CARES ACT BENEFITS FOR SMALL BUSINESSES AND TAX-EXEMPT ORGANIZATIONS

Small Business Administration (SBA) Coronavirus Small Business Guidance & Loan Resources

Paycheck Protection Program

What is it?

This is an SBA 7(a) loan forgiveness that allows the SBA to make "paycheck protection" loans up to $10 million ($1 million for an SBA Express loan) to certain businesses, including tax exempt organizations. For the period of February 15 to June 30, 2020, the law allows the SBA to provide 100% federally guaranteed loans to eligible businesses to pay operational costs including payroll support, paid sick or medical leave, insurance premiums, mortgage, rent, and utility payments, subject to eligibility and limitations. No collateral is required. Loans can convert to grants. Lenders will start processing applications on April 3.

NOTE: Funds will be distributed on a first come, first serve basis until the lender runs out of the funds.

Who is eligible?

Generally, these include for-profit businesses (including sole proprietors, independent contracts, and the self-employed), 501(c)(3)s, 501(c)(19)s, and tribal business concerns with 500 or fewer employees (certain exceptions exist). Prior to the Stimulus Bill, in order to be eligible for a 7(a) Loan a small business applicant had to establish that it was a for-profit operating business located in the U.S. that met the size requirements (based on headcount and/or revenue) and demonstrated a need for the credit. **The CARES Act modifies these general eligibility criteria, expanding them in several key ways:**

- First, **non-profit entities** are specifically eligible for 7(a)(36) Loans.
- Second, businesses need not demonstrate a "need" for the credit. In addition, size restrictions for businesses are in many cases tightened, with entities generally only eligible for a 7(a)(36) Loan to the extent that they have 500 or fewer employees. An exception to this is where the "general," pre-Stimulus Bill 7(a) Loan size restriction for the business is greater than 500 employees.

Where Can a Nonprofit Get a Loan?

Only from an approved lending institution. Banks that already issue SBA Business Loans can issue loans immediately. While final SBA guidance is not yet available, early indicators are that other federally insured depository lenders and credit unions and Farm Credit institutions will be enabled. The loans have a maximum interest rate of 4 percent, a 100 percent government guarantee, and other borrower-favorable terms and conditions. Loan amounts are generally 250% of average monthly payment costs during the last year up to $10 million.

Borrower Certification Requirement

A borrower under the Paycheck Protection Program must certify in "good faith" that (i) current economic conditions necessitated the loan, (ii) the funds will be used to retain workers and make other eligible payments, (iii) the borrower has not applied for another 7(a)(36) Loan for "the same purpose and duplicative of" the requested loan, and (iv) the borrower has not in fact received another 7(a)(36) Loan for the same purpose and duplicative of the requested loan.

What are Loan Forgiveness Requirements?

Nonprofits are eligible for loan forgiveness for the amount spent during the first eight weeks of the loan on payroll costs, interest payment on mortgage, rent, and utilities. The portion of these expenses that is eligible for forgiveness depends on the percentage by which you reduced FTE staff and/or salaries (relative to a comparable period in 2019). In general, the amount of payroll, interest paid on a covered mortgage obligation, covered rent payments, and covered utility payments that are <u>actually paid</u> by the borrower during the 8-week period beginning on the date the loan is obtained is forgivable. The amount of forgiveness cannot exceed the amount of 7(a)(36) Loan principal (*i.e.*, not principal plus interest).

When to Apply?

The program is authorized to run through June 30, 2020. Lenders will start processing applications on immediately.

NOTE: Funds will be distributed on a first come, first serve basis until the lender runs out of the funds.

***Special Note:** If the loan benefits under this provision are utilized, the employee retention credit also authorized by the bill cannot be taken.

Economic Injury Disaster Loans (EIDL)

What is it?

The EIDL loan is a low-interest federal loan issued by the SBA to alleviate economic injury small businesses or private non-profits are experiencing injury and, in this case, injury caused by the Coronavirus (COVID19). These loans become available once a county or state gets an Economic Injury Disaster Loan assistance declaration also issued by the SBA. This loan program provides small businesses with working capital loans of up to $2 million that can provide vital economic support to small businesses to help overcome the temporary loss of revenue they are experiencing.

Who qualifies?

Small businesses with fewer than 500 employees, including tax exempt organizations, 501(c)(19) veterans' organizations and Tribal businesses that are unable to pay their bills due to the coronavirus pandemic are eligible to apply for an advance, up to $10,000.

How to apply

- Organizations can complete the application and upload documents to the SBA online portal.
- Applications can be mailed to the SBA's processing center or taken to a SBA disaster center, but many offices may be closed to the public now.

When are the loans available?

- April 3, for small businesses and sole proprietors.
- April 10, for independent contractors and self-employed individuals.

What is available?

- The maximum loan size is $2 million. Applicants may request an advance of up to $10,000 from the SBA.
- The advance will be distributed within three (3) days. **Applicants are not required to repay this advance.**
- Funds will be made available within three days of a successful application, and the loan advance will not have to be repaid.
    - The interest rate is 3.75% for small businesses.
    - The interest rate for non-profits is 2.75%.
- These loans are available until December 31, 2020. *Note:* the amount of the grant does not need to be returned if the loan application is denied but would be counted toward the loan forgiveness amount for payroll cost under a Paycheck Protection Program 7(a) loan.

Documentation Requirements for Nonprofits

Most applicants must provide recent tax returns and other documentation. However, nonprofit organizations can substitute the organization's IRS tax exempt certification along with complete copies of the organization's statement of activities in lieu of tax returns.

***Special Note:** Organizations cannot receive loans under both loan programs, unless the loan applications are for different purposes such as personnel and rent costs for 7(a) and other operating expenses for EIDL.

Other Relief for Businesses including Tax Exempt Organizations

Employee Retention Credit

At a high level, section 2301 of H.R. 748 provides a refundable credit up to $5,000 per employee against employment taxes for employers who retain employees during the COVID-19 crisis. **It must be taken in lieu of the SBA paycheck protection loan program described above.**

The employee retention credit has a maximum dollar value to an employer of $5,000 per employee, which is realized in part over the calendar quarters that the employer retains the employee.

More technically, the employee retention credit is available to any "eligible employer" for "each calendar quarter" in an amount equal to 50 percent of the "qualified wages" paid with respect to "each employee of such employer for such calendar quarter" between March 12, 2020 and January 1, 2021. However, the total amount of "qualified wages" that can be taken into account "for all calendar quarters" is $10,000.

*This credit is applicable against the employer-side portion of employment taxes with respect to all wages paid by an employer of all of the employees of that employer for a calendar quarter. Any excess amount of credit for a quarter is refundable to the employer.

An "eligible employer" is one that was engaged in a business in 2020 and who meets one of two standards measured on a quarterly basis.

- The first is met where the employer's business operations were "fully or partially suspended" during the calendar quarter due to government orders to limit commerce, travel, or group meetings due to COVID-19. **Nonprofits are deemed to have been engaged in a trade or business for these purposes and to have been fully or partially suspended due to COVID-19.**
- The second occurs when the business has suffered a significant decline as a result of COVID-19.

The measure for such a decline includes:

- The period that begins with the first calendar quarter where the business's gross receipts for the calendar quarter are less than 50 percent of gross receipts for the same calendar quarter in the prior year.
- Business with gross receipts that end the calendar quarter beginning after the first calendar quarter where gross receipts are at least 80 percent of gross receipts for the same calendar quarter in the prior year.

In other words, a business first meets this test where gross revenues have declined by more than 50 percent versus the prior year's calendar quarter and continues to meet this test until such time as revenues have increased to at least 80 percent of the prior year's calendar quarter.

Qualified wages depend on the size of the business.

- For businesses up to 100 employees, qualified wages of an eligible employer are simply the wages paid by the employer (subject to the limitation described below).
- For businesses between 101 and 500 employees, qualified wages are wages paid with respect to which an employee is not providing services to the employer due to COVID-19. For these purposes, wages include qualified health plan expenses properly allocable to the underlying wages.

In both cases, wages paid cannot exceed those paid for work in the 30 days immediately preceding the period during which a business qualifies for this relief.

Future Rules and Restrictions

Under future rules, (likely to be issued by the Treasury Department and IRS) employers cannot take into account certain employees for purposes of the credit. For example, parties who are related to the employer (i.e., the business) in certain ways (e.g., the business's owner(s), certain family members and/or related parties) are ineligible for the credit, as are certain new hires (e.g., persons who have not performed a threshold number of hours of service for the employer).

Under future rules (likely to be issued by the Treasury Department and IRS), the portion of wages that equal the value of the credit taken by an employer with respect to an employee is non-deductible. In other words, if an employer takes a $5,000 credit with respect to an employee, the employer's future deduction for the employee's compensation is reduced by $5,000. This would appear to thereby impact a business's section 199A deduction, reducing the "wages" paid for purpose of the deduction. Until further guidance is issued, however, this result is not precisely clear.

An employer can elect to not apply the provision. In addition, governmental employers and employers taking an SBA 7(a) loan by virtue of section 1102 of H.R. 748 are ineligible for the credit.

The provision also requires the IRS ("shall") to waive penalties for a failure of an employer to deposit applicable employment taxes if the IRS determines that the failure was due to a **"reasonable anticipation"** of a credit allowed by the provision.

Companies with 100 or more employees will be able to claim the tax credit for employees who are working only part time as a result of the coronavirus pandemic, under amended guidelines expected to be issued by the IRS and Treasury Department. Initial guidance limited the credit for companies of that size to wages paid to employees no longer at work but still on their payrolls. But that wasn't in line with the new CARES Act that includes the employee retention credit or with congressional intent.

Delay of Payroll Tax Remittance

This provision of the CARES Act permits employers to delay payment of employer payroll taxes (Social Security tax) between the day the bill became law through January 1, 2021. Fifty percent will be due by December 31, 2021 and the other 50 percent will be due on December 31, 2022.

***Note: this provision does not apply to employer who have loans forgiven under the Paycheck Protection Program.**