This practice advisory was written by Patrick Kolasinski and Johanna Torres. Both authors are practicing immigration attorneys, and this advisory was written for our colleagues as a guide to understanding and explaining the recently enacted Coronavirus Aid, Relief, and Economic Security ("CARES") Act. It’s important to note that neither author is a practicing tax attorney or CPA, and the information contained herein is not intended to be tax advice or legal advice. If you have detailed questions, specifically about the tax implications of any action related to the information contained herein, you should seek the advice of an actual tax professional.

In this advisory, we will seek to answer the most commonly-asked questions (as asked by our colleagues) on two broad topics: (1) the individual tax payer relief funds (the “Corona Checks” as some are calling them); and (2) the expansion of unemployment eligibility and its applicability to solo practitioners. Practitioners are welcome to share with their clients and communities.

A special note for immigration practitioners: the CARES Act is primarily a modification of the IRS tax code. Some of the terminology (in particular “non-resident aliens”) has very specific definitions in the tax code, and those definitions are quite different from what they would be in the immigration sphere, or in common parlance. We are using the language in the Act and the relevant code sections here. We are also using the definitions from the relevant code, and have tried to highlight those differences that might differ from a plain English or immigration-based reading. When reading through this, we strongly encourage you to set aside what you think an immigration-related word means because it most likely has a completely different definition.

Summary

On March 27, 2020, Congress passed, and the President signed into law, the CARES Act, a $2+ Trillion-dollar stimulus and relief package to address the economic crisis brought by the COVID-19 pandemic. This over-300-page Act contains a LOT of details, and no single summary or advisory can adequately tackle it. The CARES Act modifies the IRS Tax Code; therefore, we are using definitions in the tax code throughout this advisory. There are two key parts of this Act that we will cover in this advisory:

First, there is the matter of the “Corona Checks”, a form of direct relief/stimulus that is being sent directly to eligible taxpayers. This comes in the form of a tax credit advance in the amount of $1,200 per individual ($2,400 for joint filers), plus $500 for eligible children claimed as dependents.

Second, there is an expansion of unemployment insurance coverage that will likely benefit “true solos” (practitioners with no staff), by allowing them to collect unemployment benefits if they have to stop working due to the pandemic. In short, individuals who are self-employed, are “able to work” and “available to work”, and do not have the ability to telework with pay, are considered eligible for
unemployment benefits. They will be eligible to receive the amount authorized under the employment compensation law of the State where they are self-employed. Additionally, under the CARES Act, they are eligible to receive an additional amount of $600 per week up until 07/31/2020.

Analysis

I. Direct Relief to Taxpayers

This is the part of the CARES act that has gotten the most media attention, as it has the most immediate impact on the largest group of people. There’s a lot of confusing information out there, so let’s break it down a bit.

The Cares Act provides for a fast relief/stimulus of approximately $1,200 to each qualifying taxpayer and $500 per each child included as a dependent. In order to get the money out as quickly as possible, Congress had to use a bit of a convoluted process to push the money through the Federal financial bureaucracy. So, how does it work? Well, if you are a qualified (more on that in a moment) taxpayer, this is what you should experience:

1) On your 2020 taxes (the ones you file NEXT year), you’ll get a straight tax credit for either $1,200 (if filing an individual return) or $2,400 (if filing a joint return) plus $500 for each child.

2) This tax credit will be reduced by the 5% of the amount that your *2020* income exceeds:
   a. $75,000 for individual tax filers (“single” or “married filing separately”);
   b. $112,500 for head of household filers; or
   c. $150,000 for joint filers (“married filing jointly”).

3) Since a 2020 tax credit won’t benefit anyone for the better part of a year, the IRS will send you an anticipatory payment for their best estimate of what your credit will be. This will be sent to you via whatever method you indicated you wanted the refund on your most recently filed (2018 or 2019) tax refund sent to you. Because your 2020 income, filing status, and number of children is unknown, this will be an estimate, and it will be based on your most-recently filed tax return (2018 or 2019). It’s estimated that qualifying taxpayers will receive this check in approximately 3 weeks.

An important note: there are some very significant surprises (both good and bad) in the definition of the “qualified taxpayer” phrase. Be sure to read the “Who gets it?” section below to see who can qualify. The estimated nature of the payment also means that there can be some potential tax surprises when filing 2020 taxes. So read on for those.

Difference Between Tax Credit and Deduction

We have heard from several of our colleagues that there is confusion about the difference between a tax “credit” and a deduction. These are important concepts that should be understood before explaining how these anticipated payments work. A deduction reduces the amount of income on which you pay taxes. A tax credit, on the other hand, acts as a payment of your taxes.
For example: assume that taxpayer Teresa earns $50,000 in a tax year, and has a combined tax rate of 30%.¹

1. Her tax bill in this scenario would be: $50,000 * 0.30 = $15,000.
2. If Teresa can claim a $5,000 deduction, her taxable income becomes $50,000 - $5,000 = $45,000, and her tax bill would be $45,000 * 0.30 = $13,500. That $5,000 deduction saved Teresa only $1,500.
3. If, however, Teresa gets a $5,000 tax credit, her income is unchanged but her initial tax bill would be reduced. If her tax bill was $15,000 ($50,000 * 0.30 = $15,000) the tax credit would save her $5,000 ($15,000 - $5,000 = $10,000). The $5,000 tax credit saved Teresa $5,000.

Differences in Amount of Payment and Credit
Because the actual relief is a tax credit on a taxpayer’s 2020 taxes, and the payment that people receive is by necessity an estimate of the amount of the credit that taxpayers will be able to claim when they file their 2020 taxes in 2021, there will be cases where the payment doesn’t match the credit. Let’s take a quick look at the three general situations that we’re likely to see:

- If your income is relatively steady (at least with regard to the $75K/$150K caps) each year, and your filing status and/or number of kids doesn’t change, you will get a check for the same amount as your credit. The credit will offset the check, and you won’t see any tax impact from these relief funds.

- If your most recent (2018/2019) adjusted gross income was over the caps, but your 2020 AGI is lower, your relief check will be smaller than your tax credit. So, you’ll have an additional mini-relief next year, when you file your 2020 taxes. The same thing applies if you have a child born this year, as you will be able to claim the $500 extra child credit on your taxes, but the IRS will have no way of knowing that you have a child when sending you the estimated check.

- If your 2020 income is both a) over the caps and b) greater than your 2018/2019 income, your relief check might be bigger than your tax credit. If that’s the case, you’ll have to pay back some of the credit when you file your 2020 taxes. The same, appears to be true for people who had a child they could claim on their most recently file (2018 or 2019) return, but who won’t be able to claim that child on their 2020 taxes, and for people who last filed jointly, but whose spouse has passed away. If any of these apply to you, you would be well-served to speak to a qualified tax professional before deciding how to spend any check you get.²

Important Note for Recently Separated Taxpayers
For people who separated from their spouse since filing their most recent (2018 or 2019) return, it is important to note that the IRS will be sending payments based on the information contained in that return. This is of particular concern to those who are escaping abusive relationships, as very often, the abusive spouse takes control of the finances. If you, or a client, last filed a return with a spouse and now are planning on filing separately (or as an individual), a tax professional should be consulted as soon as

¹ Yes, this example is massively over-simplified. And yes, we know that the tax credit shows up above the “tax due” line on the tax returns. But this is an accurate way explaining how a tax credit works in a practical sense. If you are a tax attorney, accountant, or just well-versed in taxes, please accept our apologies for your outrage.
² If you find yourself working on an I-360 widow(er) petition, it would be best practice to suggest your client speak with a tax professional.
possible to determine the feasibility and impact of filing a separate/individual 2019 return before the payments are sent out.

Payments Aren’t Taxable
We have seen a lot of questions and concerns from colleagues and clients about the impact of this check on their 2020 taxes. Specifically, people seem to be concerned that this relief stimulus payment will either push them into a higher tax bracket or cause them to pay additional taxes due to lack of withholding. Given how the payments are designed, it is clear that the relief payments are not taxable income, and so will have no impact on a taxpayer’s tax bracket or withholding amount. The only impacts that are likely are those discussed above, in cases where the payment amount doesn’t match the actual credit.

Who Gets It?
Many news articles refer to a stimulus/relief that is given to “taxpayers”, but there is little clear information available on who, exactly, is eligible. The Act provides that only any “eligible individual” should benefit from the credit. The Act, then, defines “eligible individual” in a counterintuitive fashion, by stating that “‘eligible individual’ means any individual other than [1] any nonresident alien individual, [2] a person who is claimed as a dependent in a deduction, and [3] an estate or trust.”

Additionally, even an eligible individual is only eligible to claim the tax credit if they include their “valid identification number” on their return and, in the case of joint returns, the “valid identification number” of their spouse. In order to benefit from the $500 child credit, the taxpayer must also include the child’s “valid identification number.”

It is important to note here that the terms “nonresident alien individual”, and “valid identification number” do not have the same meaning you might think. The former, in fact, has a very different meaning from that which an immigration practitioner might assign it, while the latter is far more restrictive that you may expect. We analyze the two terms separately, below.

Who Is A Nonresident Alien Individual?
The CARES Act’s relief credit/payment provisions are contained entirely in changes to the Internal Revenue Service Act, and so we have to use the tax definitions of terms of art such as “Nonresident Alien Individual.” This is very important, because the tax code defines this word very differently from what common usage or immigration law would suggest. The standard in tax practice is to look to IRS publications for interpretation of concepts of tax law, rather than directly chasing meanings and formulas through statutes, cases, and regulations. In this case, we turn to IRS publication 519, the “U.S. Tax Guide for Aliens” for clarification. Publication 519 provides a clear definition of “Alien” as “Not a U.S. Citizen,” which already slightly differs from the way the term is used in the immigration sphere. The

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3 In the words of the Act, “any individual with respect to whom a deduction under section 151 is allowable to another taxpayer for a taxable year beginning in the calendar year in which the individual’s taxable year begins”

4 Because this practice advisory is intended for immigration practitioners and is not intended to be a comprehensive piece of tax advice, we do not go into a detailed analysis of terms (2) and (3) here. If you believe one of these disqualifying factors applies to you or your client, consult a qualified tax professional for advice.


6 We are neither qualified nor gifted with the time and space to delve into the differences (if any) in the tax treatment of non-U.S. Citizen U.S. nationals who would appear to be aliens under this definition but not under immigration law. If this is a topic of particular application to you or a client, we strongly recommend you get advice from a tax professional with particular competency in this topic.
key, difference, however, is in the way that the IRS defines the concepts of “resident” and “nonresident” with regard to aliens. Specifically, Publication 519 provides that:

“You are a resident alien of the United States for tax purposes if you meet either the green card test or the substantial presence test for calendar year 2019 (January 1–December 31). Even if you do not meet either of these tests, you may be able to choose to be treated as a U.S. resident for part of the year. See First-Year Choice under Dual-Status Aliens, later.”

We can conclude from Publication 519, that a taxpayer is considered a “nonresident alien” if they are both (1) not a U.S. Citizen and (2) fail both the “green card test” and the “substantial presence test for residency”. Again, the construction of the definition of a “nonresident alien” is very counterintuitive. We are defining something by what it is not.

The “green card test” is a straightforward one:

“You are a resident for tax purposes if you are a lawful permanent resident of the United States at any time during calendar year 2019.”

Easy enough. If you are a Lawful Permanent Resident at any point in the tax year in question, you’re a resident alien. Nothing different here. The big difference comes when we look at the second test, the substantial presence test. Let’s turn to Publication 519 again for more information about that test:

“Substantial Presence Test

You will be considered a U.S. resident for tax purposes if you meet the substantial presence test for calendar year 2019.

To meet this test, you must be physically present in the United States on at least:

1. 31 days during 2019, and
2. 183 days during the 3-year period that includes 2019, 2018, and 2017, counting:
   a. All the days you were present in 2019, and
   b. 1/3 of the days you were present in 2018, and
   c. 1/6 of the days you were present in 2017.”

Clear enough? The first two points alone actually make it clearer than it seems. If the taxpayer was present for a total of 31 days in the tax year, and a total of 183 in the three tax years preceding (and including) the tax year in question, they are a resident. This is a much broader definition than what any immigration practitioner would consider.

Under the analysis provided by Publication 519, every single DACA recipient is a resident alien. Every E-42B eligible EWI client is a resident alien. Effectively, every single one of our clients who has been in the U.S. for more than six months out of the last three years is a “resident alien” for the purposes of this bill.

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7 Please note that the current edition of Publication 519 deals with the 2019 tax year. There is no 2020 edition yet. Because the tax credit will appear in the 2020 year, we have to assume that the relevant portions of this analysis will not change by then. For evaluating eligibility for the tax credit, add one year to all the years in these quotes.
And so, conversely, nearly none of our clients are disqualified as a “nonresident alien.” When discussing this prong of eligibility, you can summarize it as follows: “have you spent more than 183 days in the last three calendar years physically present in the United States?”

Additionally, because the tax credit is being calculated in the 2020 tax year, even a person who has, as of today, never entered the United States still can be eligible for this credit so long as they enter on or before June 30, 2019. This last point is particularly important for those of us who are working in the employment immigration sphere, and those who are working with asylees and refugees. It also gives additional weight to the need to eliminate the “Migrant Protection Protocols” on our southern border, but that is a different topic altogether.

What Is a Valid Identification Number?

The Detailed, Statutory Answer

Although, as we saw above, the “nonresident alien” restriction is not particularly restrictive, there is a second limitation on eligibility for the tax credit that is far more likely to have an impact on an eligible individual’s ability to claim the tax credit. The Act provides that:

“(1) IN GENERAL. —No credit shall be allowed under subsection (a) to an eligible individual who does not include on the return of tax for the taxable year—

(A) such individual’s valid identification number,

(B) in the case of a joint return, the valid identification number of such individual’s spouse, and

(C) in the case of any qualifying child taken into account under subsection (a)(2), the valid identification number of such qualifying child.”

This immediately gives rise to an obvious question: “what is a valid identification number?” Fortunately, the very next section of the act provides the answer:

“(2) VALID IDENTIFICATION NUMBER. —

(A) IN GENERAL. —For purposes of paragraph (1), the term ‘valid identification number’ means a social security number (as such term is defined in section 24(h)(7)).

(B) ADOPTION TAXPAYER IDENTIFICATION NUMBER.—For purposes of paragraph (1)(C), in the case of a qualifying child who is adopted or placed for adoption, the term ‘valid identification number’ shall include the adoption taxpayer identification number of such child.”

This seems clear enough, but this definition has an important caveat that needs to be explored. As we see, the section explicitly references the definition of “Social Security Number” in “section 24(h)(7).” Given that this code section is in the Tax Code, we then turn to Section 24(h)(7) of the tax code to see that it states, in its entirety:
“(7) Social security number required

No credit shall be allowed under this section to a taxpayer with respect to any qualifying child unless the taxpayer includes the social security number of such child on the return of tax for the taxable year. For purposes of the preceding sentence, the term "social security number" means a social security number issued to an individual by the Social Security Administration, but only if the social security number is issued-

(A) to a citizen of the United States or pursuant to subclause (I) (or that portion of subclause (III) that relates to subclause (I)) of section 205(c)(2)(B)(i) of the Social Security Act, and

(B) before the due date for such return.”

From this, we see that we need to check another code, the Social Security Act (“SSA”), to get a clear definition of what “social security number” means for the purposes of the law. Before we get there, it’s important to note subsection (B) here, which limits “social security number” to only those that are issued “before the due date for such a return.” We will get back to this important distinction in a moment, but for now, let’s not lose sight of this rabbit, and jump over to section 205(c)(2)(B)(i) of the SSA:

“(B)(i) In carrying out the Commissioner’s duties under subparagraph (A) and subparagraph (F), the Commissioner of Social Security shall take affirmative measures to assure that social security account numbers will, to the maximum extent practicable, be assigned to all members of appropriate groups or categories of individuals by assigning such numbers (or ascertaining that such numbers have already been assigned):

(I) to aliens at the time of their lawful admission to the United States either for permanent residence or under other authority of law permitting them to engage in employment in the United States and to other aliens at such time as their status is so changed as to make it lawful for them to engage in such employment;

(II) to any individual who is an applicant for or recipient of benefits under any program financed in whole or in part from Federal funds including any child on whose behalf such benefits are claimed by another person; and

(III) to any other individual when it appears that he could have been but was not assigned an account number under the provisions of subclauses (I) or (II) but only after such investigation as is necessary to establish to the satisfaction of the Commissioner of Social Security, the identity of such individual, the fact that an account number has not already been assigned to such individual, and the fact that such individual is a citizen or a noncitizen who is not, because of his alien status, prohibited from engaging in employment; and, in carrying out such duties, the Commissioner of Social Security is authorized to take affirmative measures to assure the issuance of social security numbers:

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8 Much like the INA and Title 8 of the US Code, the SSA’s sections don’t map numerically to Title 42. SSA§205(c)(2)(B)(i) is found at 8 USC 405(c)(2)(B)(i).
(IV) to or on behalf of children who are below school age at the request of their parents or guardians; and

(V) to children of school age at the time of their first enrollment in school.”

We have included the entire section here because there are some very important (and, it would appear intentional) omissions that need to flagged. The SSA excerpt lists all the categories of people who are eligible for a Social Security Number. It is important to distinguish this from the CARES’s Act’s limitation (via tax code section 24(h)(7)) of its own applicability only to those who obtained their Social Security Number under clause (I) of SSA205(c)(2)(B)(i). Resident aliens who obtained their Social Security Numbers through the remaining four\(^9\) clauses are not able to claim the tax credit.

The Short, Simple Answer

Although all that statutory rabbit-hole jumping is fun, what does this really mean? Put simply, a qualified individual cannot claim the tax credit if they don’t list their (and in the case of joint returns, their spouse’s) social security number and that number was obtained either on account of their U.S. Citizenship or through their admission for Lawful Permanent Residence or the issuance of an Employment Authorization Document.

The good part of this is that this means that many people who might otherwise expect to be excluded from this benefit are actually eligible, including many who are currently out of status (or not even present in the country yet). Pending Asylum applicants, those with pending E-42B and/or I-485 applications, U- and T-visa holders, and those in TPS all qualify. The same is true for DACA recipients, nonimmigrant visa holders authorized for employment (H1Bs, L’s, J’s, and yes, even F’s). This is even true for immigrants who once had employment authorization but whose status has lapsed or been revoked.

The bad part is that many of our otherwise-eligible clients, including U.S. Citizens, will be unable to claim the credit because they have filed their tax returns jointly with a spouse who lacks a social security number issued under one of the qualifying categories. That is, a U.S. Citizen who is married to a person who has no status, and who files taxes jointly with their spouse, will not be eligible for this tax credit (unless they are a member of the armed forces).

An Important Note

Astute readers of this advisory may have noticed that we refer throughout this “What Is A Valid Authorization Number?” section to the tax credit, and not the payment. This is intentional. As discussed above, this relief is primarily structured as a tax credit, with an advance payment made in anticipation of the taxpayer claiming the credit. There is no indication in the Act as to how the IRS will handle the issuance of payments to eligible individuals who are not allowed to claim the credit because of their spouse’s lack of a valid (within the meaning of the Act) Identification Number.

It is reasonable to assume that, in the case of qualified individuals who have filed their most recent tax return jointly with a spouse who lacks a valid Identification Number, the IRS will simply not issue a check. In that case, the individual can decide when they file their 2020 taxes whether it is more

\(^9\) Yes, we see the reference to clause (III), but that reference is specifically limited to those who are eligible under clause (I).
beneficial to file jointly and give up the credit or to file separately and claim the credit. If this happens, the qualified individual will miss out on the relief funds right now, when they are most needed, but may get a nice surprise at tax time next year.

It is also possible that the IRS will issue a payment to the qualified individual, and then deal with the issue on next year’s taxes. In that case, the taxpayer who receives the check but is not eligible for the credit will need to be aware that they may have to pay back the credit at tax time next year, a far less pleasant surprise.

Hypotheticals / Examples

1. Wei is a US citizen, and his wife Fang is a B1 overstay. Wei and Fang have been married for 12 years and have 3 minor US citizen children. Wei works full-time while Fang is a stay-at-home mother. They file their taxes under the “married filing jointly” status and use an ITIN for Fang. Are Wei and Fang eligible for a tax credit?
   a. No, unless Wei and Fang (re)file their taxes as “married filing separately.”
   b. While this seems unfair because Wei and his 3 kids are all US Citizens with valid “identification numbers” (their social security numbers), the inclusion of Fang on the joint tax return categorically blocks Wei from benefitting from the tax credit and/or payment.
   c. If Fang had a valid social security number obtained through either LPR status or an EAD, the family would be entitled to both a tax credit on their 2020 tax return and the advanced payment of that credit this year, of up to $3,900 ($2,400 for the couple and $500 for each child), depending on their income.
   d. If the Fang is eligible for Adjustment of Status (as a visa overstay, she may be eligible for 245A adjustment, unless there is another ground of inadmissibility), the couple would likely benefit from quickly filing a one-shot adjustment application. While this would not get them the advance payment, the EAD that comes with a pending AOS application would make Fang eligible for a social security number. If she were to obtain that number before the couple files their 2020 tax return, their tax credit would likely more than cover the filing fees and a portion of their attorney’s fees.

2. Eva is a single woman from El Salvador; she has been in the U.S. since 2001 and has Temporary Protected Status (“TPS”). She has one USC daughter and files her taxes as “head of household”. Since 2005, Eva works as a housecleaner; she has been using a valid social security number to pay taxes over her income. Is Eva eligible for a tax credit?
   a. Yes, since Eva has a valid identification number (a social security number) and has been filing her taxes, she will be eligible for a tax credit, in the form of an anticipated payment, of up to $1,700 ($1,200 for herself and $500 for her child).
   b. This is true even if Eva’s TPS status has lapsed or been terminated, as Eva’s social security number was validly issued when she received her EAD.

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10 It is, of course, possible that the spouse will not have a valid Identification Number now, but will get LPR status or an EAD at some point this year, and be eligible to claim the credit by the time the 2020 tax return is due, on 4/15/2021.
3. Krisha is a single woman; she entered the U.S. without inspection on February 14, 2019. She quickly applied for asylum and 6 months later, in August of 2019, received her work permit and a social security number. Krisha has been working as a parking attendant, but has still not filed her 2019 taxes. Is Krisha eligible for a tax credit?

   a. Yes, she is eligible for a tax credit of up to $1,200. Krisha is considered a U.S. resident for tax purposes because she meets the “substantial presence test”. She was present in the U.S. for at least 31 days during 2019 and 183 days during the 3-year period that includes 2019, 2018, and 2017. Specifically, Krisha was present in the U.S. for 320 day during 2019 and also the 3-year period. Since she is considered a “U.S. resident” and has a valid identification number (a social security number), she is eligible to receive a tax credit. However, she will have to wait until she files her 2020 taxes to assert her eligibility.

   b. Note that there is no way to “apply” for the advance payment. It is likely that a prompt filing of her 2019 taxes would get her payment sent to her, but there is no guidance available from the IRS at this point. Still Krisha should be advised to discuss her tax situation with a competent tax profession who can advise her about the timing of her filing and the likelihood that a quick filing would get her an advance payment this year.

4. The same scenario as 3., but Krisha entered with her 2-year-old daughter, who is a beneficiary on Krisha’s I-589. Krisha was advised that her 2-year-old daughter “doesn’t need a work permit”, and so didn’t file an I-765 for her daughter. Is Krisha still eligible for the tax credit?

   a. No, in this scenario, Krisha is NOT eligible for the tax credit because she cannot file her taxes with her daughter’s valid “identification number”, as her daughter doesn’t have such a number.

   b. In this scenario, Krisha would be well-advised to quickly file an I-765 for her daughter so that her daughter can get an EAD, and through it an SSN, before Krisha files her 2020 taxes.

5. Harinder is an unmarried Indian citizen present in the U.S. on a valid H-1B. He has been here since November 2017, and has timely filed his 2017, 2018, and 2019 taxes, and has had his return direct deposited into his U.S. bank account. Harinder’s 2019 adjusted gross income was $80,000. His employer just laid him off due to COVID-19-related slowdowns, and he has been unable to secure alternate employment for a transfer, as everyone in his industry is similarly affected. Harinder intends to return to India, but wants to know if he will be able to get a relief check if he does so. Is he eligible for the tax credit, and will he get the relief check?

   a. Yes, Harinder is eligible to claim a $1,200 tax credit on his 2020 tax return (which he will file next year).

   b. Harinder will also receive the advance payment direct deposited into his bank account even if he leaves for India tomorrow. However, that advance payment will be reduced from $1,200 to $950 because his income was over the cap ($80,000 - $75,000 = $5,000. $5,000 *.05 = $250. $1,200 - $250 = $950.)
II. Unemployment Eligibility for Solo Practitioners

Expansion of Unemployment Benefits
Title II of the CARES Act significantly expands unemployment benefits, both in scope of coverage and in amount paid. There are two basic components of this. First, the Act provides States with the ability to contract with the federal government to receive compensation for unemployment claims in 2020. Under these contracts, the federal government will reimburse States for the pandemic-related unemployment insurance claims, but the State must meet certain requirements in order to be reimbursed. The States must pay each eligible unemployed person an extra $600 for each week in which they are eligible for unemployment insurance. This is a flat increase in the weekly benefit, rather than a scaled or pro-rated increase, and applies to all unemployment checks that the state wishes to be reimbursed for.

Expansion of Unemployment Eligibility
In addition to increasing the amount of unemployment benefits, the Act significantly expands who is eligible to receive benefits in the first place. Specifically, the Act provides that individuals who are not eligible for ordinary unemployment insurance (but are still legally and physically able and willing to work, and actively seeking work) can receive unemployment benefits (including the $600 flat weekly bonus).

Qualifications
First, in order to collect unemployment benefits, an individual must show that they were in satisfactory immigration status and authorized to work in the United States when earning the wages that they used to establish their claim. This means that an individual must establish that they are either: 1) a U.S. citizen; 2) a Legal Permanent Resident; or 3) they have an immigration status that authorizes them to work in the U.S. This last prong is of special importance to us because in order to collect unemployment insurance, workers must be both “able to work” and “available for work”. Generally, undocumented workers are not “available for work” because they are not legally eligible for work. Therefore, undocumented workers normally cannot collect unemployment insurance.

The unemployment provision in the CARES Act includes those who are either 1) diagnosed with COVID-19; 2) in a household with someone who has been diagnosed with COVID-19; 3) the parent of a child who can’t go to school or daycare because of a COVID-19-related closure; 4) unable to get to their regular work because of shelter-in-place or quarantine orders related to COVID-19; 5) unable to get to work because a doctor has advised them to self-quarantine due to COVID-19; 6) otherwise unable to work because of COVID-19; e or 6) are self-employed, seeking part-time employment, lack sufficient work experience, or are otherwise not usually included in unemployment benefits.

This last provision is, in all likelihood, the most important one for most of our readers. That is because it not only applies to our clients, but also to self-employed attorneys who are unable to work at this time. Additionally, it does not appear that this provision has any explicit requirement for the unemployment to be related to COVID-19. As such, self-employed people who have suffered a loss of employment due to the economic slowdown and social distancing rules are, apparently, eligible for unemployment benefits,
To qualify, self-employed individuals must provide “self-certification” that they are: self-employed; do not have the ability to telework with pay; are willing, able, and legally eligible to work, and that they are actively seeking employment.

Duration of Coverage
As long as the covered individual’s unemployment, partial unemployment or inability to work caused by COVID-19 continues, the authorized assistance will cover the weeks of unemployment, partial unemployment, or inability to work beginning on or after 01/27/2020 and ending on or before 12/31/2020. This time period is important, as the Act specifically provides for coverage for unemployment that began before the Act was passed and signed into law. How this will be implemented remains to be seen, but it appears that those who have been out of work for COVID-19 related reasons, and possibly others, may be getting a lump-sum payment of $600 for each of the weeks they have already been collecting unemployment. The total unemployment period should not extend beyond 39 weeks unless the Act is amended to include additional time. The CARES Act authorizes an additional amount of $600 per week up until 07/31/2020.

But beware, lying to the government about your status as self-employed and requesting unemployment, is considered a federal crime under 18 USC Section 1001 and can lead to up to 5 years of imprisonment. Think Martha Stewart, as she was convicted under this same statute.

Hypotheticals / Examples

1. Taylor is a USC who has a solo immigration practice that is primarily focused on removal defense. Her office is located on the Texas border. Assuming that the awesome new lawsuit filed on 03/27/2020 in the Oregon District Court moves forward and both detained and non-detained cases are suspended, can Taylor apply for unemployment?

   a. Taylor is a USC; she is considered an eligible individual for unemployment insurance because as a USC, she is authorized to work in the U.S. Her unemployment is caused by COVID-19. She can apply for, and receive unemployment assistance beginning from the date she “self-certifies” that she is unemployed, does not have the ability to telework with pay, and that she willing, able, and legally eligible to work, and that she is actively seeking employment. She will be eligible to receive the benefit amount authorized under the state law (Texas) plus $600 a week from the CARES Act. As long as Taylor’s unemployment is caused by COVID-19, she can continue to receive unemployment assistance up until 12/31/2020.

11 (a) Except as otherwise provided in this section, whoever, in any matter within the jurisdiction of the executive, legislative, or judicial branch of the Government of the United States, knowingly and willfully—
(1) falsifies, conceals, or covers up by any trick, scheme, or device a material fact; 
(2) makes any materially false, fictitious, or fraudulent statement or representation; or
(3) makes or uses any false writing or document knowing the same to contain any materially false, fictitious, or fraudulent statement or entry; shall be fined under this title, imprisoned not more than 5 years or, if the offense involves international or domestic terrorism (as defined in section 2331), imprisoned not more than 8 years, or both.

12 https://www.splcenter.org/sites/default/files/documents/0029_03-27-2020_emergency_motion_for_tro.pdf?fbclid=IwAR0YWmUSdVzkFRakhtrPKLQoR9xda_DA_ZIndulMe9t4JXn7-SABEL-HY-ahA
2. Parminder is a USC; she is also an immigration lawyer. She is a true solo with no support staff. Although she has an office, 60% of her work is done from her home in Florida. As a result of COVID-19, the county where her office is located issued a stay-at-home order. This order began 03/27/20 and does not have a definite end date. Since Parminder’s business is not classified as “non-essential”, she is unable to meet with new clients and her work has been substantially reduced. Parminder can still do some of her work from home, can she apply for unemployment?

a. Parminder is a USC; she is considered an eligible individual for unemployment insurance. Her partial unemployment is caused by COVID-19. She can apply for, and receive partial unemployment assistance beginning from the date of the county mandated stay-at-home order. She will be eligible to receive the benefit amount authorized under the state law (Florida) plus $600 a week from the CARES Act. As long as Parminder’s partial unemployment is caused by COVID-19, she can continue to receive partial unemployment assistance up until 12/31/2020.

3. Miguel owns a landscaping company in California; he has no valid immigration status and does not have a social security number. He has been paying taxes for the last 15 years using his Individual Tax Identification Number (ITIN). Miguel employs 3 people: himself, Carlos and Susana. Carlos has a social security number through DACA and 2020 will be his first year paying taxes. Susana has an EAD through VAWA, but because of a mistake at the Social Security Administration’s Office, she has not yet received a social security number. Susana has been using a fake social security number to work and has paid taxes for the last 3 years. California issued a stay-at-home order and landscaping is not considered an “essential business”. As a result, Miguel has to close up shop and let go of Carlos and Susana. What benefits are Miguel, Carlos and Susana eligible for, respectively?

a. Miguel cannot collect unemployment insurance because, as a non-USC without a valid immigration status that authorizes employment, he does not meet the criteria for “available for work”. Furthermore, although he has been paying his taxes using an ITIN, he does not have a “valid identification number” as defined by the CARES Act, (that is, a social security number issued as a result of LPR status or an EAD). Therefore, he is not eligible for the tax credit.

b. Carlos can collect unemployment insurance because he is in satisfactory immigration status, was laid off because of a reason related to COVID-19, and is able and available to work. He will be eligible to receive the benefit amount authorized under the state law (California) plus $600 a week from the CARES Act. As long as Carlos’ unemployment is caused by COVID-19, he can continue to receive unemployment assistance up until 12/31/2020. Although Carlos has a social security number, he will not receive an advanced payment of his tax credit because he has not yet filed taxes. He will, however, receive a tax credit when he files his 2020 taxes, and can quickly file a no-income 2019 tax return to have a chance at the advanced payment.

c. Susana can collect unemployment insurance, because she is in satisfactory immigration status, was laid off because of a reason related to COVID-19, and is able and available to work. Susana does not have a valid identification number under the tax code (she does not have a valid social security number), therefore, even if she’s been paying taxes for the past 3 years using a fake social security number, she will not get an advanced
payment of her tax credit. However, once she gets a valid social security number, and files her 2020 taxes, she will be eligible to receive the tax credit. The consequences of her having filed her past return using a false SSN are best handled by a competent tax professional, and she should speak to one soon. Susana should also be screened for false claims to USC, but you already knew that, didn’t you?