KRIEG DEVAULT

Insights

Executive Compensation Restrictions Under the CARES Act

March 31, 2020

By: Alexander L. Mounts and Fenton D. Strickland

Companies who obtain loans and loan guarantees from the Exchange Stabilization Fund authorized by the CARES Act are subject to restrictions on executive compensation. These loans and loan guarantees are separate from relief small business employers might otherwise realize under the CARES Act through the Paycheck Protection Program or expansion of the Economic Injury Disaster Loan Program which do not have executive compensation restrictions.

What are the Restrictions?

The restrictions apply to officers and employees whose total compensation in 2019 exceeded $425,000 ("Affected Employees"). The restrictions apply from the date the loan or loan guarantee is entered into through the first anniversary of the date the loan or loan guarantee is repaid ("Applicable Period").

- For any 12 consecutive months during the Applicable Period, Affected Employees may not receive total compensation exceeding their 2019 total compensation.
- During the Applicable Period, an Affected Employee may not receive severance pay or other benefits upon termination exceeding two times his or her 2019 total compensation.
- Affected Employees whose 2019 total compensation exceeded $3 million, for any 12 consecutive months during the Applicable Period, he she may not receive total compensation exceeding the sum of $3 million and ½ of the excess over $3 million in 2019.

Employees whose compensation is paid pursuant to a collective bargaining agreement entered into before March 1, 2020 are not subject to these restrictions. Also, the Applicable Period for air carriers and certain governmental contractors receiving financial assistance is the two-year period ending on March 24, 2022.

Many Questions to be Resolved

Without a doubt, the executive compensation limitations are meant to prevent employers from diverting assistance under the CARES Act to executive compensation packages. However, issues remain open for employers to resolve before signing a binding agreement.

- "Total compensation" includes salaries, bonuses, stock awards, and "other financial benefits" provided by the employer; however, we need additional guidance on what is included in "other financial benefits." For

example, does it include benefits accrued under welfare benefits or various fringe benefits?

- The term “severance pay or other benefits upon termination” also has similar ambiguities.
- How will deferred compensation be treated? Is the compensation considered received when deferred, vested, or paid?

Employers will need to make quick work of discussing its intentions to pursue a loan or loan guarantee with Affected Employees and will need to review existing employment contracts, benefit plans, and incentive award agreements to determine whether amendments of those plans and contracts are required.

We hope to receive regulatory guidance soon to assist employers’ understanding and interpretation of these restrictions and will update you on developments as they occur. If you have any further questions, comments or concerns, please feel free to contact **Alexander L. Mounts**, **Fenton D. Strickland** or a member of our **Employee Benefits team**.