

CORONAVIRUS AID, RELIEF AND ECONOMIC SECURITY ACT (THE CARES ACT)

The **Association of Riverdale Cooperatives and Condominiums (ARC)** is grateful for the continuing professional and legal advice and guidance that it has received in behalf of its membership, and is proud to convey information that may not be readily or immediately available elsewhere directly to its members.

In this regard we wish to acknowledge the direct support of Attorneys at Law from the firm of **Clifton Budd & Demaria, LLP** for providing us with comprehensive information concerning the CARES Act.

Conceivably, the provisions of this law may not directly impact the operation of many co-ops and condominiums, but it may be wise to familiarize yourself with its details since circumstances vary substantially among **ARC** member buildings, and parts of the new law may be applicable.

Steve

Stephen Budihas, President

Association of Riverdale Cooperatives & Condominiums

arc-riverdale.com



On March 27, 2020 the \$2 trillion Coronavirus Aid, Relief, and Economic Security Act enacted to confront the devastating effects of the COVID-19 virus global pandemic went into effect.

The Act provides *immediate and sizable* cash and economic relief for citizens, businesses, and hard-hit industries.

This memorandum provides an initial overview of the Act's relevant labor, employment and employee benefits provisions.

Title I – Keeping American Workers Paid and Employed Act

A. Paycheck Protection Program

What is this new business loan program under the Act?

By expanding the previously existing Small Business Administration's (the "SBA") 7(a) loan guaranty program, the Act creates the Paycheck Protection Program (the "Loan Program") to guarantee loans to small businesses for the period of February 15, 2020 to June 30, 2020 (the "Covered Period"). This new law allows the SBA to provide 100% federally backed loans to eligible businesses up to a certain maximum to assist them with operational costs like payroll, rent, health benefits, insurance premiums, utilities, etc. The loan amounts are forgivable subject to certain conditions contained in the statute.

The Loan Program allows the SBA Administrator to provide loans through agreements to participate on an immediate or deferred (guaranteed) basis. Lenders authorized to make loans under the SBA's current loan program are automatically approved to make and approve loans under the new Loan Program, and the U.S. Department of the Treasury Secretary (the "Treasury") may extend such authority to additional private sector lenders under certain criteria.

The SBA Administrator may guarantee covered loans under the Loan Program on the same terms, conditions, and processes as the SBA's 7(a) loan program. No collateral or personal guarantee may be required for a loan, and the loans must be non-recourse. The interest rate on loans under the program is not to exceed 4%. There will be no subsidy recoupment fee associated with the loans and no prepayment penalty for any payments made.

A loan made under the SBA's previously existing Disaster Loan Program on or after January 31, 2020 may be refinanced as part of a loan under the Act's Loan Program. SBA Disaster Loan recipients with economic injury disaster loans made since January 31, 2020 may receive new assistance under the Act's Loan Program subject to meeting the statutory loan requirements.

Who is eligible for a loan?

- Small business that are nonprofits, veteran's organizations, sole proprietors, self-employed individuals, and small businesses *with fewer than 500 employees* (more on this below), including corporations, LLCs, and partnerships; or if applicable, the size standard in the number of employees established by the SBA for the industry in which the entity operates.³
- Franchise businesses are now eligible for lending relief.⁴
- Lenders can only consider whether a small business was operational on February 15, 2020 and had employees for whom it paid salaries and payroll taxes, or a paid independent contractor.
- The small business must make a good faith certification that the loan is necessary due to the uncertainty of the current economic conditions caused by COVID-19.
- The Administrator must now issue guidance to lenders and agents to ensure that processing and disbursement of covered loans prioritizes: small business concerns; entities in underserved and rural markets (including veteran communities); small business concerns owned by socially and economically disadvantaged individuals; women; and businesses in operation for less than two years.

How does a business determine if they have less than 500 employees?

- For the purposes of determining whether a business employs less than 500 employees, the term "employee" includes individuals employed on a full-time, part-time or other bases. The employees that work part time would be included in the count.
- Based on recent U.S. Department of Labor ("DOL") guidance for the Federal Emergency Sick Leave Act under the Families First Coronavirus Response Act ("FFCRA"), generally a corporation (including its separate establishments or divisions) is considered to be a single employer and its employees must each be counted towards the 500-employee threshold. However, if a corporation has an ownership interest in another

corporation, the two corporations are separate employers unless they are joint employers under the Fair Labor Standards Act (FLSA) with respect to certain employees.

How does a business apply for a loan?

- There is little information about the Loan Program application process in the Act. We know the SBA will administer the covered loans, and a borrower must submit a good-faith certification that:
 - The loan is needed to continue operations during the COVID-19 emergency;
 - Funds will be used to retain workers and maintain payroll or make mortgage, lease, and utility payments;
 - The applicant does not have any other application pending under the Loan Program; and
 - The applicant has not received duplicative amounts under this Loan Program during the Covered Period.

What is the maximum amount of the loan?

- The maximum loan amount (capped at \$10 million) is the lesser of:
 - 2 ½ times the average total monthly payroll costs incurred in the one-year period before the loan is made *or*
 - For businesses that were not in existence during the period from February 15, 2019 to June 30, 2019, 2 ½ times the average total monthly payroll payments from January 1, 2020 to February 29, 2020
 - \$10 million.

What may the loan be used for?

- The Loan Program is intended to help small businesses pay existing obligations, including payroll costs, healthcare premiums, paid time off, rent, utilities, mortgage payments, and interest on other pre-existing loans for an eight-week period falling during the Covered Period.
- It may not be used to fund mortgage, rent or utilities expenditures for new loans or leases executed on or after February 15, 2020. *Nor may it be used for* individual employee compensation prorated above \$100,000/year; certain federal taxes; compensation to employees whose principal place of residence is outside of the US; and sick and family leave wages for which credit is allowed under the FFCRA.

Can the loan payment be deferred?

- Businesses that were operating on February 15, 2020 and have a pending or approved loan application under the Loan Program are presumed to qualify for complete payment deferment relief (for principal, interest, and fees) for six months to one year.

Is the loan eligible for forgiveness?

- All small businesses are eligible for loan forgiveness equal to the amount spent during an 8-week period after the origination date of the loan on payroll costs, mortgage interest payments, rent, and utilities. Payroll costs eligible for loan forgiveness do not include compensation above \$100,000. Also, the amounts forgiven cannot exceed the principal amount of the loan.

Can the amount of loan forgiveness be reduced?

- Yes, there are *two ways* the amount forgiven can be reduced under the Loan Program:
 - If the employer reduces the number of full-time equivalent employees (“employees”) then the forgiveness amount is reduced. To determine the amount forgiven in this situation, the forgiveness amount is multiplied by a percentage equal to the average number of employees during each month of the Covered Period divided by the average number of employees in a later period.
 - For example, if there is \$500,000 expected in forgiveness x (70 employees during the covered period in 2020 / 100 employees during the elected earlier period) = \$350,000 in actual forgiveness.
 - If the employer reduces the gross amount paid to employees earning less than \$100,000 annually by 25% or more during the Covered Period compared to the gross amount paid to those same employees in the most recent quarter before the Covered Period, then the forgiveness amount will be reduced by that percentage.
- There is relief if an employer rehires the employees or raises wages by June 30, 2020.
 - Reductions in employment or wages that occur during the period beginning on February 15, 2020, and ending 30 days after enactment of the Act, (as compared to February 15, 2020) shall not reduce the amount of loan forgiveness *if* by June 30, 2020 the borrower eliminates the reduction in employees or reduction in wages.
- Employers with tipped employees (as described in the FLSA) may receive forgiveness for additional wages paid to those employees.

How does a business apply for loan forgiveness?

- Businesses seeking forgiveness of amounts must submit the following to the lender:
 - Documentation verifying employees on payroll and their pay rates;
 - Documentation on covered costs/payments (e.g. documents verifying mortgage, rent, and utility payments);

- Certification from a business representative that the documentation is true and correct and that forgiveness amounts requested were used to retain employees and make other forgiveness-eligible payments; and
 - Any other documentation the SBA Administrator may require.
- Within 90 days of determining the ultimate forgiveness amount, the SBA Administrator must remit payment plus interest accrued through the date of payment to the lender. The SBA Administrator has 30 days following the enactment of the Act to issue regulations on these loan forgiveness rules.

What if the loan amount is not forgiven?

- Any amount of the loan not forgiven at the end of one year is carried forward as an ongoing loan for a term of no more than *10 years* and with no more than a *4% interest rate*.
- There is *no recourse* against any individual, shareholder, member, or partner of an eligible loan recipient for non-payment, unless the individual uses the loan proceeds for unauthorized purposes.

The Loan Program also...

- Waives certain fees that would otherwise apply under the SBA's loan program;
- Provides that loan balances following any forgiveness reductions will be guaranteed by the SBA;
- Establishes a maximum maturity date for loans;
- Stipulates that loans under the Loan Program are eligible to be sold in the secondary market consistent; and, among other things,
- Sets forth compensation parameters for participating lenders.

B. Emergency Economic Injury Disaster Program

What is an Economic Injury Disaster Loan?

- The SBA Disaster Loan Program (existing prior to the Act) provides loans for small businesses that suffered a substantial economic injury, which are called Economic Injury Disaster Loans ("EIDL").

Who can receive an EIDL?

- (1) businesses with 500 or fewer employees;
- (2) sole proprietorships without employees;
- (3) independent contractors;
- (4) cooperatives with 500 or fewer employees;
- (5) ESOPs with 500 or fewer employees; and
- (6) tribal small business concerns.

How does the Act amend the EIDL Program?

- The Act makes the following changes to the EIDL Program for loans made in response to COVID-19:
 - Waives rules related to personal guarantees on advances and loans of \$200,000 or less for all applicants;
 - Waives the “1 year in business prior to the disaster” requirement;
 - Waives the requirement that the applicant be unable to find credit elsewhere; and
 - Allows lenders to approve applicants based solely on credit scores or alternative appropriate methods to determine an applicant’s ability to repay.

Can an entity apply for an advancement under the EIDL Program?

- Entities can request an emergency advance from the Administrator of up to \$10,000, which does not have to be repaid, even if the loan application is later denied.
- Advances may be used for purposes already authorized under the EIDL Program which includes sick leave; rent or mortgage payments; and repaying debt that cannot be paid due to lost revenue.
- If an entity receives an emergency advance and transfers into or is approved for a loan under the Loan Program, the advance amount will be reduced from any payroll cost forgiveness amount.

Title II – Assistance For American Workers, Families, and Businesses

A. Unemployment Assistance (Subtitle A)

Overview

The Act provides federal funding for unemployment compensation to employees, self-employed individuals and those gig-economy workers adversely impacted by COVID-19, who are not otherwise covered by state compensation laws or have exhausted state compensation benefits. If covered by the Act, an employee will receive the same compensation benefit as regular employees receive under the pertinent state’s unemployment compensation law. The Act provides states the opportunity to: (1) enter agreements with the federal government to provide enhanced unemployment compensation benefits under existing state compensation benefit programs and (2) receive funding for state-enacted “short-time compensation” programs to subsidize employees who have their hours reduced in lieu of a layoff, where the federal government would fund the difference between reduced hour payments and the unemployment benefit.

Who is eligible for federal unemployment benefits?

- Any individual that can self-certify that they are able and available to work but is unemployed or partially unemployed due to any of the following:

- The individual has been diagnosed with COVID-19 or is experiencing symptoms and seeking medical diagnosis;
- A member of the individual's household has been diagnosed with COVID-19;
- The individual is providing care for a family member or household member who has been diagnosed with COVID-19;
- The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of COVID-19;
- The individual has a child or other person in the household for which the individual has primary caregiving responsibility that is unable to attend school or another facility because it is closed as a direct result of COVID-19;
- The individual is unable to work because a health care provider has advised the individual to self-quarantine due to COVID-19 concerns;
- The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of COVID-19;
- The individual has become the breadwinner or major support for a household because the head of household has died as a direct result of COVID-19;
- The individual must quit their job as a direct result of COVID-19;
- The individual's place of employment is closed as a direct result of COVID-19;
or
- The individual meets any additional criteria established by the Secretary of unemployment assistance.

Who is not eligible for federal unemployment benefits?

- Individuals able to telework with pay or who are receiving paid sick leave or other paid leave benefits *are not eligible* for unemployment.

When are the federal unemployment benefits available?

- The Act waives the typical one week waiting period, so benefits will become available immediately. Individuals may receive assistance for 39 weeks for the period beginning on January 27, 2020 and ending on December 31, 2020.

How much money will the employee receive?

- The individual will be eligible for up to \$504 per week under New York State's unemployment compensation law, plus up to \$600 per week through the federal benefits. An individual may receive benefits up to their regular weekly pay while employed or \$1,104, whichever is greater, per week for up to 26 weeks. An individual may then receive up to \$600 per week through the federal benefits for an additional 13 weeks.

What is the Pandemic Emergency Unemployment Compensation?

- An additional 13 weeks of unemployment benefits through December 31, 2020 to help those unemployed after weeks of state unemployment benefits are no longer available.

B. Recovery Rebate Checks (Subtitle B)

Who is eligible for these rebate checks?

- Those U.S. residents with adjusted gross income of less than \$99,000. This includes individuals with no income.

How much will individuals receive?

- U.S. residents with a gross yearly income up to \$75,000 (\$150,000 for joint filers) who are not a dependent of another taxpayer and have a work eligible social security number are eligible for the full \$1,200 (\$2,400 for joint filers) rebate. The rebate amounts are increased \$500 per child.
- If an individual's income exceeds \$75,000 (\$150,000 joint filers) the rebate amount is reduced by \$5 for each \$100 the individual's income exceeds the \$75,000 threshold.

What is the process to receive the rebate check?

- Individuals will not have to apply for the rebate check. The IRS will send the rebate check to the individual's residence based on the individual's 2019 or 2018 federal income tax return.

C. Retirement Plan Provisions (Subtitle B)

The Act also includes provisions with respect to employee benefit plans, mainly retirement plans.

What changes does the Act make to retirement plans?

- **Early Distributions.** The Act waives the 10% early withdrawal penalty for distributions up to \$100,000 from all qualified retirement plans (including all the plans of the employer's controlled group), including 401(k)s and Individual Retirement Accounts ("IRAs"), for coronavirus-related purposes made on or after January 1, 2020, *subject to the following rules:*
 - A coronavirus related distribution is one made to an individual: (1) who is diagnosed with COVID-19; (2) whose spouse or dependent is diagnosed with COVID-19; (3) who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, having work hours reduced, being unable to work due to lack of child care due to COVID-19; (4) closing or reducing hours of a business owned or operated by the individual due to COVID-19; or (5) other factors as determined by the Treasury Secretary.

- The distribution may be repaid at any time over a three-year period commencing on the date the distribution was received and will be treated as rollovers when repaid.
 - Distributions will be deemed to meet the permissible distribution requirements of Section 401(k) of the Internal Revenue Code (the “Code”), meaning they will satisfy the Code’s hardship distribution rules and be exempt from the 10% early withdrawal tax and instead of being subject to income tax upon receipt, taxation of these distributions may be spread out in equal parts over three years beginning in 2020, unless otherwise desired by the recipient.
- **Qualified Plan Loan Increase.** The Act increases the dollar amount available for loans from qualified plans from \$50,000 to \$100,000 beginning on the effective date of the Act and ending 180 days later. Participants can borrow up to the lesser of \$100,000 or 100% of their accrued benefits. The Act also provides payment relief for outstanding loans. Current plan loans that call for payments to be made on or after the Act’s enactment date through December 31, 2020 may be delayed for one year without penalty. Interest will continue to accrue.
- **Temporary Waiver of RMDs.** The Act adds a provision permitting a one-year delay in 2019 required minimum distributions (“RMDs”) for plans under Sections 401(a), 403(a) and (b), 457 of the Code, and IRAs. Waived RMD amounts may be rolled over into another qualified plan or IRA.
- **Pension Plan Changes.** The Act gives single-employer pension plan sponsors additional time to make minimum funding contributions due in 2020. Usually, the plan sponsor must make payment of any required minimum contributions no later than 8.5 months after the end of the plan year, and any funding shortfalls from prior years must be paid quarterly. The Act extends the deadline to pay minimum funding contributions due in 2020 until January 1, 2021, although plans sponsors will still owe interest if utilizing the extension.
- **Plan Amendments.** The Act generally delays plan amendment due dates if the plan is operated as if the amendment is in effect at that time and any subsequent writing is retroactive. In most cases, plans may begin operating in accordance with the benefit plan changes in the Act, provided they are amended no later than the last day of the plan year beginning on or after January 1, 2022 (i.e., December 31, 2022 for calendar year plans). Any retroactive amendment will not violate the anti-cutback provisions of the Employee Retirement Income Security Act of 1974 as amended (“ERISA”) or the Code.
- **DOL Authority to Postpone Deadlines.** The Act amends ERISA to permit the DOL to postpone certain filing deadlines by up to one year if the Secretary of the Department of Health and Human Services (HHS) declares a "public health emergency" under the Public Health Service Act, which just occurred on January 31, 2020.

D. Business Provisions (Subtitle C)

Are there any other provisions in the Act that I may want to know about?

Collective Bargaining Agreements. The Act *prohibits* the issuance of a loan, loan guarantee, or investment on a borrowing employer's implementation of measures to enter into negotiations with the bargaining representative of the employer's employees regarding terms and conditions of employment. This prohibition is effective from the date of the loan or loan guarantee until one year after the loan or loan guarantee is no longer outstanding.

Real Estate Industry Assistance. The Act contains certain measures directly impacting real estate such as:

- Appropriating hundreds of millions of dollars to fight COVID-19 affecting the larger global real estate industry.
- Clarifying prior law and allowing the write-off of costs associated with improving buildings instead of depreciating such improvements over the 39-year life of a building.
- Prohibiting foreclosures of all federally backed mortgage loans (which include loans on residential real property for the occupancy of one to four families *but not abandoned or vacant property*) for a 60-day period commencing on March 18, 2020.
- Until the earlier of the end of the COVID-19 crisis or December 31, 2020:
 - Borrowers of federally backed mortgage loans (which include loans on residential real property for the occupancy of one to four families) facing COVID-19 difficulties can seek up to 360 days of forbearance; and
 - Multifamily borrowers of federally backed multifamily mortgage loans (which include loans on residential real property for the occupancy of five or more families) facing COVID-19 difficulties and that were current on their loan payments as of February 1, 2020, can seek up to 90 days forbearance. *These borrowers may not evict or charge late fees or penalties to tenants during the forbearance period.*
- For the next 120 days, residential landlords cannot recover rental units or charge fees or penalties resulting from the nonpayment of rent, if that landlord's mortgage is insured, guaranteed or assisted 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.

Employee Retention Credit For Employers Subject to Closure Due to COVID-19. The Act provides a refundable payroll tax credit for 50% of the first \$10,000 in wages per employee (including the value of that employee's health benefits) during the COVID-19 crises. The credit is available to employers that carried on a trade or business during 2020 and whose (1) operations were fully or partially suspended, due to a COVID-19 related shutdown order, *or* (2) gross receipts declined by more than 50% when compared to the same quarter in the prior year (until the gross receipts exceed 80% year after year). The credit is based on qualified wages paid to the employee. For employers with greater than 100 full-time employees, qualified wages are wages paid to employees when they are not providing services due to COVID-19. For employers with 100 or fewer full-time employees, all employee wages qualify for the credit, whether the employer is open for business or subject to a shut-down order.

Delay of Payment of Employer Payroll Taxes. Employers are generally responsible for paying 6.2% of Social Security tax on employee wages. The Act allows employers and self-employed individuals to defer payment of the employer share of the Social Security tax they otherwise are responsible for paying to the federal government with respect to their employees. The Act requires that the deferred employment tax be paid over the following two years, with half of the amount required to be paid by December 31, 2021, and the other half by December 31, 2022.

Modifications for Net Operating Losses. The Act relaxes the limitations of a company's use of losses, as modified by the Tax Cuts and Jobs Act, to allow that company to utilize losses as well as claim certain refunds for losses – ideally providing critical cash flow and liquidity during the COVID-19 crisis net operating losses (“NOL”) are currently subject to a taxable-income limitation, and they cannot be carried back to reduce income to a prior tax year. The Act provides that an NOL arising in a tax year beginning in 2018, 2019, or 2020 can be carried back five years. The Act also temporarily removes the taxable income limitation to allow an NOL to fully offset income.

Modification of Limitation on Business Interest Expense. The Act temporarily increases the amount of interest expense businesses may deduct on their tax returns by increasing the 30% of adjustable taxable income limitation to a 50% adjustable taxable income threshold for tax years 2019 and 2020.