

Navigating the CARES Act: How Your Small Business May Benefit From Available Loan Programs

APRIL 1, 2020 WEBINAR | Q&A



Harter Secret & Emery LLP
ATTORNEYS AND COUNSELORS

DEJOY, KNAUF
& BLOOD LLP
Business Advisors & CPAs

Below are responses to questions submitted during the live webinar on April 1, 2020. Should you have any other questions, please do not hesitate to reach out to [Harter Secret & Emery](#) or [DeJoy, Knauf & Blood](#).

Q. Payroll costs: Our company utilizes temporary staffing. Since there is reference to independent contractors, would that be an allowed cost in the calculation, up to \$100k? Would it appear to be a double dip if so?

A. Based on the current language, it does not appear that temp employees who are paid through a temp agency would be includable as payroll costs, however they would be included if the temp agency were to apply for a loan. That said, the SBA's affiliation rules indicate that a company must include temp employees when determining if it has 500 or more employees, so it's unclear.

Q. Are bonuses included in payroll costs?

A. Although not specifically stated in the computation, we believe these would be included and fall under 'salaries, wages, commissions, or other similar compensation.'

Q. Do employer contributions to a Simple IRA (401(k) type program) count towards Total Payroll Cost and therefore eligible for PPP?

A. Yes, these would be considered a payment of a retirement benefit and includable.

Q. If you have a triple net lease, can you include property taxes in a PPP loan? Would this amount be forgivable?

A. The rules merely specify that "*rent* obligated under a leasing agreement in force before February 15, 2020. Most commercial lease agreements would treat the additional charges due under a triple net lease as "additional rent" so we assume that those taxes would be included but we suggest you review your underlying lease.

Q. Are employees with \$100K in compensation excluded from the calculation? Or is their compensation capped at \$100K when making the calculation?

A. Employees at or over \$100k in compensation are still included in the computation, but their cash compensation (i.e. salary, wages, tips and commissions) is just capped at \$100k.

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Q. Are EE benefits (health, vision, dental, STL, LDL, life ins, 401(k) contributions) considered salary for purposes of the \$100k limit?

A. As stated in the guidance, the \$100,000 is applied to cash compensation (i.e. salary, wages, tips and commissions) only. Only cash compensation in excess of \$100,000 is excluded. The non-cash payroll costs (benefits, state and local taxes) are still included for that employee.

Q. Is worker's compensation covered under employee benefits that are includable?

A. This is not included in the definition of 'payroll costs'.

Q. Please add additional clarity about self-employed employers with employees including their own net income payments when comp is entirely outside of payroll system for PPP loans.

A. Eligible self-employed individuals, independent contractors and sole proprietors are able to use 'income from self-employment' or pass through income from the business up to \$100,000 in the computation. This is in addition to compensation up to \$100,000 for employees.

Q. What about property taxes and maintenance costs for NNN leases?

A. The rules merely specify that "rent obligated under a leasing agreement in force before February 15, 2020. Most commercial lease agreements would treat the additional charges due under a triple net lease as "additional rent" so we assume that those taxes would be included but we suggest you review your underlying lease.

Q. How do you calculate the past year payroll if you have one highly compensated employee most all others are less than 100K?

A. The one employee above \$100,000 would be limited to \$100,000 for the computation. Therefore, the average monthly salary/wage for this individual would be capped at \$8,333 per month.

Q. If a company is exempt and exempts themselves from the federal sick leave requirements can they receive the FICA credits?

A. Yes, to the extent that the employer is incurring the payroll tax expense and is not taking the wages into account for determining other payroll tax credits.

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Q. Are the payroll costs based on when they are paid (cash method) or how we accrue our payroll on a monthly basis accrued bonuses and commissions? I.e: January bonuses accrued in January but paid in February. What month do we include the January bonuses? January when accrued or February when paid?

A. The definition in the CARES Act specifies ‘the average total monthly **payments** by the applicant for payroll costs incurred’ which would indicate they are includable when **paid**.

Q. For the employee retention credit, is the quarter Q2 or Q1 & Q2?

A. This covers eligible wages paid from 3/13/20 through 12/31/20 for eligible employers.

Q. We have various divisions within our company, some of which are considered essential, but other divisions have been shuttered for now as non-essential. I assume the employee retention credits are not available for just the division if it were to qualify?

A. The CARES Act defines an “eligible employer” for purposes of this credit as one whose operation is fully or partially suspended due to orders from a governmental authority due to COVID-19. Businesses that have not been completely halted may still be eligible.

Q. Is there any chance the allowance is increased to get more than a \$3000 capital gains loss for 2020? I know this isn't a business benefit, rather a middle-class income tax benefit, but just wondering.

A. This is not in the CARES Act and we are not aware of any discussion about changing this at this point.

Q. For PPP - do employees who are out on disability, PFL, or FMLA count toward headcount?

A. Yes, we believe they would count for the under 500 employee limitation for eligibility for the PPP loan. We also believe they would count for the loan forgiveness computation.

Q. As an independent contractor, does an EIDL loan exclude unemployment benefits?

A. An EIDL loan is computed based on the ‘economic injury’ to you or your company that the SBA computes.

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- Q. Do distributions to the owners of the business or payments to the owners of the business as salary count towards payroll costs? How are company owners or partners who receive guaranteed payments or who do not receive a W-2 treated as part of this computation? If you are an LLC owner and receive guaranteed payments, are those guaranteed payments treated as salary for PPP purposes?**
- A.** It seems like the intention would be to allow business owners to include salary up to \$100,000. This is not specifically included in the definition of payroll costs, as the definition limits payments to 'employees' if you are not a sole proprietor or independent contractor. Therefore, companies set up as S-Corporations would be able to include salary paid to the owner as an employee, however the same company under a partnership or LLC structure would not consider the owner an employee as they are paid via guaranteed payments. We don't believe the intent is to make the loan available to cover payroll-type costs of owners of certain entity structures but not others. Overall, we will be looking for additional guidance from the SBA to clarify this.
- Q. We have incurred heavier than normal prevailing wage payroll this year. Presumably, we would maintain these workers by paying a 40-hour check at their regular rate. This will cause our payroll in the 8-week period to be much less than in periods before. Could this reduction make receiving forgiveness problematic?**
- A.** Based on how the computation is worded for the limitations on forgiveness, this could potentially be an issue if your employees (who make less than \$100,000) are making more than 25% less at their regular rate than they were during the full prior quarter. The computation specifically excludes any employees who received, during any single pay period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000. Therefore, if your employees on prevailing wage jobs made an amount during a pay period in 2019 that was in excess of \$100,000 annualized, then they wouldn't have to be included in the computation. We don't believe that the intent of the law is to penalize companies who are keeping people on payroll and paying them a normal wage that they would otherwise get. We will be looking for more guidance on this in the coming days.
- Q. Where do we find the list of lenders for PPP loans?**
- A.** We recommend going with a lender you already have a banking relationship with. If you do not have an existing relationship, a list of the 100 most active SBA 7(a) lender is available here: <https://www.sba.gov/article/2020/mar/02/100-most-active-sba-7a-lenders>

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Q. If we maintain employment levels for 8-week period after receiving loan, but then have to lay folks off -- what is the impact on forgiveness?

A. At this point there is no guidance in the CARES Act about what happens if you must lay off individuals after the 8-week period for loan forgiveness (or the outside date of June 30, 2020). We expect there may be further guidance on this but as of April 3, 2020 it would not impact your forgiveness.

Q. If your business is impacted by COVID-19, as many businesses are, but the loan is not "Needed to continue operations during the COVID-19 emergency", can you still certify and receive a loan?

A. In order to receive the loan, you must be able to certify that "Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant."

Q. If a business uses the loan only for eligible expenses during the 8-week window, is there any reason to think your loan will NOT be forgiven?

A. If you follow the guidance for permissible uses and properly document your forgivable expenses per the regulations then there is no additional reason under the law to think you would not have forgiveness. However, additional guidance is developing around forgiveness and use of the proceeds. For example, the Treasury is now requiring that 75% of the proceeds be used for payroll costs and has made clear that only 25% of the costs that are available for forgiveness may be for non-payroll costs.

Q. What if you are a non-essential business and you are not permitted to rehire by June 30? Do you think this would get extended?

A. There is no impact on your eligibility for the loan based on the essential/non-essential business designation. Even if your employees are not permitted to physically work before June 30th, in order to receive forgiveness you would need to put them back on your payroll. We understand this is not an ideal result.

Q. How does 2.5x monthly payroll relate to 8 weeks being forgiven? Is this because rent and utilities is also included?

A. Yes, you are able to be forgiven for up to 25% of other non-payroll costs, included rent, utilities and interest on mortgage payments. You must use 75% on payroll costs.

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Q. So with the PPP, will a borrower have to get preapproval/waiver from existing lender (i.e. Freddie Mac loans)?

A. If your existing loan documents contain a prohibition on obtaining additional indebtedness (including unsecured indebtedness) yes, you'll need to get a waiver or preapproval from your existing lender. We recommend you review any existing loan documentation and reach out to your lawyer for any questions on prohibitions under those documents.

Q. I have applied for an EIDL do I have to reapply to a different lender for a PPP loan?

A. Yes, the application process is different for the PPP loan and the EIDL. The EIDL is through the SBA directly and the PPP loan is direct through banks/lenders.

Q. You mentioned you can apply for both PPP Loan and EIDL. Should payroll not be included in EIDL so not "double-dipping" within both loans?

A. If you borrow money under an EIDL for payroll costs and also apply for a PPP loan you are able to roll the amount of payroll costs you requested under the EIDL into your PPP loan. PPP Loans are meant to support payroll costs for the covered period where EIDL is more general for necessary costs related to COVID-19.

Q. If we lay off 1 or more employees (for performance reasons), but hire other people at same or higher salaries to replace them, will we still be eligible for total loan forgiveness under PPP SBA loan?

A. As written today, yes you do not need to bring back the same individual employees but simply hire back the same number of employees. We expect there to be further guidance on this topic.

Q. Is there a minimum loan amount for the EIDL? For instance, can a small business apply for a \$20,000 loan and still receive the \$10,000 grant?

A. Not that is clear from the application. You can apply for any amount and still be eligible for the \$10,000, which is computed \$1,000 per employee up to \$10,000.

Q. Is it confirmed that we are to look at trailing 12 months payroll to calculate our max loan size? I have another source telling me to use 2/15/19-6/30/19 if we were in business during that time.

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- A.** It is not clear. We recommend looking at your bank's specific application. We understand that some banks are using the 2019 payroll while others may be using a defined period.
- Q. Is the PPP loan impacted at by any payments from an insurance claim for business interruption?**
- A.** It does not appear so.
- Q. Any idea when the regulations might be completed and the application process begin?**
- A.** The regulations will continue to be a rolling process. On April 2, 2020 we received additional guidance along with an update sample application from the SBA. Some banks are accepting applications as early as April 3, 2020, we recommend reaching out to your lender to get a sense of their timeline.
- Q. Will you be able to elect when your PPP loan is disbursed to dictate when your 8-week period begins?**
- A.** It is not clear, but we suspect the applications will be reviewed and the loan proceeds will be disbursed in the order they are received. Check with your bank for any specific requests on disbursement. We have heard that some banks are making these loans quickly – in a matter of 3-5 business days - and others may take as long as 30-45 days to loan the money.
- Q. If owners advance funds, through a capital call, loan or otherwise, can he be reimbursed from PPP or EIDL funds loans?**
- A.** Return of capital or payment of that type of loan is not a permitted use under the PPP so that is not allowed.
- Q. If we applied for EIDL and want to get \$10K advance only and then CARES. Is the \$10K forgiven or is that part of the CARES forgivable calculation?**
- A.** Pursuant to the regulations from April 2, 2020, the \$10,000 advance is part of the forgiveness amount under the PPP loan.
- Q. For Loans and Loan Guarantees for Mid-Size Businesses, are those funds only available for air carriers, cargo air carriers; businesses critical to maintaining national security;**

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and investments in support of facilities established by the Federal Reserve to support lending to eligible businesses, states, and municipalities?

- A.** We do not yet have enough information on the Title IV mid-size business loans but anticipate there will be some form of “Main Street Lending Program” available to businesses who are not otherwise able to find relief under the CARES Act.
- Q. We were about to let an employee go before Covid happened. If we release them now how will that effect our forgiveness on the PPP Loan?**
- A.** The CARES Act does not contemplate employees who are let go for reasons other than COVID-19 (e.g. for cause termination). We expect there will be further guidance around this point.
- Q. If I pay my employees more for Hazard pay during this period, can those payroll costs be forgiven in the loan?**
- A.** Yes, we believe so, if provided to employees during that 8-week period. There does not seem to be any restriction on paying people more money than they made previously (subject to the \$100,000 cap)
- Q. We are allowed to potentially obtain a loan for 2.5 times our monthly payroll cost however we only have 8 weeks to spend it. If we have extra money at the end of the 8 weeks can we give that back to the bank to wipe our loan clean?**
- A.** The loan has no prepayment penalties, so yes you can pay back any monies that weren’t forgiven. Also, any monies that weren’t forgiven at the end of the 8-week period will be subject to a 1% interest rate with a 2 year loan term if you choose not to pay them back immediately.
- Q. If we make money during this 8-week period, will that have any effect on the forgiveness?**
- A.** No, but you do need to certify that the economic uncertainty has caused you to need the loan when you apply for the loan.
- Q. If we have recently received a deferral for an SBA loan, will that be impacted?**
- A.** No, the CARES Act does not impact any loan deferrals already in place. If you have an existing SBA loan that is not in deferral however you should contact your lender to discuss available deferral options.

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Q. Do you have to apply for the PPP through the lender you have your operating account with? Or any SBA-approved lender?

A. You can use any SBA approved lender though we think it would make the most sense to go through your existing lender as it will cut down on administrative time in processing your application. As well, many lenders are currently only reviewing applications for their existing business banking clients.

Q. Is a sole proprietor with no employees (other than the owner) eligible for the loan?

A. Yes, sole proprietors are eligible for the loan.

Q. If you have laid off workers, do you have to bring those same workers back or just the positions? Just the positions.

A. Under the CARES Act in order to be eligible for forgiveness you need to maintain the same amount of full-time equivalent employees but it is not specific of who must make up those positions.

Q. Would utilities include broadband/internet service?

A. Yes.

Q. Are only the payroll costs that are incurred during the 8-week period forgiven? Anything prior or subsequent to this 8-week period are not, correct?

A. Correct, you are only forgiven for amounts spent during the 8-week covered period.

Q. Do you expect the "creditworthiness" bar under the EIDL program to be different (lower bar) than under pre-COVID SBA standards?

A. Yes, the SBA has waived the Creditworthiness standard and authorized to approve applicants based solely on credit scores (no tax return submission required) or "alternative appropriate methods to determine an applicant's ability to repay."

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& BLOOD LLP
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Presenters:

Thomas R. Anderson, Esq., Partner, Harter Secret & Emery LLP
tanderson@hselaw.com | 585.231.1106

Emily R. L. Cohen, Esq., Senior Associate, Harter Secret & Emery LLP
ecohen@hselaw.com | 585.231.1141

Mark S. Blood, CPA, Co-Founder and Partner, DeJoy, Knauf & Blood LLP
mblood@teamdkb.com | 585.697.9304

Corey Dennis, CPA, Senior Manager, DeJoy, Knauf & Blood LLP
cdennis@teamdkb.com | 585.491.9831