



COVID-19 Legislation Applicable to Small Businesses June 17, 2020

Loan Programs:

SBA Economic Injury Disaster Loan ("EIDL")

Note: Despite the information below, the SBA has recently capped EIDL loans at \$150,000.

Generally, this is for any business with less than 500 employees (including sole proprietorships, independent contractors and self-employed persons), private non-profit organization or 501(c)(19) veterans organizations affected by COVID-19. This program has its own distinct affiliation rules. Businesses in certain industries may have more than 500 employees if they meet the SBA's size standards for those industries.

Loan amount will be based on actual economic injury and company's financial needs. Repayment terms will not be longer than 30 years and the interest rate will not exceed 4%. Personal guarantees are waived on loans not more than \$200,000.

Application requests personal financial statements, business financial statements, and personal and business tax returns. SBA can approve loans based solely on credit score without requiring submission of a tax return, or other methods necessary to determine applicant ability to pay. The whole process is conducted via a link on the SBA's website.

Applicant is allowed to request an advance, separate from the loan, in an amount not to exceed \$10,000 within three days after SBA receives an application. An advance may be used to maintain payroll, provide sick leave related to COVID-19, and meet costs due to interrupted supply chains, among other provisions. This loan advance will not have to be repaid.

Paycheck Protection Program Loan ("PPP")

Any business, nonprofit organization, veterans' organization, or Tribal business, which meets certain requirements qualify for loans up to \$10 million under this program.

You are eligible for a PPP loan if you have 500 or fewer employees whose principal place of residence is in the United States, or are a business that operates in a certain industry and meet the applicable SBA employee-based size standards for that industry. You must have been in operation on February 15, 2020 and either had employees for whom you paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC.

This program has its own distinct affiliation rules that could combine related businesses based on common ownership, common control, and other factors. It is the responsibility of the borrower to determine which entities (if any) are its affiliates and determine the employee headcount of the borrower and its affiliates.

You are also eligible for a PPP loan if you are an individual who operates under a sole proprietorship or as an independent contractor or eligible self-employed individual, you were in operation on February 15, 2020.

You must also submit such documentation as is necessary to establish eligibility such as payroll processor records, payroll tax filings, or Form 1099- MISC, or income and expenses from a sole proprietorship. For borrowers that do not have any such documentation, the borrower must provide other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount.

Generally, the loan amount will be determined by multiplying 2.5 times the average monthly payroll costs incurred during the 1-year period before the date on which the loan is made. Guidance released on April 8, 2020, states, "In general, borrowers can calculate their aggregate payroll costs using data either from the previous 12 months or from calendar year 2019".

"Payroll costs" are defined to include payments for salary, wage, commission, or similar compensation; payments for cash tip or equivalent; payments for vacation, parental, family, medical, or sick leave; allowance for dismissal or separation; payment required for the provisions of group health care benefits; payment of any retirement benefit; payment of state or local tax assessed on the compensation of employees; payments of any compensation or income of a sole proprietor or independent contractor that is an amount not more than \$100,000 in 1 year, as prorated for the covered period. "Payroll costs" do not include the compensation of an individual employee in excess of an annual salary of \$100,000, as pro-rated for the covered period; taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code; compensation of an employee whose principal place of residence is outside of the United States; and qualified sick leave wages or qualified family leave wages for which a credit is already allowed under the Families First Coronavirus Response Act.

Per guidance published by the U.S. Small Business Administration on April 2, 2020, independent contractors do not count as employees for purposes of the PPP loan calculations. The exclusion of compensation in excess of \$100,000 annually applies only to cash compensation, not to non-cash benefits, including: 1. employer contributions to defined-benefit or defined-contribution retirement plans; 2. payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums; and 3. payment of state and local taxes assessed on compensation of employees. Payroll costs are calculated on a gross basis without regard to (i.e., not including subtractions or additions based on) federal taxes imposed or withheld, such as the employee's and employer's share of Federal Insurance Contributions Act (FICA) and income taxes required to be withheld from employees.

An EIDL loan obtained prior to receiving a PPP loan will be refinanced as part of the PPP loan. The loan amount will be increased by the outstanding EIDL loan. You are now allowed to carry both an EIDL loan and a PPP loan at the same time. If you obtained an EIDL loan after you received your PPP loan you cannot include expenses paid with your EIDL proceeds towards your PPP loan forgiveness.

Repayments terms will not be longer than 10 years and the interest rate will not exceed 4%. Updated laws and regulations call for a 2 to 5 year repayment term. There are no personal guarantees. Payments of principal and interest can be deferred for a period of six months to one year. No prepayment penalties.

Loan funds can be used for payroll costs; cost related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums; interest payments on any

mortgage; rent and utility payments; and interest payments on any other debt obligations that were incurred before February 15, 2020.

The loan may be forgiven to the extent of certain Payroll Costs and Nonpayroll costs incurred and paid over a certain Covered Period. At least 60% of the loan proceeds must be used for payroll costs or none of the loan can be forgiven. A separate document addresses the loan forgiveness requirements as set forth in the Loan Forgiveness Application and specific SBA guidance on loan forgiveness.

Loan forgiveness will not be included in a business's taxable income. However, the IRS has published a notice that per Section 265 of the Internal Revenue Code expenses are not deductible when paid with loan proceeds in which the loan was forgiven tax free.

The SBA guidance (originally issued on April 28th and recently updated on May 5th) that borrowers should review the following certification from the application to determine if it actually applies to them, "current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." A business who does not believe they can certify to this statement in good faith may repay the loan by May 18th to avoid punishment. The government also announced they will be auditing every PPP loan application for fraud which includes those who they do not believe can sign this certification in good faith. They have announced punishment could be a fine of up to \$1,000,000 and 30 years in prison. The certification is subjective and was not part of the law as passed. A California company has filed suit against the SBA and Treasury asking the court to interpret the certification, and to rule whether it is in fact invalid and unenforceable, or not. On May 13, 2020, the SBA issued guidance stating, "Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith. Borrowers with loans greater than \$2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification".

Main Street Lending Program

The Federal Reserve has announced that it is establishing a Main Street Lending Program (Program) to support lending to small and medium-sized businesses that were in sound financial condition before the onset of the COVID-19 pandemic. The Program will operate through three facilities: the Main Street New Loan Facility (MSNLF), the Main Street Priority Loan Facility (MSPLF), and the Main Street Expanded Loan Facility (MSELF). U.S. businesses may be eligible for loans if they meet either of the following conditions: (1) the business has 15,000 employees or fewer; or (2) the business had 2019 revenues of \$5 billion or less. Loans issued under the Program would have a four year maturity, and principal and interest payments on the loans will be deferred for one year.

To implement the Program, the Federal Reserve Bank of Boston will set up a special purpose vehicle (SPV) to purchase participations in loans originated by eligible lenders. The SPV will purchase 85-95% participations in Eligible Loans from Eligible Lenders. Eligible Lenders will retain 5-15% of each Eligible Loan. The Department of Treasury, using funds appropriated to the Exchange Stabilization Fund under section 4027 of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"), will make a \$75 billion equity investment in the single common SPV in connection with the MSNLF, the MSPLF, and the MSELF. The combined size of the Facilities will be up to \$600 billion.

The MSNLF is intended to facilitate lending to small and medium-sized Businesses by Eligible Lenders who do not currently have a loan eligible for expansion in place. Under the MSNLF, borrowers can borrow up to \$25 million or an amount equal to four times the company's 2019 adjusted EBITDA.

The MSPLF is intended to facilitate lending to small and medium-sized Businesses by Eligible Lenders who do not currently have a loan eligible for expansion in place. The MSPLF may allow the borrower to borrow a larger amount than they can through the MSNLF. The borrower can borrow up to \$25 million or six times the company's 2019 adjusted EBITDA.

The MSELF is targeted at larger borrowers and would allow a lender to restructure an existing loan of a minimum size of \$10 million. The maximum loan size would be the lesser of \$200 million or 35% of outstanding and undrawn available debt.

The Federal Reserve has launched the program through participating vendors. Small and medium-sized businesses interested in the Program should seek to apply for Program loans from an eligible lender.

Payroll Tax Benefits

FFCRA Payroll Tax Credit

The Families First Coronavirus Response Act ("FFCRA") requires private employers with fewer than 500 employees to provide paid sick leave and family leave for certain COVID-19 related absences. The 500 employee rule is subject to FMLA integrated employer regulations and distinct aggregation rules. The FFCRA includes payroll tax benefits to help offset the cost associated with these employee benefits.

Employers covered by FFCRA will be allowed a credit against the Social Security tax for each calendar quarter in an amount equal to 100 percent of the qualified sick leave wages paid per employed individual per day. The credit amount is generally limited to 10 days in total per individual and capped at (i) \$511 per day for an individual who is quarantined or self-quarantined due to COVID-19 or seeking a medical diagnosis for COVID-19 symptoms and (ii) \$200 per day for an individual caring for either a quarantined or self-quarantined individual or for a child due to COVID-19 related school or childcare disruptions. The amount of this credit is increased by the amount of tax imposed by the Medicare tax on qualified sick leave wages.

Employers covered by FFCRA will also be allowed a credit against the payroll tax imposed for each calendar quarter in an amount equal to 100 percent of the qualified family leave wages paid per employed individual per day. This amount is generally capped at a per individual amount of \$200 per day and \$10,000 in total for all calendar quarters. The amount of this credit is increased by the amount of Medicare tax on qualified family leave wages.

FFCRA payroll tax credits are available to businesses that take out a loan under the PPP.

Employee Retention Credit

Under the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") eligible employers are allowed a refundable credit against the employer component of employment tax (Social Security and Railroad Retirement) equal to a maximum of 50 percent of qualified wages paid after March 12, 2020, through and including December 31, 2020, for each employee. The total wages attributed to an

employee is capped at \$10,000 (including health benefits), resulting in a maximum credit of \$5,000 per employee.

Eligible employers include any employer carrying on a trade or business during the 2020 tax-year whose business operations are fully or partially suspended due to orders from a governmental authority limiting commerce, travel, or group meetings due to the COVID-19 pandemic, and employers with gross receipts that are less than 50 percent of their gross receipts for the same quarter in the prior year are also eligible to claim the employment tax credit, until their gross receipts exceed 80 percent of their gross receipts for the same calendar quarter in the prior year.

Further, for eligible employers with 100 or fewer full-time employees, all employees' wages up to \$10,000 for each employee are eligible for credit. For employers with more than 100 full-time employees, qualified wages are limited to wages paid to employees who are unable to provide services due to the COVID-19 pandemic.

Businesses are precluded from obtaining both the retention credit under the CARES Act and either a "Work Opportunity Tax Credit" under Internal Revenue Code (IRC) Section 51 or an "Employer Credit for Paid Family and Medical Leave" under IRC Section 45S.

Business can take both the Employee Retention Credit and the FFCRA credit.

The Employee Retention Credit is not available to businesses that take out a loan under the PPP.

Payroll Tax Deferral

Under the CARES Act eligible employers can postpone payment of certain employer payroll taxes. The CARES Act would permit a business to delay the payments of the employer's share of Social Security taxes (this does not include Medicare taxes) incurred from March 27, 2020, through December 31, 2020. A business choosing to take advantage of this offer would be required to repay half the amount deferred by December 31, 2021, and the remaining half by December 31, 2022.

An employer using a third-party payroll provider or agent should work with its payroll provider to implement this program.

The payroll tax deferral is now available to businesses that receive loan forgiveness under PPP. Employers who have received a PPP loan, may defer deposit and payment of the employer's share of social security tax that otherwise would be required to be made beginning on March 27, 2020, through the date the lender issues a decision to forgive the loan in accordance with paragraph (g) of section 1106 of the CARES Act, without incurring failure to deposit and failure to pay penalties. Even if an employer receives a decision from its lender that its PPP loan is forgiven, the employer is still eligible to defer deposit and payment of the employer's share of social security tax due after that date.

Employee Benefits

The FFCRA requires private employers with fewer than 500 employees to provide paid sick leave and family leave for certain COVID-19 related absences. The FFCRA applies to most private employers with less than 500 employees. Per guidance from the DOL, employers should calculate the coverage count at the time an employee requests the leave. This means that employees with a workforce that fluctuates

around the 500-employee mark may fluctuate in and out of coverage. For purposes of the employer coverage calculation, the DOL advises that the employers should count all active employees, full- and part-time, as well as employees on leave, temporary employees who are jointly employed with another employer, and day laborers supplied by a temporary agency. Independent contractors should not be included in the employer coverage calculation. The aggregation rules related to this 500 employee count are not the same as the affiliation rules applied to the PPP program.

Emergency Paid Sick Leave Act (“PSLA”)

Employees who work for covered employers are eligible for leave regardless of their tenure with the organization or full- or part-time status. The Emergency Paid Sick Leave Act (PSLA) requires covered employers to provide two weeks of paid sick leave if an employee is unable to work (or telework) due to a need for leave because the employee: Is subject to a federal, state or local quarantine or isolation order related to COVID-19; Has been advised by a health care provider* to self-quarantine due to concerns related to COVID-19; Is experiencing symptoms of COVID-19 and seeking a medical diagnosis; Is caring for an individual who is subject to an order as described in bullet point one or has been advised to self-quarantine as described in bullet point two; Is caring for his or her son or daughter because the school or place of care has been closed, or the child care provider is unavailable due to COVID-19 precautions; or Is experiencing any other substantially similar condition as specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Full-time employees are entitled to up to 80 hours of paid leave for the reasons listed above. Part-time employees are entitled to paid leave up to the average number of hours they would work in a two-week period for the reasons listed above. Once the 80-hour entitlement is exhausted, no additional leave under the PSLA is available, even if the employee experiences another qualifying event.

The rate of pay for sick leave is the employee’s regular rate of pay, the minimum wage under the Fair Labor Standards Act (FLSA), or the state or local minimum wage, whichever is greater. If an employee is taking paid sick leave for a use described in bullet points four, five or six above, the employee’s pay entitlement is reduced to two-thirds of the rate of pay.

PSLA limits the amount an employer is required to pay to an employee each day, consistent with the tax credits permitted under the FFCRA, as follows: \$511 per day (\$5,110 in aggregate) for a use described in bullet points one, two or three above; and \$200 per day (\$2,000 in aggregate) for a use described in bullet points four, five or six above.

Employers may not require employees to exhaust their current sick leave before using leave under the PSLA.

Emergency Family and Medical Leave Expansion Act (“EFMLA”)

The EFMLA expands leave under the FMLA to provide leave for employees who need to care for their child due to the closure of schools and childcare facilities as a result of the COVID-19 public health emergency (referred to as a Qualifying Need Related to a Public Health Emergency).

Under the EFMLA, both full-time and part-time employees who have worked for the employer for at least 30 calendar days will be entitled to take up to 12 weeks of job-protected leave for a Qualifying Need Related to Public Health Emergency. For purposes of determining employee coverage, the DOL has advised that the 30-days of employment calculation is made as of the day leave would commence. As a result, employees hired during 2020 will become eligible for leave after 30 calendar days of employment.

Under the EFMLA, the first two weeks of such FMLA may be unpaid. During this 10-day period, an employee may choose to substitute accrued vacation leave, personal leave or other medical or sick leave, but an employer may not require an employee to do so.

After the two weeks of unpaid leave, employers must provide up to 10 weeks of paid FMLA leave at a rate of no less than two-thirds of the employee's regular rate of pay**. The EFMLA caps the paid leave entitlement at \$200 per day (\$10,000 in aggregate).

Disclaimer: CBIZ MHM, LLC is not a law firm and is not providing legal advice. If you have any questions regarding how the new COVID-19 legislation or any other legislation applies to you or your business, please contact your legal counsel.