An Employer Cheat Sheet for the 854 Page Virus Relief Bill

By [Braden Campbell]

Law360 (March 27, 2020, 8:00 PM EDT) -- The $2 trillion stimulus package **the president signed into law Friday** is a game-changer for a national economy decimated by the novel coronavirus, handing workers an unprecedented expansion of unemployment benefits and providing businesses with a deep well of loans. Here, Law360 looks at four employment takeaways from the feds' latest relief effort.

More Benefits for More Workers

The passage of the Coronavirus Aid, Relief and Economic Security Act, or CARES Act, came a day after the U.S. Department of Labor said nearly 3.3 million workers filed for unemployment from March 15 to March 21, detailing the startling toll coronavirus-related shutdowns have already taken on the American workforce.

The CARES Act will help displaced workers make ends meet during the crisis by **providing them $600 per week** for four months on top of their state unemployment benefits, which vary in amount from state to state. The law also dramatically expands benefit eligibility by adding in workers who typically cannot collect, including independent contractors, the self-employed and those who haven't hit the minimum hours for benefits.

Cozen O'Connor Chicago office managing partner Jeremy Glenn said the expansion will be a boon to these workers, including a self-employed meeting planner he knows.

"Meetings have generally dried up [because of the coronavirus], so that person has no income right now," said Glenn, who is a member of the firm's labor and employment practice. "This CARES Act will allow for that person to not only receive state benefits, but the $600 federal benefit on top of it."

Workers' advocate Heidi Shierholz, who was the DOL's chief economist under former President Barack Obama, said the $600 boost means the lower half of wage earners will earn "essentially 100% replacement rate" for four months.

She also praised the bill for making clear that workers who are furloughed, or temporarily laid off, can collect unemployment while remaining on shuttered employers' books. That means those employers won't have to go through hiring and onboarding once the worst is over, she said.

"Not having to do that will speed up the recovery," said Shierholz, policy director for the Economic Policy Institute.

Loans, With a Catch

The CARES Act also opens up the federal coffers to many employers, though they'll want to read the fine print before taking out a loan with Uncle Sam.

The law creates a $500 billion Exchange Stabilization Fund under the purview of the **U.S. Department of the Treasury**. This fund consists of about $50 billion in direct lending to the airline industry and "businesses important to maintaining national security," and about $450 billion in emergency loans for general business.

The direct lending includes several conditions, including that the recipient can't engage in stock buybacks for a year after taking out a loan and must maintain the bulk of its staff through September.

And the emergency loan provisions lay out conditions for nonprofits and private businesses with between 500 and 10,000 employees, including that they maintain staffing, pledge not to offshore jobs, abide by collective bargaining agreements with unions, and promise to "remain neutral" if employees seek to form a union during the loan term.

This last condition has caught the eye of labor attorneys, who say it clashes with the National Labor Relations Act and may violate employers' First Amendment rights.

Jerry Hunter, a former National Labor Relations Board general counsel who now advises businesses on labor relations at Bryan Cave Leighton Paisner LLP, pointed to a series of U.S. Supreme Court rulings holding that employers can express their views — including negative views — about unions as long they don't threaten workers.

"I wouldn't be surprised if the Chamber of Commerce or some other business group files a lawsuit seeking an injunction" nullifying that language, Hunter said.

The law also limits how much executives of air carriers and certain other businesses that take CARES Act money can be paid during the term of the loan. Executives who earned between $425,000 and $3 million in 2019 can't top that year's pay in any 12-month period while the loan is active, and they can't take home more than double their 2019 compensation through a severance package.

If the executive earned more than $3 million in 2019, they can only be paid $3 million plus half the amount by which they exceeded that figure in 2019. For example, an executive who earned $5 million in 2019 could be paid a maximum of $4 million during the loan, or the $3 million cap plus half their 2019 surplus.

The law sets these payment caps using execs' "total compensation," which it defines as including salary, bonus awards, stock and other financial benefits. But it's unclear how stock options that are granted in a given year but vest in the future factor into the compensation math for that year, said Jeanie Cogill, a partner in King & Spalding LLP's corporate, finance and investments practice.

"There's definitely going to be guidance" from the federal government on that point, Cogill said.

Separately, the CARES Act also provides hundreds of billions of dollars in partially forgivable loans to employers with fewer than 500 workers, with requirements that the money be used for payroll and other immediate needs, and without most of the conditions applied to the other loans.

An Incentive for Layoffs?

The act creates two ways to keep workers paid during the crisis: Providing direct help to workers who lose their jobs, and extending loans to businesses to help them maintain pay and benefits. But some are concerned the former path is too generous, incentivizing employers to close up shop rather than wait out the crisis.

This led Sens. Lindsey Graham, R-S.C., Tim Scott, R-S.C., Ben Sasse, R-Neb., and Rick Scott, R-Fla., to threaten to derail the bill hours before the Senate vote Wednesday, though they ultimately relented. But the concern is real, said Donald Schroeder, a partner with management-side firm Foley & Lardner LLP.

Coupled with many employers' looming obligations to provide paid sick days and leave to workers affected by the virus under the Families First Coronavirus Response Act, there are "few economic incentives for employers to do anything but lay off employees right now," Schroeder said.

"It's giving a lot of benefits to employees, either employed or no longer employed, but it does not appear to give significant benefits to the employers to ensure that they're not the ones stuck footing the bill," he said.

But not everyone is worried employers will take the layoff path. Shierholz, the workers' advocate, said she expects many employers to foot the bill for benefits knowing the government will pay workers even if they can't make payroll. And the debt forgiveness for employers that use loans to pay workers should also avert some closings.

"Congress really bent over backwards to incentivize employers to keep people on payroll, which is great," she said.

Cozen O'Connor's Glenn said he expects many of his clients to opt for loans, especially those that can access the forgivable loans.

"Most small-business owners are optimistic by nature, and when they have the opportunity to bet on themselves and bet on their workers, they consider that a well-placed investment," he said.

Additional Benefits

The law also gives workers directly affected by coronavirus a few ways to use their retirement savings to get through the crisis.

The act empowers workers to withdraw up to $100,000 from their 401(k) or another defined contribution plan without facing the penalties they would typically incur for withdrawals before age 59½, though they'll still owe income tax on any money they take out.

The worker will get three years to pay back the amount they take out, even if doing so would push their payment above the annual maximum contribution. This is available to workers who are diagnosed with COVID-19, whose spouse or dependent is diagnosed with the virus, or who experiences "adverse financial consequences” because of the pandemic.

The law also lets such workers take out larger loans from their accounts. Under existing benefits law, workers can generally take the lesser of $50,000 or half of their account balance as a loan and pay that amount back over time. The CARES Act doubles the maximum loan amount for affected workers to the lesser of $100,000 or the full amount of their balance.

Eric Keller, a member of Paul Hastings LLP’s global compensation, benefits and ERISA practice group, said these measures are meant to give workers liquid assets at a time when money is tight. Hard-up workers will generally want to opt for a loan before withdrawing because they won’t have to pay income tax and any interest they pay only bolsters their accounts, he said. But together, these changes will help workers who are going through especially tough times.

"The increased maximum loan amount … will help people, but there may be people who even with a loan still have other expenses that they need assistance for," he said. "They may want both a loan and a hardship withdrawal."

The CARES Act also provides employers some relief from their obligations to pension plans. Ordinarily, employers must make minimum periodic contributions to fund plans. Under the new law, employers can delay those payments until the end of the year, Keller said.

"This is addressing employer liquidity needs, essentially giving the employer more time during 2020 to make those minimum required contributions, rather than requiring them to be made quarterly during the year," he said.

--Editing by Philip Shea, John Campbell and Alanna Weissman.