

## ASHA COVID-19 Legislative, Regulatory, State and Industry Initiatives Update

**April 17, 2020**

ASHA has been working on multiple fronts to advance legislative and regulatory policies and programs on Capitol Hill and in the agencies to assist senior living owners/operators with the challenges associated with COVID-19. ASHA has also worked to provide industry guidance to address some of the operational challenges such as webinars, legal guidance and industry survey data.

The following summarizes much of the activity we have been engaged in since early March (see **Exhibit A** for more details on specific provisions):

**February 27:** ASHA releases Hanson Bridgett Guidance to ASHA Members: *Coronavirus Preparedness and Response for Senior Living Communities*: ([click here](#))

**March 4:** ASHA letter to Congressional Leaders seeking prioritization of senior living in the supply distribution channel for PPE and N95 masks and other supplies as well as financial relief to aid in response efforts that are significantly increasing in costs to prepare and respond to COVID-19. ([click here for letter](#))

**March 6:** *The Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020* ([click here](#)) provided \$8.3 billion in emergency funding for federal agencies to respond to the coronavirus outbreak. This put in motion the next two stimulus packages.

**March 9 & 25** ASHA/Argentum Webinars (recorded webinars available in members area)

- [March 9 Webinar Slides](#)
  - o **Participants:** JoAnne Carlin, Willis Towers Watson; Kim Elliott, Brookdale; Paul Gordon, Hanson Bridgett; Linda Homan, Ecolab; Mary Sue Patchett, Brookdale; Ruth Petran, Ecolab
- [March 25 Webinar Slides](#)
  - o **Participants:** JoAnne Carlin, Willis Towers Watson; Susan Coppola, Sunrise Senior Living; Paul Gordon, Hanson Bridgett; Lynne Katzmann, Juniper Communities

**March 11:** ASHA sent letter to HHS urging action to ensure that senior living is included among priority recipients for PPE, N95 masks, other supplies and that direction is communicated to state and local health departments or other agencies who will be in charge of dissemination. ([click here for letter](#))

## Stimulus Legislation 1, 2 and 3

**March 18:** *H.R. 6201 The Families First Coronavirus Response Act*, a \$100 billion bill marked the second major legislative initiative to address COVID-19. It provides for paid sick leave, expanded Family and Medical Leave, insurance coverage of coronavirus testing, nutrition

assistance, and unemployment benefits. *Health Key Provisions*: ASHA sought action to include senior living in health care provider exemption. Final bill did not exempt senior living but grants DOL Secretary authority to expand the definition. (see below)

**March 23:** ASHA requests DOL to include senior living in definition of health care provider for purposes of exemption ([click here for ASHA/Argentum letter to DOL](#))

**March 29:** Department of Labor publishes Q&A ([click here](#)) and defines “health care provider” as anyone employed at: “*retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, employer, or entity.*”

**April 1:** Treasury Department and IRS releases further guidance on reimbursements for small and midsize employers (fewer than 500 employees) under the Families First Coronavirus Response Act (the FFCRA) for paid employee sick and family leave during the COVID-19 pandemic. Employers who are not exempt or choose to participate are entitled to fully refundable tax credits to cover the costs of the leave required to be paid for these periods of time when employees are unable to work, including telework. [Click here](#) for IRS guidance and FAQs. [Click here](#) for Hanson Bridgett alert *FFCRA Health Care Provider Paid Sick Leave Exemption Expanded and CARES Act Increases Unemployment Compensation Coverage*.

**March 27:** Congress enacted the \$2 trillion *Coronavirus Aid, Relief, and Economic Security Act (CARES Act)*, the third stimulus and largest economic relief bill in U.S. history. Provides direct financial support to individuals and businesses affected by the pandemic and economic downturn. It offers federal grants, loans, and other assistance for small businesses and other businesses disproportionately affected by the coronavirus outbreak including funding for hospitals and doctors. It offers a significant expansion of unemployment insurance.

[Click here](#) for ASHA’s March 25<sup>th</sup> overview of the CARES Act

[Click here](#) for the CARES Act legislation

*Key Priority Provisions of CARES Act:*

- I. Public Health and Social Services Emergency Fund (PHSSEF):** ASHA supported the Public Health and Social Services Emergency Fund, and advocated that 1) senior living be expressly included as an eligible recipient of grant money, 2) \$20 billion be allocated to the senior living industry to defray the significant financial expenditures associated with COVID-19 prep and response, and 3) the amount of the fund be increased from a proposed \$75 billion to \$100 billion.

**Status:** The first tranche of funding was allocated to Medicare providers at the level of \$30 billion The remaining \$70 billion is expected to be delivered to Medicaid and other providers. ASHA and Argentum continue to stress the critical work underway in senior living communities across the country to address COVID-19 and to protect

the 1.9 million seniors under our care. Access to these funds are a necessary component to continuing this work.

- **April 2<sup>nd</sup>:** ASHA/Argentum sends letter to HHS Secretary Alex Azar ([Click here for letter to HHS](#))
- **Hill Activity:** ASHA/Argentum sent letter to Congress alerting them to our request of HHS and seeking support. Currently, several Republican Senators indicate willingness to send letter
- **Grassroots:** Request calls into offices of key Congressional leadership offices with same message ([Click here for letter to Congress](#))

**II. SBA Paycheck Protection Program (PPP):** Authorizes up to \$349 billion toward job retention and certain other expenses. Provides small businesses with funds to pay up to 8 weeks of payroll costs including benefits. Funds can also be used to pay interest on mortgages, rent, and utilities. Small businesses with 500 or fewer employees—including nonprofits, veterans’ organizations, tribal concerns, self-employed individuals, sole proprietorships, and independent contractors are eligible. The SBA program makes loans generally for small businesses, those with fewer than 500 employees. The Treasury Department and SBA announced that banks will be able to start making the loans Friday, April 3, 2020 and the SBA plans to create a web page where potential borrowers can find banks in their area. ASHA members who meet the fewer than 500 employee threshold are encouraged to consider this loan program.

**Status:** The program is not available for employers with over 500 employees. To calculate the number of employees a business must consider the affiliation rules, that may increase an applicant’s employee count for purposes of this program. Affiliation occurs when one entity controls or has the power to control another entity, or when a third-party control both entities and businesses must consider affiliated business relationships. The SBA interim guidance describes circumstances under which affiliation is established. (See table) A waiver of these rules was extended to an industry assigned a North American Industry Classification System Code (NAIC) beginning with 72, which is the accommodations and food service industry. This waiver allows businesses with multiple locations to be eligible as long they do not employ more than 500 employees per physical location.

- **April 2:** Treasury Department releases interim final rules (2) on SBA Paycheck Protection Program ([Click here](#)) including application.
  - o [Davis & Harman Summary](#)

- [Borrower Information Fact Sheet](#)
- [Lender Information Fact Sheet](#)
- **April 7:** ASHA/Argentum sent letter to SBA ([Click Here for Letter to SBA](#))

**Status:** Senior living falls under the NAIC Classification 62 for health care and social services. While it is not likely this is open for further interpretation, we submitted a comment letter to SBA seeking a similar waiver for senior living. We will also prioritize additional funding and a Program waiver for NAIC Classification 62 in Stimulus 4.

**III. Treasury Economic Stabilization and Assistance to the Severely Distressed Sectors of the United States Economy:** The \$500 billion “Exchange Stabilization Fund” will provide loans, loan guarantees, and other investments to eligible businesses including senior living. Of this amount, Congress allocated \$25 billion to passenger air carriers, \$4 billion to cargo air carriers, and \$17 billion to national security businesses. The remaining \$454 billion will be available to eligible businesses, including senior living, and imposes specific conditions:

(1) Alternative financing is not reasonably available to the business; (2) The loan is sufficiently secured or made at an interest rate that reflects the risk of the loan and, if possible, not less than an interest rate based on market conditions for comparable obligations before the coronavirus outbreak; (3) The duration of the loan shall be as short as possible and shall not exceed 5 years; (4) Borrowers and their affiliates cannot engage in stock buybacks, unless contractually obligated, or pay dividends until the loan is no longer outstanding or one year after the date of the loan; (5) Borrowers must, until September 30, 2020, maintain its employment levels as of March 24, 2020, to the extent practicable, and retain no less than 90 percent of its employees as of that date; (6) A borrower must certify that it is a U.S.-domiciled business and its employees are predominantly located in the U.S.; (7) The loan cannot be forgiven; and (8) In the case of borrowers critical to national security, their operations are jeopardized by losses related to the coronavirus pandemic.

\*Limitation on Certain Employee Compensation Prohibits recipients of any direct lending authorized by this Title from increasing the compensation of any officer or employee whose total compensation exceeds \$425,000, or from offering such employees severance pay or other benefits upon termination of employment which exceeds twice the maximum.

**Status:** ASHA will monitor guidance from Treasury on program details

## **COVID-19 Liability Immunity for Industry**

ASHA/Argentum have been working on multiple fronts to secure liability protection for senior living providers in their efforts to combat COVID-19.

### **I. The Public Readiness and Emergency Preparedness Act (PREP Act) Declaration:**

Issued by HHS Secretary Azar on March 17, 2020 (but retroactively effective February) Provides liability immunity to certain individuals and entities (Covered Persons) against any claim of loss caused by, arising out of, relating to, or resulting from the manufacture, distribution, administration, or use of medical countermeasures (Covered Countermeasures), except for claims involving 'willful misconduct' as defined in the PREP Act.

**Status:** ASHA and Argentum submitted request to HHS Secretary Azar seeking confirmation that senior living communities and their employees will be among those afforded critical legal protections under this Declaration.

- [March 17 HHS Declaration](#)
- [April 3 Letter to HHS Secretary Azar](#)

### **II. Model State Executive Order for COVID-19 Liability Immunity**

In public health emergencies such as this, Governors and public health officials have been granted or possess inherent powers to declare an emergency and activate immunities to tort liability for responders such as care providers and care facilities called into duty and service in the fight against, or mitigation of the emergency. ASHA, Argentum, AHCA/NCAL, and LeadingAge developed a model state executive order to grant immunity for senior living providers and are pushing out through various channels, including the associations' affiliate networks, to advance in state legislature or executive action.

- [Model State Executive Order](#)
- [April 8 Letter to National Governors Association](#)

## **Stimulus 4 Legislative Priorities**

Congressional leaders are continuing to outline policy priorities for the next round of COVID-19 response/stimulus legislation. It is expected that we will explore options to:

- Seek Senior Living Grant Program under HHS (Similar to PHSSEF) and fund at the level of \$20 billion.

- Fund additional money into SBA loan program with a 62-classification waiver
- Insurance Backstop: Explore federal proposal to create a federal insurance backstop for pandemics, like the Terrorism Risk Insurance Act (TRIA) that was created after 9-11.
- Address Workforce leave to counter UI benefit
- Miscellaneous tax benefits

## **Exhibit A**

# Families First Coronavirus Response Act (FFCRA)

- **Emergency Paid Sick Leave Act (EPSLA)**
- **Emergency Family and Medical Leave Expansion Act (Expanded FMLA)**

## **Emergency Paid Sick Leave Act (EPSLA)**

### **Key Provisions:**

- Establishes a federal emergency paid leave benefits program, permits tax credits for amounts paid to employees on leave. Requires covered employers (fewer than 500 employees) to offer emergency paid medical leave and expanded Family and Medical Leave.
- Effective April 2020 – December 31, 2020.

### **Covered Employers:**

- Fewer than 500 employees (**exemptions for health care workers and first responders**). DOL Guidance creates exemption for senior living- see below DOL Q&A

### **Paid Medical Leave Benefit:**

- Up to 80 hours for full-time employees
- Pro-rated based on work schedule for part-time employees

### **Qualifying Reasons to Take Leave:**

1. the employee is under a Federal, State, or local quarantine or isolation order related to COVID-19;
2. the employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
3. the employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis;
4. the employee is caring for an individual who is subject to a Federal, State, or local quarantine or isolation order related to COVID-19, or has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
5. the employee is caring for the child of such employee if the school or place of care of the child has been closed, or the child care provider of such child is unavailable, due to COVID-19 precautions;
6. the employee is experiencing any other substantially similar condition specified by the U.S. Department of Health and Human Services.

### **Leave Amounts:**

- For leave reasons (1), (2), or (3): employees are entitled to paid leave at either their regular rate or the applicable minimum wage, whichever is higher, up to \$511 per day and \$5,110 in the aggregate (over a 2-week period).
- For leave reasons (4), (5) or (6): employees are entitled to paid leave at 2/3 their regular rate or 2/3 the applicable minimum wage, whichever is higher, up to \$200 per day and \$2,000 in the aggregate (over a 2-week period).

### **Employer Tax Credit:**

- Employers are provided a payroll tax credit to cover 100% of the wages paid to employees up to the capped amounts (see leave amounts).

### **DOL Regulatory Guidance:**

- The DOL clarified, “For the purposes of Employees who may be exempted from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, a health care provider is anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical

school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity.”

**Notice to Employees:**

- Each covered employer must post a notice of the Families First Coronavirus Response Act (FFCRA) requirements in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees or posting this notice on an employee information internal or external website.

**Emergency Family and Medical Leave Expansion Act (Expanded EMLA)**

**Key Provisions:**

- Establishes a federal emergency paid leave benefits program, permits tax credits for amounts paid to employees on leave. Requires covered employers to offer emergency paid medical leave and expanded Family and Medical Leave.
- Effective April 2020 – December 31, 2020.

**Covered Employers:**

- Fewer than 500 employees (**exemptions for health care workers and first responders**). DOL Guidance creates exemption for senior living- see below DOL Q&A

**Paid Family Leave:**

- Up to 10 weeks (first two weeks can be unpaid). Can be combined with two weeks paid leave. Employees can only receive the additional 10 weeks of expanded family and medical leave under the Emergency Family and Medical Leave Expansion Act for leave to care for their child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.

**Qualifying Reasons to Take Leave:**

- The employee is caring for the child of such employee if the school or place of care of the child has been closed, or the child care provider of such child is unavailable, due to COVID–19 precautions. The employee must have been employed for at least 30 calendar days to be eligible for EMFLA. Full-time, part-time and salary are all included.

**Leave Amounts:**

- For leave reason (5): full-time employees taking leave are entitled to paid family and medical leave equal to 2/3 of the employee’s regular pay, up to \$200 per day and \$10,000 in the aggregate (over a 10-week period).

**Employer Tax Credit:**

- Employers are provided a payroll tax credit to cover 100% of the wages paid to employees up to the capped amounts (see leave amounts).

**DOL Regulatory Guidance:**

- The DOL clarified, “For the purposes of Employees who may be exempted from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, a health care provider is anyone employed at any doctor’s office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity.”

**Notice to Employees:**

- Each covered employer must post a notice of the Families First Coronavirus Response Act (FFCRA) requirements in a conspicuous place on its premises. An employer may satisfy this requirement by emailing or direct mailing this notice to employees, or posting this notice on an employee information internal or external website.



## **Coronavirus Aid, Relief, and Economic Security Act (CARES Act)**

- **Public Health and Social Services Emergency Fund (PHSSEF)**
- **Title IV: Treasury Economic Stabilization and Assistance to the Severely Distressed Sectors of the United States Economy**
- **Small Business Administration (SBA) Paycheck Protection Program (PPP)**
- **Employee Retention Tax Credit**
- **Social Security Employer Tax Deferral**

### **Public Health and Social Services Emergency Fund (PHSSEF):**

#### **General:**

- Allocates \$100 billion through grants to reimburse eligible health care providers for health care related expenses or lost revenues that are attributable to COVID-19.

#### **Eligible Health Care Providers:**

- Includes public entities, Medicare or Medicaid enrolled suppliers and providers, and such for profit entities and not-for profit entities not otherwise described ...that provide diagnoses, testing, or care for individuals with possible or actual cases of COVID-19.

#### **Application process:**

- Guidelines not yet issued but statutory language states that eligible health care provider shall submit an application to HHS including a statement justifying the need for the payment and have a valid tax id number

#### **Reports:**

- Not later than 60 days after enactment, HHS Secretary shall provide a report to the Appropriations committees (House and Senate) including obligations to such providers summarized by state. These reports shall be updated every 60 days.

#### **Agency:**

- Health and Human Services (HHS). To date no guidance released. However, an announcement on April 8, 2020 called for a \$30 billion allocation and immediate delivery of grant money to be directed to Medicare providers.

## **Title IV: Treasury Economic Stabilization and Assistance to the Severely Distressed Sectors of the United States Economy**

### **General:**

- The \$500 billion “Exchange Stabilization Fund” will provide loans, loan guarantees, and investments through the Federal Reserve’s lending programs and facilities to support states, municipalities, and eligible businesses.
  - \$25 billion to passenger air carriers
  - \$4 billion to cargo air carriers
  - \$17 billion to national security businesses.
  - \$454 billion will be available to eligible businesses

### **Eligible Business:**

- United States business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under this Act.

### **Conditions:**

- Loan entered into directly with eligible business as the borrower
- Loan cannot be forgiven
- Treasury has the discretion to set terms, conditions, covenants, representations and warranties

### **Restrictions:**

- No stock buybacks (unless contractually obligated) for term of the loan plus one year
- Cannot pay dividends for term of the loan plus one year
- Businesses can only invest in, or loan to, American businesses
- Executive compensation restrictions for the term of the loan plus one year:
  - Employees > \$425,000 in 2019 cannot receive a raise, nor can severance be more than double maximum compensation
  - Executives > \$3 million in 2019 cannot make more than \$3 million + ½ of the amount over \$3 million in 2020

## **Federal Reserve Facility for Mid-Sized Businesses**

### **Eligibility:**

- Establishes a new facility that would provide financing to banks and other lenders to make direct loans to businesses with between 500 and 10,000 employees.

### **Terms:**

- Direct loans from private lenders
- Interest rate of no more than 2% per year
- No principal or interest due for the first six month
- None of the loans issued under these Treasury or Federal Reserve programs are eligible for loan forgiveness.
- Loans shall be treated as indebtedness for tax purposes.

### **Criteria:**

- Entity or business is domiciled in the United States with significant operations and majority of its employees in the United States
- Not a debtor in bankruptcy

- Uncertainty of economic conditions make loan necessary to support ongoing operations
- Those loans would have an annualized rate no greater than two percent and with no principal or interest due for at least six months.

**Borrowers under this program must certify that:**

- “Uncertainty of economic conditions” requires a loan to support ongoing operations.
- The funds received will be used to retain 90 percent of the recipient’s workforce, at full compensation and benefits, until September 30, 2020.
- The borrower intends to restore 90 percent of the workforce that existed as of February 1, 2020, and to restore all compensation and benefits to workers no later than four months after the termination of the current public health emergency.
- The borrower is domiciled in the U.S. and has significant operations and a majority of its employees in the U.S.
- The borrower is not a debtor in bankruptcy proceedings.
- Borrowers will not engage in stock buybacks, unless contractually obligated, or pay dividends until the loan obligation is satisfied.
- The borrower will not outsource or offshore jobs for the term of the loan plus an additional two years.
- The borrower will not abrogate existing collective bargaining agreements for the term of the loan plus an additional two years.
- The borrower will remain neutral in any union organizing effort for the term of the loan.
- Same limits on Executive Compensation as above

**Small Business Administration (SBA) Paycheck Protection Program (PPP)**

**Eligible Employers**

Potentially forgivable SBA Paycheck Protection loans will be available to:

- **Small Business Concerns:** determined using the standard SBA definitions based on employee count, receipts, and industry classification (most small businesses expected to qualify) -- affiliation rules apply. Business generally must be independently owned, for-profit that operates primarily in the US, and that is not “dominant in its field of operation”
- **Other Business Concerns:** meeting the SBA definition of “business concern” with no more than 500 employees – affiliation rules apply except for businesses receiving Small Business Investment Act financial assistance
- **Certain Non-Profit Entities:** Internal Revenue Code (Code) section 501(c)(3) entities; Code section 501(c)(19) veterans organizations; and tribal business concerns with no more than 500 employees -- affiliation rules expected to apply
- **Hospitality and Food Service Concerns:**
  - NAICS code must begin with “72”
  - No more than 500 employees, but 500 employee count satisfied provided each separate physical location has 500 or less employees (not based on total)
  - Affiliation rules do not apply
- **Franchises** (regardless of sector): No more than 500 employees -- affiliation rules do not apply  
[Note that SBA regulations provide that businesses that enter into a co-employer arrangement with a PEO are not affiliated with the PEO solely on the basis of the agreement. 13 CFR § 121.103(b)(4)]

**Terms and Benefits**

**Loan Terms**

- Forgivable SBA loans will be made available to eligible employers. Applies to loans made between 2/20/20 and 6/30/20
- **Maximum Loan Amount:** The lessor of 250% of average monthly payroll costs (based on 12-month look back) or \$10 million

- **Payroll costs include:**
  - Salary, wage, commission, or similar compensation (generally capped at \$100,000/employee)
  - Cash tips or equivalent
  - Pay for vacation, parental, family, medical, or sick leave
  - Allowance for dismissal or separation
  - Group health care benefits “including insurance premiums”
  - Retirement benefits
  - State or local tax assessed on the compensation of employees
  - Certain sole proprietor and independent contractor compensation
- **Generous Loan Terms:**
  - Loans will be 100% guaranteed by the SBA
  - No application fees allowed
  - No closing costs allowed
  - First 6 months of principal and interest automatically deferred
  - Maximum interest rate of 4%
  - Maximum loan term of 10 years
- **Streamlined Loan Procedures:**
  - Nonrecourse; no collateral; no personal guarantees
  - Waiver of requirement to explore credit availability from other sources
  - Borrower must only certify that: (a) loan is necessary to support ongoing operations; (b) funds will be used to retain employees and maintain payroll or make mortgage payments, lease payments, or utility payments; and (c) no prior loan under this program has been received and there are no applications pending for duplicate amounts

**Loan Forgiveness** – Some (or all) of the loan will be forgiven

- **Maximum Eligible Loan Forgiveness:** Generally, loans will be forgiven to the extent the borrower demonstrates that the proceeds were used to cover the following during the period between 2/15/20 through 6/30/20:
  - Payroll costs (as defined above)
  - Rent obligated under a lease in effect before 2/15/20
  - Utility costs for services which began before 2/15/20
  - Interest on the business’ mortgage obligations
- **No Tax on Loan Forgiveness: Forgiven Loans Not Subject to Tax**
- **Reductions in Loan Forgiveness:** The portion of the loan that will be forgiven will be reduced if there is a reduction in the employee count and/or the extent to which there is a significant reduction in wages paid to an employee.
  - **Employee Count Reduction:** The loan forgiveness amount will be reduced based on the ratio of
    - (i) the average number of full-time equivalent employees (FTEEs) during the 8-week period beginning on origination date of Paycheck Protection Program loan (the “covered period”); divided by
    - (ii) the average number of FTEEs during a choice period.
 For this purpose, the choice period will, at election of borrower, be either (a) 2/15/19 to 6/30/19, or (b) 1/1/20 to 2/29/20
  - **Wage Reduction:** In addition, the amount of loan forgiveness will be further reduced by the amount of reduction in total salary and wages of any employee during the covered period when compared to the most recent full quarter during which the employee was employed before the covered period. This reduction would not apply to any employer who received wages or salary at an annualized rate of more than \$100,000 for any pay period in 2019.

### Restrictions on Overlapping Benefits

- A business with an SBA Paycheck Protection loan will not be eligible for the employee retention credit
- A business that has had indebtedness forgiven under the SBA Paycheck Protection program will not be eligible for deferral of Social Security taxes

## Employee Retention Tax Credit

### Eligible Employers

- Available to employers:
  - (1) that were carrying on a trade or business during calendar year 2020, and
  - (2) with respect to any calendar quarter:
    - had its operations fully or partially suspended under government orders due to COVID-19, or
    - had a decline of at least 50% in gross receipts as compared to the same calendar quarter in the prior year
- Special rules to be provided for employers that were not in operation for all of 2020
- Tax-exempt employers described in Code section 501(c) are treated as having met the conditions for eligibility (i.e., they are deemed to satisfy the trade or business requirement and the full or partial suspension requirement)

### Potential Benefits

- Employer generally entitled to a tax credit equal to 50% of “qualified wages” with respect to each employee for the quarter
- Credit can be taken immediately against the employer portion of Social Security taxes (Code section 3111(a)) that are due (and potentially against other federal employment tax obligations that the IRS specifies). If employer is not able to claim entire credit against applicable employment taxes due, any excess credit is treated as an overpayment to be refunded promptly by the IRS.
- “Qualified wages” are calculated as follows:
  - For employers with 100 or fewer fulltime employees: all employee wages paid
  - For employers with more than 100 full time employees: wages paid to employees not performing services due to COVID-19-related circumstances (either suspension of operations or reduction in gross receipts)
  - Maximum total wages considered for any employee are capped at \$10,000 (i.e., max credit is \$5,000 **per employee**)
  - Credit calculation includes employer’s “properly allocable” qualified health plan expenses with respect to the employee
  - Wages considered under paid sick/family leave (FFCRA) (i.e., those that receive a separate 100% credit) are excluded
- Full-time employee count is determined in same manner as the Affordable Care Act’s shared responsibility provisions (Code section 4980H).
- IRS authorized to provide guidance to clients and PEOs on documentation necessary to substantiate the eligible employer status of clients

### Restrictions on Overlapping Benefits

- Credit not available if eligible employer receives a covered loan under SBA’s new Paycheck Protection program
- Also, no double benefit with:
- Work opportunity credit (Code section 51)
  - Employer credit for paid family and medical leave added in 2017 tax reform legislation (Code sec. 45S)

## **Deferral of Payment of Employer's Social Security Taxes**

### **Eligible Employers**

- All employers are eligible (subject to the exception described in the last row below)

### **Potential Benefits**

- Employers may defer employer share of Social Security tax deposits (Code section 3111(a)) due for the period beginning 3/27/20 through 12/31/2020.
- Payment schedule for deferred taxes:
  - 50% due by 12/31/2021
  - 50% due by 12/31/2022
- PEO client employers would assume sole liability for payment of any deferred taxes when the client directs the PEO to defer tax payment with respect to wages paid by the PEO under this deferral option. IRS expected to issue guidance on rules for the administration and enforcement of these provisions
- Comparable tax deferral provisions are provided to partners with respect to ½ of SECA taxes for the period beginning 3/27/20 through 12/31/2020

### **Restrictions on Overlapping Benefits**

- Social Security tax deferral is not available if taxpayer has had indebtedness forgiven under new SBA loan forgiveness provisions
- However, it is possible that the IRS will determine that partners in an LLP may be eligible for SECA tax deferral even if the LLP obtains an SBA Paycheck Protection loan

<b>Immunity</b>	<b>PREP Act</b>	<b>Model State Executive Order</b>
	The Public Readiness and Emergency Preparedness Act (PREP Act) provides liability immunity to certain individuals and entities (Covered Persons) against any claim of loss caused by, arising out of, relating to, or resulting from the manufacture, distribution, administration, or use of medical countermeasures (Covered Countermeasures), except for claims involving ‘willful misconduct’ as defined in the PREP Act.	In public health emergencies such as this, Governors and public health officials have been granted or possess inherent powers to declare an emergency and activate immunities to tort liability for responders such as care providers and care facilities called into duty and service in the fight against, or mitigation of the emergency.

<b>Stimulus 4</b>	<p>Congressional leaders are continuing to outline policy priorities for the next round of COVID-19 response/stimulus legislation.</p> <p>It is expected that we will explore options to:</p> <ul style="list-style-type: none"> <li>• Seek Senior Living Grant Program under HHS (Similar to PHSSE) and fund at the level of \$20 billion</li> <li>• Fund additional money into SBA loan program with a 62-classification waiver</li> <li>• Insurance Backstop: To create a federal insurance backstop for pandemics, like the Terrorism Risk Insurance Act (TRIA) that was created after 9-11</li> <li>• Address Workforce leave to counter UI benefit</li> <li>• Miscellaneous tax benefits</li> </ul>
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