

TAX, UNEMPLOYMENT BENEFITS, AND STIMULUS CHECKS: How the HEALS Proposal May Affect Hospitality

By Matt Walker

Vice President, Government Affairs
National Restaurant Association

Unemployment Benefits - The bill would provide a weekly \$200 federal unemployment benefit add-on for two months, down from the current \$600/week set to expire this Friday. Starting in October, this flat benefit would be converted to a federal add-on (up to \$500), which would replace 70 percent of lost wages when added to existing state unemployment benefits. If a state still can't administer 70-percent wage replacement in October, they can apply for a waiver to keep the flat-rate \$200 add-on for two more months.

Direct Payments – The bill would provide another round of stimulus checks, up to \$1,200 for individuals and \$2,400 for married couples, with the same eligibility requirements as the CARES Act. The bill would also provide \$500 for dependents, regardless of age.

Expanded Employee Retention Tax Credit (ERTC) – The ERTC would be increased to 65 percent, up from 50 percent. This tax credit is available to employers for wages paid to employees if they have had to partially or fully suspend their business OR if they have seen a significant decline in gross receipts. The required decline in gross receipts for eligibility would be reduced to 25 percent, down from 50 percent. The maximum amount of qualified wages would be increased to \$30,000 this year, up from \$10,000. Finally, the threshold for employees under which all wages are qualified for the credit for working employees – not just furloughed employees – would be raised to 500, up from 100. ERTC enhancements has been a longstanding priority for our industry, and can be utilized by restaurants with partial closings due to capacity restrictions, this is outlined in our Blueprint for Restaurant Revival (Blueprint).

Expanded Work Opportunity Tax Credit (WOTC) – The WOTC would be expanded to include qualified COVID unemployment insurance recipients hired prior to January 1, 2021. The credit amount applicable to this new group would be 50 percent of the first \$10,000 in first-year wages. We have long been supportive of WOTC enhancements, as more people are certified through the program in our industry than nearly any other.

Safe and Healthy Workplace Tax Credit – The bill would establish a refundable payroll tax credit equal to 50 percent of an employer's qualified employee protection expenses. These include personal protective equipment, contactless payment equipment, cleaning supplies, COVID testing for employees, and qualified workplace reconfiguration expenses. Each quarter, the credit cannot exceed the cap based on the number of employees. The cap is equal to \$1,000 for each of the first 500 employees, plus \$750 for each employee between 500 and 1000, plus \$500

for each employee that exceeds 1,000. The credit would be available retroactive to March 12, 2020, and through January 1, 2021. This tax credit is a restaurant priority contained in our Blueprint.

Increased Deductions for Business Meals – The bill would increase the tax deduction for business meals to 100 percent, up from 50 percent. We support this change.

Simplifying State and Local Taxes for Certain Employees – Through 2024, the bill would ensure employees who perform employment duties in multiple states would be subject to income tax only in their state of residence and any states in which they are present and performing employment duties for more than a limited time during a calendar year. To address remote workers, this bill would restore the pre-pandemic position of allowing employers to treat remote employees' wages as earned at their normal work location until an employee can return to such location or the end of the year.

PAYMENT PROTECTION PROGRAM SECOND DRAW AND CREDIT PROGRAMS

Paycheck Protection Program Second Draw – This item, contained in our Blueprint, would provide \$190 billion in committed and newly appropriated funds to support the PPP and its second draw. Eligibility for the PPP Second Draw is limited to businesses that meet the applicable SBA revenue size standard, or have no more than 300 employees, and can demonstrate a 50 percent drop in gross revenues. It also includes:

- \$25 billion set-aside for entities with 10 or fewer employees
- \$10 billion set-aside for loans made by community lenders
- Loan amounts are calculated by multiplying the "average total monthly payment for payroll the year before the loan origination date" by 2.5.
- Maximum loan size capped at \$2 million.
- 60/40 cost allocation to payroll and non-payroll costs to receive full forgiveness

We retained the carve-out that we had previously secured for our industry, allowing the employee size threshold to be considered on a per location basis, versus aggregated. As a result, restaurants would be eligible if they meet other requirements and have 300 or fewer employees per location.

The legislation included language that we support to expand forgivable expenses to include covered supplier costs, covered worker protection expenditures, and covered operations expenditures.

It also calls for a simplified forgiveness process on smaller loans, which we have advocated in favor of.

As we have expressed, in anticipation of this legislation, we remain very concerned with the requirement that a business show a 50% reduction in gross revenues (when comparing one of the first two quarters in 2020 to the same quarter in 2019) to qualify.

On average, restaurants have a razor thin 4-6% pre-tax profit margin. Therefore, even a 20% loss in revenue can be devastating for a restaurant. A key priority will be to lower the 50% threshold to increase the number of restaurants that can draw a second PPP loan.

We also would like to revise the timeframe measurement period to eight consecutive weeks. In the alternative, businesses should be able to compare any consecutive three-month period in the first and second quarter of 2020, to the same timeframe in 2019, regardless if they are a calendar quarter. For instance, February through April, which spans two calendar quarters.

Additionally, we are concerned that the proposal does not include provisions to allow that expenses paid with PPP loans should be deductible business expenses. We will be advocating in favor of having the Small Business Expense Protection Act (S. 3612) included into the final bill, to allow for the deductibility.

Recovery Loans – The legislation would authorize \$100 billion in long-term, low-cost loans to help small businesses and seasonal businesses in lower-income areas, according to census data, recover. They would be available to employers with no more than 500 employees that can demonstrate a 50 percent reduction in gross revenues and meet the applicable SBA revenue size standard. Loans would be available up to twice the borrower’s annual revenue, capped at \$10 million. The loans would have a 100 percent SBA guarantee, and a maturity of up to 20 years with a one percent fixed interest rate.

We called for a long-term loan program, similar to this, in our Blueprint. However, we would like to see this program revised, in several ways, so more restaurants can participate and to increase its effectiveness. For instance, the 50% threshold should be lowered (see above), the pool of businesses that can participate should be expanded, and it would benefit from the addition of a forgiveness component.

LIABILITY PROTECTIONS

Liability Protections – As called for in our Blueprint, the bill includes temporary, targeted liability protections for employers, who are making “reasonable” efforts to follow public health guidelines, against personal injury claims related to actual or alleged exposure to COVID-19, with exceptions for bad actors engaged in gross negligence or willful misconduct. The bill, therefore, requires plaintiffs to not only establish a business was grossly negligent or engage in willful misconduct, but also that it failed to make “reasonable efforts” to comply with applicable public health guidelines. Punitive damages would only be available in cases of willful misconduct and cannot exceed the amount of compensatory damages.

Under the bill, individuals have one year from the date of "actual, alleged, feared or potential for exposure" to file a civil suit.

The bill preempts all state laws that impose liability for exposure-based claims on broader grounds. However, the bill imposes a floor on liability by instructing the courts to apply state laws that impose further liability limitation. It also makes clear that the states are free to further limit liability for COVID-19 exposure. The bill sets a one-year statute of limitations – plaintiffs have one year from the date of "actual, alleged, feared or potential for exposure" to file a civil suit.

Additionally, the bill mandates that any civil suit seeking damages for virus-related injuries and deaths be filed under a federal cause of action and, while suits can be filed in state courts, the defendants will have the right to remove any COVID-19 injury case to federal court. If a case is filed in or removed to federal court, a plaintiff must provide an opinion from a medical expert essentially vouching for his/her claim. These requirements will set a uniform, national standard that will allow large, multistate operators to better handle litigation across the country.

The bill states that the liability shield is retroactive to December 1, 2019 and will remain in effect until either Oct. 1, 2024, or the end of the national public health crisis as declared by the U.S. Department of Health and Human Services, whichever is later.

Finally, the bill incorporates a provision that we championed to clarify that employers would not be liable for claims relating to violations of the federal Worker Adjustment and Retraining Notification (WARN) Act as long as the job loss took place during the pandemic. Normally, federal law requires employers with 100 or more employees to provide employees with 60 days advance notice before business closures or layoffs.

ADDITIONAL PROVISIONS

\$306 Billion in Appropriations:

- \$105 billion to help schools adapt for children to safely return to the classroom
- \$16 billion in grants to states for testing and contact tracing
- \$20 billion for vaccine research, therapeutics and diagnostic development
- \$6 billion for vaccine production and distribution
- \$20 billion to support agricultural producers, growers, and processors
- \$29 billion for the Department of Defense

State and Local Aid – The bill would allow states and localities to use previously allocated funds for additional costs, including some revenue replacement. The bill would also extend the deadline states have to use those funds. However, the bill would not allocate any additional money to states and localities, a Democratic priority.

The TRUST Act – This bill would create “Rescue Committees” for federal trust funds, including Social Security, Medicare, and the Highway Trust Fund. The rescue committees would be tasked with crafting legislation to rescue the endangered trust funds within a set period of time.