

Business Law Alert

The Paycheck Protection Program Under the Historic CARES Act

On March 27, 2020, the historic Coronavirus Aid, Relief and Economic Security Act (CARES Act) was signed into law. The Act is 800-plus pages and includes a number of different programs and interventions that are intended to provide financial relief to eligible employers and employees alike. The CARES Act includes the following:

- \$349 Billion for small business loans will be made available to eligible employers and self-employed individuals (Paycheck Protection Program).
- The CARES Act provides enhanced unemployment insurance benefits to employees for total and partial unemployment and to employers for retaining certain employees.
- The Act confirms the emergency FMLA and sick leave benefits available to employees and advanced tax credits employers can take in providing these benefits.
- The Federal government will make loans to certain distressed businesses and places limits on compensation paid to executives servicing businesses subject to these loans.
- Employers may make certain non-taxable “qualified disaster relief payments.”

This Alert highlights the Paycheck Protection Program, which provides non-recourse loans for small businesses, sole proprietors and independent contractors. As described below, if certain conditions are satisfied, a

Contact

Paul A. Gilman
312.755.3168
pgilman@agdglaw.com

Mark Anderson
312.755.3163
manderson@agdglaw.com

Jerry Holisky
312.755.3176
jholisky@agdglaw.com

Timothy R. Nelson
312.755.3149
tnelson@agdglaw.com

330 N. Wabash Ave.
Suite 1700
Chicago, IL 60611
T: 312.828.9600
F: 312.828.9635
www.agdglaw.com

Paycheck Protection Loan will be forgiven. The Paycheck Protection Program could provide much needed relief for eligible employers and their employees.

Questions remain regarding the implementation of the CARES Act. The CARES Act requires the Small Business Association (SBA) to issue rules within 30 days of the signing of the Act. While there remain questions concerning how the program will be implemented, the Treasury Department intends to publish rules providing for expedited review and funding of the loan program as early as April 3, 2020.

We encourage you to reach out to your [Aronberg attorney](#) to discuss how the CARES Act impacts your business.

Who Is Eligible for a Paycheck Protection Loan

- The Paycheck Protection Program Loans are designed for a “small business concern.” A small business concern (as defined in the Small Business Act) generally means any business (including non-profits) that employs either: (i) fewer than 500 employees or (ii) if applicable, the size standard in number of employees established by the administration for the industry in which the business concern operates.
- Sole proprietorships, independent contractors and certain self-employed individuals are included.
- There are special rules for determining whether franchises, hotels and restaurants with multiple locations and other business organizations are eligible.
- The borrower has to have been in business since at least Feb. 15, 2020, and have had employees for which it was paying salaries or payroll taxes, or paid independent contractors.
- Eligible recipients must certify that:
 - the uncertainty of current economic conditions make the loan necessary to support the ongoing operations of the business;
 - the funds will be used to maintain workers and payroll, and make mortgage, lease and utility payments; and
 - the borrower is not receiving any loans from the SBA for similar purposes.
- Eligible recipients do not have to demonstrate that they are unable to obtain credit elsewhere.
- Eligibility can be assessed by visiting the [SBA website](#).

How to Start the Loan Process

The Paycheck Protection Program will be operated similar to the current SBA Section 7(a) program. Loans will be originated by banks and other lenders that participate in the SBA 7(a) program. It is possible that additional lenders will be approved by the SBA to make these Paycheck Protection Loans. Those seeking the new loans should contact their current bank to see if they participate in SBA loan programs.

Loans are available between February 15 and June 30, 2020.

How Much Is Available Under the Paycheck Protection Program

The lesser of (i) \$10 million and (ii) 2.5 times the average monthly payroll costs for the one-year period before the date the loan is made. The loan may also include the amount necessary to refinance an outstanding Emergency Injury Disaster Loan (EIDL).

Loan Terms

Loans will have the following terms:

- 10-year maturity period (to the extent not forgiven)
- Not greater than 4 percent interest
- Personal guarantees are waived and no collateral is required
- No recourse against owners, directors or officers of the borrower
- Lenders are required to treat every borrower as having been impacted by the COVID-19 and to defer the loan repayment for no less than six months and no longer than one year if the borrower requests deferral.
- Guaranty and annual fees will be waived
- Prepayment penalties will be waived

Use of Loan Proceeds

- Loans can be used for payroll costs, costs related to the continuation of group healthcare benefits and insurance premiums, employee salaries (not in excess of \$100,000 annually per employee), payment of interest on any mortgage obligations, rent, utilities and interest on any other debt obligations incurred before Feb. 15, 2020.
- Eligible payroll costs for an independent contractor or a sole proprietor include the sum of payments of any compensation received that is a wage, commission, income, net earnings or similar compensation that is not more than \$100,000 in one year (prorated for the covered period).

- Loan proceeds may also be used to refinance a loan made under the EIDL program on or after Jan. 31, 2020.

Loan Forgiveness

A borrower is eligible for forgiveness on a loan in an amount equal to the amount the borrower paid in the eight-week period following the loan origination date for the following: (i) payroll costs, (ii) interest on a “covered mortgage obligation”; (iii) “covered rent obligation”; and (iv) “covered utility payments.”

The forgiveness amount will be reduced by any reduction in the average number of full-time equivalent employees employed by the borrower during the eight-week period beginning from the origination of the loan, as compared to the average number of full-time employees employed by the borrower per month between either (i) February 15 and June 30, 2020 or (ii) the average number of full time employees employed by the borrower between January 1 and February 29, 2020.

The loan eligible for forgiveness will be reduced proportionally by any reduction in employees during the covered period compared to certain prior periods. In addition, the loan amount eligible for forgiveness will be reduced by the reduction in pay of certain employee in excess of 25 percent.

To encourage employers to rehire any employees who have already been laid off due to the COVID-19 crisis, borrowers that re-hire workers previously laid off will not be penalized for having a reduced payroll at the beginning of the period and the payroll costs of any such employees are eligible for loan forgiveness.

In order to have any loan forgiven, Borrowers are required to submit certain documentation verifying their payroll and pay rates during the applicable periods and make certifications regarding the use of the loan. Borrowers should keep detailed accounting records in order to take advantage of the loan forgiveness provisions.

Observations

- Loans cannot be used to pay any principal amounts due under a mortgage obligation or other debt. Mortgage interest payments are permissible only if the mortgage existed before Feb. 15, 2020.
- The CARES Act does not address what happens after the eight-week covered period of forgiveness. At this time, we do not know if Congress will extend the initial eight-week loan forgiveness period.
- A business should carefully determine which of the new programs is best for its business before applying for a program and should carefully plan for the use of the funds.

- Although the loan program builds upon the existing SBA 7(a) loan program for efficiency and simplicity, such modifications are themselves complex and businesses should seek appropriate guidance to determine if (1) they are eligible for a Paycheck Protection Loan, and (2) a Paycheck Protection Loan is permitted by any existing debt agreements of such business and whether appropriate consents are obtained.

If you have any questions about this Alert, or if you would like legal assistance in light of the COVID-19 pandemic, please contact one of the attorneys listed on Page One of this Alert or the [Aronberg Goldgehn attorney](#) with whom you work.