GROOM LAW GROUP
www.groom.com

The HEROES Act: Key Retirement, Health and Welfare, and Tax Provisions

PUBLISHED: May 29, 2020

The House of Representatives recently passed a fourth round of legislation in response to the COVID-19 pandemic. The bill – called the *Health and Economic Recovery Omnibus Emergency Solutions Act* (the "HEROES Act" or the "Act," **H.R. 6800**) – is unlikely to advance in the Senate, and the White House has threatened to veto the bill. However, the Act reflects the House Democratic majority's priorities, and some of the provisions could be included as part of a bipartisan compromise package. This alert first summarizes key provisions of the HEROES Act impacting retirement plans and health insurance. It then discusses other provisions that may impact employers and individuals.

I. Retirement

A. Single-Employer Pensions

- *Extended Amortization Period (Section 40201).* The Act includes relief for single-employer defined benefit plan funding requirements. Under the Act, all of the prior year's shortfall amortization bases (i.e., the amount of a plan's historical underfunding that must be funded in the prior plan year) will be deemed to be zero. Effectively, this means that a "fresh start" will apply; the funding shortfall—and therefore, the future contribution requirements—will depend entirely on the assets and liabilities as of the start of the 2020 plan year. Further, for the 2020 plan year and onward, the funding shortfall will be payable over 15 years, instead of the current 7-year schedule.
- *Extended Funding Stabilization (Section 40202).* Pension liabilities are calculated using interest rate assumptions. In 2012, Congress passed legislation to set a floor and a ceiling on the rate assumptions in order to make pension contributions less volatile. The floor and ceiling – referred to as the interest rate "corridor" – is based on historic, 25-year average rates. The corridor is currently set to expand beginning in 2021, making stabilization less effective. As shown in the chart below, the Act changes the interest rate corridor by both narrowing it and then slowing the scheduled expansion.

This publication is provided for educational and informational purposes only and does not contain legal advice. The information should in no way be taken as an indication of future legal results. Accordingly, you should not act on any information provided without consulting legal counsel. To comply with U.S. Treasury Regulations, we also inform you that, unless expressly stated otherwise, any tax advice contained in this communication is not intended to be used and cannot be used by any taxpayer to avoid penalties under the Internal Revenue Code, and such advice cannot be quoted or referenced to promote or market to another party any transaction or matter addressed in this communication.

© 2020 Groom Law Group, Chartered • 1701 Pennsylvania Ave NW • Washington, DC 20006. All rights reserved.

Year:	Current Corridor:		Proposed Corridor:	
	Minimum:	Maximum:	Minimum:	Maximum:
2020	90%	110%	95%	105%
2021	85%	115%	95%	105%
2022	80%	120%	95%	105%
2023	75%	125%	95%	105%
2024	70%	130%	95%	105%
2025	70%	130%	95%	105%
2026	70%	130%	90%	110%
2027	70%	130%	85%	115%
2028	70%	130%	80%	120%
2029	70%	130%	75%	125%
2030+	70%	130%	70%	130%

In addition, the Act provides for an interest rate floor of 5%, meaning that if the 25-year average is less than 5%, the average is deemed to be 5%. For example, the 25-year average for 2020 is approximately 4.04%. Under this provision of the Act, the 25-year average would be deemed to be 5%. With the application of the corridor, the interest rate for funding purposes in 2020 under the Act is 95% of that average, or 4.75%.

- *Expansion of Community Newspaper Funding Rules (Section 40307).* The Act modifies the definition of "community newspaper employer" to allow additional plan sponsors to qualify for the special funding rules for community newspapers enacted as part of the Setting Every Community Up for Retirement Enhancement Act of 2019. Community newspaper employers are permitted to elect to amortize their pension underfunding over 30 years (rather than the typical 7-year period) and calculate plan liabilities using an 8% interest rate.

B. Multiemployer Pensions

- *Temporary Partition Program (Section 40101).* The Act creates a temporary partition program under which part of certain distressed multiemployer plans can receive financial assistance from the Pension Benefit Guaranty Corporation ("PBGC") while the remaining part of the plan remains solvent. A plan generally is eligible if it (a) is in critical and declining status, (b) has previously had a benefit suspension application approved, (c) is in critical status and meets additional criteria with respect to funding levels and demographics, or (d) became insolvent after December 16, 2014. The amount of liabilities assumed by PBGC is determined such that after the partition, the plan is projected to avoid insolvency and to reach an 80% funded ratio over a 30-year period. Participants will continue to receive their full benefit amounts, regardless of whether their benefits remain in the original plan or are transferred under a partition. This partition assistance is provided through a new fund within the PBGC, which receives appropriations from the general fund of the Treasury (unlike the current PBGC insurance funds, which are funded through insurance premiums, recoveries from terminated plans, and investment returns only). The special partition program applies for plan years beginning in 2020 through 2024. PBGC is required to provide guidance regarding the requirements and application process for special partition relief, and is authorized to impose certain conditions on partitioned plans.
- *PBGC Guarantee Increase (Section 40106).* The Act increases the maximum PBGC benefit guarantee for a multiemployer pension plan to 100% of the first $15 of monthly benefit accrual, plus 75% of the next $70 of monthly benefit accrual. For example, for a participant with 30 years of service, the Act raises the maximum PBGC guaranteed benefit from $1,072.50 per month to $2,025 per month. The Act also provides that the maximum multiemployer guarantee will increase in future years in accordance with increases in the national average wage index.
- *Repeal of Benefit Suspension Rules (Section 40102).* The Act repeals the provisions of the Multiemployer Pension Reform Act of 2014 that permitted the sponsors of critical and declining plans to adopt benefit suspensions. Plans that have already implemented benefit suspensions may receive a partition that would result in a retroactive restoration of suspended benefits, and no further plans may adopt benefit suspensions.
- *Funding Relief (Sections 40103 through 40105).* For plan years beginning on or after March 1, 2020 and before March 1, 2021, the Act permits the sponsors of multiemployer pension plans to elect to maintain the same zone status as was certified for the prior plan year. Notice of an election

GROOM

described above generally must be provided to plan participants and beneficiaries. Plan sponsors making this election are also not required to update their funding improvement or rehabilitation plans from the prior year. The Act also permits plan sponsors to elect to extend their funding improvement or rehabilitation periods by five years. This relief is similar to what was provided in the Worker, Retiree, and Employer Recovery Act of 2008.

The Act also provides that, for minimum funding purposes, multiemployer pension plans may amortize the investment losses incurred in either or both of the first two plan years ending after February 29, 2020 over a 30-year period. Additionally, plans may change their asset valuation methods to spread those investment losses over a 10-year period, and for those two plan years the smoothed actuarial value of assets may exceed the fair market value by 30% (as opposed to the 20% limit that normally applies). This relief is similar to what was provided in the Pension Relief Act of 2010.

- *Composite Plans (Sections 140001 through 140006).* The Act authorizes the creation of composite plans, which are a new type of pension plan available to multiemployer plan sponsors. A composite plan operates similarly to a defined benefit pension plan in that the employer makes contributions to the plan and participants (and beneficiaries) receive lifetime benefits; however, there are certain fundamental differences. Rather than the current minimum funding requirements under the Code and ERISA, the funding standard for composite plans requires that the 15-year projected funded ratio of a plan must be at least 120%. If a plan falls below this benchmark, the sponsor must implement measures to improve its projected funded ratio. These measures range from changes to future benefit accruals and contribution rates to, as a method of last resort, reductions to accrued benefits. ERISA's withdrawal liability rules that apply to defined benefit plans do not apply to composite plans, and composite plans are not covered by PBGC. Existing plan sponsors that move to composite plans must continue to fund the legacy defined benefit plans in accordance with both the current funding rules and additional transition funding requirements.

C. Distributions and Loans

- *Waiver of 2019 Required Minimum Distributions ("RMD") and Related Rollover Rules (Sections 40301 and 40302).* The Act extends the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") relief to include 2019 RMD distributions. Therefore, now 2019 and 2020 RMD distributions are waived for defined contribution plans and IRAs due to the volatile financial markets. These RMD payments are eligible for rollover back into a plan or IRA, and the 60-day rollover period is extended for these payments through November 30, 2020. Importantly, the Act also eliminates the one-per-12-month IRA limitation on these indirect rollovers, which will facilitate the return of these payments (if so desired).
- *Qualified Plan Loan Relief – Qualified Disaster Relief Extended to SARS and COVID-19 (Section 40303).* The Act clarifies that the CARES Act, consistent with prior disaster relief provisions, permits an administrator of a plan to rely on the employee's certification that they are a

GROOM

qualified individual in order to take advantage of the enhanced loan provisions (e.g., new loans up to $100,000/100% account balance, and one-year loan suspension), absent knowledge to the contrary (effective as if included in the CARES Act).

- *Qualified Plan Withdrawal Relief Extended to Money Purchase Plans (Section 40305).* The Act extends the CARES Act relief for in-service distributions of up to $100,000 to a money purchase pension plan ("MPPP"). Unlike prior disaster relief provisions, this will permit a participant in a MPPP to take a distribution, regardless of the participant's age (effective as if included in the CARES Act).

II. Health and Welfare

A. Health Insurance

- *Special Enrollment Period through Exchanges; Federal Exchange Outreach and Enrollment Activities (Section 30301).* The Act adds a one-time, eight-week special enrollment period to allow uninsured individuals to enroll in an Affordable Care Act ("ACA") Exchange plan if they are otherwise eligible. The special enrollment period would begin one week after enactment of the Act. New enrollees would have the option to make their coverage retroactive to April 1, 2020, or the first day of the month following plan selection. A State-operated or State-established Exchange that provided a special enrollment period prior to the enactment of the Act and during the public health emergency is exempt. The Act also includes $25 million for outreach and education for Exchanges established or operated by the Department of Health and Human Services ("HHS").
- *Coverage of COVID-19 Related Treatment at No Cost Sharing (Section 30303).* The Act requires group health plans and health insurance issuers offering group or individual health insurance (including grandfathered plans) to provide coverage for medically necessary COVID-19 treatment without cost sharing (deductibles, copayments, and coinsurance) during the COVID-19 public health emergency. Specifically, plans and issuers would be required to cover medically necessary items and services (including in-person or telehealth visits in which such items and services are provided) that are furnished to an individual who either (1) has been diagnosed with (or is later diagnosed with) COVID-19, or (2) is presumed to have COVID-19 but is never diagnosed as such, to treat or mitigate the effects or impact of COVID-19.

  The Act requires the Tri-Agencies (the Departments of Labor, Treasury, and Health and Human Services) to issue guidance within one week of enactment of the Act specifying applicable diagnoses and medically necessary items and services for treatment related to COVID-19. The Act clarifies that covered items and services include "all items or services that are relevant to the treatment or mitigation of COVID-19, regardless of whether such items or services are ordinarily covered under the terms of a group health plan or group or individual health insurance coverage offered by a health insurance issuer." This provision is effective upon enactment.

GROOM

Individuals have a private right of action against plans and issuers that fail to provide such coverage without cost sharing.

- *Prescription Drug Refill Notifications during Emergencies (Section 30304).* The Act requires group health plans and health insurance issuers offering group or individual coverage to notify consumers within five business days of the beginning of an emergency period (or within five days of enactment of the Act) as to whether their plan will permit advance prescription drug refills during the emergency period. If the plan will permit such advance refills, the plan or issuer must also provide a follow-up notification within five business days informing consumers as to how they can obtain their advance refills.

- *Notifications Provided to Qualified Beneficiaries by Group Health Plans in the Case of Qualifying Events (Section 30305).* The Act amends the COBRA notice requirements to require plan administrators to provide information about any ACA Exchange through which a qualified beneficiary may be eligible to enroll in a qualified health plan when they lose their employer-sponsored coverage. Specifically, plan administrators must include in the COBRA notice:

  - Publicly accessible website for such Exchange,
  - Publicly accessible website for Find Local Help,
  - Explanation of options for COBRA and Exchange coverage,
  - Information on ACA consumer protections for Exchange plan enrollees (such as the requirement to cover essential health benefits),
  - Information on the availability of financial assistance for enrolling in an Exchange plan, including the maximum income limit for eligibility for the premium tax credit.

  The new notice requirement is effective for qualifying events that take place on or after 14 days after enactment of the Act. The Act directs the Tri-Agencies to revise the model COBRA notices to reflect these additional requirements, conduct consumer testing, and rename the notices, no later than 14 days after enactment of the Act.

- *Risk Corridor Program for Health Insurance Coverage Offered in the Individual or Small Group Market, and Self-Insured Group Health Plans and Coverage Offered in the Large Group Market (Sections 30307 and 30308).* The Act requires the Secretary of HHS (in coordination with the Secretaries of the Department of Labor ("DOL") and the Treasury) to establish and administer two risk corridor programs for plan years 2020 and 2021. The programs would make payments to health insurance issuers offering health insurance coverage in (i) the individual and small group markets and (ii) the large group market and self-insured group health plans. Payments will be based on the ratio of the "allowable costs" of the coverage to the "target amount" of the coverage.

  For individual and small group market health insurance coverage, the allowable costs are the total costs of providing benefits under the coverage less any administrative costs, risk adjustment payments, or reinsurance payments received under a state-based reinsurance program. For large group insured and self-insured plans, the Act defines allowable costs as the

total costs of providing the coverage less any administrative costs, reinsurance payments received under a state-based reinsurance program, or other costs that are determined by the Secretary of HHS. For individual, small group, and large group market insurance, the target amount will be the aggregate premiums of the coverage less any administrative costs. For large group self-insured plans, the target amount will be the expected costs of the plan for the preceding plan year taking into account the COBRA applicable premium, less any administrative costs and increased by 5%.

Under both programs, if the allowable costs for the plan year are more than 105% of the target amount, the Secretary is required to pay to the issuer or plan an amount equal to 75% of the allowable costs in excess of 105% of the target amount. There is an appropriation for the programs.

- *Preserving Health Benefits for Workers (Section 30312).* The Act provides approximately nine months of full premium subsidies for workers who become eligible for and elect COBRA (except for voluntary termination by the individual) and for workers who have been furloughed but are still eligible for their employer-sponsored plan. The period during which such premium assistance would be provided would run from March 1, 2020 to January 31, 2021. Upon expiration of the premium assistance period, individuals would be eligible for a special enrollment period through an ACA Exchange. The Act would allow individuals, if permitted by their employer, to enroll in a different plan offered by their employer instead of the plan in which he or she was previously enrolled when the qualifying event occurred or the furlough period began. The Act would also allow individuals experienced a COBRA qualifying event but had not elected COBRA on or after March 1, 2020 to elect COBRA for a sixty-day period following enactment of the Act.

  Individuals who request such premium assistance but are denied by the plan would be afforded an expedited review of the denial by DOL or HHS. The agency would be required to make a determination regarding eligibility within 15 business days after receipt of the individual's application for review.

  Plan administrators would be required to describe in the COBRA election notice the availability of such premium assistance and the option to enroll in different coverage (if permitted by the employer). This information would also need to be provided within 60 days of enactment of the Act to individuals who do not have COBRA continuation coverage on the date of enactment of the Act but would be eligible for premium assistance if a COBRA election was in effect. The Act directs the Tri-Agencies to provide a model for the additional notice requirements within 30 days of enactment of the Act.

  Plan administrators would also be required to provide furloughed workers with an election notice. The notice would have to describe the availability of premium assistance and the option to enroll in different coverage (if permitted by the employer). The Act directs the Tri-Agencies to provide a model for the additional notice requirements within 30 days of enactment of the

GROOM

Act. Plan administrators must provide these notices to individuals whose furloughs began prior to enactment within 60 days of enactment.

Finally, at least 15 days before the expiration of premium assistance, employers are required to distribute a notification to eligible individuals informing them:

- Premium assistance will expire soon, and the date of such expiration,
- The individual may be eligible for coverage without premium assistance through COBRA or a group health plan, Expiration of premium assistance will be treated as a qualifying event enabling the individual to enroll in coverage through an ACA Exchange, and
- Information regarding the Exchange in which the individual may be eligible.

The Act directs the Tri-Agencies to provide a model for this notification no later than 30 days after the enactment of the Act.

The premium assistance is provided in the form of an employment tax credit for:

- A plan, if a group health plan is a multiemployer plan;
- An employer maintaining the plan, for any group health plan that is not a multiemployer plan and provides furlough continuation coverage or is subject to COBRA, and coverage is not provided by insurance; and
- An insurer providing coverage under the group health plan, for any group health plan not described above.

B. Cafeteria Plans and Flexible Spending Arrangements ("FSAs")

The Act includes several provisions providing certain relief and flexibility for cafeteria plans. This comes on the heels of the Internal Revenue Service's recently released Notices 2020-29 and 2020-33 that provide additional flexibility for cafeteria plans and increase the carryover limit for health care FSAs. With respect to cafeteria plans, the Act includes the provisions outlined below.

- *Increase in Exclusion for Employer-Provided Dependent Care Assistance (Section 20142).* The Act increases the amount of excludable employer-provided dependent care assistance from $5,000 to $10,500 (from $2,500 to $5,250 in the case of a married taxpayer filing separately) for taxable years beginning during 2020.

- *Increase in Carryover for Health FSAs (Section 20151).* The Act allows health FSA carryovers of up to $2,750 from the 2020 to the 2021 plan year. It does not address future years, so presumably the amount reverts to $550 (or the IRS indexed amount).

- *Carryover for Dependent Care FSAs (Section 20152).* The Act allows dependent care FSA carryovers of up to $10,500 (or $5,250 for married filed separately) from the 2020 to the 2021 plan year.

- *Carryover of Paid Time Off (Section 20153).* The Act allows paid time off benefits in cafeteria plans to carryover from the 2020 to the 2021 plan year, with no cap in carryover amount.

- *Change in Election Amount (Section 20154).* The Act permits cafeteria plans to permit participants to modify their health FSA or paid time off elections one time (in addition to any other election changes during a period of coverage permitted under the plan) for any reason between the date of enactment of the Act and December 31, 2020.
- *Extension of Grace Period (Section 20155).* The Act permits health FSAs, dependent care FSAs and cafeteria plans to extend their grace period for unused benefits for the 2020 plan year, up to 12 months. The Act clarifies that a health FSA may allow employees who cease participation in the plan (e.g., due to being terminated) during the 2020 calendar year to continue to receive reimbursements from unused contributions for the rest of the plan year (including the grace period as extended above).
- *Plan Amendments (Section 20156).* If an employer wants to adopt any of the above changes, it must amend its cafeteria plan, health FSA plan, or dependent care FSA plan to adopt any changes no later than the last day of the plan year in which the change is effective (i.e., the last day in the 2020 plan year). The plan or arrangement must be operated consistent with the terms of such amendment during the period beginning on the effective date of the amendment and ending on the date the amendment is adopted.

C. Paid Sick and Family Leave

- *Family and Medical Leave Act ("FMLA") (Sections 120101 through 120113).* The HEROES Act builds upon changes to the expanded FMLA leave provisions made in the two most recent COVID-19 response bills, the Families First Coronavirus Response Act and the CARES Act, by making the following changes:
    - *Effective Dates (Section 120103).* The Act expands the availability of leave from December 31, 2020 to December 31, 2021.
    - *Employer Applicability (Section 120104).* Currently, the expanded FMLA leave provisions only apply to employers with fewer than 500 employees, with certain exceptions. The Act also applies the expanded FMLA requirement (but not the related tax credit) to employers with 500 or more employees.
    - *Reasons for Leave (Section 120104).* The Act allows expanded FMLA leave to be taken for additional covered reasons, including the following: to obtain a medical diagnosis; to comply with a recommendation or order to self-isolate, regardless of whether the recommendation or order is specific to the employee, or to care for a family member who is self-isolating for the same reason; to self-isolate because the employee was diagnosed with COVID-19 or because a family member was diagnosed, even if the employee or family member did not receive an order or recommendation to self-isolate; and to care for a family member who is an individual with a disability or a senior citizen whose place of care or direct care provider is unavailable.

GROOM

  - *Covered Family Members (Section 120104).* For purposes of determining who a covered family member is, the Act defines "parent" to include foster parents, adoptive parents, step-parents, a parent of a domestic partner, and a legal guardian. The Act also defines family members to include next of kin, domestic partners, grandparents or grandchildren, and other individuals related by blood or affinity whose close association is equivalent to a family relationship.
  - *Paid Leave Maximum (Section 120107).* The Act increases the maximum paid FMLA leave to an employee from $10,000 to $12,000. The rate of pay would need to be at least the federal minimum wage, state minimum wage, or two-thirds of the employee's wage, whichever is greatest. The Act prohibits employers from requiring employees to substitute vacation, personal, or sick leave, although employees may elect to substitute such leave for the paid FMLA leave.
  - *Scheduling (Section 120109).* The Act requires employers to allow employees to take intermittent and reduced schedule FMLA leave.
  - *Increased Tax Credit (Section 20223).* The Act provides for an increase in limitations on the tax credit for FMLA paid leave. Currently, the maximum refundable payroll tax credit allotted to employers per employee is $10,000. The Act increases the maximum credit to employers from $10,000 to $12,000 with respect to any employee. Notably, the Act prohibits employers with 500 or more employees from being eligible for the tax credit for FMLA paid leave or emergency paid sick leave.

- *Emergency Paid Sick Leave Expansion (Sections 120114 through 120120).* In addition to the expanded FMLA leave, the Families First Act required employers with fewer than 500 employees to offer employees up to 80 hours of paid sick leave related to certain specified COVID-19 events. The Act expands the availability of the emergency paid sick leave to harmonize with the changes to emergency FMLA leave.
  - *Effective Dates (Section 120116).* The Act expands the availability of emergency paid leave from December 31, 2020 to December 31, 2021
  - *Employer Applicability (Section 120117).* The Act applies the emergency paid leave to all employers (not just those with less than 500 employees).
  - *Reasons for Leave (Section 120117).* The Act provides that emergency paid leave can be taken for the same covered reasons as emergency FMLA leave.
  - *Scheduling (Section 120115).* The Act permits leave to be taken intermittently or on a reduced schedule.
  - *Availability (Section 120115).* The Act also clarifies that the leave is available to employees as soon as they begin employment.

GROOM

III. Other Employer Tax Credits and Deductions

A. Payroll and Retention Credits

- *Refundable Credit for Qualified Pandemic-Related Employee Benefit Expenses (Section 20204).* The Act provides a refundable payroll tax credit to employers for certain expenses paid after March 12, 2020 and before January 22, 2021 that employers elect to be "qualified pandemic-related employee benefit expenses." Such expenses are defined as payments made to or for the benefit of employees to "reimburse or pay reasonable and necessary personal, family, living, or funeral expenses incurred as a result of a qualified disaster" relating to COVID-19, and exclude any amounts (e.g., grants) received by the employer from Federal, state, or local governments for such purposes. The amount of the credit is equal to 50% of qualified employee benefit expenses for essential employees (as defined in the Act) and 30% for all other employees. The credit takes into account up to $5,000 in qualified employee benefit expenses per employee for each quarter.

  Notably, the credit only applies to expenses for employees "in the employment of the employer," which suggests that the credit may only be available with respect to employees that are active employees as of the time that the credit is sought. In other words, as currently drafted, it is unclear whether the credit is intended to apply to expenses for furloughed or terminated employees.

- *Employee Retention Credit (Section 20111).* The Act makes several changes to the employee retention credit provided by the CARES Act.

  - *Amount*. As currently in effect, the CARES Act provides a refundable employee retention credit for certain employers equal to 50% of qualified wages. Currently, the maximum amount of qualified wages with respect to each employee is $10,000 for all calendar quarters, and so therefore the maximum credit is currently $5,000 for any employee.

    The Act increases the amount of the credit from 50% to 80% of qualified wages. In addition, the Act significantly expands the credit's current $10,000 per employee limit for all calendar quarters. In this regard, the Act increases the per employee limits to $15,000 per quarter and $45,000 for all calendar quarters.

  - *Definition of Large Employer.* Currently, the definition of "qualified wages" for purposes of determining the employee retention credit is based on whether the employer has more or less than 100 full time employees. The Act replaces the 100 employee test with different definition of "large employer." In this regard, a large employer is an employer that for 2019, (i) averaged more than 1,500 full time employees and (ii) had gross receipts exceeding $41.5 million.

  - *Conditions for "Significant Decline in Gross Receipts."* Currently, to be eligible for the employee retention credit, an employer must have a "significant decline" in gross receipts. Specifically, an employer is eligible for the credit beginning with the first

GROOM

quarter in 2020 in which gross receipts are less than 50% of gross receipts relative to the same quarter in 2019. An employer remains eligible for the credit up until the earlier of January 1, 2021 or the first quarter in which gross receipts exceed 80% of gross receipts relative to the same quarter in 2019.

The Act modifies the "significant decline" thresholds by increasing the 50% comparative 2020/2019 quarter decline threshold to 80%, and similarly increasing the 80% termination of eligibility threshold to 90%. In addition, the Act provides that certain employers that have a comparative 2020/2019 quarterly decline of less than 50% and therefore do not meet the "significant decline" test may be eligible for a proportionally reduced employee retention credit.

  - *Consideration of Group Health Plan Expenses as Qualified Wages*. The Act expands the definition of "wages" to include amounts paid or incurred by an employer to provide and maintain a group health plan. As a result, it appears that such expenses may be considered qualified wages for purposes of the employee retention credit even if no other wages (e.g., salary) are paid to an employee.

- *Refundable Payroll Tax Credit for Qualified Fixed Expenses (Section 20212).* The Act provides a refundable payroll tax credit to certain employers equal to 50% of qualified fixed expenses paid or incurred by the employer during the calendar quarter, which include the payment or accrual of any covered mortgage payments, rent payments, or utility obligations. The definition excludes the prepayment of such expenses for any period beyond one month "unless the payment for such period is customarily due in advance."
- *Payroll Tax Deferral Allowed for Recipients of Certain Loan Forgiveness (Section 20231).* Under the CARES Act, employers who do not have a Paycheck Protection Program ("PPP") loan forgiven are eligible to defer payment of the employer portion of Social Security tax payments for the period beginning March 27, 2020 through the end of 2020. All 2020 deferred amounts are due in two equal installments, 50% by the end of 2021, and the other 50% by the end of 2022. The Act would expand eligibility for the payroll tax deferral so that employers who have a PPP loan forgiven can also defer payroll tax payments.

IV. Other Provisions

A. Provisions Affecting Employers

- *CARES Act Loan Forgiveness (Sections 20233 and 20234).* The Act modifies the Internal Revenue Code to exclude forgiven small business Economic Injury Disaster Loan ("EIDL") and PPP loans from the taxable income of the borrower. Forgiven debt is normally taxable to the borrower. The Act also makes a conforming change to eliminate the requirement for entities that have EIDL or PPP debt forgiven to file a return detailing their forgiven debt.

GROOM

- *Clarification of Treatment of Expenses Paid or Incurred with Proceeds from Certain Grants and Loans (Section 20235).* The Act enhances the benefit of forgiven EIDL advances and PPP loans by permitting "double dipping." Under the Act, an employer can claim as a business expense, expenses paid using an EIDL expense or a PPP loan, while also not being taxed on the amount of the advance or loan that was forgiven.
- *Not-For-Profit and Small Business Expansion of Main Street Lending Program (Sections 110604 and 110605).* The Act directs the Federal Reserve to update its Main Street Lending Program in two important ways. First, it directs the Federal Reserve to not only allow not-for-profit entities to participate but to specifically create a new low-cost loan option that is solely available to not-for-profit entities. In some instances, the Federal Reserve has been instructed to make this new type of loan forgivable. Second, it directs the Federal Reserve to create a new loan type from which small businesses and small not-for-profit entities can borrow. This new loan type would not have a minimum loan amount. Currently, there is no loan type under the proposed Main Street Lending Facility with a minimum loan amount of less than $500,000.

B. Provisions Affecting Individuals

- *Individual Stimulus Payments (Section 20111).* The Act provides $1,200 tax rebates directly to Americans as in the CARES Act, as well as $1,200 per dependent, up to three dependents. The rebates begin to phase out at an adjusted gross income of $75,000 for an individual or $150,000 for joint filers. It also would modify the earlier CARES Act provision to make all dependents eligible for the $500 qualifying child payments that previously applied only to children under age 17.
- *Earned Income Tax Credit Improvements (Section 20121).* The Act expands the earned income tax credit ("EITC") by lowering the qualifying minimum age for those without children from age 25 to age 18 if a former foster or homeless youth, age 25 if a full-time student, or age 19 if neither of the above. The Act also increases the qualifying maximum age from 65 to 66. Additionally, the Act increases the maximum allowable amount of earned income, thereby increasing the credit itself.
- *Child Tax Credit Improvements (Section 20131).* The Act increases the child tax credit from $1,000 to $3,000 ($3,600 in the case of a child under age 6) and makes 17-year-olds eligible children. The Act also makes the credit fully refundable for 2020.
- *Child and Dependent Care Credit Improvements (Section 20141).* The Act makes the child and dependent care tax credit fully refundable for 2020 and 2021 and doubles the limit for qualifying expenses (from $3,000 to $6,000 for a single child and from $6,000 to $12,000 for more than one child). The Act also increases the income phase-out threshold from $15,000 to $120,000.
- *Pause of State and Local Tax Deduction Limitation (Section 20161).* For tax years 2020 and 2021, the Act eliminates the $10,000 limit on the deduction of state and local taxes.

GROOM

If you have any questions, please do not hesitate to contact your regular Groom attorney or the authors listed below:

Kathryn Bjornstad Amin, Lisa Campbell, Mark Carolan, Elizabeth Thomas Dold, Zack Hoffmann-Richards, Lena Kettering, Katherine B. Kohn, Michael Kreps, Arsalan Malik, Scott Mayland, Diana McDonald, Anthony Onuoha, Stephen Pennartz, Stephen Saxon, Joshua Shapiro, Ryan Temme, Levine Thomas, Kevin Walsh, Brigen Winters

GROOM