

# The Workplace Recovery Act: A Constitutionally Conservative Plan to Reopen the Economy



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# The Workplace Recovery Act

## A Constitutionally Conservative Plan to Reopen the Economy

### Executive Summary

America's health crisis has become a major economic crisis. Without prompt action, the United States is likely headed for a prolonged recession. With that ominous forecast comes the potential for massive and permanent growth in government spending.

The most effective solution to avert this outcome is readily constructed by following the core principles of constitutional and fiscal conservatism. This starts by clearly defining government's proper role in the crisis and establishing objective and measurable goals for the government spending that is required to resolve it.

To ensure conservative principles are made central to resolving the crisis, the notion of "limited government" should relate to obligations that each level of government—federal, state, and local—be limited to its constitutional role. Where "limited" and "less" are relative terms, they are neither measurable nor useful as elements of a sound conservative plan to help America persevere through and emerge stronger from the crisis.

Three principles are required as the foundation for the nation's economic recovery if we are to sustain conservatism:

- First, workplaces that were disrupted by government orders to suspend economic activity should be made whole for their losses as the Constitution requires.
- Second, all efforts to provide for citizens should be intended to achieve specific social objectives that are constitutionally sound and measurable.
- Third, all crisis-resolution efforts should be terminated when the goals are achieved or the efforts are demonstrated to be ineffective.

These are the proper bedrock principles to see our nation through crisis while also preserving conservatism as the best approach to what may be a new era of American Exceptionalism.

### Constitutional Principles, Fiscal Conservatism

The Workplace Recovery Act achieves the objectives of constitutional and fiscal conservatism. The Act is constructed on a solid constitutional foundation, with a clear objective that will accomplish our national purpose. Once that purpose is achieved, the program and its government funding will end. The Workplace Recovery Act will avert the grim prospect of an economic death spiral and allow American workplaces and workers to recover financially. That accomplishment will provide conservatives the opportunity to reclaim high ground to advance sound policy in other areas of American life.

Morgan Stanley recently projected that the nation's second-quarter gross domestic product (GDP) will decline a stunning 38% ([Goldstein, 2020](#)). Their economists further stated that they "expect the U.S. economic recovery will be more drawn out than previously anticipated, marked by a deeper drop into recession and slower climb out." Clearly, the damage done to the economy as a result of the economic shutdowns, even if deemed reasonable and understandable, is significant.

In America, principles of equity generally require that when a party causes economic damage to another, the offending party should pay just compensation. A person who drives a truck through another's house is usually obligated to repair the damage, even if not intentional. This principle applies to government as well. The Fifth Amendment to the Constitution provides that just compensation is required for a taking of private property. While Supreme Court precedent may not deem the government actions of shutting down the economy as a taking, it is appropriate to consider the damage done by these actions and compensate those harmed. In the current economic crisis—already assumed by many to be among the most severe in our history—many Americans will rightly demand their government repair the damage it caused—even if they agree that the government's action was warranted.



## The Workplace Recovery Act Methodology Provides Financial Sustenance and Restores Confidence

In order to ensure any compensation is “just,” it must be paid in a manner that (a) fixes the actual damage, (b) does so quickly, and (c) minimizes economic waste while holding fast to constitutional principles of equity. The Workplace Recovery Act achieves these goals.

The appropriate question is therefore not whether or how much government funding should be expended to restart the economy, but what the fastest and most economical way to pay just compensation and restore damaged workplaces to health is. The answer is simple: Pay operating losses incurred as a result of the government actions until workplaces can revive sufficiently to pay their own way. This is an approach that has been used successfully for many decades in the private sector to cover workplace shutdowns from natural disasters.

Every business aims to achieve a profit. But the lifeblood of business is positive cash flow. Business can survive with negative book income, because expenses like depreciation reduce income but do not create cash outflows. But they cannot survive long with negative cash flow. This is why businesses began aggressively shedding employees when they saw their revenues dry up. The average profit margin for U.S. businesses is approximately 8%. And most of many businesses’ operating expenses are personnel costs. When revenues dry up, costs must be reduced quickly to avoid immediate bankruptcy, and that means layoffs or furloughs.

With much of the private sector economic engine shut down, and likely continuing to deteriorate, businesses that have suffered cash losses are going to be reluctant to reopen and rehire until they believe it is safe to do so. Which likely means they will wait to open until others open, creating a gridlock of inaction. That means creating confidence is one of the most important objectives for the workplace recovery.

The Workplace Recovery Act (WRA) equitably solves these problems by allowing workplaces that have suffered cash operating losses to recoup those cash losses with their initial claim, without double dipping with other government programs. Next, workplaces may make additional monthly claims to cover cash losses while the workplace is reopening and rebuilding its employment. This can give businesses the confidence to reopen and rehire in advance of seeing others reopen and rehire. This is a vital aspect of the WRA, providing confidence for a broad restart and rehiring.

Once employees are rehired and revenues return, cash operating losses will be reduced. As a consequence of those loss

reductions, claims under the WRA will shrink, then evaporate as businesses become cash flow positive.

Businesses will be allowed to pick any consecutive months as their covered period within the 12-month time frame the WRA is authorized. This provides a strong incentive for early termination. Early termination allows businesses to retain positive cash generated after that date. This creates both the confidence to reopen and rehire quickly, as well as an incentive to terminate reliance on the WRA as rapidly as possible.

Thus, the WRA fulfills the constitutional principle of equity by providing just compensation to affected workplaces. The WRA also meets the standard for good fiscal stewardship, since the WRA has a specific and constitutionally legitimate purpose and terminates once the purpose is achieved.

The WRA has a definite end date—a one-year term in order to give business sufficient runway to generate confidence. If the government does not soon open fully, that term might need to be extended, and there is a provision that allows an extension. It is vital for the runway to be long enough for businesses to have confidence to reopen, but short enough to create a sense of urgency to reopen and rehire.

The WRA also addresses a problem that has become apparent that some unemployed workers are reluctant to return to work if they are being paid more in unemployment benefits. The WRA would therefore allow those on unemployment to retain their \$600 federal supplement. This does two important things:

- It creates a rationale to resist any extensions of this stipend, which could easily morph into a “living wage entitlement” that pays people more not to work than they can make working.
- It prevents employers from seeking to reopen but not having any “takers” because employees are being paid more to remain unemployed.

It will be vital to the WRA that there be no extensions of the federal unemployment benefit so employees will return to work while keeping their \$600 stipend, rather than waiting to see if they still receive the supplement.

The WRA is also constructed to be simple and efficient. It requires payments to be made based on representations from eligible businesses, further boosting confidence in an economic recovery. It is also inherently fair in that it is open to a broad spectrum of businesses and allows smaller businesses to have the same program access as larger businesses. No one jumps to the front of the line, and no prior

relationships with bankers or accounting professionals are necessary.

### How the WRA Works

The Workplace Recovery Act would direct federal funds specifically at businesses that have incurred and can demonstrate cash operating losses after March 1, 2020, when government shutdowns began. The funds directed are limited to covering cash operating losses. The program is designed to have a long enough length to create business confidence to reopen and rehire. The WRA compensates businesses with a valid taxpayer ID number prior to March 1, 2020, for up to 90% of their revenues of the prior 12 months. This 90% reimbursement limitation is an important protection against possible program abuse. The intent of the WRA is to restore workplaces, not to provide expansion capital. It also serves as an important precondition to funding that is easily checked through automation based on IRS data. This should make it difficult for large-scale fraud abuse, since taxpayer IDs that are dormant or show no revenue will not be eligible for claims.

The effects of the shutdown have been so extensive that qualification for the program does not require any designations of affected sectors. Rather, the WRA simply qualifies workplaces based on an objective standard of whether they have suffered cash operating losses after March 1, 2020.

The limitation of eligibility to only include businesses with a valid taxpayer ID prior to March 1, 2020, also provides an important barrier to abuse. This provision, together with the 90% revenue cap, effectively allows an automated program to readily detect abuse. This allows for an automated issuance of claim payments based on information provided by affected businesses in their application. Just as with our income tax system, which relies on representations with audits, the WRA establishes authority to audit applications and ensure the program is administered for its appropriate purpose.

The amount of payment is based on the amount of eligible cash operating losses. Non-cash expenses like depreciation are not eligible costs. Similarly, capital expenditures such as construction or land purchases are not eligible. The goal is to restore the workplace, not recover lost profits or provide expansion capital.

Similarly, by allowing workplaces necessary cash to continue paying their cash bills, the WRA allows them time to return to profitability, with the hope the value of their business will be restored. Because non-cash expenses are not eligible cash operating expenses under the WRA, most if not all workplaces will still be experiencing negative income while they are receiving claim payments, because

most if not all businesses have non-cash expenses. However, excluding non-cash expenses is a necessary feature that creates equity for all parties. The WRA does not cover lost profits or lost cash flow. It simply covers cash losses for a sufficient period to allow workplaces to restart and resume.

The WRA claim payments only ensure workplaces reach a cash break even during the covered period. Accordingly, the WRA formula effectively forecloses any incentive for businesses to desire to extend the WRA and turn it into a corporate welfare program. Businesses desire to be profitable, not to merely reach cash flow break even. The WRA is designed to provide confidence for business to reopen and rehire quickly, while incentivizing business to terminate program participation at the earliest possible time.

Reimbursements are paid monthly and will naturally reduce as business revenue increases with economic recovery. This provides incentive to reopen and rehire rapidly. In order to incentivize employees to return to work, those receiving federal unemployment benefits are allowed to keep the \$600/week in federal unemployment authorized under the CARES Act after they return to work. This allowance is intended to encourage these employees to return to work and eliminate any rationale to extend this federal unemployment supplement past July 31.

Eligible cash operating losses are limited to the period beginning on or after March 1, 2020, but prior to February 28, 2021. Claims can be made monthly up to the amount by which eligible cash operating costs, including personnel costs, exceed revenues. Businesses are allowed to choose their claim period as being any consecutive months between March 1, 2020, and February 28, 2021. This allows businesses confidence to reopen without revenue certainty but provides a powerful incentive to ramp up quickly. By allowing businesses to choose their claim period retroactively, businesses have an incentive to rehire quickly, so that once their revenues exceed expenses, they can terminate coverage and begin to experience positive cash flow.

### Special Administrator

In order to ensure a seamless interface with the Treasury Department and to implement the plan and disburse the funds timely and efficiently, a special administrator would be appointed to implement the program. The special administrator would also be authorized to contract with third parties as necessary to ensure timely processing and payment and combat fraud.

To the extent practicable, the special administrator would be directed to utilize a system whereby applications are submitted through a commonly used internet-based software interface. The specific eligibility criteria to calculate

eligible operating losses and resulting payment should allow the process to be fully automated, allowing transparency, speed, and certainty. The WRA also includes provisions for congressional reporting and oversight as well as inspector general authority.

By designing the WRA as a fund, uncertainty is removed as to the term, and business leaders can be assured the WRA will be available for them to rebuild their workplaces. By removing any fears of “the money running out,” the WRA gives businesses the confidence to rely on it to reopen and rehire. Ironically, if the WRA were to include a limitation on total expenditures, it is likely that the recovery would take longer and that the total cost would be substantially greater. So, in this case, designing the WRA as a fund without a cap on total cost is the preferred fiscally conservative approach. The focus is on limiting time rather than amount. The principles of equity as well as the pragmatic reality of the importance of confidence as a preamble to business decisions make this an essential part of the WRA design.

Any forgivable loans received under the Paycheck Protection Program are considered revenues for the purpose of the WRA, which eliminates double dipping. Also, the receipt of any similar payments from government programs is considered revenue, which further eliminates double dipping. Those industries that received specific treatment under the CARES Act, such as the airline industry, are disallowed to participate in the WRA. The WRA also includes restrictions on stock buybacks and dividends, further supporting the core purpose of the WRA to restore workplaces.

### What the WRA is not

The WRA is not an entitlement program. While the WRA is structured as “mandatory” spending, it does not create what is usually referred to as an entitlement for two reasons. First, the WRA recognizes that this is a payment of “just compensation” for damage done by the government shutdowns of workplace activity. Second, the program is structured to terminate, not only because it has an end date (which can always be extended) but because by its very nature it disallows businesses from accomplishing their core objective of creating profits so long as businesses remain on the program. No legitimate business would consider being able to break even a benefit. In recognition of the preceding, only those businesses with eligible cash operating losses may receive funding to compensate for their losses due to the government-ordered shutdown.

Structuring the WRA as mandatory spending is one of the primary features that creates confidence and surety that constitutional principles of equity will be followed. Tying spending to a specific term rather than a specific amount provides confidence the program will be there, it will not

“run out” before businesses have the opportunity to have their losses covered. Further, by tying the program to eligible cash operating losses and a specific date, the structure creates a high level of surety that the spending will end. The primary need to restart the economy is confidence of businesses and workers, and the mandatory spending structure is an essential feature to create that confidence.

The WRA does not create payments for general assistance. The payments are to be used by businesses only for certain operating expenses aimed at allowing the business to reopen and reestablish operations, which will allow workplaces the opportunity to flourish once again.

It is not a new permanent government program. The WRA is managed and operated by a special administrator within the Treasury Department, and the program has a definite end date after which the program will cease operations and close.

It is not an enrichment program. No payments may be used for profit or other enrichment programs and certain other expenditures using these funds are also specifically prohibited. Eligible losses are effectively capped at 90% to further ensure no profits are earned from these payments.

Unlike previous assistance from the federal government, the WRA would direct payments to compensate businesses incurring cash operating losses as a result of government-ordered shutdowns and assist those businesses to reopen, rehire, and resume operations timely.

### Eligible Operating Costs and Accelerating Reemployment

The WRA is narrowly structured to pay claims only to those businesses that can demonstrate they are incurring operating losses after March 1, 2020. In order to receive funding, businesses may file an initial application which shall be simple to file, process, and audit. The application is required to include eligible operating costs and eligible revenue for the period beginning March 1, 2020, or on the first day of the month selected by the applicant for the coverage period if after March 1, 2020, and ending on the last day of the month immediately succeeding the month in which the application is filed.

Eligible operating costs are defined as all cash expenses of the workplace necessary to maintain its operations during the covered period, minus excluded expenses such as:

- certain capital expenditures;
- payment of principal on debt obligations, except payments made according to an existing obligation written prior to March 15, 2020;



- payment of dividends or other capital distributions with respect to the common stock of the applicant, except certain real estate investment trusts;
- stock purchases and buybacks, except to the extent required under a contractual obligation previously in effect;
- non-cash compensation including stock options;
- non-cash expenses related to long-term assets, including depreciation and amortization;
- wages in excess of the wage rate for 2019, unless pursuant to a previously existing contract;
- executive bonuses;
- payments to acquire land, real property, or property, plant, and equipment; and
- payments to related parties or affiliates; except those historically made in the normal course of business.

To guard against program abuse, the operating costs eligible for reimbursement are further capped at 90% of the applicant's historical operating revenue for 2019. There is no enrichment or expansion under this program. The intent is to only amply cover cash losses incurred as a result of the economic shutdowns, which should allow workplaces the opportunity to recover quickly. This will ensure that no funds are paid to recover lost profits and an incentive remains for all eligible businesses to regain full operations and terminate program participation as soon as possible.

The primary expense of many if not most businesses is personnel costs. But personnel must have tools to use, a place to operate, merchandise to sell, or raw material from which to fabricate. By allowing these functions to be supported through eligible cash operating expenses, maximum incentive and confidence are provided to accelerate and support the rehiring process.

### Monthly Submissions

Before any additional funds may be received each month, each recipient must submit an update of the information provided in the initial application, including eligible cash operating costs, revenue, and any "collateral sources" (government grants) of revenue which will offset and reduce the eligible payment (such as forgivable PPP loan proceeds). Businesses are allowed to forecast revenues and expenses for the succeeding month, and true up based on actual results. This also boosts business confidence and encourages businesses to reopen and rehire quickly. As eligible losses decline and the business regains profitability no further payments are necessary and the business exits the program.

### Supporting Coalitions

As TPPF began to advocate workplace recovery policies, a number of organizations also began advocating similar ideas. Efforts were combined, and, at this moment, the coalition has drafted a bill that is being reviewed with potential supporters in Congress. The coalition is growing rapidly and already includes enough business associations to represent almost half the nation's workforce prior to March 1, 2020.

This demonstrates both the need as well as the opportunity. As Americans always do, disparate communities are coming together to solve a mutual problem. This is an opportunity to advance community and unity among Americans.

### Conflicting Jurisdictions

One question the WRA raises in light of the federal government's delegation of decision making about time and manner of reopening is whether any distinction should be made between states or municipalities. In particular, if some states continue to shutter workplaces past what others deem prudent, does that create inequity by causing states reopening to have to pay extra to cover states that do not, thus creating the potential to thwart the intent of the WRA?

Since the federal government has primacy, it could likely override jurisdictional differences. However, it is best to rely on market forces to solve this potential discrepancy. States and localities compete rigorously for business and population. Regions that reopen and begin to thrive quickly due to the benefits of the WRA will put immense market pressure on those that do not. The market is always working, even in spite of governmental constraints. Some might argue it is unfair for one region to pay for the mistakes of another. However, it is more consistent with free-market reasoning to hold that regions that make best use of the WRA will create a substantial competitive advantage and thereby receive a disproportionate return.

### Conclusion

The failure of the American economy would be America's failure and the failure of our government to pay for the actions it has taken.

The free-market economy of the United States was the strongest in the world prior to the COVID-19 pandemic and remains so despite the government-ordered shutdown and the resulting economic downturn. But businesses will not be able to remain closed for long without total and irrevocable economic failure.

These businesses that were strong and profitable before the shutdowns are failing today through no fault of their own. And they and their workforce remain willing and able

to restart operations if they have the capital to do so. The WRA would provide that capital not as an entitlement but as just compensation for the losses incurred as a result of the government actions.

Allowing these businesses to fail would have catastrophic implications for the entire economy and the country as a whole. It would trigger a domino effect of further business and employment losses across the spectrum. If these businesses fail, their workforce and every other business that depends on the failed businesses will also fail. Landlords, business and individual creditors, and others depend on the payments of debtors and tenants. Bankruptcies will likely rise significantly. Many are already predicting significant bankruptcies across the country. Real estate prices may decline through higher foreclosures resulting in added strain and lower tax collections schools and local governments depend on.

The economic relief provided to American businesses and workers through the CARES Act, PPP, and other stimulus bills, while well intentioned, has not yet generated the high level of confidence necessary to fuel a robust economic recovery.

Business owners need additional confidence to reopen their businesses and rehire employees as the impact of the virus recedes. Employees need additional confidence that they will be able to sustain themselves through the current crisis, that their jobs will be there when the crisis recedes, or that the recovery will be sustainable in the event the virus returns later this year. Moreover, employees in many economic sectors are making an economic decision to not return to work until August 1 because their unemployment benefits are more lucrative than their salaries.

Public policymakers have a narrow time frame to choose among several options that will have both an immediate and long-term impact on the nation's society, culture, and economy:

- Discontinue additional spending until the impact of the current stimulus bills can be more effectively evaluated.

- Enact extreme spending measures and greater government involvement in and oversight of every aspect of the economy and the lives of Americans.
- Enact a constitutionally based program with definitive start and end dates to provide businesses just compensation in an unbiased manner for well-defined losses incurred during the government-mandated shutdown and the subsequent recovery period. Such a program, embodied by the WRA, will provide business owners and employees with the financial support they need to sustain themselves through the economic crisis, and the confidence they need to reopen businesses and return to work as quickly as possible.

The WRA helps define government's appropriate constitutional role and response to this unprecedented pandemic by clearly specifying the scope and duration of the losses resulting from the government's taking of property incurred by the mandatory shutdown of the economy and the payments for such business interruption losses, and by terminating the program once its goals have been met.

The cost of the program is high, and likely in excess of \$2 trillion. The cost of doing nothing may result in a prolonged recession that would cost the government even more and undermine morale and confidence in the economy and the government.

The question now is not whether to expend government funds for an action to restart the economy, but whether instead to pay for the action that the government has already taken to shut down the economy. The action has already been taken, now the bill is due. The only question now is how best to ensure the payment in the most fair and efficient means possible. ★

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## **ABOUT THE AUTHOR**



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