



ALERTS

Restrictions On Executive Compensation For Companies Receiving Financial Assistance Under The CARES Act

April 2, 2020

Among many other provisions, the recently enacted CARES Act – that is intended to provide financial assistance to individuals and businesses negatively impacted by the global pandemic – restricts executive compensation paid by companies that receive financial assistance under the Act itself.

Under the Act, the federal government may provide up to \$500 billion in financial assistance to mid-sized businesses (with between 500 to 10,000 employees), non-profits, and state and local governments. It requires, that as a condition of receiving financial assistance, a company must agree to comply with the following conditions from the date the loan or guarantee is entered into through one year after the loan or guarantee is no longer outstanding (Restriction Period).

No officer or employee who received “Total Compensation” that exceeded \$425,000 in calendar year 2019 may receive:

- Total Compensation exceeding their calendar year 2019 compensation over any consecutive 12 months of the Restriction Period, or
- Separation pay and benefits in excess of twice such calendar year 2019 compensation.

Total Compensation includes salary, bonus, awards of stock and other financial benefits.

Additionally, to the extent any officer or employee had Total

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Compensation in excess of \$3 million in calendar year 2019, during any consecutive 12 month period within the Restriction Period, such officer or employee may not receive Total Compensation that exceeds the sum of \$3 million and 50% of the excess over \$3 million of the Total Compensation received by the officer or employee in calendar year 2019. To illustrate, an officer who had Total Compensation of \$5 million in calendar year 2019 could not receive, for any 12 consecutive month period, more than \$4 million in Total Compensation, until one year after the financial assistance is no longer outstanding.

Those receiving financial assistance under the air carrier worker support provisions of the Act are subject to the restrictions on compensation as well, though the Restriction Period that applies to them is the two-year period ending on March 24, 2022. Compensation restrictions do not apply to any compensation determined through a collective bargaining agreement entered into prior to enactment of the Act.

Companies subject to the CARES Act should consider the following action items:

- Identify officers and employees who are subject to the Total Compensation limits
- Tally the aggregate 2019 Total Compensation for such officers and employees
- Track Total Compensation for such officers and employees on a rolling 12 month basis
- Consider any planning opportunities for non-qualified deferred compensation subject to IRC Section 409A that vests or is scheduled for payout during this period
- Consult compensation counsel for an evaluation of the proper approach to the following, which are unclear under the Act:
 - Determination of the value of equity and other non-cash components of Total Compensation
 - Application of the limits to officers and employees with partial years of service
 - Application of calendar year based rules on companies operating on a fiscal year

To obtain more information regarding this alert, contact the Barnes & Thornburg attorney with whom you work or Mina Amir-Mokri at 312-214-4804 or mina.amir-mokri@btlaw.com.

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