

PRACTICAL NEWS
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PAYCHECK PROTECTION PROGRAM

On March 27, 2020, President Trump signed the Coronavirus Aid, Relief, and Economic Security Act of 2020 into law, also known as the "CARES Act". The CARES Act was amended in a number of material respects by the Paycheck Protection Program Flexibility Act (the "PPPFA"), which was signed into law on June 5, 2020. The PPPFA is effective retroactively to the date the CARES Act was passed, so any business that already received a CARES Act loan can take advantage of the amendments. The following Alert has been updated to give effect to the PPPFA.

Title I of the CARES Act (the "Paycheck Protection Program") provides for the creation of a new line of federally-guaranteed small business loans ("Program Loans") administered by the Small Business Administration ("SBA") that will be available for the period of February 15, 2020 to December 31, 2020.

The Paycheck Protection Program is designed to provide a direct incentive for small businesses to keep their workers on the payroll.

The SBA will forgive Program Loans if all employees are kept on the payroll for eight weeks (or 24 weeks if the borrower elects the longer coverage period) and at least 60% of the money is used for payroll costs and the balance for rent, mortgage interest, or utilities. Secretary of the Treasury Mnuchin has released a statement indicating the Government's support for further legislation that would clarify that the 60% threshold is not a cliff and that partial forgiveness will be possible.

The Paycheck Protection Program will be available through December 31, 2020, subject to the availability of funds.

The SBA has issued several rounds of interim final rules concerning the Paycheck Protection Program and is continuing to issue additional guidance to borrowers and lenders as this program is being implemented.

Who Can Apply

In general, this program is for any small 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 coronavirus/COVID-19, taking into account the SBAs affiliation rules, as modified for this program.

Businesses in certain industries may have more than 500 employees if they meet the SBA's size standards for those industries.

Small businesses in the hospitality and food industry with more than one location could also be eligible at the store and location level if the store employs less than 500 workers. This means each store location could be eligible.

How to Apply

You can apply through any existing SBA 7(a) lender or through any federally insured depository institution, federally insured credit union, and Farm Credit System institution that is participating. Other regulated lenders will be available to make these loans once they are approved and enrolled in the program. You should consult with your local lender as to whether it is participating in the program.

A sample application form can be accessed through the following link: <https://www.sba.gov/document/sba-form--paycheck-protection-program-ppp-sample-application-form>

How Much May Be Borrowed

In general, the amount that may be borrowed under a Program Loan is the lesser of:

- The Borrower's average total monthly payments for payroll costs for the 12 months prior to the loan date (or in the alternative calendar 2019) multiplied by 2.5
- and
- \$10 million

A Borrower can receive a Program Loan even if the Borrower has received an economic injury disaster loan (“EIDL”) to the extent the EIDL loan was used for a purpose other than those permitted for Program Loans. EIDL loans may be refinanced with proceeds of Program Loans, in which case the maximum available Program Loan amount is increased by the amount of the EIDL loans being refinanced.

At least 60% of the loan proceeds must be used for payroll costs.

Payroll Costs

- Salary, wages, commissions, cash tips and similar compensation calculated on a gross basis (not reduced by FICA taxes and income taxes withheld from employees).
- Payment for vacation, parental, family, medical, or sick leave (excluding qualified family and sick leave for which applicant may receive a credit under the *Families First Coronavirus Response Act*).
- Allowances for dismissal or separation.
- Payments to provide group healthcare benefits (including insurance premiums)
- Payments for retirement benefits.
- Payment of state or local taxes assessed on employee compensation.
- Payroll costs do not include any cash compensation paid to an employee in excess of \$100,000- annually, prorated for the period February 15 to December 31, 2020, excluding healthcare, retirement benefits and state and local taxes paid by the employer.

Loan Details and Forgiveness

The loan will be forgiven if, during the 24-week period beginning on the date of the origination of the loan (but not later than December 31, 2020), at least 60% of the funds were used to pay payroll costs and the balance used for interest on mortgages, rent and utilities. The PPPFA extended the “covered period” from 8 weeks to 24 weeks from the date of the origination of the covered loan, or December 31, 2020, whichever is earlier. A borrower under an existing Program loan may elect to keep the 8-week covered period.

The IRS issued a recent Notice (2020-32) in which it stated that a borrower is denied a tax deduction to the extent that covered expenses are paid with PPP loan proceeds that are forgiven. The IRS concludes that its guidance is appropriate in order to prevent a double tax benefit (meaning, the taxpayer should not be able to exclude forgiven debt from income and also deduct the expenses paid with tax-exempt income).

Forgiveness is based on the employer maintaining or quickly rehiring employees and maintaining salary levels. Forgiveness will be reduced if full-time headcount declines, or if salaries and wages

decrease. However, the PPPFA eliminates the proportional reduction in loan forgiveness based on a reduction in employees if the Borrower is able to document that they were unable to rehire terminated employees or replace unfilled positions, or is unable to return to the pre-pandemic level of business activity due to compliance with the guidance established by HHS (U.S. Department of Health and Human Services), CDC (Centers for Disease Control and Prevention) or OSHA (Occupational Safety and Health Administration).

The Treasury Department has indicated that the loans will bear interest at a fixed rate of 1.00% per annum. In its first Interim Final Rule (IFR) issued in early April 2020, the SBA set the loan maturity at two years. The PPPFA requires all new PPP loans made on or after June 5, 2020 to have a minimum maturity of 5 years, up to a maximum of 10 years. The PPPFA also does not “prohibit lenders and borrowers from mutually agreeing” to modify the two-year term of existing PPP loans to conform with this new section. Loans may be prepaid without penalty.

- Loan payments will be deferred until the date that the SBA remits the amount of forgiveness to the lender. If a borrower does not apply for forgiveness within 10 months after the last day of the covered period, the deferral period ends on that same date.
- No collateral or personal guarantees are required.
- Neither the government nor lenders will charge small businesses any fees.
- Forgiven amounts will not constitute cancellation of indebtedness income for federal tax purposes.
- Under the CARES Act, an employer can defer its share of 2020 social security taxes, with 50% due at the end of 2021 and 50% due at the end of 2022. But this deferral has not been available if the employer obtains forgiveness of a Program loan. The PPPFA allows a borrower that obtains forgiveness to get the benefit of this deferral if the Program loan is forgiven before December 31, 2020.

Other Assistance

Under the CARES Act, all US States, Territories, and Tribes have been declared disaster areas following the economic impact of the COVID-19 pandemic, enabling small business owners to apply to the Administrator for economic injury disaster loans. For additional information concerning these programs see the following link: <https://www.sba.gov/disaster-assistance/coronavirus-covid-19>

Additional Information

The U.S. Treasury Department has issued a fact sheet concerning the Paycheck Protection Program, which provides additional information and which is available through at the following link: <https://home.treasury.gov/system/files/136/PPP--Fact-Sheet.pdf>

This notice contains information which is general in nature and based on sources which are believed to be authoritative. Specific applications would require consideration of all facts and circumstances by qualified professionals familiar with a taxpayer and therefore we (Phillips Nizer LLP) are not liable for the application of any information contained herein.

CONTACT US



Alan Behr

Fashion Practice Chair
(212) 841-0552
abehr@phillipsnizer.com

R. Brian Brodrick

Partner
(212) 841-0700
bbrodrick@phillipsnizer.com

Regina E. Faul

Labor & Employment Chair
(212) 841-0575
rfaul@phillipsnizer.com

Thomas L. Fuerth

Partner
(212) 841-1320
tfuerth@phillipsnizer.com

Christian B. Hylton

Government Relations Co-Chair
(212) 841-0582
chylton@phillipsnizer.com

Richard P. Kaye

Partner
(212) 841-1341
rkaye@phillipsnizer.com

Jay H. Kim

Partner
(212) 841-0776
jkim@phillipsnizer.com

Neil Kleinhandler

Partner
(212) 841-0769
nkleinhandler@phillipsnizer.com

Marc A. Landis

Managing Partner
(212) 841-0705
mlandis@phillipsnizer.com

Monica P. McCabe

Intellectual Property Chair
(212) 841-0713
monicam@phillipsnizer.com

Scott B. Piekarsky

Partner
(201) 975-4426
spiekarsky@phillipsnizer.com

Lisa R. Radetsky

Real Estate Co-Chair
(212) 841-0739
lradetsky@phillipsnizer.com

Edward H. Schauder

Partner
(212) 841-1340
eschauder@phillipsnizer.com

Jonathan Tillem

Partner
(212) 841-0506
jtillem@phillipsnizer.com