

CARES Act and COVID-19 Quick Reference Guide

Paycheck Protection Program Loans (SBA)

Generally – under the Act, Paycheck Protection Program Loans (“PPL”) under Section 7(a) of the Small Business Act are to be 100% guaranteed by the Small Business Administration (the “SBA”).

○ **Eligibility** – Any business that employs no more than 500 employees unless the business’s covered industry’s SBA size standard allows more than 500 employees.

○ **Affiliation and private equity / sponsor considerations** – The “affiliation rules” (as outlined below) will typically aggregate all of a sponsor’s portfolio companies for calculation of the “number of employees” for eligibility purposes.

Exclusions – There are, however, three exclusions to the application of the “affiliation rules”: (i) businesses in Sector 72 under the NAICS (i.e., companies that operate hotels, motels or restaurants or provide traveler accommodations or catering services); (ii) franchise businesses with SBA franchisor identifier codes; and/or (iii) any business that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act (i.e., from a Small Business Investment Company).

○ **Certification** – Eligible borrower must certify that: (i) the borrower needs the funds to operate because of current economic disruption (note: the Act states that all borrowers are presumed to be adversely affected by COVID-19), (ii) the funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments (note: the Act does not require borrowers to provide any documentation to support this certification; however, in order to receive loan forgiveness, borrowers are required to produce documentation showing evidence of the amounts eligible for forgiveness); (iii) the borrower does not have an application pending for a loan made under section 7(a) of the Small Business Act; and (iv) the borrower has not received a 7(a) loan during the period beginning February 15, 2020 and ending December 31, 2020.

○ **Loan amount** – The lesser of \$10 million; or the sum of: (i) 250% of the borrower’s average monthly payroll costs for 12 months prior to applying for the PPL, and (ii) the outstanding amount of any Economic Injury Disaster Loan made under section 7(b)(2) of the Small Business Act after January 31, 2020.

“Payroll costs” include: (i) employee and independent contractor wages (capped at \$100,000/year per employee or independent contractor), (ii) payment for vacation, parental, family, medical, or sick leave, (iii) severance payments; (iv) payment for group health

care benefits, including insurance premiums; (v) retirement benefit payments; and (vi) state and local payroll taxes. “Payroll costs” do not include: (x) federal payroll taxes; (y) compensation for employees with a principal residence outside of the United States; or (z) sick leave wages or family leave wages which qualify for a credit under the Families First Coronavirus Response Act.

○ **Terms of the PPL** – Term: Any balance remaining after loan forgiveness can have a maximum maturity of 10 years from the date on which the borrower applied for debt forgiveness.

Interest Rate: The interest rate cannot exceed 4%.

Prepayment: No prepayment penalty.

Collateral: No collateral or personal guaranties are required.

No Recourse: The SBA will have no recourse against any individual shareholder, member, or partner of a borrower, except to the extent that the shareholder, member, or partner uses the covered loan proceeds for an unauthorized purpose.

Deferral: Mandatory deferral of principal, interest and fees for at least 6 months, with the lender having the ability to defer up to one year.

No Lender or Borrower Guaranty Fees: During the covered period (February 15, 2020 through June 30, 2020), the SBA may not charge any lender or borrower guaranty fees in connection with a covered loan.

Application Assistance Fee Limits: An agent that assists an eligible recipient to prepare an application for a covered loan may not collect a fee in excess of the limit established by the SBA.

Other Permitted Fees: The Act does not waive, or otherwise limit, any other categories of fees. This may be addressed in subsequent guidance or regulation from the SBA.

○ **Forgiveness** – A borrower will be eligible for forgiveness of indebtedness under a covered loan in an amount equal to the sum of the following costs incurred during the eight-week period following the covered loan’s origination: (i) payroll costs; (ii) interest payments on a mortgage obligation incurred before February 15, 2020; (iii) rent payments under a lease in force before February 15, 2020 obligation; and (iv) payments for utilities in service before February 15, 2020. However, the amount of forgiveness is capped at the original principal amount of the covered loan and will be reduced based on any reduction in the number of the borrower’s employees or their wages from before the COVID-19 crisis and after the loan is made.

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SBA Affiliation Rules

Generally – affiliation exists when one business controls or has the power to control another or when a third party (or parties) controls or has the power to control both businesses. The affiliation rules typically require a company to add together its employees and the employees of all other companies that its affiliates control.

- “Control” may be negative or affirmative; that is, control includes both the power to make things happen and the power to block them from happening. Control may arise through ownership, management, or other relationships and interactions between the parties such as contractual control-type rights, identity of interest or economic dependence, etc.
- Although it is a case-by-case factual analysis, affiliation can be based on any of the following:

Stock ownership –

1. Control of 50% or more of voting stock.
2. Control of less than 50% voting stock, but large compared to others.
3. Control of less than 50% voting stock by multiple minority owners (if such minority holdings are large compared to any other stock holdings), this creates a rebuttable presumption of affiliation with each of those persons.

Stock options, convertible securities, and agreements to merge – Each are treated as though the rights granted have been actually exercised.

Common management – If one or more officers, directors, managing members, or general partners of a business concern control the Board of Directors and/or the management of another business concern, the business concerns are affiliates.

Other factors –

1. An identity of interest between individuals or businesses, including family members
2. Contractual relationships or economic dependency
3. A joint venture (although there are exceptions)
4. The relationship between a prime contractor and its subcontractor if the subcontractor is an “ostensible subcontractor”
5. A franchise or license agreement
6. The totality of circumstances

Economic Stabilization Loans (Non-SBA)

Generally – the Act allocates \$454 billion for loans that, among other things, are to encourage lending to mid-size businesses (between 500 – 10,000 employees).

Eligibility – (i) Business must be solvent and able to repay the loan, (ii) loan is tied to losses from COVID-19, and (iii) other forms of liquidity are not available.

- Terms of loans – (i) Term of 5 years or less, prohibition on stock buybacks, (ii) dividends may not be paid for one year, (iii) borrower must maintain its March 24th employment levels until September 30th, and (iv) borrower must retain no less than 90% of its employees until September 30th.
- Special provisions for mid-sized businesses – the Act instructs the Treasury Secretary, through the Federal Reserve, to ensure that mid-sized businesses between 500 and 10,000 employees have access to a specific loan facility.
- Interest and repayment – (i) Interest rate not higher than 2%, and (ii) No payments due for the first 6 months.
- Certification – Eligible borrower must self-certify, among other things, that: (i) the loan is necessary to support the borrower’s ongoing operations, (ii) the borrower will retain 90% of its workforce (with full compensation and benefits) until September 30, 2020, (iii) the borrower will not outsource or offshore jobs for a period of time ending 2 years after repayment of the loan, and (iv) The borrower will maintain existing union agreements for the term of the loan plus 24 months and “remain neutral” on any attempts of employees to unionize for the term of the loan.

Additional insight – Banks are going to be the main distribution channel for these loans. Treasury is expected to issue the guidelines for eligibility and repayment within 10 days of the Act being signed into law.



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Labor and Employment

1. Increased Unemployment Benefits and Changes Under the Act.

Standard unemployment benefits provide for up to 26 weeks, with the states determining the benefit periods and eligibility requirements.

Pandemic Unemployment Assistance program to provide expanded unemployment benefits without a waiting period for the time period from January 27, 2020 through December 31, 2020.

Key features

- Expands unemployment eligibility to individuals who are not traditionally eligible for unemployment benefits (e.g., the self-employed, gig workers, independent contractors, those with limited work history, and others), and enhanced unemployment if such individuals are unable to work because of COVID-related reasons (as set forth in the act).

Additional features –

- The Act provides for (i) an additional \$600 payment per week, above what state unemployment compensation law already provides (note: the additional weekly payment is available from the date that the applicable state enters into an agreement with the federal government until July 31, 2020 (i.e., four months maximum)), (ii) federal funding for 13 weeks of additional, regular unemployment benefits through the end of 2020, (iii) states to provide flexibility to individuals who are unable, for COVID-19 reasons, to meet applicable requirements that they be actively seeking work in order to qualify for unemployment compensation, and (iv) individuals who have the ability to telework with pay or who are receiving paid sick leave or other paid leave benefits remain ineligible for unemployment for such periods.
- The Act provides federal funding to support state programs in which employers reduce employees' hours instead of laying off workers, and the employees with reduced hours can receive a pro-rated unemployment benefit. Numerous states already offer unemployment benefits for underemployment situations. These benefits are not available to seasonal, temporary, or intermittent workers.

For context, this issue pertains to workers who are furloughed. A furlough is a temporary period of mandatory reduced hours or unpaid leave. The difference between a furlough and a layoff is that the employee remains employed during a furlough, often with insurance benefits intact. Workers who are placed on a complete furlough (extended unpaid leave where they perform no work) are typically eligible for unemployment benefits for such time period.

- The Act expands unemployment eligibility for individuals who are furloughed on a reduced hours basis (i.e., where they are "underemployed" and working fewer hours than they usually would).

2. Amendments to the Families First Coronavirus Response Act -

The Act makes minor clarifications and amendments to the Families First Coronavirus Response Act ("FFCRA"), which will become effective on April 1, 2020.

Key features

- The FFCRA provides for a new, paid FMLA leave circumstance when an employee is unable to work because his or her minor child's school or place of care is closed as a result of the COVID-19 pandemic. Employees must have worked for the employer for 30 days to be eligible for this leave. The Act provides that, for rehired employees, they are eligible for the new paid FMLA leave benefit if they were laid off by the employer March 1, 2020 or later and had worked for the employer for at least 30 days in the last 60 calendar days prior to the lay-off.
- The FFCRA allows employers to recoup the amounts they pay to employees under the Act through credits against their payroll tax obligations. The Act permits advances on anticipated tax credits for employers' paid family leave costs and provides penalty relief for the failure to deposit tax amounts in anticipation of those credits. The Department of Labor ("DOL") will be issuing instructions for this process. This amendment is consistent with the position taken by the IRS in a recent press release (see the related client alert here).
- The FFCRA caps the amount of paid FMLA leave at \$200 per day or \$10,000 in the aggregate. The Act clarifies that the caps apply on a per-employee basis.
- Besides the paid FMLA benefit, the FFCRA provides for up to 80 hours of paid sick leave. The Act makes certain parallel changes to this benefit, including (a) making it easier to take the tax credits to cover the amounts paid out under the FFCRA, and (b) clarifying that the payment caps on the paid sick leave benefit apply on a per-employee basis.



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Taxes

○ **Employee Retention Credit** – Eligible employers are entitled to a refundable credit of as much as \$5,000 per employee against their payroll tax liability. This applies to employers that have fully or partially suspended operations due to certain COVID-related government orders, or that experience a 50% or greater reduction in gross receipts during specified periods. There are numerous eligibility requirements for this credit.



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○ **Delay of Employer Payroll Taxes** – Employers can defer payment of the 6.2% employer payroll tax attributable to wages paid during 2020: Fifty percent (50%) of the deferred taxes will be due December 31, 2021, and the remaining fifty percent (50%) are due December 31, 2022. Similar relief applies to self-employed individuals who owe comparable self-employment taxes.



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○ **Treatment of Net Operating Losses – Net operating losses** (“NOLs”) arising in 2018-2020 are eligible for a 5-year carryback. In addition, the limitation on the amount of NOL that can be used to offset income (80% of taxable income) will not apply until 2021. Other specialized NOL provisions apply to REITs, life insurance companies, and taxpayers who repatriated foreign earnings under Section 965 of the Internal Revenue Code.

○ **Excess Business Losses of Non-corporate Taxpayers** – Non-corporate taxpayers will not be subject to restrictions on the use of their business losses in 2018, 2019, and 2020, to offset other taxable income.

○ **Corporate AMT Credits** – Corporations can claim full refunds in 2018 and/or 2019 for unused alternative minimum tax credits.

○ **Limitation on Business Interest Expense** – Taxpayers will be able to deduct a greater amount of interest expense in 2019 and 2020 - up to 50% of a measure of taxable income rather than the 30% limitation applicable under current law.

○ **Technical Corrections Regarding Qualified Improvement Property** – Bonus depreciation has been extended to improvements to nonresidential buildings known as “qualified improvement property” (“QIP”). This amendment is a technical correction of the 2017 Tax Reform Act, which omitted treating QIP as eligible for 100% bonus depreciation, and is retroactively effective.