REID & RIEGE ATTORNEYS

COVID-19 Alert

CARES ACT PAYROLL PROTECTION PLAN LOANS

APRIL 2020

The CARES Act, passed by Congress and signed by the President on March 27, 2020, is a massive federal undertaking to stabilize the U.S. economy during the COVID-19 crisis. Among many other loan, grant and tax relief measures, it includes a Paycheck Protection Program (PPP) loan program for eligible employers, with beneficial terms including loan forgiveness.

HOW TO ACCESS THE PPP?

The PPP is a graft on to the Small Business Administration (SBA) Section 7(a) loan program, to be in place between February 15, 2020 and June 30, 2020. General information about the PPP can be found here.

Actual loans will be made and administered by banks, credit unions, and other eligible SBA lenders. To obtain a loan you must contact your bank or other lender directly. In the SBA's March 31, 2020 press release (Press Release), Treasury Secretary Mnuchin identified April 3, 2020, as the date lenders are expected to be ready to go, with hope for same day loan approvals.

The PPP is established as a $349 Billion program set to run until June 30. However, given the large number of eligible employers expected to apply, you should contact your bank or other lender immediately to not be frozen out of the opportunity.

For additional information on the PPP, please refer to the resources offered by the U.S. Chamber of Commerce, which can be found here.

WHO IS ELIGIBLE TO BORROW?

In addition to "small business concerns" as already identified by the SBA, any business concern, nonprofit (501(c)(3)) organization, veterans (501(c)(19)) organization, or Tribal business concern employing not more than 500 people (or greater number for certain industries set by the SBA). Also, subject to fulfilling certain information requirements, self-employed individuals, independent contractors and sole proprietorships are eligible. For the 500 employee requirement, full-time, part-time and other employees are taken into account. The 500 employee cap is applied on a location-by-location basis for businesses in NAICS Code 72 (food preparation and accommodations).

Note that the normal SBA affiliation rules are in play for applying the 500 employee cap, meaning that businesses under common control may need to

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take into account all of their employees (with exception for NAICS Code 72 businesses).

In addition, each applicant will need to make a good faith certification:

- That the uncertainty of current economic conditions makes necessary the loan request to support ongoing operations;
- Acknowledging that funds will be used to retain workers and maintain payroll or make mortgage payments, rent payments, and utility payments;
- That it does not have an application pending for a loan under this provision for the same purpose and in duplication of amounts applied for in the requested loan; and
- That during the period from February 15, 2020 to December 31, 2020, the applicant has not received amounts under this provision for the same purpose and in duplication of amounts applied for in the requested loan (note, however, certain other SBA-administered loans may be refinanced through the PPP).

Regarding the required funds use acknowledgement (described above), please note that the SBA sample application form indicates that the Federal government may pursue criminal fraud charges against those mis-certifying.

Note that applicants will NOT need to certify that they cannot obtain financing elsewhere, as required for other SBA 7(a) loans.

If you have questions about whether your business is eligible, please contact us.

HOW MUCH CAN BE BORROWED?

An eligible business can borrow 2.5 times its average monthly Payroll Costs during the one year period before the loan is made, capped at $10 million.

Payroll Costs for these purposes are:

- Salary, wage, commission or similar compensation (but see below);
- Payment of cash tip or equivalent;
- Payment for vacation, parental, family, medical or sick leave;
- Allowance for dismissal or separation;
- Payment for the provision of group health care benefits, including insurance premiums;
- Payment of any retirement benefit; and
- Payment of State or local tax assessed on the compensation of employees.

However, Payroll Costs do NOT include:

- Compensation of any individual employee in excess of an annual salary of $100,000, pro-rated for the covered period;
- Payroll, railroad retirement and income taxes;
- Any compensation to an employee whose principal place of residence is outside the US; or

- Qualified sick leave wages and qualified family leave wages for which a credit is allowed under Section 7001 or 7003 of the Families First Coronavirus Response Act

WHAT ARE THE LOAN TERMS?

The Cares Act itself contemplates loans with interest rates of up to 4.00% and maturity of up to 10 years, with loan payments (principal and interest) deferred for six to 12 months. In the Press Release the SBA has indicated these loans will have an interest rate of 0.50%, a two-year maturity, and a six-month deferral for payments. The loans will be 100% guaranteed by the SBA, and no collateral or personal guaranty will be required. The loans are entirely prepayable without penalty. No borrower fees to the SBA will be required; the SBA is to specify limits on any fees that an agent may charge an eligible borrower.

ARE THERE RESTRICTIONS ON USE OF LOANS?

Yes. The purpose of the PPP is to keep businesses operating and employees on staff and paid. Accordingly, it is intended that loan proceeds will be used between funding and June 30, 2020 for the following purposes:

- Payroll Costs;
- Costs related to continuation of group healthcare benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- Salaries, commissions or similar compensation;
- Mortgage interest payments (not principal);
- Rent;
- Utilities; and
- Interest on other debt obligations incurred before February 15, 2020.

MAY THE LOANS BE FORGIVEN?

Yes, in whole or part, with limits discussed below. This is the main attraction of the PPP, and has the effect of transferring much borrower-employer payroll cost (along with certain other expenses) for an eight-week period to the Federal government. Amounts forgiven will not be subject to tax as forgiveness of debt income to the borrower.

To determine how much may be forgiven, the focus is on the eight-week period beginning on the date of loan origination. The borrower's expense for the following items during that eight week period will be the starting point for determining how much of the loan may be forgiven:

- Payroll Costs (see above under How Much Can Be Borrowed?);
- Interest paid on mortgage obligations incurred prior to February 15, 2020;
- Rent paid under a leasing arrangement in force prior to February 15, 2020; and
- Utility payments for electricity, gas, water, transportation, telephone or internet access for service in place prior to February 15, 2020.

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While the Act specifies all of those items without specified limits on any of them (other than that total forgiveness cannot exceed the loan principal), the SBA has determined that items other than Payroll Cost cannot make up more than 25% of the amount forgiven.

The amount determined above is subject to two potential reductions:

- If the borrower's number of full time equivalent employees per month during the eight week period is less than that during the period from February 15, 2019 to June 30, 2019 (or, at the borrower's option, January 1, 2020 to February 29, 2020), then the amount determined above will be pro-rated to account for the difference (e.g., if eight week FTEs are 75% of base period FTEs, the amount determined above will be multiplied by 0.75).
- The amount determined above will also be reduced by the amount of compensation reduction during the eight-week period to any employee in excess of 25% of compensation of that employee in the most recent full calendar quarter prior to the eight-week period; this only applies for employees previously compensated at less than a $100,000 per year annual rate.

These reductions will be eliminated in the case of reduction in FTE's or compensation levels between February 15, 2020, and April 26, 2020, to the extent reversed before June 30, 2020.

To obtain forgiveness, the borrower will need to apply to the lender following the eight-week period, providing documentation and certification of the expenses giving rise to the reduction. The lenders are directed to issue a determination on the application within 60 days of receipt.

CONCLUSION

The PPP is a tremendous lifeline to small businesses and their employees. Things are moving very fast as this program moves in one week from creation in the CARES Act to up and running. The SBA continues to issue guidance, and lenders are establishing their own programs, on the fly.

Please contact the Reid and Riege attorney with whom you regularly work, or a member of our Business Services practice listed to the right, for more up to date information, or questions about your unique circumstances.

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