

SBA'S DISASTER ASSISTANCE LOAN IN THE AGE OF COVID-19: "ECONOMIC INJURY DECLARATION" BY SBA REQUIRED FOR MISSOURI

Posted on March 20, 2020 by Michelle F. Schwerin



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In order to minimize disruption to small businesses, on **Tuesday, March 17, 2020**, the **U.S. Small Business Administration** issued revised criteria for states (or territories) seeking an "**economic injury declaration**" related to COVID-19.

A state's governor must seek, and the SBA must issue, an economic injury declaration in order for that state's small businesses to be eligible for the SBA Disaster Assistance Loans. However, the revised criteria are meant to relax the criteria that must be met in order for the SBA to issue such a declaration.

The SBA *used* to require a state to provide documentation certifying that at least five small businesses—with at least one business located in each declared county—suffered "substantial economic injury as a result of a disaster."

Substantial economic injury, according to the SBA, "generally means a decrease in income from operations or working capital with the result that the business is unable to meet its obligations and pay ordinary and necessary operating expenses in the normal course of business."

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Under the new criteria, it does not matter where in the state the businesses impacted by COVID-19 are located. If five small businesses have suffered substantial economic injury *anywhere within the state*, the SBA may declare all such businesses eligible for Disaster Assistance Loans.

Once the SBA Issues that Declaration, Economic Injury Disaster Loan Assistance Becomes Available to “Small Businesses”

As of **Wednesday, March 18**, Missouri Governor Parson directed the Missouri State Emergency Management Agency and the Missouri Department of Economic Development to seek assistance for Missouri businesses through the SBA's Economic Injury Disaster Loan program.

Once such a declaration is issued by the SBA, **Economic Injury Disaster Loans for as much as \$2,000,000** will be available to eligible small businesses within the state at an annual interest rate of **3.75%** to for profit businesses and **2.75%** to non-profits for up to a 30-year term. The loans may be used to pay for fixed debts, payroll, accounts payable and other obligations that cannot be paid as a result of the coronavirus disaster.

The loan amount a small business can receive is based on that small business' actual economic injury and financial needs (but will not exceed **\$2,000,000**). Thus, it is important to carefully document all such losses, including relevant evidence and records to show that the loss resulted from the COVID-19 pandemic.

Once Missouri seeks an economic injury declaration and the SBA issues it, small businesses may use the **SBA's Disaster Loan Assistance portal** to provide such information. An SBA officer will then verify losses and determine eligibility.

SBA's Disaster Loan Assistance Portal:

Worth noting is that the SBA *used* to provide SBA Disaster Assistance Loans only to small businesses within counties identified as disaster areas by that state's governor. **Because of the new criteria**, once the SBA issues an economic injury declaration, the SBA Disaster Assistance Loans will be available *statewide* to all eligible small businesses.

[SBA's Disaster Loan Assistance Portal](#)

Qualifying as a “Small Business”

Size Standard and Applicable Affiliates are Basis for “Small Business” Qualification

Size Standard

How "**small business**" is defined, and thus whether an Economic Injury Disaster Loan is available to a business, is determined by a "size standard" expressed—depending on the type of business—in either the maximum number of employees or the maximum annual receipts. Thus, whether a

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company is deemed a "small business" for SBA purposes and qualifications, is completely fact dependent. The following chart (at **Section 121.201**) sets forth the applicable "**size standards**":

Small Business Size Standards by NAICS Industry

For example, according to the chart:

- "**lessors of residential buildings and dwellings**" is deemed a "small business" for purposes of the SBA if "annual receipts" do not exceed **\$30,000,000**
- "**lessors of nonresidential buildings (except mini-warehouses)**" is deemed a "small business" for purposes of the SBA if "annual receipts" do not exceed **\$30,000,000**
- "**lessors of mini-warehouses and self-storage**" is deemed a "small business" for purposes of the SBA if "annual receipts" do not exceed **\$30,000,000**
- "**offices of real estate agents and brokers**" is deemed a "small business" for purposes of the SBA if "annual receipts" do not exceed **\$8,000,000**
- "**residential property managers**" is deemed a "small business" for purposes of the SBA if "annual receipts" do not exceed **\$8,000,000**
- "**nonresidential property managers**" is deemed a "small business" for purposes of the SBA if "annual receipts" do not exceed **\$8,000,000**
- "**hotels (except casino hotels) and motels**" is deemed a "small business" for purposes of the SBA if "annual receipts" do not exceed **\$35,000,000**
- "**full service restaurants**" is deemed a "small business" for purposes of the SBA if "annual receipts" do not exceed **\$8,000,000**
 - *"full service restaurants" meaning establishments primarily engaged in providing food services to patrons who order and are served while seated (i.e., waiter/waitress service) and pay after eating*
- "**limited service restaurants**" is deemed a "small business" for purposes of the SBA if "annual receipts" do not exceed **\$12,000,000**
 - *"limited service restaurants" meaning establishments primarily engaged in providing food services (except snack and nonalcoholic beverage bars) where patrons generally order or select items and pay before eating*
- "**drinking places (alcoholic beverages)**" is deemed a "small business" for purposes of the SBA if "annual receipts" do not exceed **\$8,000,000**
- "**theatre companies and dinner theatres**" is deemed a "small business" for purposes of the SBA if "annual receipts" do not exceed **\$22,000,000**
- "**bowling centers**" is deemed a "small business" for purposes of the SBA if "annual receipts" do not exceed **\$8,000,000**

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Annual Receipts

"**Annual Receipts**" is defined in Section 121.104 (SBA Regs) as "all revenue in whatever form received or accrued from whatever source . . . reduced by returns and allowances." The entire definition from **Section 121.104** of the **Federal Regulations** is pasted below:

Receipts means all revenue in whatever form received or accrued from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances. Generally, receipts are considered "total income" (or in the case of a sole proprietorship "gross income") plus "cost of goods sold" as these terms are defined and reported on Internal Revenue Service (IRS) tax return forms (such as Form 1120 for corporations; Form 1120S for S corporations; Form 1120, Form 1065 or Form 1040 for LLCs; Form 1065 for partnerships; Form 1040, Schedule F for farms; Form 1040, Schedule C for other sole proprietorships). Receipts do not include net capital gains or losses; taxes collected for and remitted to a taxing authority if included in gross or total income, such as sales or other taxes collected from customers and excluding taxes levied on the concern or its employees; proceeds from transactions between a concern and its domestic or foreign affiliates; and amounts collected for another by a travel agent, real estate agent, advertising agent, conference management service provider, freight forwarder or customs broker. For size determination purposes, the only exclusions from receipts are those specifically provided for in this paragraph. All other items, such as subcontractor costs, reimbursements for purchases a contractor makes at a customer's request, investment income, and employee-based costs such as payroll taxes, may not be excluded from receipts.

For certification as a "small business" submitted on or before **January 6, 2022**, there is a choice in **how to calculate "annual receipts"**. You may either calculate annual receipts and the receipts of affiliates (if applicable) using **(i)** the total receipts of the concern, including applicable affiliates, over its most recently completed **5** fiscal years divided by 5 **or (ii)** the total receipts of the concern, including applicable affiliates, over its most recently completed **3** fiscal years divided by 3.

Affiliates

A "small business" is deemed to have an "**affiliate**" when "one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists" **Section 121.301(f)**. There are very few exceptions.

For example, one exception applies to businesses owned/controlled by Indian Tribes. While the SBA looks at the "totality of the circumstances" in determining affiliation, affiliation may be found based on stock ownership, common management, identity of interests, joint ventures, etc.

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Affiliation is an important determination because if a "small business" has an affiliate (or affiliates) when seeking certification as a "small business," the **affiliates annual receipts** (or employees, depending on the business type) **must be added to the above calculation**. Thus, while an entity on its own may qualify as a "small business," when the revenues of its affiliates are included, it may not.

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