

CARES ACT: PAYCHECK PROTECTION PROGRAM PROVIDES SMALL BUSINESSES AN OPPORTUNITY FOR RELIEF

Posted on March 31, 2020 by R. Thomas Avery



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DISCLAIMER: Please note this blog post relates to a different program than the "Emergency EIDL Grants" program (relating to 7(b) Economic Injury Disaster Loans) under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act").

The recently passed Coronavirus Aid, Relief, and Economic Security Act ("**CARES Act**") has important provisions for small businesses under what is called the "**Paycheck Protection Program**," which addresses temporary changes to 7(a) loans

Under the program, the Small Business Administration ("**SBA**") will make loans of up to **\$10 million** available to "**small business concerns**", defined as a business that employs not more than the **greater of 500 employees or** the business' applicable size standard in number of employees.

If you qualify, money will be available to cover payroll, employee salaries, mortgage payments (*interest only*), rent, utilities and pre-existing debt obligation. The following is a summary of the key provisions.

The choice of a lawyer is an important decision and should not be based solely upon advertisements.

Who is Eligible for CARES Act?

From March 1, 2020 to December 31, 2020, the CARES Act directs the SBA to make loans available to businesses (and certain nonprofits) that employ not more than the **greater** of **500** employees **or** the business' applicable size standard in number of employees.

In effect, if your business has **fewer** than **500** employees (or whatever amount applies to your industry via the size standard chart), you are eligible for these loans (with the limited list of excepted industries – e.g. financial, gambling, private clubs) **so long as** your business:

- **(i)** was in operation as of **February 15, 2020 and**
- **(ii)** had employees it was paying salaries and payroll taxes to.

The complicated portion, unfortunately, may be in determining your total number of employees, as it may not just include *your* business' employees . Unless you are in the accommodation (e.g. hotels, motels, inns) **or** the food industry (e.g. fast food service, restaurants) **or** are a franchise, nonprofit, or veterans organization, in determining your business' number of employees, you **must** factor in affiliates.

The test in determining whether or not your business has any "**affiliates**" is easiest described as the ability to control. If two businesses—*even if in unrelated industries*—have the same controlling owner or manager, those two businesses will be deemed to be affiliated and **both** of their employees will need to be aggregated to determine if the business applying for the loan meets the eligibility requirement regarding maximum number of employees.

How Much is Available?

The loans are limited to the **lesser** of \$10 million or the...average total monthly payments by the applicant for payroll costs multiplied by 2.5. Payroll costs do not include the portion of an employee's annual compensation which exceeds \$100,000 . For example, if your business' payroll, as defined in the act, averages \$1 million a month over the last year, you could borrow up to \$2.5 million under this program.

Additionally, to the extent your business has a 7(b) Economic Injury Disaster Loan, the outstanding amount of such loan will be **added** to the previous calculation, with such loan being rolled into this loan.

Do I Have to Give a Personal Guarantee or Collateral?

The loans under this program do not require personal guarantees from the business owners nor collateral. **However**, to the extent a member, shareholder, etc. uses the proceeds of the loans for an unauthorized use, then recourse is available.

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What are the Terms?

Any portion of the loan which is not forgiven (see below) will have a **10 year term** at not more than **4%**. Such loan can be **deferred**, though (including principal, interest, and fees), for a period not less than 6 months but not more than 1 year.

Will I Have to Pay it Back?

A portion of this loan may be forgiven by the SBA. The forgivable amount is equal to the amount spent by the borrower over the eight week period after the loan was originated on payroll costs, rent, and/or mortgage payments (*interest only*) and utilities. The amount of such loan forgiveness **cannot exceed the principal loan amount**.

Additionally, the amount of loan forgiveness **will be reduced if**:

- the average number of **full-time equivalent** employees employed by the business during the **8 week period** beginning on the loan origination date *is less than* the average number of full-time equivalent employees between either February 15, 2019 through June 30, 2019 **or** January 1, 2020 through February 29, 2020

AND/OR

- any employees' (that did not receive, during any single pay period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000) **total** wages or salaries, during the **8 week period** beginning on the loan origination date, were **reduced** *in excess of 25%* of the employee's total wages or salary during the most recent full quarter for which the employee was employed *prior to* the 8 week period

UNLESS

- *no later than* **June 30, 2020**, the business has *eliminated* the reduction of full-time employees **and/or** the business has *eliminated* the reduction in salary or wages of employees

The portion of any loan forgiven under this program is excluded from gross income and is therefore not subject to income tax.

What if I Already Have an SBA Loan?

The CARES Act also includes provisions for those with pre-existing SBA loans. Under the Act, lenders are obligated to give a complete payment deferment for one year. If you have such a loan, it is important that you reach out to your lender or the SBA to document the deferment. Unfortunately, you can't just stop paying for one year without contacting the SBA and securing the deferment in writing.

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