



Emerging from the COVID Shutdown: Legal Issues Affecting Your Business in Recovery and Beyond

Welcome!
We will start momentarily.



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COVID-19 Financial Assistance



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Coronavirus Aid, Relief and Economic Security (CARES) Act

- CARES Act is intended to address economic impacts of, and otherwise responds to, the COVID-19 (Coronavirus) outbreak and includes provisions related to Small Business Administration loan programs.
- Passed on March 27, 2020 and includes over \$2 Trillion in benefits



Main Component of CARES Act for Business: Paycheck Protection Program

- The Paycheck Protection Program (PPP) a total of **\$659 billion** in the program.
- **Eligible recipients** may qualify for a loan up to \$10 million based on 2.5 times the average monthly payroll costs.
- Loan payments will be deferred for twelve (12) months.
- **Loan forgiveness** is available for borrowers who spend their loan proceeds on eligible payroll and certain other expenses with a time frame of up to 24 weeks.



PPP Loan Metrics through June 16, 2020

- Total PPP funded by Congress: \$659 billion
- Number of approved loans: 4,607,098
- Total amount of PPP Loans approved: \$513 billion (approx.)
- PPP funds remaining: \$145 billion (approx.)

- (Source: SBA.gov)



Top States for PPP Loans (by total loan amount)*

		Approved Loans \$	No. Loans	Avg. Loan Size
1.	California	\$66,500,354,602	505,798	\$131,476
2.	Texas	\$40,479,177,091	346,839	\$116,682
3.	New York	\$37,798,829,252	281,058	\$134,487
4.	Florida	\$30,341,950,424	325,845	\$93,117
5.	Illinois	\$22,156,267,843	176,819	\$125,304
22.	Louisiana	\$7,218,312,417	65,158	\$110,781

*Not clear if based on domicile of Borrower or Lender

(Source SBA.gov)



PPP Loan Application

Apply directly to lender.

SBA Application form plus (likely) other forms required by lenders.

Deadline for SBA approval of loan application is June 30, 2020.



Paycheck Protection Program:

FIRST STEP: FIND A LENDER

- Most community and statewide banks and financial institutions have participated in the PPP, but some have recently stopped taking new applications for PPP loans.
- There are a number of other sources, including national banks, non-bank lenders and a few online lenders (i.e., Kabbage, Intuit/Quickbooks)
- **CHECK WITH YOUR EXISTING BANKING RELATIONSHIP, ASAP!**



What Businesses Are Eligible?

Businesses with **500 or fewer employees**, including for-profit entities, eligible nonprofit organizations (i.e., **501(c)(3) non-profit organizations** and **government-owned hospitals** that receive less than 50% of funding from governmental sources exclusive of Medicaid), Veterans organizations, Tribal businesses described in the Small Business Act, agricultural enterprises, as well as individuals who are self-employed or are independent contractors, are eligible if they also meet certain size standards.



How Much Can Be Borrowed?

- Eligible recipients may qualify for a loan based on their **average monthly payroll costs times 2.5**.
- The “2.5” multiplier creates a borrowing base that will fund, essentially, approximately 10.5 weeks of a borrower’s payroll, assuming average payroll is the same as 2019 or trailing 12-months and an equivalent number of employees.
- Maximum loan amount is \$10 million.



How to Determine Average Monthly Payroll Costs?

- Simple method: Determine your **eligible payroll costs** for all of 2019, and divide by **12**.
- The other method is to use eligible payroll costs over the **trailing 12-month** period and divide by 12, but because of the documentation required by lenders, using 2019 data is typically the easiest.
- If you had either a significant changes in payroll costs or number of employees since January 2020, you may want to consider the alternative method.



Simple Example of PPP Loan Calculation:

2019 annual eligible payroll costs: **\$1 million**

Avg. monthly payroll costs: **\$83,333** (\$1M/12)

Max. PPP Loan Amt.: **\$208,332** (\$83,333 x 2.5)



Other General PPP Loan Terms:

- PPP loans accrue interest at the rate of 1% per annum
- The maturity date for the unforgiven portion of a PPP loan issued after June 5, 2020 is 5-years (Loans issued prior have 2-year maturities and can only be extended by agreement of lender)
- PPP loans do not require collateral to secure the loans or personal guaranties.
 - PPP Flexibility Act extends the deferral period for borrower payments of principal, interest, and fees on PPP loans to the date that SBA remits the borrower's loan forgiveness amount to the lender (or, if the borrower does not apply for loan forgiveness, 10 months after the end of the borrower's loan forgiveness covered period).
- PPP loan application requires several "certifications" by the borrower, including:
 - The applicant was in operation on February 15, 2020 and had employees for who it paid salaries and payroll taxes
 - Current economic uncertainty makes the loan necessary to support the ongoing operations of the applicant
 - The applicant has not and will not receive another PPP loan during the period February 15, 2020 to December 31, 2020.



What are the Eligible Payroll Costs that can be included in calculating the loan amount?

- **Payroll costs** – generally, the salary, wages, commissions, or similar compensation for employees principally residing in the U.S., including cash tips payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees.



Payroll Costs that **CANNOT** be included in PPP loan amount

- What is expressly excluded from the definition of payroll costs?
 - Any compensation of an employee whose principal place of residence is outside of the United States;
 - The compensation of an individual employee in excess of an annual salary of \$100,000, prorated as necessary;
 - Employer's share of FICA (Federal Insurance Contributions Act) and other federal taxes; and
 - Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act.
 - Compensation paid to Independent Contractors



Owners / Self-Employed Loan Application

- **Self-employed and no employees:**
 - Step 1: Find your 2019 IRS Form 1040 Schedule C line 31 net profit amount (if you have not yet filed a 2019 return, fill it out and compute the value). If this amount is over \$100,000, reduce it to \$100,000. If this amount is zero or less, you are not eligible for a PPP loan.
 - Step 2: Calculate the average monthly net profit amount (divide the amount from Step 1 by 12).
 - Step 3: Multiply the average monthly net profit amount from Step 2 by 2.5. Find your 2019 IRS Form 1040 Schedule C line 31 net profit amount (if you have not yet filed a 2019 return, fill it out and compute the value). If this amount is over \$100,000, reduce it to \$100,000.
- Your 2019 IRS Form 1040 Schedule C must be provided to substantiate the applied-for PPP loan amount
- **Self-employed with employees:** repeat steps above, but add in payroll costs for employees and then determine average monthly payroll costs (including payments to owners)



Partnership Loan Application

Partnerships (partners' self-employment income should be included on the partnership's PPP loan application, individual partners may not apply for separate PPP loans):

- Step 1: Compute 2019 payroll costs by adding the following: 2019 Schedule K-1 (IRS Form 1065) Net earnings from self-employment of individual U.S. based general partners that are subject to self-employment tax, computed from box 14a (reduced by any section 179 expense deduction claimed, unreimbursed partnership expenses claimed, and depletion claimed on oil and gas properties) multiplied by 0.9235, up to \$100,000 per partner (if 2019 schedules have not been filed, fill them out).

Then follow steps to calculate average monthly payroll costs for partners and all employees.

- Cannot include non-cash benefits (i.e., health insurance, retirement, etc.)



Partnerships that received a PPP loan but did not include partner compensation can increase loan amount, even after funding

SBA issued IFR effective May 19, 2020 and said:

“Yes. If a partnership received a PPP loan that only included amounts necessary for payroll costs of the partnership's employees and other eligible operating expenses, but did not include any amount for partner compensation, the lender may electronically submit a request through SBA's E-Tran Servicing site to increase the PPP loan amount to include appropriate partner compensation, even if the loan has been fully disbursed,”



Eligible “Uses” of PPP Loan Proceeds

- Eligible payroll costs (salaries, vacation, medical, sick leave, retirement)
- Mortgage interest on debt incurred prior to Feb. 15, 2020, secured by real and personal property
- Eligible rent on leases in effect prior to Feb. 15, 2020
- Utilities (electricity, water, internet, telecommunications, transportation)
- Interest on other debt incurred prior to Feb. 15, 2020 (Note: not eligible for forgiveness)



Ineligible “Uses” of PPP Loan Proceeds

Anything that is *not* an eligible use



PPP Loan Forgiveness: Turning a “Loan” into a “Grant”

- Section 1106(b) of the CARES Act provides:

An eligible recipient shall be eligible for forgiveness of indebtedness on a covered loan in an amount equal to the sum of the following costs incurred and payments made during the “Covered Period”:

- **Payroll costs.**
- Any **payment of interest on any covered mortgage obligation** (which shall not include any prepayment of or payment of principal on a covered mortgage obligation).
- Any payment on any covered **rent** obligation.
- Any covered **utility payment.**”



“Covered Period”

- The time period in which a borrower must spend PPP loan proceeds in order to receive loan forgiveness
- “Covered Period” for purposes of PPP loan forgiveness means the 24- week period (168 days) beginning on the date of the origination of a covered loan. Originally was an 8-week period (56 days).
- “Date of origination” means the first date PPP loan proceeds are disbursed to the borrower.
- Borrowers that received a PPP loan prior to June 5, 2020 (effective date of PPP Flexibility Act) may elect to use the original 8-week period as their “covered period”.



Alternative Payroll Covered Period

“For administrative convenience, ***Borrowers with a biweekly (or more frequent) payroll schedule*** may elect to calculate eligible payroll costs using the 8-week (56-day) period or 24 week (168 day) period that begins on the first day of the their first pay period following their PPP Loan Disbursement Date (the “Alternative Payroll Covered Period”)



Example of Alternative Payroll Covered Period

Borrower uses a bi-weekly payroll period, and wishes to use a 24-week Alternative Payroll Covered Period:

- PPP loan proceeds received on Monday, April 20; and
- First day of its first pay period following its PPP loan disbursement is Sunday, April 26.

First day of the Alternative Payroll Covered Period is Sunday, April 26 and the last day of the Alternative Payroll Covered Period is Saturday, October 10 (i.e. 156 days)



What if a business does not need the full 24 week period to spend its PPP loan?

Latest IFR (6/22/20) confirms a change reflected in the revised forgiveness application that an application for forgiveness may be filed *prior* to the end of the borrower's Covered Period.

“A borrower may submit a loan forgiveness application any time on or before the maturity date of the loan – ***including before the end of the covered period – if the borrower has used all of the loan proceeds for which the borrower is requesting forgiveness.*** If the borrower applies for forgiveness before the end of the covered period and has reduced any employee's salaries or wages in excess of 25 percent, the borrower must account for the excess salary reduction for the full 8-week or 24-week covered period, as described in Part III.5.”



Which Expenses Are Eligible for PPP Loan Forgiveness?

- **Eligible payroll costs** “paid or incurred” during the applicable covered period.
 - “Payroll costs” are the same items that went into calculating the maximum loan amount.
 - At least 60% of the total PPP loan amount must be used for **eligible payroll cost** to avoid limiting the amount of non-payroll expenses that may be forgiven
 - **Maximum cash compensation** for each individual employee includable in forgiveness calculation (does not include non-cash benefits):
 - \$15,385 if using an 8-week Covered Period
 - \$46,154 if using a 24-week Covered Period
- **PLUS** employer-paid health insurance, employer-paid 401(k) matching contributions, and employer-paid state and local taxes on payroll



Eligible Payroll Costs that are forgivable

- Payroll costs consist of **gross compensation** to employees (whose principal place of residence is the United States) in the form of **salary, wages, commissions, or similar compensation**; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); **payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal**; payment for the provision of **employee benefits** consisting of **group health care coverage**, including insurance premiums, and **retirement**; payment of **state and local taxes** assessed on compensation of employees; and for an independent contractor or sole proprietor, wages, commissions, income, or net earnings from self-employment, or similar compensation.



Bonuses are includable in Forgivable Eligible Payroll Costs

- Also includes bonuses and “hazard pay” according to SBA’s FAQs
- Q: Are salary, wages, or commission payments to furloughed employees; **bonuses**; or **hazard pay** during the covered period eligible for loan forgiveness?
- Yes. The CARES Act defines the term “payroll costs” broadly to include compensation in the form of salary, wages, commissions, or similar compensation. If a borrower pays furloughed employees their salary, wages, or commissions during the covered period, those payments are eligible for forgiveness as long as they **do not exceed an annual salary of \$100,000**, as prorated for the covered period. The Administrator, in consultation with the Secretary, has determined that this interpretation is consistent with the text of the statute and advances the paycheck protection purposes of the statute by enabling borrowers to continue paying their employees even if those employees are not able to perform their day-to-day duties, whether due to lack of economic demand or public health considerations. This intent is reflected throughout the statute, including in section 1106(d)(4) of the Act, which provides that additional wages paid to tipped employees are eligible for forgiveness. The Administrator, in consultation with the Secretary, has also determined that, **if an employee’s total compensation does not exceed \$100,000 on an annualized basis, the employee’s hazard pay and bonuses are eligible for loan forgiveness because they constitute a supplement to salary or wages, and are thus a similar form of compensation.**



Additional Eligible Payroll Costs Considerations

- Payroll costs are considered paid on the day that paychecks are distributed or the Borrower originates an ACH credit transaction.
- For each individual employee, the total amount of cash compensation eligible for forgiveness may not exceed an annual salary of \$100,000, as prorated for the covered period:
 - \$15,385 if using an 8-week Covered Period
 - \$46,154 if using a 24-week Covered Period

PLUS employer-paid health insurance, employer-paid 401(k) matching contributions, and employer-paid state and local taxes on payroll



Payroll Costs that **CANNOT** be included in forgiveness

- What is expressly excluded from the definition of payroll costs?
 - Any compensation of an employee whose principal place of residence is outside of the United States;
 - The compensation of an individual employee in excess of an annual salary of \$100,000, prorated as necessary;
 - Employer's share of FICA (Federal Insurance Contributions Act) and other federal taxes; and
 - Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act.
 - Compensation paid to Independent Contractors



Owners / Self-Employed Forgiveness

Forgiveness is limited for amounts paid to owners (owner-employees, a self-employed individual, or general partners) as follows:

- For Borrowers using a 24-week Covered Period, this amount is capped at \$20,833 (the 2.5-month equivalent of \$100,000 per year) for each individual or the 2.5-month equivalent of their applicable compensation in 2019, whichever is lower.
- For Borrowers using an 8-week Covered Period, this amount is capped at \$15,385 (the eight-week equivalent of \$100,000 per year) for each individual or the eight-week equivalent of their applicable compensation in 2019, whichever is lower.

Do not add employer health insurance contributions or employer retirement contributions made on behalf of a self-employed individual, general partners, or owner-employees of an S-corporation because such payments are already included in their compensation.



Non-payroll expenses Eligible for Loan Forgiveness

- **Eligible non-payroll expenses** “paid or incurred” during the applicable covered period:
 - **Mortgage interest** on debt incurred prior to Feb. 15, 2020, secured by real and personal property
 - Eligible **rent** on leases in effect prior to Feb. 15, 2020
 - **Utilities** (electricity, water, internet, telecommunications, transportation)
 - Note that interest on non-mortgage debt is not included in the eligible forgiveness amount
 - No more than 40% of total PPP loan expenditures can be attributable to non-payroll expenses



How much can be spent on Payroll v. Non-Payroll Expenses

PPP Flexibility Act states: “To receive loan forgiveness, a borrower shall use 60% of the loan amount for payroll costs”. Consequently, no more than 40% can be used for non-payroll expenses, but even this amount can be reduced for forgiveness

Does this mean it is all or nothing? Joint statement from Treasury/SBA says *no* – “If a borrower uses less than 60 percent of the loan amount for payroll costs during the forgiveness covered period, the borrower will continue to be eligible for partial loan forgiveness, subject to at least 60 percent of the loan forgiveness amount having been used for payroll costs.”



Example of the 60% - 40% Limitation Being Satisfied With No Reduction in Loan Forgiveness:

- Assume a PPP loan in the amount of \$100,000
- Payroll expenses: \$60,000
- Non-payroll expenses: \$40,000
- Total PPP loan expenses: \$100,000
- Maximum loan forgiveness: \$100,000
- **Balance to be repaid: \$0**



Example of the 60% - 40% Limitation Being Satisfied With No Reduction in Loan Forgiveness; But With a Remaining Loan Balance:

- Assume a PPP loan in the amount of \$100,000
- Payroll expenses: \$60,000
- Non-payroll expenses: \$30,000
- Total PPP loan expenses: \$90,000
- Maximum loan forgiveness: \$90,000
- **Balance to be repaid: \$10,000***

***Borrower only spent \$90,000 of \$100,000 loan**



Example of the 60% - 40% Limitation Not Being Met and Resulting Remaining Balance:

- Assume a PPP loan in the amount of \$100,000
- Payroll expenses: \$50,000
- Non-payroll expenses: \$40,000
- Total PPP loan expenses: \$90,000
- Maximum loan forgiveness: \$83,333

*Easiest way to calculate:

Total Payroll Costs expended *divided by* .60 = max. forgiveness

- **Balance to be repaid: \$16,667**



Adjustments to Loan Forgiveness Amount for Reductions in FTE Count and/or Excess Reduction in Salaries

- If a PPP borrower reduces its number of employees (on an FTE-basis), there will be a proportionate reduction in the amount of loan forgiveness.

(Formula: Total forgiveness amount requested X FTE ratio
= Adjusted forgiveness amount)

- If a PPP borrower reduces salaries and wages for any employee during the covered period by more than 25% compared to the most-recent quarter, the amount of loan forgiveness will be reduced by the dollar amount of such reductions.



Reduction in Loan Forgiveness for Reduction in FTE Count

The amount of loan forgiveness shall be reduced by:

- i. the average number of full-time equivalent employees (FTEs) on a weekly basis (originally calculated as a monthly average) during the “covered period”;
- ii. divided by either of the following **referenced periods**:
 - a) the average number of FTEs during the period beginning on February 15, 2019 and ending on June 30, 2019; or
 - b) the average number of FTEs during the period beginning on January 1, 2020 and ending on February 29, 2020; or

Exception for seasonal employers — the average number of full-time equivalent employees per month employed by the eligible recipient during the period beginning on February 15, 2019 and ending on June 30, 2019.



Calculating FTEs in the PPP Loan Forgiveness Application

- Determination of an employee as an FTE is done **on an employee-by-employee basis**, and the maximum FTE for each employee is “1”. Also, the instructions veer from the “monthly” average concept of the statute and instruct Borrowers to calculate average FTE’s on a “**weekly**” basis during its Covered Period (or as of date of forgiveness app.).
- Based on an average 40-hour work week, rounded to the nearest tenth. Examples:
 - employee paid for 40 hrs./week = 1 FTE.
 - employee paid for 50 hrs./week = 1 FTE.
 - employee paid for 30 hrs./week = .75 FTE
 - Employee paid for 35 hrs./week = .9 FTE (rounded from .875)



Counting FTEs

- The application provides for a simplified method of determining the number of FTEs for both the reference periods and the Covered Period (or Alternative Payroll Covered Period): Borrowers may elect to use a simple method of counting FTEs by assigning a “1” for each employee who **works** 40 hours or more per **week** and a “0.5” for employees who work fewer hours
- New employees hired during the Covered Period (or Alternative Payroll Covered Period) may be counted in the calculation
- Provides several **safe harbors and exceptions** that minimize the reduction, including rehiring the employees by December 31, 2020.
- Calculate FTE counts in the same manner (i.e., hourly vs. simplified method) for all periods that need to be tested.



Example of FTE Reduction Calculation

Employee	Avg. FTE – Covered Period	Avg. FTE for Ref. period 1: Jan 1 – Feb 29, 2020	Avg. FTE for Ref. period 2: Feb 15 – June 30, 2019
Joe	.7	.9	1
Sally	.8	.9	1
Sam	.9	.8	1
Lisa	1	1	.9
Totals	3.4	3.4	3.9
FTE Reduction Ratio		$3.4 / 3.6 = 0.94$	$3.4 / 3.9 = 0.87$

- Compare adjusted loan forgiveness (Ex. total loan forgiveness requested \$150,000)
 - $\$150,000 \times 0.94 = \$141,000$ **
 - $\$150,000 \times 0.87 = \$130,500$



FTE Reduction Exceptions

Include in calculation of FTE:

- 1) any positions for which the Borrower made a good-faith, written offer to rehire an individual who was an employee on February 15, 2020 and the Borrower was unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020;
- 2) any positions for which the Borrower made a good-faith, written offer to restore any reduction in hours, at the same salary or wages, during the Covered Period or the Alternative Covered Period and the employee rejected the offer, and
- 3) any employees who during the Covered Period or the Alternative Payroll Covered Period (a) were fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of their hours.

In all of these cases, include these FTEs on this line only if the position was not filled by a new employee. Any FTE reductions in these cases do not reduce the Borrower's loan forgiveness.



FTE Reduction Safe Harbor #1

Borrower is exempt from the reduction in loan forgiveness based on reduction in FTEs described above if both of the following conditions are met:

- 1) the Borrower reduced its FTE employee levels in the period beginning February 15, 2020, and ending April 26, 2020; and
- 2) the Borrower then restored its FTE employee levels by not later than **December 31, 2020** to its FTE employee levels in the Borrower's pay period that included February 15, 2020.

No option for borrower to use the June 30, 2020 deadline.



Safe Harbor #2 (added by PPP Flexibility Act)

Inability to Rehire Employees

Statutorily adopts SBA guidance regarding additional exemptions to FTE Reduction.

No reduction in forgiveness related to FTEs if borrower can document:

1. Inability to rehire individuals who had been employed on February 15, 2020 and inability to hire similarly qualified employees for open positions by December 31, 2020; OR
2. Inability to return to pre-February 15, 2020 business activity because of compliance with guidance of Secretary of Health and Hospitals, Director of CDC or OSHA related to COVID-19.



Tacit Safe Harbor (#2.5)

From the FTE Test in Forgiveness Application Worksheet

- Step 1: Determine number of FTE for the payroll period that includes Feb. 15, 2020.
- Step 2: Determine number of FTE as of the earlier of (i) December 31, 2020 or (ii) the date of PPP forgiveness application
- If FTEs in Step 2 are equal to or greater than FTEs in Step 1, there will be no forgiveness reduction based on FTE reduction



Reduction in Loan Forgiveness due to Salary/Wage Reductions

The actual amount of loan forgiveness the Borrower will receive may be reduced, depending on whether the salary or hourly wages of certain employees during the Covered Period or the Alternative Payroll Covered Period was less than during the period from January 1, 2020 to March 31, 2020.

Applies to employees whose salaries or hourly wages were reduced by more than 25% during the Covered Period or the Alternative Payroll Covered Period as compared to the period of January 1, 2020 through March 31, 2020. Must calculate for each employee (using salary for salaried employees and hourly wage for hourly employees)



Safe Harbor (Reduction of Salary/Wages)

- Despite reductions in salary/hourly wage levels, if you restored salary/hourly wage levels prior to December 31, 2020, you may be eligible for elimination of the Salary/Hourly Wage Reduction amount.
- To determine if you qualify for this safe harbor, for each employee:
 - A. Enter the annual salary or hourly wage as of February 15, 2020.
 - B. Enter the average annual salary or hourly wage between February 15, 2020 and April 26, 2020.
 - C. If B is less than A, enter the average annual salary or hourly wage as of the earlier of December 31, 2020 or date the forgiveness application is filed.
- If C is equal to or greater than A, the Salary/Hourly Wage Reduction Safe Harbor has been met.



Other Forgiveness Requirements

- Loan forgiveness must be applied for by the borrower; it is not automatic
- Application is made directly with the lender that made the loan by using SBA forms (Form 3508 or Form 3508EZ)
- Forgiveness applications must be filed within 10 months from the end of the borrower's selected covered period.
- The forgiveness amount includes principal and accrued interest.



Additional Considerations

- PPP Loans in excess of \$2 million
 - Must check the box on Calculation Form
 - Relates to Borrower's good faith certification in loan application that economic uncertainty at the time of application made the loan request necessary to support ongoing operations
 - SBA's FAQ #46 provides these loans are subject to review for compliance with program requirements



Additional Considerations (continued):

- Additional “certifications” in the Forgiveness Application.
 - The money was used to pay eligible costs
 - Forgiveness requested includes all applicable reductions, does not include non-payroll costs in excess of 40% *of the amount requested*
 - Acknowledge the federal government may pursue recovery if used for unauthorized purposes
 - Information and documentation submitted is true and correct in all material respects
 - Understand additional documentation may be requested



Documentation that Must Be Submitted With the Forgiveness Application

- **Payroll:** Documentation verifying the eligible cash compensation and non-cash benefit payments from the Covered Period or the Alternative Payroll Covered Period consisting of each of the following:
 - a. Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees.
 - b. Tax forms (or equivalent third-party payroll service provider reports) for the periods that overlap with the Covered Period or the Alternative Payroll Covered Period:
 - i. Payroll tax filings reported, or that will be reported, to the IRS (typically, Form 941); and
 - ii. State quarterly business and individual employee wage reporting and unemployment insurance tax filings reported, or that will be reported, to the relevant state.
 - c. Payment receipts, cancelled checks, or account statements documenting the amount of any employer contributions to employee health insurance and retirement plans that the Borrower included in the forgiveness amount (PPP Schedule A, lines (6) and (7)).



Documentation that Must Be Submitted With the Forgiveness Application (cont.)

- **FTE:** Documentation showing (at the election of the Borrower):
 - a. The average number of FTE employees on payroll per week employed by the Borrower between February 15, 2019 and June 30, 2019;
 - b. The average number of FTE employees on payroll per week employed by the Borrower between January 1, 2020 and February 29, 2020; or in the case of a seasonal employer, the average number of FTE employees on payroll per week employed by the Borrower between February 15, 2019 and June 30, 2019; between January 1, 2020 and February 29, 2020; or any consecutive 12-week period between May 1, 2019 and September 15, 2019.
 - c. The selected time period must be the same time period selected for purposes of completing PPP Schedule A, line 11. Documents may include payroll tax filings reported, or that will be reported, to the IRS (typically, Form 941) and state quarterly business and individual employee wage reporting and unemployment insurance tax filings reported, or that will be reported, to the relevant state. Documents submitted may cover periods longer than the specific time period.
- **Non-payroll:** Documentation verifying existence of the obligations/services prior to February 15, 2020 and eligible payments from the Covered Period.
 - a. Business mortgage interest payments: Copy of lender amortization schedule and receipts or cancelled checks verifying eligible payments from the Covered Period; or lender account statements from February 2020 and the months of the Covered Period through one month after the end of the Covered Period verifying interest amounts and eligible payments.
 - b. Business rent or lease payments: Copy of current lease agreement and receipts or cancelled checks verifying eligible payments from the Covered Period; or lessor account statements from February 2020 and from the Covered Period through one month after the end of the Covered Period verifying eligible payments.
 - c. Business utility payments: Copy of invoices from February 2020 and those paid during the Covered Period and receipts, cancelled checks, or account statements verifying those eligible payments.



Documentation that Must Be Maintained but is Not Required to be Submitted

- Schedule A Worksheet or its equivalent and the following:
 - a. Documentation supporting the listing of each individual employee in PPP Schedule A Worksheet Table 1, including the “Salary/Hourly Wage Reduction” calculation, if necessary.
 - b. Documentation supporting the listing of each individual employee in PPP Schedule A Worksheet Table 2; specifically, that each listed employee received during any single pay period in 2019 compensation at an annualized rate of more than \$100,000.
 - c. Documentation regarding any employee job offers and refusals, refusals to accept restoration of reductions in hours, firings for cause, voluntary resignations, written requests by any employee for reductions in work schedule, and any inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020.
 - d. Documentation supporting the certification, if applicable, that the Borrower was unable to operate between February 15, 2020, and the end of the Covered Period at the same level of business activity as before February 15, 2020 due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020 by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration, related to the maintenance of standards of sanitation, social distancing, or any other work or customer safety requirement related to COVID-19. This documentation must include copies of the applicable requirements for each borrower location and relevant borrower financial records.
 - e. Documentation supporting the PPP Schedule A Worksheet “FTE Reduction Safe Harbor 2.”
- All records relating to the Borrower’s PPP loan, including documentation submitted with its PPP loan application, documentation supporting the Borrower’s certifications as to the necessity of the loan request and its eligibility for a PPP loan, documentation necessary to support the Borrower’s loan forgiveness application, and documentation demonstrating the Borrower’s material compliance with PPP requirements. The Borrower must retain all such documentation in its files for six years after the date the loan is forgiven or repaid in full, and permit authorized representatives of SBA, including representatives of its Office of Inspector General, to access such files upon request.



Links to SBA Loan Application, Forgiveness Applications and Instructions

- PPP Loan application: <https://www.sba.gov/sites/default/files/2020-06/PPP%20Borrower%20Application%20Form%20%28Revised%20June%2012%202020%29-Fillable-508.pdf>
- PPP Loan Forgiveness EZ Application: <https://www.sba.gov/sites/default/files/2020-06/PPP%20Forgiveness%20Application%203508EZ%20%28Revised%2006.16.2020%29%20Fillable.pdf>
- PPP Loan Forgiveness EZ Application Instructions: <https://www.sba.gov/sites/default/files/2020-06/PPP%20Loan%20Forgiveness%20Application%20Form%20EZ%20Instructions%20%28Revised%2006.16.2020%29.pdf>
- PPP Loan Forgiveness (long-form) Application: https://www.sba.gov/sites/default/files/2020-06/PPP%20Loan%20Forgiveness%20Application%20%28Revised%2006.16.2020%29-fillable_0.pdf
- PPP Loan Forgiveness Application Instructions: <https://www.sba.gov/sites/default/files/2020-06/PPP%20Loan%20Forgiveness%20Application%20Instructions%20%28Revised%2006.16.2020%29.pdf>
- **CHECK WITH YOUR LENDER BEFORE COMPLETING ANY OF THESE APPLICATIONS. MOST LENDERS HAVE THEIR OWN SUPPLEMENTAL FORMS AND SCHEDULES IN ADDITION TO THE FOREGOING**



Other Financial Relief to Business Offered under the CARES Act



Economic Injury Disaster Loan (EIDL)

- SBA Section 7(b) loan program; typically used for declared emergencies
- Expanded by CARES Act for small businesses suffering substantial economic injury as a result of COVID
- Apply directly through SBA
- True loan; not a grant. 30-year term
- Interest rate 3.75% for small business; 2.75% for non-profits
- \$150,000 maximum loan amount
- Used to pay fixed debts, A/P, other bills, and payroll (but cannot use with PPP loan for same payroll periods)
- EIDL advance reduces PPP forgiveness; possibly creates double liability to borrowers and shifts loan balance to lenders



Main Street Lending Program

- Program under construction by the Federal Reserve; lenders are currently registering
- Proposed \$600 billion loan funds. \$160 billion committed under CARES Act. Remainder funded by Federal Reserve
- Loans will originate with participating private lenders
- Eligibility: businesses with 15,000 or fewer employees, 2019 revenues of \$5 billion or less
- Loan minimum \$250,000; maximum loan size is lesser of \$35 million or available undrawn credit + 4x EBITDA
- Adjustable interest rate: LIBOR + 300 basis points
- 5 year maturity; principal deferred for 2 years, interest deferred for 12 months.
- While MSL is outstanding, cannot voluntarily pre-pay other debt; only mandatory payments.



Additional Legislation Under Consideration

- **Health and Economic Recovery Omnibus Emergency Solutions, or “HEROES” Act** (passed by House of Representatives on May 15, 2020; idle in Senate)
 - \$3 trillion COVID relief
 - Includes 2nd round of individual stimulus checks (up to \$6,000/household)
 - Extends extra \$600 weekly federal unemployment benefit through January, 2021
 - Extends student loan payment suspension through September, 2021, and eliminates up to \$10,000 for some federal and private student loans
 - \$100 billion grants for rental assistance; extend eviction ban for 1 year after passage
 - \$75 billion for mortgage assistance
 - \$200 billion for “Heroes Fund”, to provide hazard pay to some essential workers (i.e., \$13 per hour pay premium)
 - Eliminates federal SALT deduction limitation for 2020-2021
 - \$375 billion to assist local governments with fiscal impacts from COVID; \$500 billion for states
 - PPP changes: expands to include 501(c)(4) and 501(c)(6) nonprofits; removes 500 employee limit; eliminates %-cap on non-payroll expenses



- **Prioritized Paycheck Protection Program (P⁴)**
 - Introduced in Senate June 18th by 4 Democratic Senators from the Committee on Small Business and Entrepreneurship
 - Creates next-round “PPP” for small businesses, those with 100 or fewer employees
 - Does not exclude businesses that already received PPP loans
 - Funded with unused portion of PPP allocation
 - Comes on the heels of prediction that up to 14% of small businesses that received PPP are still likely to fail within a year

- **RESTAURANTS Act of 2020 (Real Economic Support that Acknowledges Unique Restaurant Assistance Needed to Survive)**
 - Introduced in House and Senate June 18th; bipartisan support
 - \$120 billion grant program to support restaurant workers, farmers, fishermen bakers and other producers that supply independent restaurants



Louisiana legislation

- The Main Street Recovery Program - \$300 Million grant program
- Part of \$1.7 Billion the State received from Federal government under the CARES Act
- To be eligible:
 - for-profit corporation, a limited liability company, a partnership, or a sole proprietorship
 - domiciled in Louisiana as of March 1, 2020.
 - Is in good standing with the Secretary of State, if applicable.
 - Suffered an interruption of business.
 - Controlled by one or more Louisiana residents



Questions?



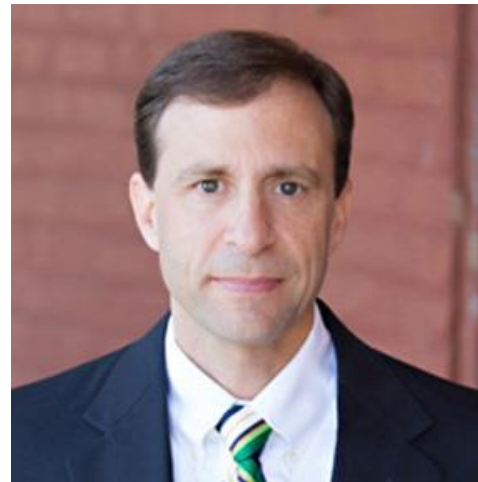
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Tax Related Provisions Under the CARES Act



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Business Tax Provisions

- Employment Tax Credits/Benefits
- NOL Carryback Period Expanded
- Increase in Section 163(j) Limitation
- Corporate AMT Credit Refundable
- Technical Correction to Qualified Improvement Property



Employment Tax Credits/Benefits

- Families First Corona Response Act (FFCRA)
 - Paid Sick Leave
 - Expanded FMLA
- Coronavirus Aid, Relief, and Economic Security Act (CARES)
 - Employee Retention Credit
 - Employer Payroll Tax Deferral



NOL Carryback Period Expanded

- Taxpayers may elect to carryback NOLs 5 years
- 5 year elective carryback applies to taxable years beginning after December 31, 2017 and before January 1, 2021
- Taxpayers may elect to forgo the entire 5-year carryback with respect to a specific year's NOL
- The 80% limitation on NOL deductions is suspended for losses generated in 2018, 2019 and 2020



Section 163(j) Amended

- For taxable years beginning in 2019 and 2020 taxpayers, except for partnerships, from 30% to 50% of adjusted taxable income (ATI)
- For taxable years beginning in 2020, a taxpayer may elect to use its 2019 ATI for purposes of computing its 2020 Section 163(j) limitation
- For partnerships, the increase to 50% of ATI applies only to years beginning in 2020
- However, if a partner is allocated excess business interest expense in 2019, they may deduct 50% of that excess business interest in 2020 with the remainder subject to the same limits



Corporate AMT Credit Refundable

- The refundable AMT tax credit will be completely refunded for taxable years beginning after December 31, 2018
- Taxpayer may also elect to take the full credit for tax years beginning after December 31, 2017



Technical Correction to Qualified Improvement Property (QIP)

- QIP is internal, non-structural improvements to property, made after the building is placed in service
- QIP now has a 15-year life and is eligible for bonus depreciation
- The fix is retroactive to 2018



Individual Tax Provisions

- Individual Stimulus Payments
- Retirement Plan Provisions
- Charitable Contributions
- Business Loss Limitations



Individual Stimulus Payments

- \$1,200 per adult (\$2,400/married couple) with an additional \$500 per qualified child.
- Full amount available for single filers who make \$75,000 or less (\$150,000 or less for married filing joint filers). Phases out for single filers who make more than \$99,000 (\$198,000 for married filing jointly).



Retirement Plan Provisions

- Qualified individuals are able to take out a loan of up to \$100,000 or 100% of the balance of their retirement plan
- The 2020 required minimum distribution has been waived for the following plans:
 - Individual retirement plans (including inherited IRAs);
 - Deferred contribution plans under IRC §403(a) and §403(b); and
 - Defined contribution plans under IRC §457(b) (provided the employer of the §457(b) plan is a state or an agency, instrumentality, or subdivision of a state).



Charitable Contributions

- Increase of individual AGI limitations to 100% of AGI for cash contributions made during the calendar year 2020
- New \$300 above-the-line deduction for individuals that do not itemize
- Corporate limit increased to 25% of taxable income
 - Excess contributions carried forward for up to 5 years



Business Loss Limitation

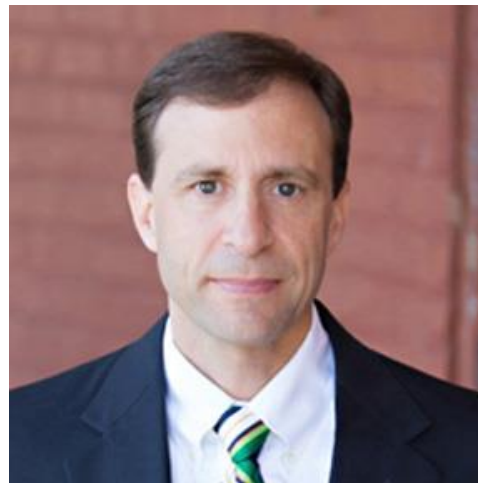
The Tax Cuts and Jobs Act of 2017 (TCJA) added a limitation on business losses, requiring business losses in excess of \$250,000 for single filers and \$500,000 for married filers to be carried forward as a net operating loss.

CARES Act

- Eliminated the limitation for farm losses for tax years beginning after December 31, 2017 and before January 1, 2026
- Eliminated the limitation for all other business losses of non-corporate taxpayers for tax years beginning after December 31, 2017 and before January 1, 2021



Questions?



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Traps for the Unwary: Conditions, Compliance, and Potential Whistleblower Complaints



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Enforcement Actions on Wrongful Payment

- **Audit/Overpayment**
 - Usually done at agency level—in this case, the SBA. The SBA Administrator has authority to adjudicate overpayments in administrative proceedings. The Administrator may refer a matter to the Department of Justice.
- **Civil False Claims Action**
 - Usually initiated by a whistleblower
 - Department of Justice may also initiate a claim
- **Criminal Action**
 - Often referred by agency or by whistleblower complaint
 - Will likely be handled by a strike force for pandemic fraud claims





The False Claims Act: 31 U.S.C § 3729 et seq.

- Claim for payment
- Falsity of Claim
- Knowledge of falsity
- Materiality
 - The falsity must be *material* to the Government's payment decision."
- Damages (up to treble the amount of loss to the government plus statutory fines)
- Causation
 - Lender may also be liable under certain circumstances





The False Claims Act: 31 U.S.C § 3729 et seq.

- The terms “knowing” and “knowingly” mean that a person, with respect to information –
 - i. Has actual knowledge of the information;
 - ii. Acts in deliberate ignorance of the truth or falsity of the information; or
 - iii. Acts in reckless disregard of the truth or falsity of the information.

- Failure to remit an amount owed can be a basis of liability.



The False Claims Act: Qui Tam Provisions

- Sealed Period
- Relator Works With Government to Develop Case
- Relator May Recovery (15-30%)
- Relator may be barred if
 - not first to file
 - allegations based on publicly disclosed information and relator does not qualify as an original source (some exceptions)
- Anti-retaliation provision in FCA





The False Claims Act: Statute of Limitations

- Government must bring claim within 6 years of the false/fraudulent claim or within 3 years of when it knew or should have known of claim
- Must bring claim within ten years or claim is barred
- Whistleblower has (basically) the same time period in which to bring claim





JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Wednesday, June 3, 2020

United States Joins Lawsuit against AECOM Alleging False Claims in Connection with Hurricane Disaster Relief

Xavier University of Louisiana Agrees to Pay \$12 Million to Resolve Related Allegations

The United States has intervened in a whistleblower lawsuit against AECOM, an architecture and engineering firm based in Los Angeles, California, and certain disaster relief applicants, alleging that they violated the False Claims Act by submitting false claims to the Federal Emergency Management Agency (FEMA) for the repair or replacement of certain facilities damaged by Hurricane Katrina, the Justice Department announced today.

“FEMA plays a critical role in helping communities to recover from natural disasters,” said Assistant Attorney General Jody Hunt of the Department of Justice’s Civil Division. “To ensure that FEMA can accomplish its mission and help those truly in need, the department will hold accountable those who seek to defraud FEMA by providing false information about their entitlement to assistance.”

Under the Robert T. Stafford Disaster Relief and Emergency Assistance Act and program rules, FEMA provided institutional applicants, such as schools and universities, with Public Assistance (PA) program funds for the repair or replacement of facilities damaged by Hurricane Katrina. Applicable rules, however, limit such funding to the amount required to restore damaged facilities to their pre-disaster condition, and the full cost of replacement is available only if repair estimates exceed a defined threshold.

Catherine M. Maraist
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FCA Civil Penalties—Individual and Corporate

- Up to treble damages of amount falsely billed to government + statutory penalties (but based generally on ability to pay)
- Joint and several liability with other defendants (both corporate and individual)
- Corporate Integrity Agreement
- Enforceable money judgment that survives bankruptcy





Paycheck Protection Payment

- \$650 Billion
- Loans at low interest rate
- Converted to Grants
- Designed for small businesses
- Little initial guidance
- Target for fraud





Certification

- Theory of FCA liability often premised on certifications.
- Three relevant periods:
 - Initial certification
 - “Safe harbor” deadline
 - Certification for loan forgiveness



Certification—Loan

- I certify that:
 - The Applicant is eligible to receive a loan under the rules in effect at the time this application is submitted that have been issued by the Small Business Administration (SBA) implementing the Paycheck Protection Program under Division A, Title I of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) (the Paycheck Protection Program Rule).
 - The Applicant (1) is an independent contractor, eligible self-employed individual, or sole proprietor or (2) employs no more than the greater of 500 or employees or, if applicable, the size standard in number of employees established by the SBA in 13 C.F.R. 121.201 for the Applicant's industry.



Certification and Authorization

- **Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.**
- **The funds will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule; I understand that if the funds are knowingly used for unauthorized purposes, the federal government may hold me legally liable, such as for charges of fraud.**



Certification and Authorization

- **I understand that loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities, and not more than 25% of the forgiven amount may be for non-payroll costs.**



Certification and Authorization

- **I further certify that the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects. I understand that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.**



Certification--Forgiveness



Paycheck Protection Program PPP Loan Forgiveness Application Form 3508EZ

By Signing Below, You Make the Following Representations and Certifications on Behalf of the Borrower:

The Authorized Representative of the Borrower certifies to all of the below by **initialing** next to each one.

_____ The dollar amount for which forgiveness is requested:

- was used to pay costs that are eligible for forgiveness (payroll costs to retain employees; business mortgage interest payments; business rent or lease payments; or business utility payments);
- includes payroll costs equal to at least 60% of the forgiveness amount;
- if a 24-week Covered Period applies, does not exceed 2.5 months' worth of 2019 compensation for any owner-employee or self-employed individual/general partner, capped at \$20,833 per individual; and
- if the Borrower has elected an 8-week Covered Period, does not exceed 8 weeks' worth of 2019 compensation for any owner-employee or self-employed individual/general partner, capped at \$15,385 per individual.

_____ I understand that if the funds were knowingly used for unauthorized purposes, the federal government may pursue recovery of loan amounts and/or civil or criminal fraud charges.

_____ The information provided in this application and the information provided in all supporting documents and forms is true and correct in all material respects. I understand that knowingly making a false statement to obtain forgiveness of an SBA-guaranteed loan is punishable under the law, including 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a Federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.



Paycheck Protection Payment Risk Areas—Application

- Necessity for Loan
- Failure to repay by safe harbor or afterwards
- Qualification for Loan
- Affiliation Rules
- Amount of Loan requested





Paycheck Protection Payment Risk Areas—Application

JUSTICE NEWS

Department of Justice

Office of Public Affairs

FOR IMMEDIATE RELEASE

Tuesday, May 19, 2020

Texas Man Charged with \$5 Million COVID-Relief Fraud

Individual Copied List of Names off the Internet and Claimed Them as Employees

A Texas man has been charged in the Eastern District of Texas with allegedly filing bank loan applications fraudulently seeking more than \$5 million dollars in forgivable loans guaranteed by the Small Business Administration (SBA) under the Coronavirus Aid, Relief, and Economic Security (CARES) Act.

Samuel Yates, 32, of Maud, Texas, allegedly sought millions of dollars in forgivable loans guaranteed by the SBA from two different banks by claiming to have over 400 employees earning wages when, in fact, no employees worked for his purported business.

Yates is charged by way of a federal criminal complaint with violations of wire fraud, bank fraud, false statements to a financial institution, and false statements to the SBA.

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Paycheck Protection Payment Risk Areas Post-Application

- Use of loan proceeds
- Valid purpose under PPP program
 - What is loan is used for other purposes but paid back with interest?
- Loan forgiveness
 - Do not meet threshold
 - Did not maintain employee compensation etc.





Paycheck Protection Payment Enforcement

- False certification (also used to prove knowledge)
- Knowing retention of loan proceeds where not proper
- Enforcement priorities may change with additional guidance





Questions?



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