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TO: MTC Council Presidents

FROM: President James Hart

SUBJECT: COVID-19 CARES ACT Advice Memo

DATE: April 3, 2020

RE: Financial Relief Available to Labor Organizations and Benefit Funds under the CARES Act

The recently-enacted Coronavirus Aid, Relief and Economic Security (“CARES”) Act, which was signed into law on March 27, 2020, contains several provisions designed to help businesses and nonprofit organizations impacted by the public health emergency caused by the coronavirus. This memorandum is intended to highlight the portions of the CARES Act that may provide financial relief to labor organizations and/or their affiliated benefit funds.

I. Paycheck Protection Program and Loan Forgiveness (CARES Act Sections 1102 and 1106)

Section 1102 of the CARES Act amends Section 7(a) of the Small Business Act and creates the “paycheck protection program,” and appropriates \$349 billion for loans under this new program. Section 1106 of the CARES Act allows for loan forgiveness for loans made under the paycheck protection program. These provisions are described in detail below.

A. Businesses Eligible for Loans

Small businesses and nonprofits organized under Section 501(c)(3) of the Internal Revenue Code with fewer than 500 employees are eligible for paycheck protection program loans. The loans are available to any small business or § 501(c)(3) organization that is affected by the coronavirus and faces economic uncertainty, and needs a loan to support the entity’s ongoing operations. While labor organizations, which are organized under § 501(c)(5), are not eligible for these loans, training

funds organized under § 501(c)(3) are eligible if they satisfy the other conditions for receiving the loan.

B. Amount and Use of Loans

Eligible employers will receive loans in the lesser amount of 250% of the employer's average monthly payroll costs, or \$10 million. Loans have a maturity of 2 years and an interest rate of .5%.

Loans may be used for:

- payroll costs, including compensation to employees, such payments for vacation, parental, family or sick leave, payment of group health plan and retirement benefits, but not including qualified sick or family leave wages for which credits are allowed under the Families First Coronavirus Response Act, and not including an individual's salary in excess of \$100,000 year, as prorated for the covered period;
- continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- interest on any mortgage obligation;
- rent;
- utilities; and
- interest on any other debt incurred before February 15, 2020.

C. Loan Forgiveness

Paycheck protection program loans may be forgiven if borrowers use the loans for specified purposes and do not lay off employees or reduce employees' wages. The loan will be fully forgiven if the loan proceeds are used for payroll costs, mortgage interest, rent, and utilities for the 8-week period beginning on the date of loan origination. At least 75% of the forgiven amount must be used for employee payroll. **To qualify for full loan forgiveness, the employer must retain its pre-COVID-19 level of full-time employees.** Forgiveness will be reduced if an employer reduces the number of its full-time employees, or reduces wages of employees making less than \$100,000 per year by more than 25%. To obtain loan forgiveness, employers will need to provide documentation of payroll costs, mortgage interest payments, rent payments, and utilities paid after the loan origination date.

D. How to Apply for a Paycheck Protection Program Loan

Eligible employers may apply for a loan until June 30, 2020. Applications can be submitted through any existing SBA § 7(a) lender or through any federally insured bank or credit union. A sample application is available on the SBA's website.¹

II. Emergency EIDL Grants (CARES Act Section 1110)

The CARES Act expands the SBA's existing Economic Injury Disaster Loan (EIDL) program (Section 7(b) of the Small Business Act, 15 U.S.C. § 636(b)) by providing near-immediate emergency grants to businesses who apply for an SBA EIDL. Congress has appropriated \$10 billion for emergency grants under the EIDL program.

A. Businesses Eligible for Economic Injury Disaster Loans

Businesses with 500 or fewer employees and private nonprofit organizations of any size are eligible for economic injury disaster loans if they have suffered a substantial economic injury due to the coronavirus pandemic. "Substantial economic injury" means that the organization is unable to meet its financial obligations or pay ordinary and necessary operating expenses.

While the term "private nonprofit organization" is not defined in the CARES Act, the EIDL application states that any tax-exempt entity under Section 501(c) of the Internal Revenue Code is eligible for a loan. Thus, § 501(c)(5) labor organizations are eligible to apply for these loans.

Section 1110 of the CARES waives some standard requirements businesses must otherwise meet when receiving an EIDL, including: 1) requiring the borrower to provide a personal guarantee on advances and loans under \$200,000; 2) requiring the borrower be in operation for at least one year prior to the disaster; and 3) requiring that the borrower be unable to obtain credit elsewhere.

To apply for an economic injury disaster loan, organizations can submit an online application at the following website: <https://covid19relief.sba.gov/#/>. As part of the loan application process, organizations can request a grant of up to \$10,000, described in more detail below.

B. Grant for Economic Injury Disaster Loan Applicants

Section 1110 of the CARES Act permits EIDL applicants to request an emergency EIDL grant of up to \$10,000, which will be provided within 3 days after the borrower submits application for an EIDL. Applicants do not need to repay the emergency EIDL grants, even if the borrower's loan application is subsequently denied. The grants are available until December 31, 2020.

C. Amount of Loan

The SBA's economic injury disaster loans may be up to \$2 million. Repayment of the loans can be made for periods of up to 30 years. The interest rate of loans made to non-profits is 2.75%, while the interest rate for small for-profit businesses is 3.75%.

D. Use of Grants and Loans

Grants and loans may be used for any purpose permitted under Section 7(b)(2) of the Small Business Act, 15 U.S.C. § 636(b)(2), including: 1) providing paid sick leave to employees; 2) maintaining payroll; 3) meeting increased costs to obtain materials; 4) making rent or mortgage payments; and 5) repaying obligations that cannot be met due to business losses.

E. Interaction with Other CARES Act Provisions

Businesses that receive an economic injury disaster loan and emergency EIDL grant may also receive a paycheck protection program loan under Section 1102 of the CARES Act described in Section I of this memo, if they are eligible for such loans. For example, a § 501(c)(3) training fund that is eligible for a loan under the paycheck protection program is also eligible for an EIDL and emergency EIDL grant.

III. Employee Retention Credit for Employers Subject to Closure Due to COVID-19 (CARES Act Section 2301)

Section 2301 of the CARES Act allows eligible employers to receive a refundable tax credit, called an "employee retention credit," against their payroll taxes. The credit may be taken by eligible employers that retain employees on payroll during a time of economic hardship caused by COVID-19.

A. Eligible Employers

Employers are eligible for the employee retention credit if:

- The employer was carrying on a trade or business in 2020, and
- with respect to any calendar quarter in 2020:
 - the employer’s business is *fully or partially suspended* ² due to an order from a governmental authority limiting commerce, travel, or group meetings due to COVID-19; or
 - the business experiences, for a period of time, a “significant decline in gross receipts,” which begins in the first calendar quarter in which gross receipts are less than 50% of the gross receipts for the same calendar quarter in the prior year, and ends with the calendar quarter following the first calendar quarter for which gross receipts are greater than 80% of the gross receipts from the same calendar quarter in the prior year.

The employee retention credit is available to nonprofit organizations organized under Section 501(c) of the Internal Revenue Code. Therefore, these credits are available to unions, which are organized under Section 501(c)(5), if the union meets the eligibility criteria described above.

B. Amount of Credit

The employee retention credit equals 50% of the “qualified wages” (including qualified health plan expenses) that an employer pays in a calendar quarter. The maximum amount of qualified wages taken into account with respect to each employee for all calendar quarters is \$10,000, so that the maximum credit for qualified wages paid to any employee is half that amount -- \$5,000. The credit is only available for wages paid or incurred from March 13, 2020 through December 31, 2020.

For employers that had more than 100 employees in 2019, “qualified wages” only includes wages paid to employees who are not providing services due to a full or partial suspension of business, or during a period of a significant decline in gross receipts.³ For employers with fewer than 100 employees in 2019, “qualified wages” includes wages paid to all employees, regardless of whether they worked or not.

“Qualified wages” do not include any wages paid to employees for paid sick leave or family leave under the Families First Coronavirus Response Act. It does, however, include amounts paid

by an employer to maintain a group health plan. (Other fringe benefit contributions (e.g., pension, training) are not included in the definition of qualified wages.) IRS will issue additional regulations on how health plan expenses should be allocated to qualified wages.

To date, IRS has not released guidance on what the term “employees not providing services” means. We believe that employees who are teleworking are “providing services” to their employers, and thus employers with more than 100 employees cannot obtain a tax credit for wages paid to teleworking employees. At this time, however, it is unclear whether such employers could receive a credit for wages paid to teleworking employees if the employee is only actually performing work for a few hours a day, but the employer continues to pay the employee their full wages. We will await additional guidance from the IRS to determine whether a credit may be available in these circumstances.

C. Application of the Credit and Relationship to Other Laws

The credit is provided against an employer’s Social Security payroll taxes each calendar quarter. If the amount of the credit exceeds an employer’s employment taxes for any calendar quarter, the excess shall be treated as an overpayment and refunded.

Employers may receive tax credits for paid sick and family leave pursuant to the Families First Coronavirus Response Act, and also claim the employee retention credit, but not on the same wages. In other words, the amount of wages for which an employer may claim the employee retention credit does not include the amount of sick and family leave wages for which the employer received tax credits under the Response Act. Additionally, an employer receiving a small business loan under the paycheck protection program, described in the Section I of this memorandum, cannot also claim the employee retention credit.

IV. Suspension of Employer Payroll Taxes (Section 2302)

The CARES Act allows employers to suspend payment of Social Security payroll taxes (i.e. the 6.2% tax paid by employers for old-age, survivors, and disability insurance taxes) (but not the 1.45% Medicare tax) from the date of enactment to January 1, 2021. 50% of the payroll taxes accrued during this time must be paid by December 31, 2021 and the remaining 50% are due on December 31, 2022.

¹ <https://www.sba.gov/funding-programs/loans/paycheck-protection-program-ppp>

² An employer's trade or business may be partially suspended if an appropriate governmental authority imposes restrictions upon the business operations by limiting commerce, travel, or group meetings due to COVID-19 such that the operation can still continue to operate but not at its normal capacity. IRS FAQs: Employee Retention Tax Credit, available at <https://www.irs.gov/newsroom/faqs-employee-retention-credit-under-the-cares-act>.

³ For employers with more than 100 employees, qualified wages taken into account for any employee may not exceed what the employee would have been paid for working an equivalent duration during the 30 days immediately preceding the period of economic hardship.