

Business Law Alert

UPDATE

The Paycheck Protection Program Under the Historic CARES Act

UPDATE APRIL 1, 2020 - The Treasury Department issued an update to the PPP Loan Program. [CLICK HERE](#) for a link to the Treasury Department page that contains the current proposed form of Application (also included at the end of this Alert).

Applications may be submitted as early as April 3, 2020.

All who are interested in pursuing the PPP Loan should contact their primary lender or an SBA Lender as soon as possible.

Do not hesitate to contact us with any questions or if you require assistance.

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).

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- 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 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.



Paycheck Protection Program Application Form

OMB Control No.: 3245-0407
Expiration Date: 09/30/2020

Non-Profit <input type="checkbox"/> Vet Org <input type="checkbox"/> Tribal <input type="checkbox"/> Ind. Cont. <input type="checkbox"/> Self Employed <input type="checkbox"/>		DBA or Tradename if applicable	
Business Legal Name			
Business Primary Address		Business TIN (EIN,SSN)	Business Phone
			() -
		Primary Contact	Email Address

Average Monthly Payroll:	\$	X 2.5 equals Loan Amount:	\$	Number of Jobs:	
Purpose of the loan (select more than one):					
<input type="checkbox"/> Payroll <input type="checkbox"/> Rent / Mortgage Interest <input type="checkbox"/> Utilities <input type="checkbox"/> Other (explain):					

Applicant Ownership

List all owners of Applicant with greater than 20% ownership stakes. Attach a separate sheet if necessary.

Owner Name	Title	Ownership %	TIN (EIN,SSN)	Address

If questions (1) or (2) below are answered "Yes," the loan will not be approved.

Question	Yes	No
1. Is the Business or any owner presently suspended, debarred, proposed for debarment, declared ineligible, voluntarily excluded from participation in this transaction by any Federal department or agency, or presently involved in any bankruptcy?	<input type="checkbox"/>	<input type="checkbox"/>
2. Has the Business, any of its owners, or any business owned or controlled by any of them, ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent or has defaulted in the last 7 years and caused a loss to the government?	<input type="checkbox"/>	<input type="checkbox"/>
3. Is the Business or any owner an owner of any other business or have common management with any other business? If yes, attach a listing of all Affiliates and describe the relationship as addendum A.	<input type="checkbox"/>	<input type="checkbox"/>
4. Has the Business received an SBA Economic Injury Disaster Loan between January 31, 2020 and April 3, 2020? If yes, provide details on a separate sheet identified as addendum B.	<input type="checkbox"/>	<input type="checkbox"/>

Applicants who are individuals and all 20% or greater owners of the business must answer the following questions. If questions (5) or (6) are answered "Yes" or question (7) is answered "No", the loan will not be approved.

Question	Yes	No
5. Are you presently subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, on probation or parole?	<input type="checkbox"/>	<input type="checkbox"/>
Initial here to confirm your response to question 5 → _____		
6. Within the last 7 years, for any felony or misdemeanor for a crime against a minor, have you: 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; 4) been placed on pretrial diversion; or 5) been placed on any form of parole or probation (including probation before judgment)?	<input type="checkbox"/>	<input type="checkbox"/>
Initial here to confirm your response to question 6 → _____		
7. <input type="checkbox"/> I am a U.S. Citizen <u>OR</u> <input type="checkbox"/> I have Lawful Permanent Resident status <input type="checkbox"/> No		
Initial here to confirm your response to question 7 → _____		



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By Signing Below, You Make the Following Representations, Authorizations, and Certifications

REPRESENTATIONS AND AUTHORIZATIONS

I represent that:

- I have read the Statements Required by Law and Executive Order included in this form, and I understand them.
- I will comply, whenever applicable, with the civil rights and other limitations in this form.
- All SBA loan proceeds will be used only for business related purposes as specified in the loan application.
- To the extent feasible, I will purchase only American-made equipment and products.
- The Applicant is not engaged in any activity that is illegal under federal, state or local law.

For Applicants who are individuals and all Associates: I authorize the SBA to request criminal record information about me from criminal justice agencies for the purpose of determining my eligibility for programs authorized by the Small Business Act, as amended.

CERTIFICATIONS

The Business and each 20% or greater owner must certify in good faith to all of the below by **initialing** next to each one:

- _____ 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 payments, lease payments, and utility payments; I understand that if the funds are used for unauthorized purposes, the federal government may pursue criminal fraud charges.
- _____ Documentation verifying the number of full-time equivalent employees on payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight week period following this loan will be provided to the lender.
- _____ Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities. Due to likely high subscription, it is anticipated that not more than twenty-five percent (25%) of the forgiven amount may be for non-payroll costs.
- _____ During the period beginning on February 15, 2020 and ending on December 31, 2020, the Applicant has not and will not receive another loan under this program.
- _____ I further certify that the information provided in this application and the information that I have provided in all supporting documents and forms is true and accurate. I realize that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable 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.
- _____ I acknowledge that the lender will calculate the eligible loan amount using tax documents I have submitted. I affirm that these tax documents are identical to those I submitted to the IRS. I also understand, acknowledge and agree that the Lender can share the tax information with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

Signature of Authorized Representative of Business

Date

Print Name

Title

Signature of Owner of Applicant Business

Date

Print Name

Title



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Purpose of this form:

This form is to be completed by the Applicant and all individuals identified below and **submitted to your SBA Participating Lender**. Submission of the requested information is required to make a determination regarding eligibility for financial assistance. Failure to submit the information would affect that determination.

Instructions for completing this form:

For purposes of calculating "Average Monthly Payroll", most Applicants will use the average monthly payroll for 2019, excluding costs over \$100,000 on an annualized basis for each employee. For seasonal businesses, the Applicant may elect to instead use average monthly payroll for the time period between February 15, 2019 and June 30, 2019, excluding costs over \$100,000 on an annualized basis for each employee. For new businesses, average monthly payroll may be calculated using the time period from January 1, 2020 to February 29, 2020, excluding costs over \$100,000 on an annualized basis for each employee.

The first section and questions 1-4 request information about the Business. Questions 5-7 are to be completed, signed and dated by each applicant who is an Individual as well as each 20% or greater owner of an Applicant Business. All parties listed below are considered owners of the Applicant Business as defined in 13 CFR § 120.10, as well as "principals."

- For a sole proprietorship, the sole proprietor;
- For a partnership, all general partners, and all limited partners owning 20% or more of the equity of the firm;
- For a corporation, all owners of 20% or more of the corporation;
- For limited liability companies, all members owning 20% or more of the company; and
- Any Trustor (if the Applicant is owned by a trust).

Paperwork Reduction Act – You are not required to respond to this collection of information unless it displays a currently valid OMB Control Number. The estimated time for completing this application, including gathering data needed, is 8 minutes. Comments about this time or the information requested should be sent to : Small Business Administration, Director, Records Management Division, 409 3rd St., SW, Washington DC 20416., and/or SBA Desk Officer, Office of Management and Budget, New Executive Office Building, Washington DC 20503.

Privacy Act (5 U.S.C. 552a) – Under the provisions of the Privacy Act, you are not required to provide your social security number. Failure to provide your social security number may not affect any right, benefit or privilege to which you are entitled. (But see Debt Collection Notice regarding taxpayer identification number below). Disclosures of name and other personal identifiers are required to provide SBA with sufficient information to make a character determination. When evaluating character, SBA considers the person's integrity, candor, and disposition toward criminal actions. Additionally, SBA is specifically authorized to verify your criminal history, or lack thereof, pursuant to section 7(a)(1)(B), 15 USC Section 636(a)(1)(B) of the Small Business Act (the Act).

Disclosure of Information: Requests for information about another party may be denied unless SBA has the written permission of the individual to release the information to the requestor or unless the information is subject to disclosure under the Freedom of Information Act. The Privacy Act authorizes SBA to make certain "routine uses" of information protected by that Act. One such routine use is the disclosure of information maintained in SBA's system of records when this information indicates a violation or potential violation of law, whether civil, criminal, or administrative in nature. Specifically, SBA may refer the information to the appropriate agency, whether Federal, State, local or foreign, charged with responsibility for, or otherwise involved in investigation, prosecution, enforcement or prevention of such violations. Another routine use is disclosure to other Federal agencies conducting background checks but only to the extent the information is relevant to the requesting agencies' function. See, 74 F.R. 14890 (2009), and as amended from time to time for additional background and other routine uses. In addition, the CARES Act, requires SBA to register every loan made under the Paycheck Protection Act using the Taxpayer Identification Number (TIN) assigned to the borrower.

Debt Collection Act of 1982, Deficit Reduction Act of 1984 (31 U.S.C. 3701 et seq. and other titles) – SBA must obtain your taxpayer identification number when you apply for a loan. If you receive a loan, and do not make payments as they come due, SBA may: (1) report the status of your loan(s) to credit bureaus, (2) hire a collection agency to collect your loan, (3) offset your income tax refund or other amounts due to you from the Federal Government, (4) suspend or debar you or your company from doing business with the Federal Government, (5) refer your loan to the Department of Justice, or (6) foreclose on collateral or take other action permitted in the loan instruments.

Right to Financial Privacy Act of 1978 (12 U.S.C. 3401) – The Right to Financial Privacy Act of 1978, grants SBA access rights to financial records held by financial institutions that are or have been doing business with you or your business including any financial institutions participating in a loan or loan guaranty. SBA is only required provide a certificate of its compliance with the Act to a financial institution in connection with its first request for access to your financial records. SBA's access rights continue for the term of any approved loan guaranty agreement. SBA is also authorized to transfer to another Government authority any financial records concerning an approved loan or loan guarantee, as necessary to process, service or foreclose on a loan guaranty or collect on a defaulted loan guaranty.

Freedom of Information Act (5 U.S.C. 552) – Subject to certain exceptions, SBA must supply information reflected in agency files and



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records to a person requesting it. Information about approved loans that will be automatically released includes, among other things, statistics on our loan programs (individual borrowers are not identified in the statistics) and other information such as the names of the borrowers (and their officers, directors, stockholders or partners), the collateral pledged to secure the loan, the amount of the loan, its purpose in general terms and the maturity. Proprietary data on a borrower would not routinely be made available to third parties. All requests under this Act are to be addressed to the nearest SBA office and be identified as a Freedom of Information request.

Occupational Safety and Health Act (15 U.S.C. 651 et seq.) – The Occupational Safety and Health Administration (OSHA) can require businesses to modify facilities and procedures to protect employees. Businesses that do not comply may be fined, forced to cease operations, or prevented from starting operations. Signing this form is certification that the applicant, to the best of its knowledge, is in compliance with the applicable OSHA requirements, and will remain in compliance during the life of the loan.

Civil Rights(13 C.F.R. 112, 113, 117) – All businesses receiving SBA financial assistance must agree not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations. All borrowers must display the "Equal Employment Opportunity Poster" prescribed by SBA.

Equal Credit Opportunity Act (15 U.S.C. 1691) – Creditors are prohibited from discriminating against credit applicants on the basis of race, color, religion, national origin, sex, marital status or age (provided the applicant has the capacity to enter into a binding contract); because all or part of the applicant's income derives from any public assistance program; or because the applicant has in good faith exercised any right under the Consumer Credit Protection Act.

Debarment and Suspension Executive Order 12549; (2 CFR Part 180 and Part 2700) – By submitting this loan application, you certify that neither you nor any Associates have within the past three years been: (a) debarred, suspended, declared ineligible or voluntarily excluded from participation in a transaction by any Federal Agency; (b) formally proposed for debarment, with a final determination still pending; (c) indicted, convicted, or had a civil judgment rendered against you for any of the offenses listed in the regulations or (d) delinquent on any amounts owed to the U.S. Government or its instrumentalities as of the date of execution of this certification.

SAMPLE