

COVID-19 SPECIAL EDITION #3



CARES Act: Small Business Loans

On Friday, March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) became law. Given the harsh impact that mandated closures and reduced business opportunities created by the COVID-19 pandemic, the CARES Act provides aid to small businesses struggling to cope with the economic uncertainty of the pandemic in the form of loans and grants through the Small Business Administration (“SBA”).

As of April 3rd, 2020, these loans became available.



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The Cares Act created the “Paycheck Protection Program,” which provides loans to businesses to help maintain payroll or to pay bills such as rent and utilities. The CARES Act authorizes approved SBA lenders to lend under the Paycheck Protection Program. Businesses interested in receiving a loan under this program should reach out to a financial institution authorized to make loans by the SBA to help determine eligibility and what steps they need to take to begin the loan process. A list of lenders can be found [here](#).

Additionally, businesses should immediately begin preparing and compiling the necessary documentation for their loan applications in order to expedite the process. If your business is in need of funds immediately to help maintain the viability of your operations, you may also want to discuss with your 7(a) lender your potential eligibility for the Express Bridge

Loan program, which permits a loan of up to \$25,000 on short notice.

The Department of the Treasury has also recently released draft guidance for borrowers under the Paycheck Protection Program. While this guidance is not final, it will be noted in this article where relevant to provide a better idea of how the program will be administered.

The Act also expanded the availability of Economic Injury Disaster Loans (“EIDL”) to businesses that have suffered substantial economic injury directly related to COVID-19. If your business is interested in applying for the EIDL program, you should visit [the SBA’s website](#). This website will guide you through the application process and let you know what documentation is necessary to complete the application.

Please note this article is meant only to provide a brief overview and general information on the CARES Act. Nothing within this article is intended to be legal advice. If you have questions about how the CARES Act relates specifically to your business or organization, please contact us at Kennerly, Montgomery, and Finley and we would be happy to assist you.

Paycheck Protection Program

The Paycheck Protection Program, created by the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act” or “Act”), makes loans available to small businesses, non-profit organizations, veteran’s organizations, and tribal businesses, so long as these entities have fewer than 500 employees. A non-profit organization, for purposes of the Act, is one that is described by section 501(c)(3) of the Internal Revenue Code (“Code”) and is tax exempt pursuant to section 501(a) of the Code. For purposes of determining the number of employees, the Act counts anyone as an employee who works on a full-time, part-time, or other basis. Additionally, the Act has also expanded the availability of loans to independent contractors, sole proprietorships, and other self-employed individuals. For independent contractors, sole proprietorships, and self-employed individuals, the applicant must have been operating during what the Act calls the “covered period,” which is defined as February 15, 2020 to June 30, 2020 (“Covered Period”).

The Paycheck Protection Program provides loans up to \$10,000,000 to assist businesses with expenses that they may have a difficult time meeting. The actual loan amount to any given business will vary based on a formula that uses payroll costs as a baseline to determine the amount of assistance needed. Notably, the Act excludes from its definition of “payroll costs” the compensation of an individual employee in excess of an annual salary of \$100,000, which likely allows a borrower to count \$100,000 of an employee’s salary or wages even if that employee makes more than \$100,000 per year. This is consistent with recent guidance from the Treasury Department, which provided that “payroll costs are capped at \$100,000 on an annualized basis for each employee.” If a loan application is approved, the loan funds may be used for various approved purposes, including:

- payroll costs, consisting of:
 - salary, wages, commissions, or tips;
 - employee benefits including costs for vacation , parental, family, medical or sick leave; allowance for separation or dismissal; payments required for the provisions of group health care benefits including insurance premiums; and payment of any retirement benefit;
 - state and local taxes assessed on compensation; and
 - for a sole proprietor or independent contractor: wages, commissions, income, or net earnings from self-employment, capped at \$100,000 on an annualized basis for each employee.

- mortgage interest payments, incurred before the Covered Period
- rent payments, under lease agreements in force before the Covered Period
- utilities, for which service began before the Covered Period

- interest on debt obligations incurred prior to the Covered Period.

The loans under this program have a maximum interest rate of 4%, however, Treasury guidance has stated that the interest rate will be a fixed interest rate of 1.00%. It is unclear whether the 1.00% interest rate is on a per month or per annum basis and further guidance is necessary on this issue. Similarly, the bill is silent as to whether the 4% maximum interest rate is on a per month or per annum basis.

The Act also permits loans taken under the EIDL program after January 31, 2020 to be refinanced to Paycheck Protection Program loans and raises the limit on express loans from \$350,000 to \$1,000,000. Any amount of a loan under the Paycheck Protection Program that is not forgiven, as described below, has a maximum maturity date of ten years from the date the forgiveness application is submitted, however, the Treasury has indicated that loans under the program must be paid within two years. According to the Treasury, the loans may be repaid earlier without any prepayment penalty or fee.

In order to ease the burden on those seeking loans under this program, the Act waives any requirement that the applicant make a personal guarantee or put up any collateral in connection with the loan. Further, the Act also makes the loans non-recourse, meaning that the individual members, shareholders, or partners in a business are not able to be sued for the debt of the business so long as the funds are used for an authorized purpose. The Act also waives the requirement that the applicant not be able to receive credit elsewhere and any fees that would normally be required to apply for a loan under this section of the Small Business Act.

A borrower that was in operation as of February 15, 2020 and had an application for a loan under this section approved or pending as of the date of the enactment of the Act, March 27, 2020, is eligible for deferment of their loan payments. Specifically, an eligible borrower will have its payments, including principal, interest, and fees, deferred for at least six months and up to one year. Additionally, the Act also provides for subsidies for SBA loans taken out prior to the enactment of the CARES Act or for SBA loans taken out after the enactment, but which are not Paycheck Protection Program loans. In particular, the SBA shall pay the principal, interest, and fees on loans:

- made prior to the CARES Act and not on deferment, for six months beginning with the next due payment;
- made prior to the CARES Act and on deferment, for six months beginning with the next payment due after the end of the deferment period;
- made in the six-month period beginning on the date of enactment of the CARES Act, March 27, 2020, for six months beginning with the first payment due on the covered loan.

Any person applying for a loan under this program must make a good faith certification of the following:

- That the uncertainty of current economic conditions makes the loan necessary to support ongoing operations of the recipient;
- That funds will be used for the permissible purposes;
- That no other loan application under this section is pending for the same purpose and duplicative of amounts applied for or received under a covered loan; and
- That during the covered period the recipient has not received amounts under this section for the same purpose and duplicative of amounts applied for or received under a covered loan.

The Treasury has indicated that small businesses and sole proprietorships may begin to apply for loans under the program beginning April 3, 2020, and that independent contractors and self-employed individuals may begin seeking loans beginning April 10, 2020. Though the program lasts until June 30, 2020, the Treasury strongly encourages those seeking these loans to apply as soon as possible due to the funding cap on the program and the time it will take lenders to process the loans.

It is important for businesses or organizations considering whether to seek out a Paycheck Protection Program loan to know that receipt of a loan under the Small Business Act will exclude the business or organization from receiving the Employee Retention Credit for employers subject to closure due to COVID-19.

Additionally, if a business or organization has a Small Business Act loan forgiven pursuant to the CARES Act, then that business or organization will also not be able to take advantage of the deferment of employer payroll taxes included in Title II of the Act. Title II of the Act contains various tax provisions relating to net operating losses and other important tax features both for upcoming and past tax years that businesses. Those features are not considered by this article, and business should consult with their accounting experts on any tax related questions.

Loan Forgiveness Under the Paycheck Protection Program

Loans made under the Paycheck Protection Program are eligible to be forgiven up to the entire amount of the principal of the loan. The amount of a loan that is forgivable is calculated by summing over an eight-week period beginning with the date the loan is originated the total of:

- Payroll costs;
- Interest payments on a mortgage existing prior to February 15, 2020;
- Rent payments on a lease agreement existing prior to February 15, 2020; and
- Utility payments on any service that began prior to February 15, 2020.

Treasury guidance has indicated that, due to expected high usage of the program, not more than 25% of the forgiven amount may be for non-payroll costs. The amount of forgiveness shall be reduced based upon two considerations:

1. whether the borrower reduced the number of employees during the eight-week period; and
2. whether the borrower reduced employee salaries or wages by more than twenty five percent during the eight-week period.

With respect to the amount of a forgiveness reduction based upon a reduction in the number of employees, the amount is calculated by determining the amount of forgiveness based upon the calculation above and multiplying that amount by a fraction where the numerator is the average number of full-time equivalent employees per month during the covered period and the denominator is either:

1. the average number of full-time equivalent employees per month between February 15, 2019 and June 30, 2019; or
2. the average number of full-time equivalent employees per month between January 1, 2020 and February 29, 2020.

The borrower may elect which calculation method to use. If the borrower is a seasonal employer, the denominator is the average number of full-time equivalent employees per month employed by the borrower between February 15, 2019 and June 30, 2019.

As it relates to the reduction in salary and wages, the amount of forgiveness is reduced by the total amount of any reduction in salary or wages of any employee in excess of twenty-five percent (25%) of the total salary or wages of the employee during the most recent full quarter during which the employee was employed. However, employees who, during any single pay period, made more than \$100,000 in annualized salary are excluded from this calculation.

However, if there is a reduction in employees or wages and salaries of employees between February 15, 2020 and April 26, 2020 and that reduction is eliminated no later than June 30, 2020, then the amount of forgiveness will be calculated without regard to any such eliminated reduction. Additionally, if a borrower has tipped employees the borrower may receive forgiveness for additional wages paid to those employees. In order to receive loan forgiveness, the borrower must submit an application for forgiveness to its lender and include with the application the following documentation:

- Payroll tax filings;
- State income, payroll, and unemployment insurance filings;
- Cancelled checks, payment receipts, transcripts of accounts, or other documents showing payments on mortgage, rent, utility, or other debt obligations; and
- Certification that the information is true, and the loan was used for covered expenses.

Emergency Injury Disaster Loans

The CARES Act has expanded access to Economic Injury Disaster Loans (“EIDL”) under section 7(b)(2) of the Small Business Act. These loans are now available to businesses with less than 500 employees, independent contractors, sole proprietorships, co-ops with less than 500 employees, tribal small business concerns with less than 500 employees, private non-profit organizations, and small agricultural co-ops.

An applicant for an EIDL must have suffered “substantial economic injury” directly related to COVID-19. The Act defines the “covered period” for this section as January 31, 2020 to December 31, 2020. The Act waives the requirements that the applicant not be able to receive credit elsewhere and that the business have been in operation for one year prior to the date of the application for the loan. However, these requirements are not waived for businesses that were not in operation as of January 31, 2020. No personal guarantee is required for an EIDL under \$200,000, however, collateral is required for any EIDL over \$25,000.

The maximum amount for an EIDL under this section is \$2,000,000. The actual amount of an EIDL loan is determined by the amount of economic injury suffered by the applicant less contributions from any potential insurance proceeds or other recovery avenues. The interest rates on an EIDL loan are 3.75% for businesses and 2.75% for non-profit entities. The term of an EIDL loan is determined on a case-by-case basis, but is capped at a 30-year term. The first payment on an EIDL loan is due twelve months from the issue date of the funds.

Of particular importance, the Act permits an EIDL applicant to request an advance on the requested funds three days after submission of the application. The advance is capped at \$10,000 and may be used to pay for:

- Paid sick leave for employees unable to work due to the effects of COVID-19;
- Maintaining payroll to retain employees during slowdowns and disruptions;
- Meeting increased costs to obtain materials unavailable from the applicant’s original source due to interrupted supply chains;
- Making rent or mortgage payments (not just interest); and
- Repaying obligations that are unable to be met due to revenue loss.

Even if the EIDL application is eventually denied, the advance is considered to be a grant that is not required to be paid back. Further, if the applicant is approved for or transfers into the Paycheck Protection Program, the advance is reduced from the amount of loan forgiveness.

We've Got Your Six (Reasons for Paid Sick Leave Under the FFCRA) Covered.

by **Ashley N. Trotto, Esq.**
with assistance from Law Clerk Zach Kiffmeyer

The DOL has issued some much-



needed guidance on applying the six qualifying reasons for paid sick leave under the Families First Coronavirus Response Act (“Act”). We’ve summarized the six qualifying reasons, including the new guidance, below:

1) An employee is unable to work because he or she is subject to a Federal, State, or local COVID–19 quarantine or isolation order.

a) An employee may take paid sick leave only if being subject to one of these orders prevents him or her from working or teleworking. Quarantine or isolation orders include orders advising some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility. The key question is whether the employee would be able to work or telework “but for” being required to comply with a quarantine or isolation order.

b) An employee subject to one of these orders may not take paid sick leave where the employer does not have work for the employee (e.g., if the employer is temporarily closed due to COVID-19). This is because the employee would be unable to work even if he or she were not required to comply with the quarantine or isolation order.

2) An employee is unable to work because he or she has been advised by a health care provider to self-quarantine for a COVID–19 reason.

The regulations clarify that the advice to self-quarantine must be based on the health care provider’s belief that the employee has COVID–19, may have COVID–19, or is particularly vulnerable to COVID–19. And, self-quarantining must prevent the employee from working.

3) An employee is experiencing symptoms of COVID–19 and seeking a medical diagnosis.

a) The regulations list the following symptoms that could trigger an employee to seek a medical diagnosis: fever, dry cough, shortness of breath, or other COVID–19 symptoms identified by the CDC.

b) Paid sick leave must be limited to the time the employee is unable to work because he or she is taking “affirmative steps” to obtain a medical diagnosis. Affirmative steps include time spent making, waiting for, or attending an appointment for a test for COVID–19.

c) An employee may continue to take leave while:

- experiencing any COVID-19 symptoms or after testing positive for COVID–19, provided that the health care provider advises the employee to self-quarantine; or
- awaiting a test result.

In the case of an employee who exhibits COVID–19 symptoms and seeks medical advice but is told that he or she does not meet the criteria for testing and is advised to self-quarantine, he or she is eligible for leave under the second reason, provided he or she meets all the requirements spelled out above.

****For the first three qualifying reasons** , an employee who can telework is not entitled to paid sick leave if: (a) the employer has work for the employee to perform; (b) the employer permits the employee to perform that work remotely; and (c) there are no extenuating circumstances, including serious COVID-19 symptoms, that prevent the employee from performing that work.

4) An employee is unable to work because he or she needs to care for an individual who (a) is subject to a Federal, State, or local quarantine or isolation order; or (b) has been advised by a health care provider to self-quarantine based on the health care provider’s belief that he or she has COVID-19, may have COVID-19, is particularly vulnerable to COVID-19 or the health care provider has other COVID-19 related concerns.

The regulations clarify that the individual being cared for must be an immediate family member, roommate, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for the person if he or she self-quarantined or was quarantined.

5) An employee is unable to work because the employee needs to care for his or her son or daughter if (a) the child's school or place of care has closed; or (b) the childcare provider is unavailable, due to COVID-19 related reasons.

An employee may take paid sick leave to care for his or her child only when the employee needs to, and actually is, caring for his or her child. An employee is not eligible for paid leave if another suitable individual—such as a co-parent, co-guardian, or the usual childcare provider—is available to provide the care the employee's child needs.

6) An employee is unable to work because the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

This is a "catch-all" provision for other circumstances not specifically mentioned in this regulation. To date, no additional conditions have been listed.

A reminder: The required rate of compensation is generally the employee's regular rate of pay. However, for uses described in (4), (5) or (6) above, the employee's required rate of compensation shall generally be 2/3 of the employee's regular rate of pay. Paid sick leave under the Act shall not exceed \$511 per day (\$5,110 in the aggregate) for uses described in (1), (2), or (3) above or \$200 per day (\$2,000 in the aggregate) for uses described in (4), (5), or (6) above.

Kennerly Montgomery appreciates your time, and our attorneys are here to assist you during these unusual and unprecedented times. If you have any questions, please reach out to one of our attorneys at (865) 546-7311.

Prior Coverage

**CARES Act
Provides Early
Access to
Retirement Funds
and Other
Retirement Plan
Relief Due to
COVID-19**

**DOL Provides
Limited Guidance
on New Families
First Coronavirus
Response Act**



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A Summary of the Families

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