

# **CARES Act and independent contractors – How businesses can mitigate risk related to CARES Act unemployment claims**

*Below is an expanded version of a Gavel to Gavel column that [appeared in The Journal Record on May 14, 2019.](#)*

## **Businesses should identify and mitigate risk related to CARES Act independent contractor unemployment claims**

In response to the COVID-19 national emergency, Congress has taken the extraordinary measure to allow independent contractors, gig-workers, and self-employed individuals access to unemployment insurance benefits for which they are generally ineligible. This article is geared towards businesses that regularly use independent contractors who may file claims for unemployment insurance benefits—discussing the risks involved and how businesses can mitigate those risks.

### **Background Regarding Relevant CARES Act Provisions**

On March 27, 2020 President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (“CARES

Act”). Among other provisions, the CARES Act significantly expands the availability of unemployment insurance benefits to include workers affected by the COVID-19 national public health emergency who would not otherwise qualify for such benefits—including independent contractors. This increased accessibility to unemployment insurance benefits theoretically provides an avenue for a state unemployment agency to find an independent contractor applicant to be an employee. Such a finding introduces the risk of the state unemployment agency assessing unpaid employment and payroll taxes for those a business previously treated as independent contractors. Tangentially, such a finding could serve to establish or bolster independent contractors’ claims in wage and hour litigation.

To qualify as a “covered individual” under the Pandemic Unemployment Assistance (“PUA”) provisions of the CARES Act, a self-employed individual must self-certify that she is self-employed, is seeking part-time employment, and does not have sufficient work history or otherwise would not qualify for unemployment benefits under another state unemployment program. Further, the self-employed individual must certify that she is otherwise able to work and is available for work within the meaning of applicable state law, but is “unemployed, partially unemployed or unable or unavailable to work” because of one of the following COVID-19 related reasons:

- The individual has been diagnosed with COVID-19 and is seeking a medical diagnosis;
- A member of the individual’s household has been diagnosed with COVID-19;
- The individual is providing care for a family member or member of the individual’s household who has been diagnosed with COVID-19;
- A child or other person in the household for which the individual has primary caregiving responsibility is

- unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;
- The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;
  - The individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
  - The individual was scheduled to commence employment and does not have a job as a direct result of the COVID-19 public health emergency;
  - The individual has become the breadwinner or major support for a household has died as a direct result of COVID-19;
  - The individual has to quit his or her job as a direct result of the COVID-19 public health emergency;
  - The individual's place of employment is closed as a direct result of the COVID-19 public health emergency.

If the individual meets the above criterion, she is a "covered individual" and is eligible for unemployment assistance authorized by the PUA provisions of the CARES Act. Such assistance was available beginning January 27, 2020 and provides for up to thirty-nine (39) weeks of unemployment benefits extending through December 31, 2020. Covered individuals' unemployment benefits are calculated state-by-state, according to each state's conventional unemployment compensation system. In addition, under the PUA provisions of the CARES Act, covered individuals may receive an additional \$600 for each week of unemployment until July 31, 2020.

# What Businesses Can Do to Protect Themselves

To counteract the risks discussed above, I recommend a business implement the following best practices when responding to a claim of unemployment by an independent contractor:

- respond proactively to unemployment claim notices for independent contractors;
- state clearly in the response that the relevant individual-claimants were independent contractors and not employees of the business;
- affirmatively state that each independent contractor claimant was an independent contractor to whom the business occasionally (or routinely) provided work, but that it is unable to provide the same volume (or any) work to the individual at present because of the COVID-19 national emergency;
- specify in the response that the individual's eligibility for unemployment benefits must be entirely predicated on the PUA provisions of the CARES Act allowing for independent contractor participation in the program; and
- provide the claimant's independent contractor agreement to the state unemployment agency.

In providing this information and documentation to the state unemployment agency, the business will be able to demonstrate its independent contractor relationship with the individual. Together with the fact that these individuals' eligibility to receive unemployment income rests exclusively on relevant CARES Act provisions, the business should be well-positioned to avoid the typical risks that can result from a successful unemployment claim by an independent contractor.

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