Insights: Alerts

CARES Act Programs Available to Small Businesses

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Please note: The below information may require updating, including additional clarification, as the COVID-19 pandemic continues to develop. Please monitor our main COVID-19 Task Force page and/or your email for updates.

The CARES Act provides several programs to assist small businesses impacted by the COVID-19 pandemic, including favorable loan terms, significant temporary tax breaks, and employee retention credits. Below are key terms of the primary programs under the Act available to small businesses, together with links to various Kilpatrick Townsend legal alerts and governmental notices and guidance that provide more detailed information.

Paycheck Protection Program (PPP)

The SBA announced on April 16, 2020 that no new applications were being accepted based on "available appropriations funding."

On April 21, 2020, the Senate approved an additional $310 billion infusion into the Paycheck Protection Program, which bill is expected to be passed by the House and signed by the President in the coming days. Of this amount, $60 billion will be set aside for small, midsize and community lenders. Otherwise, the bill provides additional funding without changing the existing structure or rules of the PPP.

Introduction

- Designed to encourage small businesses to retain employees through COVID-19 crisis.
- Initially provided $349 Billion in **forgivable** loans to small businesses primarily to meet payroll, with an additional $310 Billion having been approved by the Senate.
- Administered as part of the existing lending procedures/policies of the Small Business Administration (SBA).

Loan Specifics

- Loan amount: Lesser of $10 Million or 2.5 times the borrower's average monthly payroll during 2019 or during the 12-month period before the date of the loan.
- Interest rate: 1%.
- Term: 2 years, with payments deferred during the first six months.
- Collateral: No borrower collateral or personal guarantee required.
- Loan fees: None.

Use of Proceeds

- Payroll Costs (at least 75%)
    - Employers:
        - Salaries, wages, commissions, and tips – up to $100,000 per employee on an annualized basis
        - Health insurance premiums.
        - State and local payroll taxes.
    - Sole proprietors and independent contractors:
        - Wages, commissions, income or net earnings from self-employment or similar compensation.
- Interest on mortgages and other debt obligations incurred before 2/15/2020.
- Rent and utilities on accounts in place before 2/15/2020.
- Refinancing an Economic Injury Disaster Loan made between 1/31/2020 and 4/3/2020.

Eligible Borrowers

- Loan eligibility not based on ability to repay; no collateral or personal guarantees required).
- All businesses (and non-profits) that:
    - Have fewer than 500 U.S. employees, applying SBA affiliation rules, and were in operation on 1/15/2020.
    - Qualify as a “small business concern” under existing SBA employee-based or revenue-based size standards that apply to particular industries. Go to www.sba.gov/size for the industry size standards.
    - A ‘small business concern' is also defined as meeting both tests in SBA's “alternative size standard” as of 3/27/2020:
        - Maximum tangible net worth of not more than $15 million; and
        - The average net income after federal income taxes (excluding any carryover losses) of the business for the two full fiscal years before the date of application is not more than $5 million.
- Special exception for individual locations of hospitality, restaurant, or food service employers (NAICS Code beginning with 72) with 500 or fewer employees.

Affiliate Rules

- Existing SBA rules regarding affiliation apply, except as otherwise provided in the Act for the hospitality and food service industries.
- The SBA rules are quite aggressive in finding affiliation to exist, as they have been used over the years to ensure that the advantageous programs of the SBA are made available only to truly ‘small' businesses.
- KTS Legal Alert: SBA Loan Programs Augmented - Who is "Small" and What Does "Affiliation" Mean (4/2/2020)
- Treasury Department: Affiliation Rules Applicable to U.S. SBA PPP (4/3/2020) - https://home.treasury.gov/system/files/136/Affiliation%20rules%20overview%20%28for%20public%29.pdf

Application Process

- Borrower submits to approved lender:

    - SBA PPP Application – Form 2483 (https://www.sba.gov/sites/default/files/2020-04/PPP-Borrower-Application-Form-Fillable.pdf).
- Include payroll documentation sufficient to demonstrate payroll amount.
- Borrower's ownership information, including any owner with more than a 20% ownership interest.
- Certification that the current economic uncertainty makes the loan necessary to support the borrower's ongoing operations.

Loan Forgiveness

- Loan amounts may be forgiven to the extent used for approved expenses during the 8-week period after receiving the loan.
- At least 75% of loan proceeds must go to payroll costs for full loan forgiveness to apply.
- Loan forgiveness amount may be reduced to the extent:
    - Full-time equivalent employee headcount is decreased after the loan from historic pre-loan levels;
    - Salaries and wages are decreased by more than 25% for any employee from quarter prior to loan (excludes employees who made more than $100,000 annualized in 2019); or
    - Any non-refundable grant in connection with an EIDL.
- Process
    - Borrower must document and certify compliance with PPP requirements, including 75% payroll cost threshold.
    - Eligibility is not being scrutinized by lending banks at the time of application in an effort to get the funds out quickly. But borrowers should expect greater scrutiny in the loan forgiveness process.
    - Lender must notify borrower of forgiveness decision within 60 days of request.

Additional Resources

- KTS Legal Alert: Small Business Loan Programs under the CARES Act: Look Here First for Financing (3/26/2020)
- Treasury Department: PPP Information Sheet for Borrowers (4/3/2020) - https://home.treasury.gov/system/files/136/PPP--Fact-Sheet.pdf
- SBA: Paycheck Protection Program Information
- SBA: Paycheck Protection Program Loans FAQs (4/8/2020) - https://www.sba.gov/sites/default/files/2020-04/Final%20PPP%20FAQs%20for%20Lenders%20and%20Borrowers%204-8-20_0.pdf
- Treasury Department: PPP Loan Approval Statistics - https://home.treasury.gov/system/files/136/SBA%20PPP%20Loan%20Report%20Deck.pdf

Economic Injury Disaster Loan (EIDL)

The SBA announced on April 16, 2020 that no new applications were being accepted based on "available appropriations funding."

The bill approved by the Senate on April 21, 2020 also provided an additional $10 billion in new funding for the EIDL program, without changing any of the existing structure or rules of the program.

Loan Specifics

- Loan amount: Up to $2 Million, based on borrower's actual economic injury and financial need, with potential for immediate, non-refundable advance of up to $10,000.
- Interest rate:
  - Businesses: not more than 3.75%
  - Non-profits: not more than 2.75%
- Term: Up to 30 years, based on borrower's ability to repay.
- Collateral: Required for loans over $25,000.
- Personal guarantee: Required for loans over $200,000.
- Debt forgiveness: None except for emergency advance amount.

Eligible Borrowers

- Entities that:
  - Meet the SBA's Size Standard. Go to www.sba.gov/size for the industry size standards.
  - Were in operation on 1/31/2020.
  - Suffered a Substantial Economic Injury: An inability to meet its financial obligations, pay ordinary and necessary operating expenses, or a reduction in working capital resulting from the COVID-19 crisis.

Additional Resource

- KTS Legal Alert: Small Business Loan Programs under the CARES Act: Look Here First for Financing (3/26/2020)

Main Street Lending Program (MSLP)

Introduction

- Federal Reserve Program in conjunction with Treasury Department.
- Loans taken through private banks.
- $600 Billion available.
- Applications have not opened yet, and it will likely take substantial time to flesh out details and implement this new program, much more so than the PPP which provided massive additional funding for an already established loan program.

Loan Specifics

- Loan amount: $1-$25 Million, but the loan and all other debt and committed but undrawn credit facilities may not exceed 4 times 2019 EBITDA.
- Interest rate: Secured Overnight Financing Rate (currently 0.01%) plus 2.5% to 4%.
- Term: Maximum 4 years, with 1 year payment deferral.
- Debt forgiveness: None.

- Collateral: None.
- Origination fee: 1% of principal.
- Facility fee: 1% of principal paid by lender to Federal Reserve.
    - Can be passed on to borrower.
- Note: Loan cannot be used to refinance existing loan with lender.

Eligible Borrowers

- Intended for small to mid-sized business:
    - 10,000 employees or less; or
    - Less than $2.5 Billion in 2019 revenue.
    - This is not an SBA loan program so it does not appear that the SBA affiliation rules will apply – but some affiliation rule is likely.
- Must be a business that is created or organized in the U.S. or under the laws of the U.S. with significant operations in and a majority of its employees based in the U.S.
- Firms may take out loans under both the PPP and the Main Street Lending Program.

Program Restrictions

- Applicant must certify that it requires the financing due to exigent circumstances presented by the COVID-19 pandemic.
- Borrowers must use reasonable efforts to maintain payroll and retain workers.
- Workforce restrictions:
    - Neutral in union organization efforts and maintain collective bargaining agreements.
    - No outsourcing jobs for 2 years.
- Executive compensation restrictions:
    - KTS Legal Alert: Businesses Receiving Discretionary Loan Relief are Subject to Executive Compensation Restrictions During the Loan Term Plus 1 Year (3/28/2020)
- Borrowers cannot pay other debt prior to repaying MSLP loans in full (other than mandatory principal payments).

Additional Resources

- KTS Legal Alert: Federal Reserve Announces Creation of New $600 Billion Main Street Lending Program to Facilitate Lending to Small and Medium-Sized Business (4/9/2020)
- Federal Reserve Press Release: Federal Reserve Takes Additional Actions to Provide up to $2.3 Trillion in Loans to Support the Economy (4/9/2020)

Payroll Tax Credits for Leave

Paid Leave Requirements under FFCRA

- Two weeks of paid sick leave at the employee's regular rate of pay up to $511 per day and $5,110 in the aggregate because the employee is quarantined and/or experiencing symptoms of COVID-19 and seeking

medical diagnosis; or

- Two weeks of paid sick leave at two-thirds the employee's regular rate of pay for a bona fide need to care for an individual in quarantine, to care for a child whose school is closed because of COVID-19, or the employee has substantially similar conditions; and
- Up to an additional 10 weeks of paid expanded family and medical leave at two-thirds the employee's regular rate of pay due to a need for leave to care for a child whose school is closed because of COVID-19.
- Payroll tax credits available for qualified leave wages paid for period from 4/1/2020 to 12/31/2020.

Small Employer Exemption Regarding Leave Requirements

- Small employers with fewer than 50 employees may qualify for an exemption from the requirement to provide paid leave due to school closing if the leave payments would jeopardize the viability of their business as a going concern.
    - Requires determination by employer of need (e.g., that providing leave would cause business to stop operating at minimal capacity).
    - Small employer must document why its business satisfies DOL criteria and retain such records for four years.
    - Addressed in DOL temporary rule (see Questions 58 and 59 at https://www.dol.gov/agencies/whd/pandemic/ffcra-questions#59).

Tax Credit Amounts

- Credits cover 100% of:
    - Up to two weeks (capped at 80 hours) of qualified sick leave wages paid by employer during a quarter.
    - Up to 10 weeks of qualified family leave wages paid by employer during a quarter.
    - Any qualified health plan expenses allocable to those wages.
    - The amount of employer's share of Medicare taxes imposed on sick and family leave wages.

Claiming Payroll Tax Credits

- Credits claimed on employer's quarterly federal employment tax returns.
- Credits may be funded using withheld federal employment taxes (without incurring failure-to-deposit penalties).
- IRS procedures apply where employer pays qualified leave wages during quarter before federal employment taxes must be deposited with IRS.

Advance Payment of Credits

- Employers may request advance payment if federal employment taxes are insufficient to cover amount of credits.
- May be needed if quarterly returns are not filed until after qualified leave wages must be paid.
- Requested by submitting IRS Form 7200.

Refund Procedures May Apply

- Refunds available if qualified leave wages exceed employer's portion of Social Security taxes owed for quarter.
- Excess amount is treated as an overpayment and refundable.
- Excess applied to offset remaining tax liability on Form 941.

Qualified Health Plan Expenses

- Tax credits also reflect an employer's health insurance costs.
- Credits increased by qualified health plan expenses (QHEPs) on each type of qualified leave wages.
- Methods available for allocating QHEPs to qualified leave wages

Determining QHEPs for Various Types of Benefit Plans

- Employers with multiple plans.
- Pro rata allocations for insured and self-funded health plans.
- Defined contribution health plan arrangements.
- Contributions to HRAs, ICHRAs, Health FSAs, and QSEHRAs

Additional Resources

- KTS Legal Alert: The "Families First Coronavirus Response Act" Becomes Law (3/19/2020)
- KTS Legal Alert: CARES Act Summary of Key Labor and Employment Provisions (3/26/2020)
- Department of Labor: Guidance on FFCRA Employee Paid Leave Rights
- Department of Labor: Announcing Plan to Implement Coronavirus-Related Paid Leave for Workers and Tax Credits for Small and Midsize Businesses (3/20/2020)
- IRS: COVID-19-Related Tax Credits for Required Paid Leave Provided by Small and Midsize Businesses FAQ (4/17/2020)
- Bloomberg Tax: CARES Act Offers Payroll Loan, Retention Credit, Delayed Deposits (4/2/2020)

Employee Retention Credit

Introduction

- Refundable payroll tax credit to encourage employers to keep employees on payroll.
- Credit is 50% of up to $10,000 in qualified wages paid for each employee after 3/12/2020 and before 1/1/2021 (meaning up to $5,000 per employee).

Eligible Employers

- Business is fully or partially suspended by government order due to COVID-19 during the calendar quarter; or
- Employer's gross receipts are below 50% of the comparable quarter in 2019.

- Once employer's gross receipts go above 80% of comparable quarter in 2019, it no longer qualifies after the end of that quarter.

Qualifying Wages

- Determined by average number of full-time employees in 2019:
  - More than 100: Only the wages paid for time not worked for furloughed/reduced-hours employees qualify.
  - 100 or fewer: No furlough/reduced-hours requirement.
- Includes employer share of healthcare costs.

Key Exclusions

- Ineligible if employer has received a PPP loan, even if the employer does not receive forgiveness of all or a part of that loan.
- Self-employed individuals cannot claim the credit for their own services or earnings.

Additional Resources

- KTS Legal Alert: CARES Act Summary of Key Labor and Employment Provisions (3/26/2020)
- KTS Legal Alert: Financial Protection for Healthcare Providers and Healthcare Insurance for Workers (3/27/2020)
- IRS: Employee Retention Credit (4/7/2020)
- IRS: New Employer Tax Credits (4/15/2020)

Payroll Tax Deferral

- Employers (including self-employed) can defer 2020 employer social security tax deposits and payments due after 3/27/2020 and before 1/1/2021.
  - 50% of deferred payments will be due 12/31/2021.
  - Remainder of deferred payments will be due 12/31/2022.
- Coordination with Other Relief
  - Apply FFCRA paid leave credits and Employee Retention Credit first.
  - Employers who have received a PPP loan that has not yet been forgiven may defer deposits and payments through the date the lender issues a decision to forgive the loan, without incurring penalties.
    - Deferral is not available for deposits and payments due after the date PPP lender notifies employer that the PPP loan is forgiven.
- Claiming the Deferral Benefit
  - No election required.
  - Form 941 will be updated with instructions for Q1 deferrals.
  - Self-employed individuals: for tax years that include any portion of the payroll tax deferral period, the deferred self-employment tax is not included in estimated tax calculations.

- Additional Resources
  - KTS Legal Alert: CARES Act Allows Delay of Employer Payroll Tax Payments (3/31/2020)
  - KTS Legal Alert: Business Tax Breaks in Coronavirus Aid Relief and Economic Security (3/26/2020)
  - IRS: Deferral of Employment Tax Deposits and Payments Through December 31, 2020 (4/16/2020)

Other Tax Relief

- Temporary Net Operating Loss and Interest Deduction Changes
  - Temporary suspension of NOL taxable income limitation for 2018-2020.
  - 5-year carryback for NOLs generated in 2018-2020.
  - Limitations on deduction of business interest under IRC 163(j) temporarily loosened.
  - KTS Legal Alert: Business Tax Breaks in Coronavirus Aid Relief and Economic Security (3/26/2020)
- Deadline Extensions
  - Federal income tax payments and returns originally due on April 15 now due July 15.
  - Certain time-sensitive actions due April 1 – July 15 can be delayed to July 15.
  - Caution: State extensions inconsistent.
  - KTS Legal Alert: IRS Provides 90-Day Federal Income Tax Filing Relief Due to COVID-19 (3/20/2020)
- State Tax Relief
  - American Institute of Certified Public Accoutants: State Tax Filing Guidance for Coronavirus Pandemic (4/17/2020) - https://www.aicpa.org/content/dam/aicpa/advocacy/tax/downloadabledocuments/coronavirus-state-filing-relief.pdf

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