2020 CARES ACT:
FAQS FOR NONPROFIT ORGANIZATIONS AND DONORS

James P. Joseph, Bridget M. Weiss, Dana O. Campos

Updated on 4/13/2020

Arnold&Porter

Coronavirus: *Tax-Exempt Organizations*

By James P. Joseph, Bridget M. Weiss, Dana O. Campos

Table of contents

Overview

1. What is the CARES Act?

In response to the COVID-19 (coronavirus) pandemic, Congress passed and the President signed a $2.2 trillion stimulus plan — the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act).

2. Which Provisions in the CARES Act are relevant to nonprofit organizations and donors?

The Act includes several relevant provisions for nonprofit organizations and donors including:

- Paycheck Protection Program (PPP) (Sections 1101-1106) (new small business loan program that includes charities);
- Economic Injury Disaster Loans (EIDL) (Sections 1110) (expanded small business loan program that includes nonprofits);
- Expanded unemployment benefits for employees who have lost their jobs due to COVID-19 (Sections 2101-2116);
- Enhanced charitable deductions on 2020 taxes for non-itemizers, individuals who itemize their deductions, and corporations (Sections 2204-2205);
- Employment tax incentives for employers to retain employees during the pandemic (Sections 2301); and
- Deferment of certain payroll taxes for employers.

These FAQs have been revised from their original publication to provide information about these programs and incentives as of April 8, 2020; ; we will continue to update these FAQs as additional information becomes available. We also have an in-depth analysis of these topics, along with additional details about expanded unemployment benefits for employees and other topics of potential interest to nonprofits: Arnold & Porter's Analysis of CARES Act for Non-Profit Organizations. For a comparison of the PPP and EIDL programs, see page 15 below.

Paycheck Protection Program (PPP) (CARES Act, Sections 1101-1106)

3. What is the PPP?

The PPP is an expansion of the Small Business Administration's (SBA's) 7(a) loan program that authorizes financial institutions to issue loans to qualifying small businesses (including organizations that are tax exempt under section 501(c)(3) and 501(a) of the Internal Revenue Code (IRC) (501(c)(3) organizations), IRC section 501(c)(19) veterans organizations (501(c)(19) veterans organizations), and tribal business concerns) on the terms set forth in the CARES Act.

4. What is the purpose of the PPP?

The goal of the PPP is to assist small businesses (including "eligible nonprofits," as defined in question ("Q") #5) with fully guaranteed loans (up to $10M to each qualified borrower) at an affordable interest rate (capped in the Act at 4%, but the Interim Final Rule issued by the SBA on April 2, 2020 (Interim Final Rule) provides that the rate will be set at 1.0%) to cover payroll and other operating costs.

5. Which types of organizations are eligible for the PPP?

In addition to any business that already qualified as a "small business concern" under the SBA's existing loan programs and certain other businesses, eligible nonprofits able to participate in the PPP are 501(c)(3) organizations, 501(c)(19) veterans organizations, and tribal business concerns. Nonprofit organizations that are not tax-exempt under IRC sections 501(c)(3) or 501(c)(19), such as trade associations, advocacy organizations, unions, and social clubs, are not eligible to participate in the PPP.

6. Which are the size requirements for PPP eligibility?

501(c)(3) organizations, 501(c)(19) veterans organizations, and tribal business concerns that employ not more than either 500 employees whose principal place of residence is in the U.S., or, if greater, otherwise meet the SBA's existing size standards are eligible for a loan under the PPP (a "PPP loan"). Volunteers (those individuals not receiving monetary or in-kind compensation) do not count for purposes of determining the number of employees.

7. What is the operative date to determine the size of a business applying to participate in the PPP?

Under current guidance, applicants should calculate the number of employees using one of the following methodologies:

- Average number of employees for pay periods during the 12-month period prior to the date of the loan application.
- Average number of employees for pay periods during 2019.
- For seasonal businesses, average number of employees during the pay periods between February 15, 2019 (or, at the election of the applicant, March 1, 2019) and June 30, 2019.
- If the applicant was not in business from February 15, 2019 through June 30, 2019, the average number of employees for pay periods from January 1, 2020 through February 29, 2020
- If applicant has not been operational for 12 months, the average number of employees for each of the pay periods that the applicant has been in business.

In addition, an applicant should review the certifications required by its lender on the PPP application because the lender may require that the applicant certify that it meets the size requirement on the date the application is filed.

8. Are churches and other religious institutions eligible to participate in the PPP, even if they do not have a 501(c)(3) determination letter from the IRS?

Yes. No otherwise eligible organization will be disqualified from receiving a loan because of the religious nature, religious identity, or religious speech of the organization. Churches, including synagogues, mosques, and similar houses of worship, as well as their integrated auxiliaries and conventions or associations that meet the requirements of IRC section 501(c)(3), are automatically considered tax exempt, whether or not they seek formal recognition from the IRS. Therefore, all churches and religious institutions should be eligible to participate in the PPP, regardless of whether the particular organization has obtained formal recognition from the IRS.

9. Are for-profit subsidiaries of nonprofits eligible for PPP loans, even if the nonprofit organization itself is not eligible?

Yes, assuming the for-profit subsidiary meets all other eligibility requirements. The Interim Final Rule provides that SBA's Standard Operating Procedure (SOP) 50 10, Subpart B, Chapter 2 should be referenced for eligibility requirements. Under SOP 50 10, a for-profit entity that is a subsidiary of a nonprofit can be eligible for SBA assistance, provided: (a) the lender must include the nonprofit affiliate in determining size; (b) the loan proceeds must be used exclusively for the benefit of the for-profit business; and (c) if the nonprofit affiliate owns 20% or more of the for-profit business but the nonprofit affiliate cannot or will not guarantee the loan, the for-profit business is not eligible for SBA assistance.

10. Do part-time employees count as "employees" for purposes of determining whether the organization exceeds the 500-employee limit?

Yes. Under the PPP, the term "employee" includes all individuals employed on a full-time, part-time, or other basis by the organization. If an organization has seasonal employees, they will still be counted in the total number of employees in determining eligibility for a PPP loan; however, the SBA will apply a different formula when determining the amount of that loan. (See additional details in Q #13.)

11. Do independent contractors count as employees for purposes of PPP loan calculations?

No. Under the SBA's Interim Final Rule, independent contractors do not count for purposes of determining the number of employees. However, independent contractors may be eligible to apply for a PPP loan on an independent basis.

12. Do the employees of affiliate organizations count under the PPP?

Yes. In determining whether a business is "small," the SBA looks at the loan applicant together with its affiliates. The SBAs affiliation analysis is intended to determine whether those that might appear small are, in fact, tied to other entities to an extent that the SBA would no longer consider them to be in that category. As a general matter, entities are considered affiliates when one controls or has the power to control the other, regardless of whether an entity exercises that power. In the case of nonprofit organizations, control cannot be determined through stock ownership, but is generally determined through factors such as overlapping boards of directors, officers, or management, as described in the SBA's affiliation regulations at 13 CFR § 121.301. (As the CARES Act rescinds the then-current version of the SBA's affiliation regulations, the SBA provided guidance that the prior version of these regulations (July 27, 2016) governs) (Borrowers are also required to provide information regarding "overlapping management" with another organization in its PPP borrower application (SBA Form 2483, Question 3: "Is the Applicant or any owner of the Applicant an owner of any other business, or have common management with, any other business? If yes, list all such businesses and describe the relationship on a separate sheet identified as addendum A.")) (Additional information about SBA's affiliation rules are available in Arnold & Porter's advisory Small Business Loan Relief from CARES Act , the SBA's Affiliation Interim Final Rule (and Summary), and in the Treasury Department FAQs updated as of April 8, 2020 (Treasury FAQs.)

If an organization is affiliated with another entity based on a religious teaching or belief or is otherwise a part of the faith-based organization's exercise of religion, the SBA Interim Final Rule, as explained in the SBA Faith Based Organization FAQs, provides an exemption from the affiliation rules. For example, if a faith-based organization affiliates with another organization because of its organization's religious beliefs about church authority or internal constitution, or because the legal, financial, or other structural relationships between your organization and other organizations reflect an expression of such beliefs, the faith-based organization would qualify for the exemption. If, however, a faith-based organization is affiliated with other organizations solely for non-religious reasons, such as administrative convenience, then the faith-based organization would be subject to the affiliation rules.

13. How much money can an eligible nonprofit receive through the PPP?

The maximum loan amount that may be borrowed through June 30, 2020 will be the lesser of:

- The sum of (i) 2.5 multiplied by the average total monthly payments for payroll costs incurred during the 1-year period before the date on which the loan is made and (ii) the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and the date on which PPP loans are made available to be refinanced under the PPP loan (if applicable);
- For a seasonal employer, the sum of (i) 2.5 multiplied by the average total monthly payments for payroll for February 15, 2019 (or March 1, 2019, at the election of the recipient) through June 30, 2019 and (ii) the outstanding amount of an EIDL made between January 31, 2020 and the date on which PPP loans are made available to be refinanced under the PPP loan (if applicable);
- If requested by an eligible recipient that was not in operation from February 15 through June 30, 2019, then the sum of (i) 2.5 multiplied by the average total monthly payments by the applicant for payroll costs incurred January 1 to February 29, 2020 and (ii) the outstanding amount of an EIDL that was made between January 31, 2020 and the date on which PPP loans are made available to be refinanced under the PPP loan (if applicable); or
- $10 million.

14. For purposes of calculating "payroll costs" under the PPP, what is included or excluded in the definition?

Included: gross compensation (salary, wages, commissions or similar compensation); tips; vacation, parental, family, medical or sick leave; allowances for dismissal or separation; contributions for group health care and retirement benefits; and state and local taxes on the compensation of employees.

Excluded: salary, wages, commissions or similar cash compensation of any individual employee in excess of $100,000 per year (as prorated for the calculation period); payments to independent contractors; employer's portion of FICA; sick leave or paid family medical leave for which a credit is allowed under the recently passed Families First Coronavirus Response Act (FFCRA); and compensation for an employee whose principal residence is outside of the U.S.

15. Are there unique requirements for an organization that uses a Professional Employer Organization (PEO) to process payroll and report payroll taxes?

For purposes of PPP loan payroll documentation, a borrower may use a PEO's payroll documentation to indicate the amount of wages and payroll taxes reported to the IRS by the payroll provider for the borrower's employees. As detailed in the Treasury FAQs, relevant information from a Schedule R (Form 941), Allocation Schedule for Aggregate Form 941 Filers, attached to the PEO's or other payroll provider's Form 941, Employer's Quarterly Federal Tax Return, should be used if it is available; otherwise, the eligible borrower should obtain a statement from the payroll provider documenting the amount of wages and payroll taxes.

16. What are the allowable uses for the loan proceeds received under the PPP?

In addition to the allowable uses for traditional SBA 7(a) loans (e.g., use as short-term or long-term working capital, to refinance current business debt, or to purchase furniture, fixtures and supplies), PPP loan recipients (borrowers) can use funds from the PPP for: (a) payroll costs (as defined above in Q #□), retirement benefits, and state and local employment taxes; (b) rent for a lease entered before February 15, 2020; (c) utilities, including electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020; and (d) interest payments on mortgage obligations or any other debt obligations incurred before February 15, 2020 (but not prepayments or payments of principal).

Importantly, under the Interim Final Rule, 75% of the loan proceeds received must be used to cover "payroll costs."

17. What certifications does an organization make on the PPP application?

An organization applying for a PPP loan certifies several items on its application, including, but limited to: (a) current economic uncertainty makes the loan necessary to support the ongoing operations of the applying organization; (b) the funds will be used only for the intended purposes during the "covered period" (February 15, 2020 through June 30, 2020), and that no more than 25% of the forgiven loan amount will cover non-payroll costs; (c) the information provided in its application is accurate and true in all material aspects; (d) applicant understands that false statements on a loan application are punishable under law by imprisonment of not more than five years and/or a fine up to $250,000; and (e) applicant satisfies the size and other requirements for applying for a PPP loan. An applicants should check its lender's application to confirm that the lender is not requiring other certifications.

According to the Treasury FAQs, borrowers and lenders may rely on the laws, rules, and guidance as of the date that a loan application is submitted. However, borrowers whose loan applications have not been processed at the time additional guidance becomes available may revise their application as appropriate.

18. What are the terms of a PPP loan?

Under the SBA's Interim Final Rule, PPP loans have a term of 2 years and an interest rate of 1.0%.

19. Under the PPP, is there a deferred repayment period?

Yes. Under the SBA's Interim Final Rule, all lenders are required to defer payments on covered loans for six months, including payments of principal, interest, and fees. Interest will accrue during the deferment period.

20. Can a portion of the PPP loan be forgiven?

Yes. The full principal amount of a loan (and, under the SBA Interim Final Rule, any accrued interest) may be forgiven in an amount equal to payroll costs, interest on mortgage obligations incurred before February 15, 2020, rent payments for leases in force before February 15, 2020, and utility payments for service which began before February 15, 2020 during the 8-week period following the loan origination date (as further explained in Q #21).

21. The amount of forgiveness of a PPP loan depends on the borrower's payroll costs over an eight-week period; when does that eight-week period begin?

The eight-week period begins on the date the lender makes the first disbursement of the PPP loan to the borrower. The lender must make the first disbursement of the loan no later than ten calendar days from the date of loan approval. (See Treasury's PPP Borrower Fact Sheet.)

22. What does an organization need to do to have all or part of its PPP loan forgiven?

A borrower must apply to its lender. The application must include:

- documentation (including payroll filings) verifying the number of FTEs the organization employs and employed during the relevant periods and the compensation that it paid them, and documentation (including cancelled checks, payment receipts, transcript of accounts, etc.) verifying payments of mortgage obligations, rent, and utilities;
- a certification representing that the documentation is true and correct and that the amount of forgiveness requested was used for retaining employees and paying mortgage interest, rent, and utilities during the covered period; and
- any additional information that the SBA Administrator requires.

23. How will a lender determine the PPP loan forgiveness amount?

A lender will determine the PPP loan forgiveness amount based on the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities. The lender must issue a decision on a borrower's loan forgiveness within 60 days of receiving the completed application. Importantly, if a nonprofit receives an EIDL including a $10,000 EIDL emergency grant (discussed below at Qs #45-#47), and then is approved for a PPP loan, the $10,000 emergency grant will be subtracted from the organization's PPP loan forgiveness amount and any remaining portion of the EIDL will be subtracted from the organization's PPP loan amount except to the extent attributable to uses not allowable under the PPP.

24. What restrictions, if any, are there to the PPP loan forgiveness program?

The amount forgiven will be reduced proportionally by any reduction in the number of employees compared to the prior year and reduced, dollar-for-dollar, by the reduction in pay of any employees (who made less than $100,000 annualized in 2019) beyond 25% of their compensation the prior year. Moreover, the SBA's Interim Final Rule provides that, for the loan to be fully forgiven (including principal and interest), at least 75% of the loan principal must have been used for payroll.

Specifically, the formula to calculate the reduction in the number of employees is:

a. the average number of full-time equivalent employees per month employed by the borrower during the covered period, divided by
b. (b) at the election of the borrower*:

    (i) the average number of full-time equivalent employees per month from February 15, 2019-June 30, 2019, or

    (ii) the average number of full-time equivalent employees per month from January 1, 2020-February 29, 2020.

*For seasonal employers, the February 15, 2019-June 30, 2019 period must be used.

To encourage employers to rehire employees who may already have been laid off due to COVID-19, the Act provides an exception to the reduction if the organization re-hires employees and/or eliminates the reduction in salaries by June 30, 2020. If an employer takes advantage of the June 30, 2020 rehire date, it is unclear if that restarts or impacts the 8-week covered period for calculating the amount of a borrower's loan forgiveness. There may be additional guidance coming from Treasury or the SBA on these points.

25. If an organization has already laid people off and wants to take advantage of the loan forgiveness program, and rehires employees before the June 30, 2020 deadline, does the organization have to rehire the same individuals it has laid off?

No. The program is aimed at incentivizing nonprofits and other eligible businesses to maintain their headcount during the ongoing crisis, but does not require that the individual employees filling the positions within an organization remain the same during the covered period.

26. Do payments to independent contractors qualify as compensation paid to employees for purposes of PPP loan forgiveness?

No. Under the SBA's Interim Final Rule, payments to independent contractors do not qualify as compensation paid to employees for purposes of a borrower's PPP loan forgiveness. However, independent contractors may be eligible to apply for a PPP loan, as well as corresponding forgiveness on such loan, on an independent basis.

27. If an organization cuts positions or staff after the end of the covered period will it still be eligible for the loan forgiveness program?

Yes, for now. The Act does not prohibit an organization from taking advantage of the loan forgiveness program if it reduces its workforce after the June 30, 2020 cut off. However, this may change if the SBA issues additional guidance on the PPP or if additional stimulus packages are enacted.

28. When and how can an organization apply for the PPP?

The PPP's sample application and instructions are now available on the U.S. Department of Treasury's website. The application period opened on April 3, 2020, and the Treasury Department recommends applying as soon as possible due to the PPP's overall funding cap. Applicants must apply for the PPP through an eligible lender (see Q #32 for additional information).

29. Can an organization apply for more than one PPP loan?

No. Under the Interim Final Rule, a borrower may only receive one PPP loan; therefore, an organization should consider applying for the maximum amount to the extent that it anticipates fully expending that amount for allowable uses of which non-payroll costs constitute no more than 25% (as the organization will not be eligible to apply for a supplemental loan should it elect to receive less than the maximum amount).

30. Are PPP funds made available to potential borrowers on a first-come, first-served basis?

Yes. PPP funds authorized under the CARES Act are made available to potential borrowers on a first-come, first-served basis, so organizations should submit loan applications as soon as possible. To the extent that available funding runs out, organizations unable to obtain PPP loans may obtain alternate relief under the CARES Act, such as the employee retention credit and the deferral of payroll taxes, as discussed in Qs #54-66. If additional stimulus packages are enacted, more funds may become available under the PPP.

31. Are the names of PPP borrowers made public?

We anticipate yes. Under the Freedom of Information Act (FOIA), information about approved 7(a) loans is automatically released by the SBA, including: (a) the name of each borrower and its officers, directors, and, if applicable, stockholders or partners; and (b) the amount of the loan, its maturity, and the purpose of the loan. We anticipate that the SBA will follow this process under the PPP and release similar information.

32. Which lenders are eligible to participate in the PPP?

Lenders already authorized to issue SBA 7(a) loans are automatically approved to make PPP loans, while other lenders are eligible to make PPP loans if they satisfy certain additional qualifications described in the SBA's Interim Final Rule and enter into an agreement to participate in the PPP. We recommend that potential borrowers reach out first to their existing lenders to determine whether any such lender is already an approved 7(a) participant or has been accepted as a lender under the PPP, and has begun accepting applications under the PPP; in some cases, lenders have either elected not to participate or have not yet begun to accept applications for PPP loans. Borrowers can also contact a local SBA office to find a list of approved 7(a) lenders in their area. In addition, SBA maintains a list of the 100 most active SBA lenders in the country.

33. Will the SBA have recourse against a borrower if it does not repay its PPP loan?

Yes. If a borrower fails to repay a PPP loan and the lender receives payment from the SBA under the guarantee, the SBA will be able to collect the amount paid by the SBA from the nonprofit. Under the SBA's Interim Final Rule, including as clarified by the Treasury FAQs, lenders may rely on the borrower's certifications and supporting documentation to determine the borrower's loan amount and loan forgiveness and will generally be held harmless for borrowers' failure to comply with PPP criteria. For example, as described in the Treasury FAQs, the borrower has responsibility to certify as to the accuracy of its calculations regarding payroll costs. Lenders must only perform a good faith review and are permitted to rely on borrowers' certifications.

34. Do borrowers have other potential liability?

Yes. If a borrower uses PPP funds for unauthorized purposes, the SBA will direct the borrower to repay those amounts. If a borrower knowingly uses the funds for unauthorized purposes, the borrower will be subject to additional liability, including potential criminal charges. If a borrower's shareholders, members, or partners use PPP funds for unauthorized purposes, the SBA will have recourse against those individuals or entities for the unauthorized use.

35. What if borrower's loan has a remaining balance after application of forgiveness?

The organization, as the borrower, will have to repay the remaining balance, plus ongoing interest accruals. The SBA will continue to guarantee the remaining balance. The loan will have to be repaid within the two-year term.

36. Will there be further guidance regarding loan forgiveness under the PPP?

Yes. While some guidance was provided in the Interim Final Rule, the SBA Administrator is required to issue further guidance regarding loan forgiveness within 30 days of the enactment of the CARES Act (by April 27, 2020).

37. Are there other considerations under the CARES Act that will impact the decision to request a PPP loan and/or loan forgiveness?

Organizations should consider whether they will have allowable expenditures equal to the total loan amount during the covered period, as described at Q #23; to the extent an organization does not, it will not be eligible for forgiveness of the full loan. In some cases, it may also be possible for an organization to receive both a PPP loan and an EIDL, to the extent that the EIDL loan is used for expenditures not allowable under the PPP, as discussed at Q #50; organizations should consider whether some portion of their expenses may be covered by an EIDL. Finally, an organization that receives a PPP loan is ineligible for both the employee retention credit and the deferral of payroll taxes available under the CARES Act, as discussed at Qs #54-66; therefore, a nonprofit wishing to take advantage of these benefits should not participate in the PPP.

Economic Injury Disaster Loan (EIDL) Program (CARES Act, Section 1110)

38. What is the EIDL program?

Economic injury disaster loans (EIDL) are offered as part of a preexisting SBA program. An EIDL is a low-interest federal loan issued by the SBA to alleviate economic injury to small businesses or private nonprofit organizations. EIDLs are typically available for eligible borrowers in amounts up to $2M at a fixed interest rate of 2.75% for nonprofits (3.75% for for-profit businesses), for a term of no more than 30 years.

39. Which nonprofits are eligible for EIDLs?

EIDLs are available to a much broader set of nonprofits than those eligible under the PPP. For the EIDL program, eligible "private nonprofit organizations" include any entity exempt under section 501(c), including the trade associations, advocacy organizations, unions, and social clubs that are excluded from the PPP. However, organizations that are primarily engaged in lobbying or political activities are ineligible to participate in the EIDL program. The EIDL program also includes certain organizations tax-exempt under 501(d) (apostolic organizations) or 501(e) (cooperative hospital service organizations). In contrast to the PPP, there are no limitations on the size of nonprofits that are eligible to obtain EIDLs. (Organizations can verify their eligibility for the EIDL program on the SBA website.)

40. How does an organization show it has suffered economic injury?

Many organizations that were in existence at the start of the U.S. COVID-19 national emergency (January 31, 2020) have sustained an "economic injury." While this term is not defined in the Act, the SBA's website describes eligible e small businesses or nonprofits as those that have experienced temporary loss of revenue due to the ongoing crisis. (Economic injury would also likely include any harm to an organization that shuts down, had to lay off workers, had supply chain interuption, or suffers economic loss due to a drop in value of its endowment.)

41. Does eligibility for an EIDL depend on state disaster declarations?

No. A national emergency under the Robert T. Stafford Disaster Relief and Emergency Assistance Act has been declared, making a state disaster declaration unnecessary.

42. How much may an organization receive as an EIDL, and how may it use the funds?

An EIDL is a working capital loan of up to $2 million that can be used to pay fixed debts, payroll, accounts payable, and other bills that could have been paid had the disaster not occurred. EIDLs are not meant for business expansion.

43. When does a borrower have to begin repaying an EIDL?

A borrower may defer its first repayment for one year after the origination date, though interest will accrue during this deferment. The amount of the loan at the end of the deferred repayment period will be carried forward as an ongoing loan subject to the terms negotiated between each lender and borrower, with a maximum term of 30 years and a maximum interest rate of 2.75% for nonprofit organizations (3.75% for businesses).

44. Can a borrower obtain loan forgiveness for an EIDL?

No. Unlike the PPP, there is not a loan forgiveness component of an EIDL. However, in response to the COVID-19 crisis, applicants can receive an emergency grant in the amount of $10,000 when submitting their request for an EIDL.

45. What is an EIDL emergency grant, and who is eligible to receive one?

Recognizing that the EIDL approval process can typically take as long as a month, the CARES Act provides that businesses (including nonprofits) whose COVID-19-related applications are submitted between January 31 and December 31, 2020 can receive an emergency grant of up to $10,000 within 3 days after the SBA receives the application. To be eligible for an emergency EIDL grant, an applicant must be eligible to receive an EIDL and have been in operation since January 31, 2020, when the COVID-19 public health crisis was announced. An organization can use the emergency grant for any allowable EIDL purpose, including:

- Providing paid sick leave to emplo7yees unable to work due to COVID-19;
- Maintaining payroll;
- Meeting increased costs due to interrupted supply chains;
- Making rent or mortgage payments; and
- Repaying obligations that cannot be met due to revenue losses.

It is important to note, however, that if an organization receives a PPP loan, the $10,000 emergency grant will be subtracted from any PPP loan forgiveness amount.

46. When and how can an organization apply for an EIDL? Can an organization request an emergency grant on the same application?

Eligible nonprofits or businesses can apply for EIDLs at any time through the SBA's website, and applicants are now able to request their $10,000 emergency grant at the same time as applying for an EIDL through a streamlined online application process.

47. If an organization receives an EIDL emergency grant, is it required to pay the grant back?

No. An EIDL applicant that receives an EIDL emergency grant is not required to repay the grant, even if the applicant is subsequently denied for an EIDL, provided that the funds are used only to cover eligible expenses. It also appears that an EIDL applicant can elect not to accept an EIDL loan, even if approved, and still retain the emergency grant. An EIDL emergency grant, however, is subtracted from any PPP loan forgiveness that a borrower may receive under the PPP. (See Q #23 above.)

48. Even if an organization is unsure if it will need an EIDL this year, can it apply for an EIDL emergency grant?

Yes, but the organization should confirm with its lender that it is not obligated to take the EIDL loan, even if approved. If the lender confirms that the organization can turn down an EIDL loan, then the organization can apply for an EIDL and receive the emergency grant without taking out an EIDL loan.

49. What if a business receives an EIDL or the $10,000 emergency grant and then is approved for a PPP loan?

The outstanding amount of an EIDL made after January 31, 2020 and up to the date on which PPP loans are made available may be refinanced into a PPP loan. In addition, if a borrower received the $10,000 emergency grant and the borrower subsequently receives a PPP loan, the $10,000 emergency grant will be subtracted from the amount of the borrower's PPP loan forgiveness. (See additional information about the PPP loan forgiveness plan in Q #23.)

50. Can a 501(c)(3) organization or a 519 veterans organization that is eligible for a PPP loan take advantage of both the PPP and EIDL?

Yes. A 501(c)(3) organization and 501(c)(19) veterans organization can apply for loans under both the PPP and the EIDL programs (see Qs #38-#51, below), but must use the EIDL for a purpose other than covering payroll costs. (If an organization received an EIDL loan between January 31, 2020 and April 3, 2020, and the EIDL was not used for payroll costs, it will not affect the organization's eligibility for a PPP loan, but the PPP loan must be

used to refinance the EIDL loan. Proceeds from the emergency grant on the EIDL will be deducted from the loan forgiveness amount on the PPP loan.)

To determine whether to apply for a PPP loan or EIDL, an organization should consider the following:

- *Eligibility:* As described in detail in this Advisory, the eligibility requirements are somewhat different for each program.
- *Maximum Loan Amounts:* PPP loans are capped at $10 million, with an applicants limit determined by a formula tied to payroll costs; EIDLs are capped at $2 million.
- *Loan Forgiveness:* PPP loans may be eligible for loan forgiveness; EIDLs have no such feature. However, EIDL applicants may receive an emergency grant of up to $10,000 that does not have to be repaid. (If a borrower received the $10,000 emergency grant (as described in Q #45) and the borrower subsequently receives a PPP loan, the $10,000 emergency grant will be subtracted from the amount that the borrower's PPP loan will be forgiven.)
- *Maximum Maturity:* PPP loans can have maturities of up to two years, with no obligation to make payments under the loan for six months. EIDLs can have maturities up to 30 years, and payments can be deferred for up to a year. Under both the PPP and the EIDL, interest continues to accrue during deferment periods.
- *Interest Rates:* PPP interest rates are capped at 1%. The EIDL interest rates for COVID-19 are 3.75% for for-profit businesses and 2.75% for nonprofit organizations.

Enhanced Charitable Giving Incentives for Individuals (CARES Act, Sections 2204-2205)

51. Under the CARES Act, what are the enhanced charitable giving incentives for individuals who do not itemize their deductions?

The Act includes a one-time, above-the-line deduction (available to taxpayers who do not itemize deductions) for cash contributions of up to $300 made to charitable or religious organizations. The incentive covers only cash contributions made in calendar 2020 and should be claimed on the taxpayer's 2020 Form 1040 filed in 2021. (The incentive does not apply to contributions to donor advised funds, private non-operating foundations, or section 509(a)(3) supporting organizations; all other contributions for which a deduction is allowable under section 170 are covered by the incentive.)

52. Under the CARES Act, what are the limitations on tax deduction for charitable contributions made by individuals who itemize their deductions?

The Act increases the limits on charitable deductions made by individuals who itemize their taxes. The current limits for an individual's tax deductions for charitable contributions in cash (60% cap of adjusted gross income) are suspended for contributions made in 2020, making cash contributions fully (100%) deductible. (This incentive also does not apply to contributions made to donor-advised funds, private non-operating foundations, or section 509(a)(3) supporting organizations).

Enhanced Charitable Giving Incentives for Corporations (CARES Act, Sections 2204-2205)

53. Under the CARES Act, what are the enhanced charitable giving incentives for corporations?

For corporations, the limit on charitable deductions for cash contributions in 2020 is increased from 10% to 25%. Additionally, the Act increases the limitation on deductions for food donations by corporations in 2020 from 15% to 25%.

Employee Retention Credit for Employers (CARES Act, Section 2301)

54. What is the Employee Retention Credit for Employers under the CARES Act?

The Employee Retention Credit is a refundable tax credit for 50% in “qualified wages” (up to a $10,000 cap) paid to each employee by an “eligible employer” whose business has been financially impacted by COVID-19 This means that an eligible employer receives a $5,000 credit for each employee who is paid $10,000 or more in qualified wages paid or incurred from March 13, 2020 through December 31, 2020.

55. Who are “eligible employers” for the Employee Retention Credit?

The credit is available to all employers in the U.S. (including all nonprofit organizations) whose (a) operations were fully or partially suspended due to a COVID-19-related shut-down order, or (b) gross receipts declined by more than 50 percent when compared to the same quarter in 2019.

56. What are “qualified wages” under the Employee Retention Credit?

As explained by the IRS Employee Retention Credit FAQs, qualified wages are wages (as defined in Section 3121(a) of the Internal Revenue Code) and compensation (as defined in IRC Section 3231(e)) paid by an eligible employer to employees after March 12, 2020 and before January 1, 2021. Under the Act, qualified wages include the eligible employer’s qualified health plan expenses that are properly allocable to the wages.

The calculation of the amount of qualified wages depends, in part, on the average number of full-time employees (as defined in Section 4980H of the Code) employed by the eligible employer during 2019.

If the eligible employer averaged more than 100 full-time employees in 2019, qualified wages are the wages paid to an employee for time that the employee is not providing services due to either (a) a full or partial suspension of operations by order of a governmental authority due to COVID-19, or (b) a significant decline in gross receipts. Qualified wages may not exceed what the employee would have been paid for working an equivalent duration during the 30 days immediately preceding the period of economic hardship.

If the eligible employer averaged 100 or fewer full-time employees in 2019, qualified wages are the wages paid to any employee during any period of economic hardship described in (a) and (b) above.

57. What are “qualified health plan expenses”?

Under the Act, qualified health plan expenses are the amounts paid or incurred by the eligible employer to provide and maintain a group health plan.

58. How is the maximum amount of Employee Retention Credit available to an eligible employer determined?

The credit is equal to 50 percent of the qualified wages (including qualified health plan expenses, as discussed in Q #57) that an eligible employer pays in a calendar quarter. The maximum amount of qualified wages is $10,000 for each employee for each quarter; therefore, the maximum credit is $5,000 for each employee during that quarter.

59. How does an organization apply the credit?

The eligible employer applies the credit to the employment taxes payable by the employer in the next calendar quarter.

The IRS provides the following example. If an eligible employer pays $10,000 in qualified wages to employee A in Q2 2020, the Employee Retention Credit is $5,000. This amount may be applied against the share of social security [FICA] taxes for which the eligible employer is liable for all employee wages paid in Q2 2020. Any excess over the employer's share of social security taxes is treated as an overpayment and refunded to the eligible employer after offsetting other tax liabilities on the employment tax return and subject to any other offsets under section 6402(a) of the Code.

60. How does an eligible employer claim the refundable tax credit for qualified wages?

Eligible employers can report their total qualified wages and their related credits for each quarter on their quarterly employment tax returns (Form 941) beginning with the second quarter of 2020. If the employers employment tax deposits are not sufficient to cover the credit, then the employer may receive an advance payment from the IRS by submitting a Form 7200, Advance Payment of Employer Credits Due to COVID-19.

61. If an organization has received a PPP loan under the CARES Act, is it also eligible for the Employee Retention Credit?

No. An eligible employer may not receive the Employee Retention Credit if it has received a PPP loan. (See additional information about the PPP program in Qs #3-#37).

62. May an organization receive tax credits for the qualified wages under the FFCRA and the Employee Retention Credit?

Yes, but not for the same wages. (The amount of qualified wages the organization can claim under the Employee Retention Credit does not include the amount of qualified and family leave wages for which the employer received tax credits under FFCRA. See Arnold & Porter's recent advisory for additional information about the Families First Coronavirus Response Act (FFCRA) and the Department of Labor's Frequently Asked Questions about the regulations).

Delay of Certain Payroll Taxes (CARES Act, Section 2302)

63. Are nonprofits able to delay making payroll tax deposits due to the ongoing COVID-19 crisis?

Yes. Under the Act, all employers, including all nonprofit organizations, may defer payment of the employer's share of the Social Security tax for which they are otherwise responsible for the period from March 27, 2020 to December 31, 2020.

64. If an organization delays its payroll taxes under the CARES Act, when must those taxes be paid?

The full amount of the deferred employment tax must be paid over the following two years; half of the amount must be paid by December 31, 2021 and the other half by December 31, 2022. (For example, if an organization owed $2,000 during the covered period (March 27, 2020 to December 31, 2020), it may defer payment of its payroll taxes and pay $1,000 by December 31, 2021, and the remaining $1,000 by December 31, 2022.)

65. If an organization delays payment of its payroll taxes, will this affect its ability to secure a loan under the CARES Act (either through EIDL or PPP)?

Yes. The payroll tax deferral benefits are not available to employers (including nonprofits) that obtain PPP loans. The Act does not prohibit an organization from taking advantage of delaying its payroll taxes if it secures an EIDL.

66. Will an organization owe interest, or will a penalty be imposed on an organization if it elects to defer its payroll tax payments?

No. Under the Act, there will be no interest or penalties charged if the organization complies with the terms of CARES Act deferral program.

Chart Comparing PPP and EIDL*

Program	Paycheck Protection Program (PPP)	Economic Injury Disaster Loans (EIDL)
Key Elements	Forgivable loans at 1.0% interest rate and 2-year maturity* *The Interim Final Rule did not adopt the maximum terms permissible under the Act (up to 4% interest rate and up to 10 year term)	Federal loans at 2.75% for nonprofits (3.75% for other businesses) and 30-year maximum maturity
Maximum Amount of Loan	Up to $10M* *Organizations that qualify for the PPP may also obtain an EIDL, subject to the qualifications described in in Q #49	Up to $2M
Eligibility	Small businesses, nonprofits exempt under sections 501(a) and 501(c)(3) of the IRS Code, 501(c)(19) veterans organizations, and tribal business concerns that employ no more than 500 employees* *500 employee limit includes all full-time, part-time or any other status, but does not include volunteers or independent contractors	"Private nonprofit organizations" include any entity of any size exempt under Section 501(c) of the IRS Code, including trade associations, advocacy organizations, unions and social clubs, in addition to certain organizations tax-exempt under 501(d) (apostolic organizations) or 501(e) (cooperative hospital service organizations) (Importantly, an EIDL does not have the 500 employee cap for "private nonprofit organizations."); but cannot primarily be engaged in political or lobbying activities. Tribal business concerns with not more than 500 employees Businesses with not more than 500 employees
Affiliates	Affiliation among organizations is determined by the factors set in 13 CFR § 121.301 such as stock ownership, overlapping management, and identity of interest.	Affiliation among organizations is determined by the factors set in 13 CFR § 121.301 such as stock ownership, overlapping management, and identity of interest.

Program	Paycheck Protection Program (PPP)	Economic Injury Disaster Loans (EIDL)
Lender	An already-approved SBA 7(a) lender (credit union or bank) or other lender that satisfies the requirements in the Interim Final Rule	The SBA
Covered Period	February 15, 2020 - June 30, 2020	January 31, 2020 - December 31, 2020
Calculation of Loan Amount	<u>Non-seasonal Employers</u>: 2.5x average total monthly payroll costs incurred during the year prior to the loan date <u>Businesses not in operation in 2019</u>: 2.5x average monthly payroll costs incurred for January and February 2020 <u>Seasonal Employers</u>: 2.5x average total monthly payment for payroll costs for the 12-week period beginning February 15, 2019 or March 1, 2019 (at the election of the loan recipient) and ending June 30, 2019	The maximum loan size is $2 million to cover permitted uses for the funds; applicants may ask the SBA for the appropriate amount based on their own calculations and cashflow need Applicants may also request an emergency grant of up to $10,000 from the SBA (these funds will be paid out within 3 days)
Permitted Uses	PPP loans can be used for: "payroll costs"*; mortgage interest; rent; utilities; and interest on debt obligations incurred before February 15, 2020 *75% of the loan proceeds must be used for "payroll costs" (See Q # for definition of "payroll costs")	Operational or financial obligations that cannot be met because of COVID-19, including: providing paid sick leave to employees unable to work due to COVID-19; maintaining payroll; meeting increased costs due to interrupted supply chains; making rent or mortgage payments; and repaying obligations that cannot be met due to revenue losses
Debt Forgiveness	The total loan amount may be forgiven in an amount equal to payroll costs, interest on mortgage obligations incurred before February 15, 2020, rent payments for leases in force before February 15, 2020, and utility payments for service which began before February 15, 2020 during the 8-week period following the origination of the loan. Loan forgiveness may be reduced if the business has laid off employees or decreased their compensation during the covered period	$10,000 emergency grant does not need to be repaid, if it is expended for the allowable uses (even if borrower is subsequently denied an EIDL). However, there is no provision for forgiveness an EIDL's principal or interest.
Deferral	6 months (includes payments of principal, interest, and fees), but interest continues to accrue during deferral period	12 months (interest accrues during deferment period), but interest continues to accrue during deferral period
Application Forms	SBA instructions and sample application (Application period opened on April 3, 2020) Applications are submitted directly to the lender	EIDL application form is submitted directly to the SBA

Program	Paycheck Protection Program (PPP)	Economic Injury Disaster Loans (EIDL)
Certification	An organization applying for a PPP loan certifies several items on its application, including that current economic uncertainty makes the loan request necessary to support the ongoing operations of the organization	An organization must certify that it is not primarily engaged in political or lobbying activities
Other Restrictions	If a borrower received the $10,000 EIDL emergency grant and the borrower subsequently receives a PPP loan, the $10,000 emergency grant will be subtracted from the forgiveness amount. (See additional information about the PPP loan forgiveness plan in Q #20) A PPP loan borrower is ineligible for the Employee Retention Credit in Section 2301 of the CARES Act. (See additional information about the Employee Retention Credit in Q #54) Employers who benefit from the loan forgiveness program under the PPP are not eligible to defer payroll taxes as provided under Section 2302 of the CARES Act (The payroll tax deferral is explained in Qs #63-#66)	If a borrower received the $10,000 EIDL emergency grant and the borrower subsequently receives a PPP loan, the $10,000 emergency grant will be subtracted from the forgiveness amount. (See additional information about the PPP loan forgiveness plan in Q #20)

*Please note that this is a high-level summary for reference only; please consult the FAQs above for additional detail.

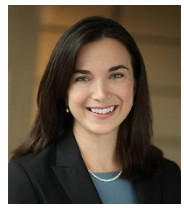
Arnold & Porter

To help our clients navigate the coronavirus (COVID-19) crisis, Arnold & Porter has established a Coronavirus Task Force covering a wide range of issues and challenges. Subscribe to our "Coronavirus (COVID-19)" mailing list to receive our latest client Advisories and register for upcoming webinars.

Authors

James P. Joseph
Partner, Washington, DC
james.joseph@arnoldporter.com

+1 202.942.5355



Bridget M. Weiss
Partner, Washington, DC
bridget.weiss@arnoldporter.com

+1 202.942.5839

Dana O. Campos
Associate, Washington, DC
dana.campos@arnoldporter.com

+1 202.942.6636