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Economic Stimulus Laws in the Wake of Coronavirus



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What Compensation Professionals and Committees Need to Understand Now

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act") was signed into law. It provides a record-breaking $2 trillion in emergency relief to various individuals and businesses across the nation impacted by the COVID-19 global pandemic. However, for those entities that are eligible to receive aid, there may be substantial strings attached, including but not limited to restrictions on executive compensation and other workforce constraints. *Executive compensation restrictions essentially put a freeze on 2019 pay for any employees who earned at least $425,000 last year, and are particularly restrictive with the subset that earned over $3 million.* Below is a summary describing what we know so far about these executive compensation provisions, but additional clarity will be forthcoming from the treasury secretary as relief is authorized. We also include, for your background, information on other significant pieces of the current legislation that have important impacts on the entire workforce.

Executive Compensation and Other Workforce Issues Under the CARES Act

Assistance under Title IV: Economic Stabilization and Assistance to Severely Distressed Sectors

Title IV of the CARES Act, entitled Economic Stabilization and Assistance to Severely Distressed Sectors, allocates $500 billion to the treasury secretary for loans, loan guarantees, and investments in the Federal Reserve's lending facilities. It is intended to provide support that includes $25 billion for passenger air carriers, $4 billion for cargo air carriers, $17 billion for national security businesses, and $454 billion to other eligible businesses, states or municipalities. Other "eligible" businesses entitled to receive aid under Title IV generally include those that have not received adequate economic relief in the form of other loans or loan guarantees (e.g., it would not be available to small businesses with fewer than 500 employees which generally qualify for relief under a

different provision of the CARES Act).

To receive financial assistance (for air carriers and contractors) or loans or loan guarantees (for other eligible businesses), a company must agree to specific limitations for a certain period of time on *any employee or officer* (other than those who are covered by a collective bargaining agreement) whose "total compensation" exceeded $425,000 in 2019 as follows:

Compensation and Severance Limits

- Employees and officers who received between $425,000 and $3 million in total compensation in 2019 cannot receive more than what they made in 2019 during any 12-month period;
- Employees and officers who received more than $3 million in total compensation in 2019 cannot receive total compensation during any 12 month period in excess of $3 million plus 50% of the excess over $3 million earned in 2019; for example, an executive who received $6 million in compensation in 2019 cannot receive more than $4.5 million if their employer received assistance under the CARES Act; and
- Employees and officers may not be entitled to severance pay in an amount more than twice their 2019 total compensation.

Definition of "Total Compensation"

Under the CARES Act, the term "total compensation" broadly includes salary, bonus, awards of stock, and other financial benefits provided.

Duration of Limitations

The above restrictions are in place from the time the business accepts a loan until the first anniversary of the date that the loan is no longer outstanding. For aircraft carriers and contractors receiving assistance, the restrictions are in place for the two-year period ending on March 24, 2022.

Other Governance and Workforce Restrictions

Companies taking loans under this program must agree not to buy back stock or pay dividends for a period of time that extends one year beyond the term of the loan (or in the case of airline carriers or contractors, until September 30, 2021). Finally, air carriers and contractors are prohibited from conducting involuntary furloughs or reducing pay rates and benefits until September 30, 2020.

Pearl Meyer Observation: Unfortunately, the text of the CARES Act leaves many gaping holes for businesses that take assistance in the program. For example:

- What does the term "receive" mean? For a bonus, does it mean the year in which it is earned (as calculated in the Summary Compensation Table), or does it mean the year in which it is actually paid? Likewise, for stock awards, does it mean when granted, earned, paid, or exercised? Is deferred compensation counted towards the

limit?
- How are stock awards valued? Again, does it mean grant-date fair value as reported in the Summary Compensation Table, or does it mean some other value such as realized or realizable pay?
- What are “other financial benefits”? Would that include vested deferred compensation?

We anticipate the treasury secretary will be forthcoming with more specific guidance shortly.

Assistance for Midsize Businesses

In addition to the executive compensation restrictions on aircraft companies and generally larger companies accepting assistance, there are other workforce restrictions attached to various programs under the CARES Act. For example, a special favorable loan program will be set up for mid-size business (i.e., those with 500-10,000 employees) that comes with its own set of restrictions. The borrowing company must provide a good-faith certification to a list of conditions, including that:

- It will retain at least 90% of its current workforce until September 30, 2020, at full compensation and benefits;
- It intends to restore at least 90% of their workforce levels as of February 1, 2020 within four months of the end of the coronavirus public health emergency;
- There will be no payment of dividends and no stock buybacks while the loan is outstanding;
- It is domiciled in the United States and is not in bankruptcy;
- It will not outsource or offshore jobs for two years after completing repayment; and
- It will remain neutral in any union organizing effort for the term of the loan, and will not breach a collective bargaining agreement for two years after completing repayment.

Paycheck Protection Program for Small Businesses

The CARES Act amended the Small Business Act to include a new guaranteed, unsecured loan program to help fund operational costs of businesses (including payroll and benefits costs) with up to 500 employees (or for certain industries such as hotels and food services, businesses with no more than 500 employees per location). In exchange for accepting a loan (which may be partially forgiven), borrowers must make a good-faith certification that, among other things, they will use the funds to retain workers and maintain payroll. They must also maintain an average monthly number of full-time equivalent employees during the covered period that is not less than the average monthly number during a specified period prior to the COVID-19 pandemic.

Retirement Accounts

The CARES Act gives workers directly affected by COVID-19 a few ways to use retirement savings to get through the crisis. Employees may 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 (although income tax will still be owed on the withdrawal). Employees impacted by COVID-19 or those with other adverse financial consequences resulting from the pandemic will have three years to pay back the amount they take out. In addition, employees may take out larger loans than under former law. Under existing benefits law, the maximum that may be taken is the lesser of $50,000 or half of the account balance as a loan and pay that amount back over time. The CARES Act doubles the maximum loan amount for affected employees to the lesser of $100,000 or the full amount of their vested balance. Finally, employers have some relief on their pension plan obligations. Under existing laws, employers must make minimum periodic contributions to fund plans. Under the new law, employers can delay those payments until the end of the year.

Unemployment Insurance

The CARES Act provides for $600 per week for four months on top of state unemployment benefits. It also expands benefit eligibility by adding in workers who typically cannot collect, including independent contractors, the self-employed, those who haven't hit the minimum hours for benefits and even furloughed employees who remain on their employers' books.

Workforce Issues Under the Families First Coronavirus Response Act

Earlier in the month the Families First Coronavirus Response Act ("FFCRA") was the first national legislation passed to address concerns surrounding COVID-19. While it did not contain specific executive compensation restrictions, it provided important relief which impacts the entire workforce and is worth noting here.

First, under one part of FFCRA, the Emergency Paid Sick Leave Act, employers with fewer than 500 employees are required to provide paid sick time to all of their employees (whether full- or part-time and regardless of the employee's length of employment), where such employee is unable to work (or telework) due to a need for leave because the employee is under COVID-19 quarantine, must care for someone so quarantined, is experiencing COVID-19 symptoms, or must care for a dependent whose school or care provider cannot, or substantially similar conditions. Specifically, all eligible full-time employees are entitled to 80 hours (two weeks) of paid sick leave, and part-time employees are entitled to a number of paid sick leave hours that is equal to the average number of hours that the employee works over a two-week period. Employees are generally entitled to receive their regular pay rate while using their paid sick leave, subject to a cap of $511 per day (and $5,110 in the aggregate). However, the employee is only entitled to two-thirds of his or her regular pay rate in the event the employee utilizes the paid sick time (i) to care for his or her son or daughter or such other individuals under the circumstances described above or (ii) because the employee is experiencing "substantially similar conditions". In those circumstances, the employee's pay is subject to a cap of $200

per day (and $2,000 in the aggregate).

Second, the Additional Paid Leave Provisions of the FFCRA expand eligibility for paid leave under the Family Medical Leave Act ("FMLA"), by requiring employers with fewer than 500 employees to provide employees (who have been employed for at least 30 calendar days) with 12 weeks of job-protected leave where the employee is unable to work (or telework) due to a need for leave to care for the employee's son or daughter under the age of 18 whose school, place of care, or child-care provider is closed or otherwise unavailable due to the coronavirus emergency. During the 12-week job-protected leave period under the Additional Paid Leave Provisions, the first 10 days of leave may be unpaid—however, during this period, employees may, if eligible, receive paid sick leave under an employer sick leave policy or the Paid Sick Leave Provisions, and they may use any accrued vacation or personal leave. After the 10 days of leave and for the remaining portion of the total 12-week job-protected leave period, an employee's pay generally cannot be less than two-thirds of his or her regular pay rate (with the pay rate for employees with a variable schedule to be calculated using an average number of hours determined in accordance with the Additional Paid Leave Provisions), subject to a cap of $200 per day (and $10,000 in the aggregate). Following the end of the leave period, the employee is entitled to be restored by the employer to the position of employment held by the employee when the leave commenced, or to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment.

Conclusions

Clearly, the significant pieces of legislation passed over the course of a few weeks have a tremendous impact not only on executives, but on the workforce at large. As to the executive compensation issues—while some companies may have no choice but to participate in Title IV assistance under the CARES Act to survive, others may weigh whether or not taking aid is worth it. In any case, compensation committees should be knowledgeable about the impact on their workforce by taking the following action steps:

- Identify which employees or officers earned in excess of $425,000 and/or $3 million in 2019 with reference to 2019 W-2s, and for named executive officers, the numbers reported in the Total column of the Summary Compensation Table which should suffice until further guidance from the treasury department on the definition of "total compensation" is available.
- For those employees that received over $425,000 last year, compute what has already been granted in 2020. In some cases, companies may have already exceeded the limit by making equity grants early in the year. Assuming equity is valued at grant at fair value, consider whether it is now impossible to comply with the restrictions in 2020.
- Review all employment, change-in-control, or other contractual commitments with employees who earned over $425,000. Check to see whether there are legal obligations to pay in excess of the new limits, as well as whether there is an obligation to pay severance in excess of two times total pay in 2019. In this case, companies may be required to obtain employee consent to amendments and waivers

of such provisions to come into compliance with CARES Act restrictions.
- Communicate the implication of taking aid with those that may be most impacted (i.e., those with compensation in excess of $3 million) and internally consider retention risks of critical talent at this level.

We will keep you posted as further guidance as to how to interpret the various executive compensation provisions in the CARES Act is issued by the treasury.

About the Author

Deb advises on executive compensation from a legal and regulatory perspective, including securities disclosure, tax and governance matters, contract negotiation, and reasonableness opinion letters.

About Pearl Meyer

Pearl Meyer is the leading advisor to boards and senior management helping organizations build, develop, and reward great leadership teams that drive long-term success. Our strategy-driven compensation and leadership consulting services act as powerful catalysts for value creation and competitive advantage by addressing the critical links between people and outcomes. Our clients stand at the forefront of their industries and range from emerging high-growth, not-for-profit, and private organizations to the Fortune 500.