

COVID-19 LEGISLATIVE RESPONSES: IMPACT FOR SMALL BUSINESS

INTRODUCTION

As the COVID-19 pandemic shuts down the United States, Congress has seen a flurry of legislative action intended to combat the outbreak and mitigate its impact on the US economy. Several of these efforts would have significant impacts for small businesses who have been disproportionately impacted by the outbreak. Most notably, small businesses should be aware of four policy developments:

- **Forgivable Loans for Small Businesses.** Impending “Phase III” response legislation would provide forgivable loans incentivizing small businesses to keep employees on payroll.
- **Emergency Grants.** The same “Phase III” bill provides affected small businesses with emergency grants of up to \$10,000.
- **Tax Incentives.** “Phase III” provides several tax incentives that could be valuable for small businesses, including an employee retention tax credit.
- **Paid Leave.** Already passed “Phase II” legislation requires paid sick and family leave for affected employees, while providing tax credits to compensate employers.

As this memo is based on a constantly changing situation, it is subject to further updates. This memo should not be considered legal advice.

PAYCHECK PROTECTION PROGRAM

Senate Majority Leader Mitch McConnell’s CARES Act, which could soon pass as Congress’s “Phase III” response to the COVID-19 outbreak, would establish a \$350 billion “Paycheck Protection Program.” In effect through June 30, this program would provide eligible small businesses with government-backed interruption loans, which could then be forgiven based on the borrower keeping its employees on payroll. The following analysis is based on the language as it appears in the latest version of the legislation.

The Paycheck Protection Program provides funding for small businesses to survive during these troubled times, as well as an incentive to maintain employment levels. The benefits of this program include:

- **A flexible loan to cover operating expenses.** The program would provide a loan equal to 10 weeks of a company's payroll, up to \$10 million. This could be used to pay the payroll, rent, and utilities that allow a small business to keep its doors open.
- **Loan forgiveness.** Borrowers could have eight weeks of payroll, rent, mortgage payments, and utility forgiven if they maintain their workforce. Loan forgiveness is reduced relative to any layoffs or salary deductions.
- **Incentives to rehire.** While reductions in workforce usually result in a reduction in loan forgiveness, the legislation allows companies that already laid off workers to rehire them while still benefitting from full loan forgiveness.
- **Broadened eligibility.** Participation in the program is open to all businesses and 501(c)3 nonprofits with fewer than 500 employees or that meet SBA's small business criteria, as well as independent contractors. In order to account for COVID-19's disproportionate impact on the restaurant and hospitality sectors, individual locations of companies in those sectors will also be eligible.
- **Streamlined application process.** The program operates directly through financial institutions, with the government waiving many requirements normally associated with such loans in order to provide small businesses relief as fast as possible. Applicants are not required to demonstrate any specific hardship, only make a good faith certification of the loan's necessity and that it will be used to retain workers.

Below is a FAQ to walk small business stakeholders through this process.

How does my company participate in the program?

The Paycheck Protection Program operates via the Small Business Administration's existing 7(a) lending program, through which SBA offers guarantees on loans made by participating financial institutions. Applicants apply for a 7(a) guarantee directly through a participating financial institution, and, if approved, receive an SBA guarantee on their loan.

Under this program, approved lenders will be directly delegated the authority to approve loan and forgiveness applications based on the determination that a borrower was in business on February 15 and paid employees or contractors. It remains to be seen how SBA will otherwise reorganize the 7(a) process in order to accommodate this massive expansion. While some insight into what this will look like can be gleamed from the current 7(a) process—which requires several dozen pieces of documentation ranging from resumes to financial statements and can take several months—it is expected that implementing guidance from SBA will streamline this process substantially.

For this reason, it is difficult to estimate what the exact mechanics of the process will be for small businesses until SBA issues guidance. As of now, it is only clear that borrowers have to certify that the current public health crisis makes the loan necessary for their continued operations, and that they will use the loan to maintain their previous average number of monthly full-time equivalent

employees. This good faith certification is in contrast with any specific demonstration of need, which could have slowed down the application process.

On a positive note, the legislation does outline several measures that would expedite the rollout of the program, including:

- Waiving application fees.
- Reimbursing financial institutions for processing applications.
- Extending participation to additional lenders.
- Waiving the requirement that an applicant cannot find credit elsewhere.
- Waiving requirements for collateral and personal guarantees.

What documents do I need to present to my financial institution?

Borrowers should expect to submit documentation such as payroll numbers demonstrating their eligibility to participate in the program. Additionally, the legislation explicitly requires contractors and sole proprietors to establish their eligibility with payroll tax filings, Form 1099-MISC, and documentation of income and expenses.

How do I determine if my business is eligible?

Participation in the Paycheck Protection Program is open to businesses, 501(c)3 nonprofits, and veterans' organizations that have fewer than 500 employees or meet one of SBA's industry-specific small business thresholds – found [here](#). Sole proprietors, independent contractors, and some other self-employed individuals are also eligible.

Additionally, restaurants and hospitality businesses with multiple locations are eligible, so long as they have fewer than 500 employees per location. Affiliation rules are waived for restaurants and hospitality locations with fewer than 500 employees, franchises, and businesses financed by small business investment companies.

What expenses are covered?

SBA will offer a 100 percent guarantee on a loan amounting to the recipient's average monthly payroll costs over the previous year, times 2.5. In other words, this loan amounts to two and a half months of payroll costs. The maximum loan amount is \$10 million.

For the purposes of loan amount and forgiveness (see below), payroll is defined as consisting of: (1) salary, wage, commission, or similar compensation; (2) cash tip or equivalent; (3) payment for vacation, parental, family, medical, or sick leave; (4) dismissal or separation pay; (5) health care or retirement benefits; (6) state and local payroll taxes; and (7) payments to sole proprietors and independent contractors that are a wage, commission, income or otherwise net earnings from self-employment. The calculation of payroll costs excludes compensation to employees exceeding \$100,000 on an annualized basis, federal payroll taxes, compensation to employees residing outside the United States, and leave for which the employer is receiving a tax credit under the "Phase II" coronavirus response.

While loan amount is calculated based on payroll costs, the loan itself can be used for a variety of essential business expenses including payroll, rent, mortgage interest, interest on debts, and utilities.

How can my loan be forgiven?

Loans made under the program can be forgiven for the total amount that the borrower spent on payroll (excluding annualized compensation over \$100,000,) mortgage interest, rent, and utilities in the eight weeks following their loan's origination. Employers are additionally allowed to make extra payments to tipped employees to account for their loss of tips. Forgiven expenses are generally restricted to obligations undertaken before February 15 of this year.

Importantly, the forgiven debt is not counted in taxable income.

The amount of forgiveness is reduced proportionally to any reduction in the borrower's workforce, as well as any reduction in employee salary beyond 25 percent. Borrowers that have already taken action to reduce their workforce and eliminate any reduction in staff or salary through this program, however, will not be penalized. The SBA is additionally able to issue *de minimis* exemptions from any reduction in forgiveness.

To calculate the portion of the borrower's covered costs that will be forgiven, participants should multiply their eligible operating costs by the quotient of:

- Their average monthly number of full-time-equivalent (FTE) employees during the eight-week period, and;
- The borrower's average monthly number of FTE's during their choice of two periods—February 15, 2019-June 30, 2019 or January 1, 2020-February 29, 2020.

To achieve forgiveness, a borrower submits to their lender documents including: (1) state or federal payroll documents; (2) documentation of mortgage interest, rent, or payroll expenses; (3) certification that the information is true; and (4) any other documentation that SBA determines is appropriate. The lender will then have 60 days to determine the appropriate level of forgiveness, at which point SBA would purchase and forgive the relevant amount of the initial loan.

Any portion of the loan not forgiven will remain guaranteed by SBA and have a 10-year maturity and at most a four percent interest rate. Lenders will be required to defer payment of that loan for between six months and one year, with the ultimate deferral period set by SBA.

How does this program interact with SBA's Economic Injury Disaster Loans (EIDL)?

Borrowers who have received a COVID-19-related EIDL loan are allowed to apply for a Paycheck Protection loan or refinance their EIDL into a Paycheck Protection loan. Any EIDL grant award provided under the bill (outlined in the following section of this memo) is subtracted from a borrower's loan forgiveness.

EIDL LOANS AND GRANTS

In addition to the Paycheck Protection Program, the CARES Act provides relief to small businesses via an expansion of SBA's Economic Injury Disaster Loan (EIDL) program, which traditionally provides operational liquidity to small businesses in disaster areas.

Most notably, EIDL would now provide emergency \$10,000 grants to eligible businesses. These changes are in effect through the end of the year.

Who is eligible for the program?

The legislation expands eligibility for EIDL to businesses, private nonprofits, and cooperatives with fewer than 500 employees, as well as small businesses currently recognized by SBA. Independent contractors and sole proprietors are also eligible. The bill broadly expands EIDL's scope to better account for the COVID-19 outbreak by treating emergency declarations under the Stafford Act (which President Trump has already invoked) as a trigger for EIDL eligibility. During this or a similar crisis, the SBA Administrator could then, at their discretion, designate what states or subdivisions have suffered sufficient economic damage to justify small businesses in those areas receiving EIDL loans.

Is this a grant or a loan?

While EIDL is traditionally a loan program, the CARES Act would provide \$10 billion for SBA to temporarily offer grants through the program. When applying for an EIDL loan, any eligible applicant could request an advance on that loan of up to \$10,000, which SBA would be obligated to fulfill within three days. While this payment is technically an advance, it explicitly does not need to be repaid, even if the applicant is denied for their loan. It is, for all intents and purposes, a grant.

How do I apply?

In order to receive a grant, eligible businesses must first apply for an EIDL loan, self-certify their eligibility under penalty of perjury, and request an advance on their loan.

To streamline the disbursement of grants, the legislation waives several items normally required for the EIDL application process, including: (1) a personal guarantee on advances and loans over \$200,000; (2) the requirement that applicants have been in business for more than one year; and (3) the requirement that applicants cannot find credit elsewhere. The process is further expedited by allowing applicants to apply solely with a credit score, rather than tax documentation.

What can my grant be used for?

EIDL grants can be used for: (1) providing paid sick leave to employees unable to work due to COVID-19; (2) maintaining payroll during business disruptions; (3) meeting increased costs arising from supply chain disruption; (4) making rent or mortgage payments; and (5) repaying obligations that cannot be met due to revenue loss.

How does this grant interact with the Paycheck Protection Program?

A grant received under this program would be counted against any forgiveness an applicant receives under the Paycheck Protection Program.

TAX INCENTIVES

The CARES Act includes several tax incentives that could be valuable to small businesses attempting to navigate the crisis:

- **Employee Retention Tax Credit.** This provision would allow employers to claim a refundable payroll tax credit equal to 50 percent of wages (maximum of \$10,000 in wages per employee) paid to employees during the crisis. The credit is restricted to employers who see a full or partial suspension of operations due to a shutdown order or who see gross receipts decline by more than 50 percent relative to the same quarter the previous year. For employers with more than 100 full-time employees, the credit is restricted to wages paid to employees not providing service due to COVID-19. For employers with fewer than 100 full-time employees, it is applicable to all wages.
- **Delay of Payroll Taxes.** This provision would allow employers to defer payment on the employer contribution of Social Security payroll taxes through the end of the year. Half of this deferred amount would be due to be paid on December 31, 2021 and the other half by December 31, 2022.
- **Modification of Net Operating Losses (NOL).** This provision would allow NOLs from 2018, 2019, and 2020 to be carried back five years and allow NOLs to fully offset income. This change is intended to allow businesses to use losses and amend prior year returns to provide liquidity during the outbreak.
- **Modification on Limitation of Losses for Sole Proprietors and Pass-Throughs.** This provision temporarily lifts the loss limitation for sole proprietors and pass-throughs with the intention of allowing them to utilize excess losses to provide necessary cashflow.
- **Increase to Interest Expense Deduction.** This provision would raise (from 30 to 50 percent of taxable income) the limitation on interest that businesses are allowed to deduct from their 2019 and 2020 taxes.
- **Technical Amendment Regarding Qualified Improvement Property (QIP).** This provision would correct an error in the 2017 Tax Cuts and Jobs Act preventing businesses, particularly in the hospitality industry, from writing off facility improvement costs immediately rather than over 39 years.

PAID LEAVE

On March 18, 2020, President Trump signed into law a bill requiring companies to provide limited paid sick and family leave to employees impacted by the COVID-19 outbreak. Two days later, the Treasury Department, Internal Revenue Service, and Department of Labor outlined their intention to implement the legislation expeditiously.

Both benefits are limited to individuals directly affected by COVID-19, whether caring for themselves or others and are only in effect through the end of the year. The provisions apply to employers with fewer than 500 employees, and the Department of Labor can exempt certain small businesses with fewer than 50 employees, as well as health care workers and emergency responders.

Employers may claim 100 percent of wages paid to employees in connection with the COVID-19-related leave requirements as a refundable credit against payroll taxes. In the case that those credits do not account for the cost of the leave, employers can seek an expedited advance from the IRS through a forthcoming claims process.

In general, employers are required to provide 10 days of paid sick leave and 10 weeks of paid family leave. The specific timeframes that employers are required to provide leave, at what percent of normal compensation it should be provided, and the maximum dollar amount of compensation that can be required are detailed in the chart below.

Max Benefits per Employee by Income

Annual Employee Income (40 Hours per Week, 52 Weeks per Year)		Sick Leave Benefit (10-Day Max)		Family Leave Benefit (10-Week Max)	Max per Employee
		Self — 100 Percent Wages (\$511 Daily Cap)	Caregiver — 2/3 Wages (\$200 Daily Cap)	2/3 Wages (\$200 Daily Cap)	
Federal Minimum Wage	\$15,080	\$580	\$387	\$1,933	\$2,513
Poverty Level (Family of Four)	\$26,200	\$1,008	\$672	\$3,359	\$4,367
Median Income for Full-Time Workers	\$48,672	\$1,872	\$1,248	\$6,240	\$8,112
Income for Max Sick Leave for Caregiving and Family Leave	\$77,997	\$3,000	\$2,000	\$10,000	\$13,000
Income for Max Sick Leave for Self	\$132,900	\$5,110	\$2,000	\$10,000	\$15,110