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The CARES Act: Summary of Select Provisions Related to Small Businesses and Nonprofits

On Friday, March 27, 2020, the President signed into law the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act). One sub-section of the bill, the Keeping American Workers Paid and Employed Act (Title I), aims to provide relief to American small businesses and nonprofits in the form of various loan programs.

Title I authorizes \$350 billion to be utilized by small businesses for eight weeks of cash-flow assistance through loans 100% guaranteed by the federal government under the newly formed Paycheck Protection Program (the Program). The Program, which will be administered through the Small Business Administration (the SBA), will make the loans available through more than 1,800 existing SBA-certified lenders, including banks, credit unions, and other financial institutions through June 30, 2020. Businesses looking to determine eligibility and initiate one of these loans should first contact their current lender.

Title I also expands the Economic Injury Disaster Loan (EIDL) Program to provide relief to small businesses and nonprofits affected by the COVID-19 emergency. Following is an overview of these two loan programs.

Paycheck Protection Program

Eligibility Requirements:

- **Small Businesses and 501(c)(3) Nonprofit Organizations with 500 or Fewer Employees:** Small businesses, 501(c)(3) nonprofits, 501(c)(19) veteran's organizations, or Tribal businesses described in section 31(b)(2)(C) of the Small Business Act, each with fewer than 500 full- and part-time employees, or the applicable size standard for the industry as provided by SBA (if higher) may be eligible. In addition, sole-proprietors, independent contractors, and other self-employed individuals may also be eligible. The Program will allow businesses in certain industries with more than one physical location that employ no more than 500 employees per physical location to be eligible.
- **Businesses in the Hospitality and Restaurant Industries Granted Certain Exceptions:** The program waives the usual SBA affiliation rules for businesses in the hospitality and restaurant industries, franchises that are approved for listing on the SBA's Franchise Directory, and small businesses that receive financing through the Small Business Investment Company (SBIC) program. The SBA will not include employees of any affiliates of businesses falling under this definition when calculating the number of employees the business employs when making a determination of eligibility.





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- **The Business Must Have Been Operational as of February 15, 2020:** The program requires lenders to determine whether a business was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes, or a paid independent contractor.
- **SBA Affiliation Rules will Apply to Nonprofits:** The Program applies current SBA affiliation rules to nonprofits when determining eligibility, meaning the SBA will include employees of any affiliates when determining whether a nonprofit meets the size requirement for eligibility. For more information on how the CARES Act impacts nonprofits, see [The CARES Act and Nonprofits](#).
- **Limitations on Borrowers Receiving an EIDL:** Borrowers cannot receive both an EIDL and a Program Loan for the same purpose. However, borrowers who have received an EIDL loan unrelated to COVID-19 may apply for a Program Loan, with an option to refinance the EIDL loan into the Program Loan. In addition, an emergency EIDL grant award of up to \$10,000 (described below) would be subtracted from any amounts forgiven under the Program.
- **No "Credit Elsewhere Test" Required:** The SBA will not require that lenders first determine that the borrower does not have the ability to obtain some or all of the requested loan funds from alternative sources without causing undue hardship, as outlined under 13 CFR 120.101.

Loan Requirements / General Terms and Conditions:

- **Good Faith Certification:** The Program requires eligible borrowers to make a good faith certification that the loan is necessary due to the uncertainty of current economic conditions caused by COVID-19; that they will use the funds to retain workers and maintain payroll, lease, and utility payments; and that the borrower has not applied for and is not receiving duplicative funds for the same uses from another SBA program for the period beginning on February 15, 2020 and ending on December 31, 2020.
- **No Collateral or Personal Guarantee Required:** Unlike other SBA loan programs, no collateral or personal guarantee will be required in order to receive a Program Loan.
- **10 Year Term:** Any loans received under the program will have a maturity of not more than 10 years, and the guarantee for that portion of the loan will remain intact.
- **Maximum Interest Rate of 4%:** Lenders and borrowers may negotiate the interest rate of the loan, however said interest rate may not exceed 4%.
- **No Prepayment Fees; Other Fees:** Borrowers will not be charged prepayment fees. In addition, neither borrowers nor lenders will be charged SBA fees in connection with the loan.
- **Allows for Deferral of Loan Payments for Six Months:** Borrowers impacted by the COVID-19 pandemic are eligible for a complete deferral of loan payments for six (6) months after receipt of loan funds up to one (1) year.



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Allowable Uses of Loaned Funds:

- **Allowable Uses:** Allowable uses include payroll and other compensation expenses such as commissions, paid sick or medical leave, group health insurance premiums as well as mortgage interest, rent, and utilities. If loan proceeds are not used for these purposes, there may be recourse to the businesses' shareholders, members or partners.

Maximum Available Loan Funds:

- **Maximum Loan Amount of \$10 Million:** The maximum amount that may be borrowed under the program is the lesser of (i) the difference between an amount equal to 2.5 times the applicant's average monthly payroll costs during the 1 year period before the date of the loan and any EIDL funds received due to the COVID-19 pandemic, and (ii) \$10,000,000. The measurement period for purposes of determining payroll costs for new and seasonal businesses is different. Payroll costs are defined very broadly in the statute to include salary and wages up to \$100,000 per employee, commission, or similar compensation, payment of cash tip or equivalent, payment for vacation, parental, family, medical, or sick leave, allowance for dismissal or separation, payment required for the provisions of group health care benefits, including insurance premiums, payment of any retirement benefit, and payment of state or local tax assessed on the compensation of employees. The Program also appears to allow inclusion of amounts paid to independent contractors and sole proprietors up to \$100,000 in the computation of payroll costs.

Program Loan Forgiveness:

- **Eligible Expenses:** Generally a borrower may be eligible for forgiveness of a Program Loan up to an amount equal to the following costs which are paid or incurred by the borrower during an 8-week period starting on the origination date of the loan: (i) payroll costs, (ii) interest payments on any mortgage, (iii) payment of rent on any lease in force prior to, and (iv) payment on any utility. There will likely be more guidance on the measurement period for the costs eligible for loan forgiveness.
- **Retaining or Re-hiring Employees Affects Loan Forgiveness:** The amount forgiven will be reduced proportionally by (i) any reduction in the average number of full time equivalent employees retained during the 8-week period compared to either the period from January 1, 2020 to February 29, 2020 or February 15, 2019 to June 30, 2020, at the election of the borrower, and (ii) the reduction in pay of any employee in excess of 25% of their total salary and wages for the most recent full quarter they were employed prior to the loan origination date. To encourage employers to rehire any employees who have already been laid off due to the COVID-19 crisis, borrowers that re-hire and restore the pay of these affected employees by June 30, 2020 will not be penalized for having a reduced payroll at the beginning of the 8-week period.
- **Effect on Taxable Income:** Canceled indebtedness resulting from this section will not be included in the borrower's taxable income. Any loan amounts not forgiven at the



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end of one year will be carried forward as an ongoing loan with terms of a maximum of 10 years, at the agreed interest rate up to 4% interest.

Changes to SBA Express Loan Program:

- The maximum loan amount for SBA Express Loans is raised from \$350,000 to \$1 million through December 31, 2020, after which date the Express Loan will have a maximum of \$350,000. For more information on SBA Express Loans please visit the SBA website [here](#).

Additional Considerations:

- Any employer who receives a Paycheck Protection Program loan will be ineligible to receive a refundable Social Security tax credit under Section 2301 of the Act for the same costs.
- Any employer who obtains a Paycheck Protection Program loan and has a portion of that indebtedness forgiven will be ineligible for a deferral of 2020 Social Security tax payment obligations.

Economic Injury Disaster Loans (EIDLs)

- **Emergency EIDL Program Changes:** EIDLs are separate from Paycheck Protection Program Loans. The SBA's EIDL program provides working capital loans of up to \$2 million that can provide economic support to help overcome the temporary loss of revenue businesses and nonprofits are currently experiencing as a result of COVID-19
 - **Changes to Eligibility Requirements:** Expands eligibility to EIDL's to include Tribal businesses, cooperatives, and ESOPs with fewer than 500 employees or any individual operating as a sole proprietor or an independent contractor during the covered period (January 31, 2020 to December 31, 2020). Private nonprofits are also eligible to participate in the EIDL program.
 - **Personal Guarantee Waived:** Requires that for any SBA EIDL loans made in response to COVID-19 before December 31, 2020, the SBA shall waive (i) any personal guarantee on advances and loans below \$200,000, (ii) the requirement that an applicant needs to have been in business for the 1-year period before the disaster, and (iii) the credit elsewhere requirement.
 - **Approval Based on Credit Score Allowed:** During the covered period, the SBA may approve and offer EIDL loans based solely on an applicant's credit score, or use an appropriate alternative method for determining applicant's ability to repay.
 - **Advances of up to \$10,000 Available:** An eligible entity who has applied for an EIDL loan due to COVID-19 may request an advance on that loan of not more than \$10,000 which the SBA must distribute within 3 days. Applicants who receive advances and are subsequently denied an EIDL shall not be required to repay the



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advanced funds. Before advanced funds are disbursed the SBA must verify that the applicant is eligible by requiring said applicant certify under the penalty of perjury that they are eligible.

- **Use of Advanced Funds:** Advances may be used for providing paid sick leave to employees, maintaining payroll, meeting increased costs to obtain materials, making rent or mortgage payments, and repaying obligations that cannot be met due to revenue losses.
- **Interaction with Other SBA Loan Programs:** Advanced payment will be considered when determining loan forgiveness, if the applicant transfers into a loan made under SBA's Paycheck Protection Program.
- Apply as soon as possible directly to the SBA through its [website](#) for a COVID-19 EIDL.

ADDITIONAL RESOURCES

- [Complying with Paid Leave Requirements Under the Families First Coronavirus Response Act](#) (April 1)
- [The CARES Act and Nonprofits](#) (March 31)
- [UPDATED: Treasury Department Extends April 15 Tax Filing and Payment Deadlines](#) (March 25)
- [Managing Contractual Relationships During the COVID-19 Crisis: Force Majeure Clauses and Other Approaches](#) (March 18)

Please visit our [COVID-19 resource page](#) for additional resources related to COVID-19.

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