such perceived breach.

## Capital Markets Perspective

Although the CARES Act provides significant financial assistance through loans (described in greater detail above), ultimately many of these businesses are expected to require additional government assistance or other financing, including potentially by accessing the capital markets. This includes small businesses, which are typically more inclined to rely on credit facilities but may view a challenging lending environment as a reason to consider alternatives, including equity offerings in reliance on Regulation A or Regulation D under the Securities Act of 1933, as amended.

The act's broader mandate — (at least) \$454 billion for the Federal Reserve to provide liquidity to the financial system — includes a facility to purchase certain new issuances by eligible issuers, potentially enabling these issuers to successfully market securities offerings that may otherwise be too costly or lack adequate investor interest in current market conditions. Notably, the act does not limit purchases to debt obligations.

In the longer term, funds allocated under the act for health care spending, including funding for research, vaccines, therapeutics and diagnostics, could help spur innovation, new technologies and growth in biotech businesses (*e.g.*, a February 2014 White House report associated spending in clean energy and health information technology under the 2009 American Recovery and Reinvestment Act with growth in these industries). The act also includes specific allocations for certain telehealth networks and technologies, as well as expanded Medicare coverage for telehealth services. Any such innovations or growth could potentially result in future capital-raising activities, such as private financing rounds and initial public offerings.

## Real Estate Measures

While the CARES Act provides certain measures that directly impact real estate, the vast majority of its provisions are designed to economically buttress individuals, businesses and hard-hit industries in an effort to enhance their ability to remain solvent and cover operational expenses, including rent and debt service. The provision of monetary relief through the act in the form of emergency cash infusions, financing availability, loan forgiveness/forbearance, tax benefits and supplemental awards is designed to help owners, landlords, operators, borrowers and tenants survive. Despite the provision of this relief, loans, leases and other contracts likely will need to be restructured and renegotiated. Property owners, operators and lenders will need to collaborate to make this happen. The more significant real estate-specific measures in the legislation include the following:

- i. The correction of a drafting error in the Tax Cuts and Jobs Act that will allow businesses to write off costs associated with improving buildings instead of depreciating such improvements over the 39-year life of a building.
- ii. Except with respect to vacant or abandoned property, a prohibition on foreclosures of all federally backed mortgage loans (which include loans encumbering residential real property designed principally for the occupancy of one to four families) for a 60-day period commencing on March 18, 2020.
- iii. Until the sooner of the termination date of the coronavirus national emergency or December 31, 2020, borrowers of federally backed mortgage loans (which include loans encumbering residential real property designed principally

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for the occupancy of one to four families) facing economic difficulties as a result of the coronavirus can seek up to 360 days of forbearance.

- iv. Until the sooner of the termination date of the coronavirus national emergency or December 31, 2020, multifamily borrowers of federally backed multifamily mortgage loans (which include loans encumbering residential real property designed principally for the occupancy of five or more families) that face economic difficulties and were current on their loan payments as of February 1, 2020, can seek up to 90 days of forbearance. These borrowers may not evict or charge late fees or penalties to tenants during the forbearance period.
- v. For 120 days from the date of the act, residential landlords cannot recover rental units or charge fees or penalties resulting from the nonpayment of rent in the event that a landlord's mortgage is insured, guaranteed or assisted in any other way by the U.S. Department of Housing and Urban Development (HUD), Fannie Mae, Freddie Mac, the rural housing voucher program or the Violence Against Women Act of 1994.
- vi. Appropriation of funds to prevent, prepare for and respond to the coronavirus, in the U.S. or internationally, including:
  - a. \$1.25 billion for Tenant-Based Rental Assistance, which includes providing additional funds for public housing agencies to maintain normal operations.
  - b. \$1 billion for Project-Based Rental Assistance.
  - c. \$4 billion to allow state and local governments to combat the spread of COVID-19 among the existing homeless population and to prevent individuals and families from becoming homeless, including, without limitation, through the provision of temporary emergency shelters by leasing existing property, temporary structures or other means.
  - d. \$685 million for the Public Housing Operation Fund to provide additional funds for public housing agencies to maintain normal operations.
  - e. \$275 million for the Federal Buildings Fund to remain available until expended.

## Bank Regulatory Relief

The CARES Act includes a number of provisions designed to support financial institutions during the COVID-19 pandemic. It authorizes the Federal Deposit Insurance Corporation to further guarantee obligations of solvent insured depository institutions and depository institution holding companies provided that any such guarantee must terminate no later than December 31, 2020. The legislation does not set the maximum amount to be guaranteed. The legislation also temporarily authorizes the Office of the

Comptroller of the Currency to exempt any transaction from its lending limits, if the exemption is in the public interest.

In addition, a financial institution can elect to suspend, during a covered period, requirements under U.S. Generally Accepted Accounting Principles for loan modifications related to the COVID-19 pandemic that would otherwise be categorized as a troubled debt restructuring, and the federal banking agencies must defer to the financial institution's determination. The covered period begins on March 1, 2020, and ends the earlier of December 31, 2020, or 60 days after the date on which the national emergency declaration related to coronavirus terminates. The legislation also permits an insured depository institution, bank holding company or any affiliate thereof to temporarily delay measuring credit losses on financial instruments using the new Current Expected Credit Losses (CECL) accounting standard until the earlier of December 31, 2020, or the date on which the coronavirus-related national emergency declaration terminates. Finally, in addition to providing additional financial support for the Federal Reserve's lending programs, as discussed above, the legislation would temporarily suspend the statutory limitation on the use of the Exchange Stabilization Fund for guarantee programs for the U.S. money market mutual fund industry. Any such guarantee must terminate not later than December 31, 2020.

Community banks also will receive support. The act requires the federal banking agencies by interim final rule to temporarily reduce the Community Bank Leverage Ratio (CBLR) for qualifying community banks to 8% and provides for a reasonable grace period if a community bank's CBLR falls below the prescribed level. The interim final rule would expire at the earlier of December 31, 2020, or the date on which the national emergency declaration related to coronavirus terminates.

The legislation also includes a number of consumer-oriented provisions, including a foreclosure moratorium and a consumer right to request forbearance. In general, the act prohibits foreclosures on federally backed mortgage loans for a 60-day period beginning on March 18, 2020, and provides up to one year of forbearance for borrowers under federally backed mortgage loans who have experienced a financial hardship related to the COVID-19 pandemic. Similarly, the legislation includes a 120-day moratorium on eviction filings with respect to certain properties, including where the property is subject to a federally backed mortgage loan. Federally backed mortgages include those purchased or securitized by Fannie Mae or Freddie Mac; insured by the Federal Housing Administration, the U.S. Department of Veterans Affairs or the U.S. Department of Agriculture (USDA); and directly issued by USDA. The legislation also includes consumer-oriented protections with respect to multifamily properties with federally backed loans.

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The CARES Act also establishes the Office of the Special Inspector General for Pandemic Recovery, which will conduct, supervise and coordinate audits and investigations of the making, purchase, management and sale of loans, loan guarantees and other investments made by the Treasury Department under any program established by the Secretary of the Treasury through the legislation. Separately, the law establishes a Congressional Oversight Commission to conduct oversight of implementation of certain provisions of the law by the Treasury Department and the Federal Reserve. These two oversight mechanisms are similar to those included as part of the 2008 Troubled Assets Relief Program.

## FDA-Related Concerns

The CARES Act also includes several important provisions that specifically implicate U.S. Food and Drug Administration-related regulatory requirements, including:

**National Academies Report:** National Academies will study the manufacturing supply chain of drugs and medical devices and provide recommendations to Congress. The study will assess dependence on critical drugs and devices sourced from outside the United States.

**Respiratory Protective Devices:** The Public Health Service Act is amended to include respiratory protective devices as Covered Countermeasures if they are approved by the Occupational Safety and Health Administration and determined by the Department of Health and Human Services (HHS) to be a priority for use during a public health emergency. It also provides liability protection for manufacturers of respiratory protective equipment.

**Review of Drug Applications:** FDA is required to prioritize and expedite review of drug applications and inspections of drugs that are deemed life-supporting, life-sustaining, intended for emergency use or surgeries, and critical during a public health emergency.

**Drug Shortage Provisions:** The legislation expands the Food, Drug and Cosmetic Act's (FDCA) current provisions to require manufacturers of covered drugs to report disruptions in the supply of active pharmaceutical ingredients. It also adds drugs that are critical to the public health during a declared public health emergency to the list of covered products subject to the reporting requirements. Additionally, the legislation requires manufacturers of covered drugs to develop redundancy risk management plans and directs FDA to prioritize and expedite review of drug applications and inspections of drugs that could help mitigate or prevent a shortage.

**Production Volume Reports:** Manufacturers of drugs registered with FDA under Section 510 of the FDCA are required to report

to FDA on an annual basis the amount of product manufactured for commercial distribution.

**Device Shortage Provisions:** Manufacturers must submit to FDA information about a device or device component shortage if HHS determines this information is needed during, or in advance of, a public health emergency.

**Strategic National Stockpile:** The Strategic National Stockpile is required to procure certain medical supplies and devices, such as personal protective equipment and other supplies.

**Over the Counter Drugs:** The legislation reforms the regulatory process for over-the-counter (OTC) drug monographs allowing the FDA to designate or approve changes to OTC drugs administratively, rather than going through a full notice and comment rulemaking. The legislation includes provisions on sunscreen ingredients and establishes a user fee program beginning in fiscal year 2021 for OTC drug products.

**Coverage of Testing and Preventative Services:** Insurers are required to provide coverage (without cost sharing) for all diagnostic tests for SARS-CoV-2 or COVID-19 provided that: (i) the test has been approved, cleared or authorized under the FDCA; (ii) the test developer intends or has requested authorization for emergency use; (iii) a state has authorized it and notified HHS; or (iv) HHS has deemed it appropriate. For such tests, insurers must pay either the rate specified in a contract or the price listed by the provider. During the emergency period, HHS may impose a penalty on any provider of a diagnostic test for COVID-19 that does not publicly disclose the price of their test on their website.

## Tax Implications

The new legislation lifts certain deduction limitations imposed by the Tax Cuts and Jobs Act (TCJA). Corporate taxpayers may carryback Net Operating Losses (NOLs) arising in 2018-2020 for up to five years (under the TCJA, no carrybacks were allowed); and for 2020 and years prior, corporations and pass-throughs may fully offset their income using NOLs (the TCJA imposed an 80% cap). Additionally, for 2019-2020, taxpayers may generally deduct interest up to the sum of 50% of adjusted taxable income plus business interest income (30% limit under the TCJA). Taxpayers may also elect to use their 2019 adjusted taxable income for determining their 2020 interest deduction.

Two mechanisms limit adverse tax consequences resulting from the Treasury's new authority to make advances to businesses. (See "[Loan Programs Central to CARES Act Stimulus](#).") First, any such advances are treated as debt for tax purposes, enabling borrowers to deduct the related interest payments. Second, Treasury may make rules so that its equity investments do not cause a

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Section 382 ownership change, which might otherwise limit the use of NOLs and certain other tax attributes.

For employer payroll tax payments that would otherwise be due before January 1, 2021, 50% of such payments are now due December 31, 2021, with the remainder due December 31, 2022. Additionally, employers severely impacted by COVID-19 (either subject to a shut-down order or incurring a 50% decline in gross receipts) are eligible for a refundable payroll tax credit of 50% of wages paid to certain employees, with limitations. (See “[Compensation-Related Provisions](#).”)

The act also accelerates the use of corporate alternative minimum tax credits, makes Qualified Improvement Property generally eligible for 15-year cost-recovery and 100% bonus depreciation, raises the corporate charitable deduction limit to 25% of taxable income, and provides that forgiveness of “Paycheck Protection Program” loans is not taxable income.

## Compensation-Related Provisions

### Limitation of Certain Employee Compensation

The act provides certain limitations on compensation payable by passenger air carriers, cargo air carriers, businesses critical to maintaining national security and any other business that receives a loan or loan guarantee under the act (a Loan Recipient). It also places limits on compensation payable by air carriers and certain contractors who provide services to air carriers that receive financial assistance to be used for continuation of the payment of employee wages, salaries and benefits (a Payroll Assistance Recipient).

For Loan Recipients, these limitations apply for the period commencing on the date that the company enters into an agreement with the Secretary of the Treasury and ending on the first anniversary of the date that the loan or loan guarantee is no longer outstanding. For Payroll Assistance Recipients, these limitations apply during the two-year period beginning March 24, 2020, and ending March 24, 2022. During the applicable restricted period, no officer or employee of a Loan Recipient or Payroll Assistance Recipient whose total compensation exceeded \$425,000 in calendar year 2019 (a Covered Employee) will receive: (i) total compensation during any 12 consecutive months exceeding his or her total compensation from the Loan Recipient or Payroll Assistance Recipient in 2019, or (ii) severance pay or other benefits upon termination of employment that exceeds twice the maximum total compensation received by the Covered Employee in 2019. In addition, during the restricted period, any Covered Employee whose total compensation exceeded \$3 million in calendar year 2019 may not receive total compensation during any 12 consecutive months in excess of the sum of (i)

\$3 million and (ii) 50% of the excess over \$3 million of the total compensation received by the Covered Employee in calendar year 2019. For purposes of the act, “total compensation” includes salary, bonuses, stock awards and other financial benefits.

### Maintaining Employment Levels

The act provides that, until September 30, 2020, those Loan Recipients that receive loans or guarantees under programs specific to passenger air carriers, cargo air carriers and businesses critical to maintaining national security will be required to maintain their employment levels as of March 24, 2020, to the extent practicable, and, in any event, not reduce employment by more than 10% from March 24, 2020 levels. In addition, the act provides that the Secretary of the Treasury will endeavor to seek the implementation of a program or facility to provide direct loans to certain eligible businesses with between 500 and 10,000 employees. Loan Recipients under this program or facility will be required to make a good-faith certification that (i) the funds they receive will be used to retain at least 90% of their workforce, at full compensation and benefits, until September 30, 2020; (ii) they intend to restore not less than 90% of the workforce that existed as of February 1, 2020, and restore all compensation and benefits no later than four months following the termination of the COVID-19 public emergency; (iii) they will not outsource or offshore jobs for the term of the loan or guarantee and for two years thereafter; (iv) they will not abrogate existing collective bargaining agreements for the term of the loan and for two years thereafter; and (v) they will remain neutral in any union organizing effort for the term of the loan. Payroll Assistance Recipients will be required to refrain from conducting involuntary furloughs or reducing pay rates and benefits until September 30, 2021.

### Payroll Tax Credit and Deferral of Employer Payroll Taxes

The act provides a refundable payroll tax credit to eligible employers for 50% of “qualified wages” paid to employees. The act also permits all employers and self-employed individuals to defer payment of the employer portion of payroll taxes owed on wages paid.

An employer is eligible for the payroll tax credit if, during any calendar quarter of 2020, it has operations fully or partially suspended due to a governmental order related to COVID-19, or it has a decline in gross receipts of more than 50% compared to the same quarter of the prior year. For employers with 100 or fewer full-time employees, “qualified wages” covers wages paid to all employees during any applicable quarter in which there was a COVID-19 impact as described above. For employers with more than 100 full-time employees, “qualified wages” only covers wages paid to those employees not providing services

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due to a COVID-19 impact as described above. Qualified wages applies to the first \$10,000 of compensation paid to an employee. This credit is not available to employers who receive a Paycheck Protection Program loan.

All employers and self-employed individuals may defer payment of the employer share of payroll taxes owed on wages paid for the period ending December 31, 2020. Such deferred taxes are due in two installments: 50% by December 31, 2021, and 50% by December 31, 2022. This provision does not apply to any taxpayer who receives loan forgiveness with respect to a Paycheck Protection Program loan.

## Unemployment Insurance Benefits and Loans to Employers

The CARES Act expands eligibility for unemployment insurance for workers who are displaced due to COVID-19 in a number of ways. It creates the Pandemic Unemployment Assistance program, which provides up to 39 weeks of combined federal and state unemployment assistance between January 27, 2020, and December 31, 2020, to individuals, including independent contractors, who are otherwise not eligible for, or have exhausted, other state or federal benefits. Also, new Federal Pandemic Unemployment Compensation provides an additional weekly \$600 federally funded payment for up to four months to individuals already collecting state unemployment insurance payments. The act further provides federal funding to states to cover the cost of the first week of unemployment benefits for states that choose to waive the typical one-week waiting period. In addition, certain federal funds are made available to states to fully fund work share programs, under which employees receive partial unemployment benefits if work hours are reduced but not eliminated by their employer.

The CARES Act also creates the Paycheck Protection Program, which allocates \$349 billion for new partially forgivable small business loans to cover, among other things, payroll costs for employers with 500 employees or fewer, as well as sole proprietors, independent contractors and other self-employed individuals. The act provides loan forgiveness for amounts spent on certain payroll and other costs incurred by an employer for an eight-week period after the loan origination date. Such payroll costs do not include sick leave wages or family leave wages, for which a tax credit is allowed under the Families First Coronavirus Response Act (FFCRA). Additionally, the act authorizes up to \$500 billion for nonforgivable loans to other businesses, but requires that all recipients, among other things, commit to maintaining, through September 20, 2020, at least 90% of their employment levels as of March 24, 2020. (See “[Compensation-Related Provisions](#).”)

The CARES Act separately provides a refundable payroll tax credit for 50% of employee wages paid by employers that are either forced to fully or partially suspend operations due to a governmental order related to COVID-19, or that experience a year-over-year decline in gross receipts of 50% or more. The payroll tax credit is available to employers regardless of the number of employees. However, employers with more than 100 full-time employees may receive the credit only for wages paid to employees who are not providing services to the employer due to COVID-19-related factors, while employers with 100 or fewer employees may receive the credit for all employee wages paid. The credit is limited to 50% of the first \$10,000 in wages per employee, per quarter; and recipients of loans under the Paycheck Protection Program are not eligible for the credit.

Furthermore, the CARES Act amends certain provisions of the FFCRA. Among other things, it makes employees who are laid off on or after March 1, 2020, but then rehired eligible for the amended family leave under the FFCRA without any waiting period.

## Provisions Related to Civil Tort Liability

The CARES Act includes several provisions limiting civil liability as to certain issues involving the health care industry and related to the COVID-19 pandemic. Most notably, the legislation extends broad liability immunity to entities or persons who manufacture, test, distribute, prescribe or administer, in any way, “respiratory protection devices” during the relevant public health crisis period. This broadly worded provision reflects an expansion of an existing statute — The Public Service Health Act — which already provides liability immunity to manufacturers and sellers of certain essential medical devices during a public health crisis. The CARES Act provides broad liability immunity for any injury “caused by, arising out of, relating to, or resulting from the administration to or the use by an individual of a [respiratory protection device].” While a narrow exception exists for willful misconduct, the vast majority of personal injury tort claims related to respiratory devices during the COVID-19 situation would likely be foreclosed by the CARES Act. The bill also provides liability immunity to volunteer health care workers. However, unlike the respiratory device liability protection, this immunity is subject to a broader exception for claims alleging reckless conduct or gross negligence, which would remain actionable. Finally, to prevent price gouging or volatility, the legislation also requires that prices for COVID-19 diagnostic tests be publicized on a public website, which, if violated, could result in a maximum civil penalty of \$300 a day.

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