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Alert

COVID-19 Legislation — Impact on Individuals

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The federal and New York State governments have passed a series of new laws to respond to the emergent problems caused by COVID-19. The most ambitious of the new federal laws is the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), signed into law on March 27, 2020. Numerous provisions of the CARES Act and other laws enacted in recent weeks provide for financial benefits to individuals. The below summarizes the impact of the new federal and New York State laws on individuals.

Enhanced Unemployment Benefits

The CARES Act establishes a framework for states to agree to expand their unemployment insurance benefits for individuals with total or partial unemployment, including when such individuals are unable or unavailable to work due to COVID-19. This expansion can be retroactive to Jan. 27, 2020, and generally covers weeks of unemployment through July 31, 2020. Qualifying COVID-19-related reasons for these expanded benefits include (i) being unable to reach the place of employment due to quarantine orders or the place of employment was shut down due to COVID-19; (ii) having been diagnosed with COVID-19 or experiencing symptoms and seeking a medical diagnosis; (iii) being a member of a household where someone was diagnosed with COVID-19; (iv) being the primary caretaker of a minor who cannot attend school or another facility as a result of COVID-19; and (v) becoming the head of household as a result of the death of the previous head of household due to COVID-19.

The CARES Act expands eligibility for unemployment insurance benefits to individuals who would not ordinarily qualify for such benefits, including those who are self-employed or those who have exhausted all rights to unemployment benefits under state law, provided they can certify that they have been impacted by COVID-19. Individuals who have the ability to telework with pay or who are receiving paid sick leave or other paid leave benefits are not covered for the expanded benefits.

The CARES Act increases the usual period of time during which recipients can receive unemployment insurance benefits to a period not to exceed 39 weeks. In addition, the CARES Act provides for the waiver of the mandatory one-week waiting period to receive unemployment insurance benefits. These provisions are applicable through Dec. 31, 2020.

The CARES Act adds "Federal Pandemic Unemployment Compensation" of $600 per week (or certain amounts for those who would not otherwise qualify under state law, such as independent contractors) to the amount of unemployment compensation an individual qualifies for under state law. The CARES Act also sets a minimum for unemployment insurance — a weekly amount equal to 50% of the average weekly payment of regular compensation in the applicable state — before the $600 is added. The Federal Pandemic Unemployment Compensation will be disregarded when determining income for the purposes of certain programs such as Medicaid and the Child Health Insurance Program.

The CARES Act encourages states to utilize or adopt programs through which employers can reduce employee hours while still allowing employees to receive unemployment insurance. Such programs permit employees to receive pro rata amounts of unemployment insurance if employers reduce hours, from 10% to up to 60%, in lieu of layoffs. For example, New York State has the Shared Work Program (more information on New York State's Shared Work Program available here).

Expanded FMLA Benefits/Sick Leave Benefits

The federal Families First Coronavirus Response Act ("FFCRA") becomes effective April 1, 2020 and remains in effect until Dec. 31, 2020. This act requires certain employers to provide paid childcare leave and paid sick leave.

Child Care Leave

The Family and Medical Leave Act ("FMLA") is being temporarily amended to include a new entitlement to up to 12 weeks of leave to employees that are unable to work (in person or remotely) due to a need to care for a child because the child's school or child care is unavailable due to a public health emergency. Employees who worked for an employer for at least 30 days prior to the FMLA leave are covered. Rehired employees are eligible if they were laid off not earlier than March 1, 2020, and had worked for at least 30 of the last 60 days prior to the layoff.

This amendment applies to employers with fewer than 500 employees. Employers with fewer than 50 employees are exempt if the leave would jeopardize the viability of their business. Employers with 25 or more employees are required to restore any employee taking leave under the expanded FMLA to the same or substantially the same position they held prior to the leave with equivalent pay and benefits. Employers with fewer than 25 employees do not have to restore an employee to the same position if the position no longer exists after the leave is complete due to economic circumstances caused by a public health emergency, provided that the employer made reasonable attempts to return the employee to an equivalent position.

During the first 10 days of this emergency, the expanded FMLA leave may be unpaid. Throughout this initial period, the employee can utilize accrued vacation or sick leave. Employers are required (if requested by the employee) to pay a full-time employee for 80 hours of mandated emergency paid sick leave (see below), instead of the initial 10 days of unpaid leave permitted under the expanded FMLA provision.

Starting on the 11th day of the leave, employers generally must pay full-time employees at two-thirds of the employee's regular rate of pay for the number of hours the employee would otherwise be scheduled to work. This pay is capped at $200 per day (or $10,000 total). Employees who work part-time or irregular schedules will be entitled to payment based on the average number of hours the employee worked for the six months prior to taking the leave.

Paid Sick Leave

Employers with fewer than 500 employees will be required to provide 80 hours of paid sick-leave benefits if the employee is:

1. Subject to a federal, state or local quarantine or isolation order related to COVID-19;

2. Advised by a health care provider to self-quarantine due to COVID-19 concerns;
3. Experiencing COVID-19 symptoms and seeking medical diagnosis;
4. Caring for an individual (not limited to family members) subject to quarantine or isolation;
5. Caring for the employee's child if the school or child care is unavailable due to a public health emergency; or
6. Experiencing any other substantially similar condition specified by the Secretary of Health and Human Services.

If the employee's qualifying reason for his or her leave is either number 4, 5 or 6 in the above list, the employee is to be paid leave at two-thirds of the employee's regular rate. Otherwise, the employee must be paid the 80 hours of paid sick leave at the employee's regular rate.

Paid sick leave wages are limited to $511 per day (or $5,110 total) per employee for their own use and up to $200 per day (or $2,000 total) to care for others and for any other substantially similar condition. This leave will not carry over to the following year and is in addition to any other paid leave currently provided by employers. If the employee works part-time or an irregular schedule, the employee will be entitled to payment based on the average number of hours the employee worked for the six months prior to the leave.

Employees who are health care providers or emergency responders may be excluded from the expanded FMLA coverage and sick leave described above.

Emergency Paid Sick Leave, Emergency FMLA, and School Closures

Caring for a child when school is closed is designated as a qualifying reason for both emergency paid sick leave and emergency FMLA leave. Department of Labor guidance provides that an employee may be eligible for both types of leave in this situation, but only for a total of twelve weeks of paid leave. Paid sick leave is available the first ten work days of expanded FMLA leave, which are otherwise unpaid, unless the employee elects to use existing vacation, personal or medical or sick leave under the employer's policy. After the ten work days elapse, the employee should receive two-thirds of the employee's regular rate of pay for the hours the employee would have been scheduled to work in the ensuing ten weeks.

This federal program will work in coordination with state or local paid leave laws and benefits. Many states are proposing similar emergency legislation in an effort to navigate this rapidly evolving situation such as New York's new law.

New York Sick Leave Law

New York implemented new requirements for employers to provide sick leave and other benefits for employees subject to a mandatory or precautionary quarantine or isolation order by a government agency due to COVID-19, as well as paid sick leave generally. (*See Governor Cuomo Announces Three-Way Agreement with Legislature on Paid Sick Leave Bill to Provide Immediate Assistance for New Yorkers Impacted By COVID-19*).

New York's COVID-19 Sick Leave

New York employers must now provide unpaid sick leave until the termination of the isolation order. Certain employers must also provide employees with paid sick leave based on the size of the employer as of Jan. 1, 2020, shown in the chart below. After five days of paid sick leave, or after having exhausted all sick leave provided by their employer pursuant to this law, employees are eligible for short-term disability benefits or paid family leave benefits.

Employers are prohibited from discharging, threatening, penalizing, discriminating or retaliating against employees for taking this sick leave. Employees have a right to return to their position held before the quarantine leave with the same pay and other terms of employment.

This law does not apply to employees who are asymptomatic or have not been diagnosed with any medical condition and are physically able to work remotely while subject to the isolation order.

New York's General Sick Leave

Effective Sept. 14, 2020, employers must provide employees sick leave with full job protection. The paid sick leave must be available for either the employee's or the employee's family member's (i) mental or physical illness; (ii) diagnosis, care or treatment of the mental or physical illness, injury or health condition; or (iii) absence from work related to domestic violence, a sexual offense, stalking or human trafficking. Employers cannot require disclosure of confidential information relating to the physical or mental illness of the employee or employee's family member as a condition of sick leave.

The requirements for this sick leave vary based on the size of the employer during the prior calendar year, shown in the chart below. The employer can require that sick leave accrue, but the rate cannot be less than one hour per 30 hours worked. The law provides that unused sick leave be carried over to the following calendar year, although employers with fewer than 100 employees may limit the use of sick time to 40 hours per calendar year and employers with 100 or more employees can limit the use of sick leave to 56 hours per calendar year.

New York Sick Leave Requirements		
Employer Size	**COVID-19 Sick Leave Requirements**	**General Sick Leave Requirements (effective Sept. 14, 2020)**
4 or fewer employees and net income less than $1 million	—	40 hours unpaid sick leave per calendar year
4 or fewer employees and net income greater than $1 million	—	40 hours paid sick leave per calendar year
10 or fewer employees and net income less than $1 million	Unpaid sick leave until the termination of the isolation order	—
10 or fewer employees and net income greater than $1 million	5 days paid sick days	—

5 to 99 employees	—	40 hours paid sick leave per calendar year
11 to 99 employees	5 days paid sick days	—
100 or more employees	14 paid sick days	56 hours paid sick leave per calendar year

Tax-Qualified Plans Under the CARES Act

Among the many provisions of the CARES Act are those that cover tax-qualified retirement plans, including 401(k) plans and defined benefit pension plans and health plans. Specifically, the stimulus legislation provides greater flexibility to participants in defined contribution plans who are impacted by the pandemic to access more of their account balances. It also allows plan sponsors of all tax-qualified retirement plans, including single, multiple and multiemployer defined benefit pension plans, to amend their plans to permit participants who experience certain financial hardships as a result of the COVID-19 pandemic to receive early distributions without an early distribution penalty. The CARES Act also amends the FFCRA to even further expand coverage for certain COVID-19-related testing and treatment and lifts certain restrictions on reimbursements from tax-favored vehicles.

I. Special Rules for Qualified Individuals

A. Qualified Individuals

Under the CARES Act, "Qualified Individuals" are eligible to take special distributions and increased loans from defined contribution plans. In general, a person is a "Qualified Individual" if:

1. The individual or the individual's spouse or dependent is diagnosed with COVID-19 by a CDC-approved test; or
2. The individual experiences adverse financial consequences due to COVID-19 as a result of:
    a) Being quarantined, furloughed or laid off;
    b) A reduction of work hours or the closing of the business owned or operated by the individual;
    c) Inability to work due to lack of child care; or
    d) Other factors determined by the U.S. Treasury.

A plan administrator may rely on an employee's certification that the conditions for the employee to receive a special distribution have been met.

B. Distribution Amounts and Tax Treatment

Until Dec. 31, 2020, plan sponsors of tax-qualified retirement plans, including IRAs, defined benefit and defined contribution plans, may amend their plans to permit Qualified Individuals to take distributions of up to $100,000. For federal tax purposes, the amount of a Qualified Individual's distribution may be spread (to the extent taxable) equally over three years, and if

made to anyone under the age of 59 and 1/2, a distribution will not be subject to a 10% early distribution tax. Importantly, participants should be aware that the tax treatment of these distributions may differ under state tax laws. While a distribution to a Qualified Individual is not a loan, it may be repaid, at any time during the three-year period following the withdrawal, to any eligible plan that the individual becomes a participant, or to an IRA.

C. Increased Loan Limits

Plan sponsors of defined contribution plans can amend their plans to enable participants who are Qualified Individuals to take enhanced loans of up to the lesser of 100% of the participant's vested account balance or $100,000 (ordinarily, 50% of the participant's vested account balance or $50,000). These enhanced loans are available only for the next 180 days. Plans may also be amended to allow participants who have existing outstanding loans for the rest of the calendar year to delay repayment of such loans for one year.

D. Plan Amendments

The availability of distributions to Qualified Individuals and increased loan limits can be implemented immediately. Timely plan amendments that reflect any implemented measures can be adopted later.

II. Temporary Waiver of Minimum Required Distributions

The CARES Act provides relief to individuals who would otherwise be required to withdraw required minimum distributions (often referred to as "RMDs") in 2020 from defined contributions plans, including 401(k) plans, 403(b) plans and certain 457(b) plan (as well as IRAs). RMDs that would otherwise have been required to be made from those plans to an individual whose required beginning date occurs in 2020 may be delayed until 2021. The delay does not apply to any RMD that should have been made before Jan. 1, 2020 and RMDs under defined benefit pension plans.

III. Single Employer Defined Benefit Pension Plans

A. Minimum Required Contributions by Employers

The CARES Act allows employers to delay until Jan. 1, 2021, minimum contributions to a single employer defined benefit pension plans (including multiple employer plans) that an employer would otherwise be required to make (including quarterly contributions) during the 2020 calendar year (regardless of the applicable plan year). Each delayed contribution will be subject to interest from the original due date through the date the amounts are contributed to the pension plan.

B. Benefit Restrictions

The CARES Act provides relief from certain benefit restrictions that would otherwise have been triggered by a pension plan's lower funding status (its "adjusted funding target attainment percentage" or "AFTAP"). If a pension plan does meet statutorily-established funding thresholds, certain restrictions may be imposed on the plan, such as restricting lump sum distributions. To avoid such restrictions from being imposed on pension plans whose funding levels decline due to the COVID-19 pandemic, the CARES Act permits a plan sponsor to elect to treat the plan's adjusted funding target attainment percentage for the last plan year ending before Jan. 1, 2020,

as the adjusted funding target attainment percentage for plan years which include the 2020 calendar year.

IV. Impact on Health Plans

As discussed in our *Alert*, Employer Concerns — Federal and New York Legislation Responding to COVID-19 (with Chart of Requirements), the FFCRA mandated group health plans, including self-insured plans, to cover certain expenses, without cost-sharing, related to COVID-19 testing and treatment. The CARES Act expands the types of COVID-19 tests and treatments that group health plans and health insurance issuers must cover without cost-sharing, prior authorization or other medical management requirements. Now, these plans must cover at 100% tests for which the developer has requested "emergency use authorization" under the Federal Food, Drug, and Cosmetic Act. In addition, the CARES Act also directs the Secretaries of Health and Human Services, Labor and Treasury to require plans and issuers to cover any COVID-19-related preventive services without cost-sharing (including vaccines) and permits sponsors of high deductible health plans to waive deductibles for all telehealth or remote care services in plan years beginning on or before Dec. 31, 2021 (even if not related to COVID-19).

The CARES Act also eliminates the requirement that individuals obtain a prescription to receive tax-favored reimbursement for over-the-counter drugs from health savings accounts, health reimbursement accounts and health flexible spending arrangements, effective Jan. 1, 2020.

Credit Protection, Foreclosure and Eviction Moratorium and Associated Relief for Lenders

Consumers that are affected by the COVID-19 pandemic may request payment accommodations from credit card providers and other lenders for the period Jan. 31, 2020 and ending on the later of 120 days after March 27, 2020 or 120 days after the termination of the declaration of national emergency. If a lender makes the accommodation, it is required to report the obligation as current.

Individuals that have residential mortgage loans (including for condominiums and cooperatives) that are federally backed, including those that have been purchased or securitized by Federal National Mortgage Association or Federal Home Loan Mortgage Corporation, are entitled to request a forbearance of mortgage payments if they have suffered a financial hardship due, directly or indirectly relating to the COVID-19 emergency. The forbearance will be automatically granted upon the borrower's certification of hardship and will be for up to 180 days and may upon the borrower's request be extended for up to an additional 180 days. The mortgage loan will continue to accrue interest as if the borrower had paid on time. In addition, lenders may not initiate foreclosure proceed prior to the 60 day period beginning on March 18, 2020.

The CARES Act also imposes a temporary federal moratorium on residential tenant evictions if the property that is subject to the lease is federally backed. The moratorium prohibits a landlord from initiating an action for eviction for non-payment of rent or other fees or charges for a period of 120 days, or from charging fees, penalties or other charges for the non-payment of rent. Following the expiration of the 120 day period, the landlord must give at least 30 days' notice to the tenant to vacate the premises.

New York Foreclosure and Eviction Moratorium

On March 20, 2020, in connection with the earlier declaration of a state disaster emergency for the State of New York, Governor Andrew M. Cuomo issued an Executive Order ("Executive Order")[1] that enacted a statewide moratorium on evictions and foreclosures for 90 days (the middle of June). The moratorium applies to both residential and commercial tenants and properties. In addition to the moratorium on evictions and foreclosures, the courts in New York are not currently accepting new cases unless they are deemed "essential." Prior to the Executive Order, a loophole permitted certain landlords to file new eviction proceedings, however, following the Executive Order, new filings will not be accepted until April 19 at the earliest. Following April 19, even if the courts permit the filings of new evictions or foreclosure actions, none can be enforced until the end of the moratorium.

Notwithstanding the Executive Order, tenants and borrowers should not rely on a moratorium unless necessary. Even though lenders and tenants may be unable to enforce evictions or foreclosure proceedings, the Executive Order does not prohibit lenders and landlords from charging late fees and penalties due to non-payment. Proposed Senate Bill S8125A[2] would suspend all rent payments for "certain residential tenants and small business commercial tenants if such tenant has lost employment or was forced to close their place of business and certain mortgage payments for landlords of such tenants in the state for ninety days." As of this writing, this bill has not yet passed.

Impact on Tax Laws

I. 2018, 2019 and 2020 NOLs Can Offset 100% of Taxable Income

Net operating losses ("NOLs") generated by a corporation in 2018, 2019 or 2020 will be permitted to offset up to 100% of income in the taxable year in 2018, 2019, 2020. This relaxes the restrictions introduced under the 2017 Tax Cuts and Jobs Act ("TCJA"), which both precluded an NOL generated after 2017 taxable years from offsetting more than 80% of the income in any subsequent taxable year and prohibited the carryback of such NOLs.

II. Five-Year NOL Carryback

Any NOLs generated in 2018, 2019 or 2020 may now be carried back to the five preceding tax years, allowing a refund of taxes paid in any such prior year. This would serve to temporarily lift the TCJA's elimination of the carryback of NOLs generated after 2017 taxable years.

Note, for corporate taxpayers, NOLs carried back to a pre-2018 taxable year when corporate rates were 35% are more valuable than losses used to offset income taxable at the current 21% rate.

A real estate investment trust is precluded from carrying back losses under the CARES Act. The legislation also restricts loss carrybacks from being used to offset any deemed repatriation income (under Section 965 of the Internal Revenue Code) that was includable to a corporation as a result of the TCJA. But in calculating the five-year carryback period, taxpayers are permitted to exclude any taxable years in which foreign earnings were included in gross income under the deemed repatriation rules of the TCJA, which potentially allows some taxpayers to carryback NOLs further than five years.

III. Loss Limitations on Non-Corporate Taxpayers Do Not Apply Until 2021

[1] *See* https://www.governor.ny.gov/sites/governor.ny.gov/files/atoms/files/EO_202.8.pdf

[2] *See* https://www.nysenate.gov/legislation/bills/2019/s8125

The TCJA limited the ability of non-corporate taxpayers to use business losses to offset their other nonbusiness income to $250,000 ($500,000 for a married couple filing jointly). Under the CARES Act, this restriction does not apply until 2021.

IV. Section 163(j) Limitation Increased to 50% of Adjusted Taxable Income

Business interest will be permitted to offset up to 50% of adjusted taxable income in 2019 and 2020 ("163(j) Limitation"), as opposed to the 30% limitation imposed by the TCJA. Currently, adjusted taxable income ("ATI") is calculated in a manner similar to EBITDA, subject to certain modifications.

In addition, the CARES Act allows a taxpayer to elect to use its 2019 ATI for purposes of determining its 163(j) Limitation for 2020, which will potentially benefit taxpayers that will have a lower than projected ATI for 2020 due to the impact of COVID-19.

This favorable 50% limitation is only available to partnerships in 2020. For 2019, however, excess business interest of a partnership is allocated to the partners and is then bifurcated: 50% of such excess business interest becomes fully deductible in the 2020 taxable year and 50% remains subject to the limitations of present law — i.e., such remaining interest will not be deductible until the partnership allocates additional excess taxable income or excess interest income to the partner.

Private equity funds will need to analyze the potential benefits of the CARES Act as it relates to the 163(j) Limitation and ensure that they are maximizing the potential benefit for their funds and their various portfolio companies. In addition, consideration should be given as to whether to put in place short term financing that can benefit from the temporary increased deduction limitations afforded by the CARES Act.

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If you have any questions concerning this *Alert*, please contact your attorney at Schulte Roth & Zabel or one of the authors.

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