CARES ACT FEDERAL LOAN PROGRAMS

In response to the COVID-19 outbreak, the U.S. government recently passed the Coronavirus Aid, Relief, and Economic Security Act (the "**CARES Act**"). In addition to expanding the existing Economic Injury Disaster Loan ("**EIDL**") program maintained by the Small Business Administration (the "**SBA**"), the CARES Act also established the Paycheck Protection Program (the "**PPP**") for businesses with 500 or fewer employees (subject to some exceptions broadening the scope) and non-profits, which allows businesses to take out emergency loans designed to help maintain employees and keep doors open. Eligible businesses can obtain both an EIDL and a PPP loan as long as the loan proceeds are used to pay separate expenses. This Bulletin discusses the EIDL and PPP, but a number of other assistance programs have been created at the federal, state and local levels to address the economic impacts of COVID-19 on businesses and individuals.

ECONOMIC INJURY DISASTER LOANS AND LOAN ADVANCE

The CARES Act amends the existing EIDL program to broaden the scope of businesses eligible for the program. All 50 states have now been declared disaster areas, making small businesses and non-profits across the U.S. eligible to participate. Businesses can obtain an EIDL of up to $2 million and an initial emergency advance of up to $10,000. The total amount allocated by the federal government under the CARES Act to the EIDL program is $10 billion, therefore the funds will likely be exhausted and not all applicants will ultimately receive EIDLs. However, the EIDL application can be made online today (see link below), and the initial advance of up to $10,000 will be paid within days of the application submission and is forgivable in full if used to pay eligible expenses.

Eligibility

Eligibility for EIDLs has been expanded to include the following:

- Businesses with 500 or fewer employees
- Sole proprietorships, with or without employees
- Independent contractors
- Cooperatives and employee owned businesses
- Tribal small businesses
- Private non-profits of any size

In addition, eligible businesses must have been in business as of January 31, 2020.

Allowable Uses

EIDL funds can be used as working capital to pay fixed debts, payroll (including paid sick leave), accounts payable and other bills that could have been paid had the disaster not occurred.

Repayment; Maturity; Interest Rate

EIDLs can have a maturity of up to a maximum of 30 years. Loan terms are determined on a case-by-case basis, based upon each borrower's ability to repay. The interest rate is 3.75% for businesses with 500 or fewer employees and 2.75% for non-profits.

Emergency Advance

Borrowers can receive a $10,000 emergency cash advance that can be forgiven if spent on paid leave, maintaining payroll, increased costs due to supply chain disruption, mortgage or lease payments or repaying obligations that cannot be met due to revenue losses. In order to receive an advance, businesses must first apply for an EIDL and then request the advance. The advance will be made available within 3 days of application for an EIDL. Borrowers will not be required to pay back the advance even if they are subsequently denied for an EIDL. In advance of disbursing the advance payment, the SBA will require that a borrower file a certification, under penalty of perjury, that they are eligible to apply for an EIDL. EIDL advances will be available until December 30, 2020. If a business also takes out a PPP loan, the amount of PPP loan forgiveness will be decreased by the $10,000 EIDL advance.

Approval

EIDLs can be approved by the SBA based solely on an applicant's credit score. EIDLs that are smaller than $200,000 can be approved without a personal guarantee.

How to Apply

Applications should be submitted as soon as possible and can be submitted online at: https://covid19relief.sba.gov/#/.

The deadline to submit an application is December 21, 2020.

PAYCHECK PROTECTION PROGRAM

Under the CARES Act, the SBA is being allocated $349 billion for PPP loans. The PPP is designed to provide a direct incentive for small businesses to keep their workers on payroll by providing each small business a loan up to $10 million for payroll and certain other expenses. These loans are also being referred to as "7(a) loans" in reference to the section of federal law that governs the SBA. The portion of PPP loans used to pay eligible expenses during the 8-week period following loan origination will be forgiven upon application by the borrower after June 30, 2020 with the condition (and supporting documentation) that loan proceeds were used for eligible expenses. The unforgiven balance of PPP loans will become 2-year loans bearing interest at a maximum rate of 1.00%. The U.S. government is guaranteeing the loans.

Eligibility

Businesses that were operating on February 15, 2020 and have 500 or fewer employees are eligible to apply for loans. Qualifying businesses include eligible for-profit corporations, limited liability companies, non-profits, veterans organizations, tribal concerns, sole proprietorships, self-employed individuals, and independent contractors. Businesses with more than 500 employees may be eligible if such businesses meet the SBA's industry-specific size standards. Businesses assigned NAICS code 72 (accommodation and food service) with more than 1 location and not more than 500 employees at each location are also eligible. There is no requirement that a business be partially or completely shut down in order to apply.

The CARES Act waives SBA affiliation rules for accommodation and food service businesses, certain franchises and businesses that receive funding through the Small Business Investment Company (SBIC) program. SBA affiliation rules otherwise apply, thereby including in the applicant's headcount the headcount of affiliates that control or have the power to control the business, such as private equity or venture capital owners, and their other portfolio companies. It is possible that the affiliation rules will be adjusted to broaden access to the PPP for private equity and venture capital-backed businesses.

Maximum Loan Amount

The maximum loan amount under the PPP is the lesser of (i) 2.5 times the average monthly payroll costs of a qualifying business over the prior 12 months and (ii) $10 million. "Payroll costs" are defined as:

- Employee compensation such as salary, wage commission or cash tips up to $100,000 per employee per year
- Independent contractor compensation that is a wage, commission, income, net earnings or similar compensation up to $100,000 per independent contractor per year
- Payment for vacation, parental, family, medical or sick leave
- Allowance for dismissal or separation
- Payments for group health care benefits, including insurance premiums
- Payment of retirement benefits
- State and local taxes assessed on employee compensation

"Payroll costs" do not include: (1) employee or independent contractor compensation in excess of $100,000 annualized compensation per employee or independent contractor; (2) federal tax withholdings; (3) compensation of employees who reside outside of the U.S.; (4) sick and family leave wages for which tax credits already exist under the Families First Coronavirus Response Act.

Businesses can only include employee compensation in payroll costs, not payments to independent contractors. Independent contractors will need to file their own applications for PPP loans.

Allowable Uses

PPP loans can be used to pay payroll costs, the interest portion of mortgage payments (excluding prepayments), rent (including rent under a lease agreement), utilities, and interest on other debt obligations incurred prior to February 15, 2020.

Loan Forgiveness

Borrowers are eligible for loan forgiveness under the PPP for eligible expenses paid during the 8-week period following loan origination. The amount eligible for forgiveness will be equal to the sum of the following costs incurred during the 8-week period:

- Payroll costs
- Mortgage interest obligations (not principal)
- Rent and lease payments
- Utilities

At least 75% of the loan must be used for payroll costs in order to be fully forgiven. The forgiven amount will not count as cancellation of debt income for tax purposes.

If a borrower's average number of employees during the 8-week period following loan origination is less than (i) the average number of employees during the period beginning on February 15, 2019 and ending on June 30, 2019 or (ii) the average number of employees during the period beginning on January 1, 2020 and ending on February 29, 2020, the amount of loan forgiveness will be reduced proportionately. A borrower may elect to use either of the time periods outlined in (i) and (ii) above for purposes of this calculation. If a business rehires terminated employees prior to June 30, 2020, the rehired employees can be counted in the 2020 employee count for calculation of loan forgiveness. The amount of loan forgiveness will also be reduced if the compensation of employees who made less than $100,000 in 2019 is cut by more than 25%, in which case the reduction will be the amount of the excess over 25%.

In order to receive loan forgiveness, a borrower must have:

- Payroll documentation verifying the number of employees on payroll and pay rates, including payroll tax filings and state income, payroll and unemployment insurance filings
- Documentation of qualifying expenses including cancelled checks, payment receipts, transcripts of accounts or other documents verifying payments relating to mortgage interest obligations, rent and utilities
- A certification from the borrower that all information provided is true and amounts for which forgiveness is being requested were used for qualifying purposes

Repayment Deferral; Prepayment; Fee Waiver; No Personal Guarantee

Borrowers can defer repayment of the principal, interest and fees for a period of at least 6 months but no more than 1 year. Lenders will have discretion within this range regarding deferment period length for a particular borrower. For the portion of any PPP loan that is not forgiven, the maturity is 2 years from the date of the loan.

Prepayment penalties and borrower and lender fees are waived. Personal guarantees and collateral are not required.

How to Apply

PPP loans can be made through any existing SBA 7(a) lender or through any federally insured depository institution, federally insured credit union, and Farm Credit System institution that is participating. Other regulated lenders will be available to make loans once such lenders are approved and enrolled in the program. Lenders can begin processing loan applications as soon as April 3, 2020. Borrowers should reach out to their local lenders and begin gathering necessary documentation, including:

- Payroll records for 2019 and 2020 year to date, including vacation, paid time off, sick and medical pay
- State and local tax withholdings on employee compensation
- Employee group health insurance premium totals
- Employer-funded retirement plan contributions for employees
- 1099s for independent contractors
- Prior year tax returns

Borrowers will also need to submit a statement certifying, among other things, that the uncertainty of current economic conditions makes the loan request necessary to support the ongoing operations of the borrower and that the funds will be used for qualifying purposes.

A sample PPP application can be found online at: https://www.sba.gov/document/sba-form--paycheck-protection-program-ppp-sample-application-form

BOLD LEGAL IS WITH YOU

To support our community, Bold Legal is providing 30-minute free consultations to business owners seeking to apply for EIDLs or PPP loans in this time of crisis. We will also provide assistance with the application process for a fixed fee. Please reach out to us with questions or for consultation at:

David Kendall – dkendall@bold.legal 720-745-4262

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Please note that the rules and regulations governing the loan programs described above are subject to change after the date of publication of this bulletin.

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