

Common Employment Related Questions Under the CARES Act

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Q. What is a Paycheck Protection Program (“PPP”) loan under the new CARES Act?

In order to provide relief from the negative economic impacts of the ongoing COVID-19 crisis, the President signed the CARES Act. This Act created the Paycheck Protection Program (“PPP”) which expanded the number of businesses that can apply for SBA loans. Perhaps most notably, the Act allows for a portion of the “covered loans” to be completely forgiven, provided that the recipient meets certain requirements during the covered period of February 15, 2020-June 30, 2020. The max PPP loan will be equal to the lesser of \$10,000,000 or 2.5 times the employer’s monthly payroll costs from the one year period that precedes the loan.¹

Q. Can an employer obtain a Paycheck Protection Program (“PPP”) loan for any reason?

An employer will be expected to certify that: (1) the uncertain economic circumstances related to the COVID-19 make a loan necessary; (2) the loan will be used to retain workers and continue payroll or pay utility, rent, and mortgage expenses; (3) the employer does not already have an application for a loan pending for duplicative amounts; and (4) the employer hasn’t already received a loan from the SBA during the covered period for the same purpose.

Q. Who qualifies for a PPP?

Businesses, veterans’ organizations, and nonprofits that employ less than 500 employees will qualify for a PPP loan.

Additionally, if a business functions within a particular industry for which the SBA has established a “size standard” greater than 500 employees, then the business will qualify so long as it employs fewer employees than the established “size standard.”

*If your business employs more than 500 employees and you are unsure if it will qualify for the loan, you can determine your industry’s “size standard” at the following link: [SBA Industry Size Standards](#).

Please note: There is an exception for “Food & Accommodations” businesses. Business that have an NAICS code beginning with 72 are still eligible for the loan even if they employ more than 500 employees in total if they employ no more than 500 employees per physical location.

¹ Seasonal employers may use the average total monthly payments for payroll for the 12-week period beginning February 15, 2019, or at the election of the employer, March 1, 2019 and ending on June 30, 2019.

Q. How is the number of employees calculated when determining if an employer is eligible for a loan under the PPP?

In most cases, all individuals who are employees of an employer, whether they work full-time, part-time, or on another basis either for the employer or one of its affiliates will count towards the applicable employee threshold.²

Q. What if my business has multiple locations? Are the employees at each location counted?

In most cases, yes. If a small business, nonprofit, or veterans' organization has multiple locations, the employees at each will count towards the number of employees. Simply put, the number of employees is the sum of the business's employees regardless of how many locations the employees work at.

Please note: There is an exception to counting employees across multiple physical locations and a waiver to aggregating affiliates' employees for any business that is assigned an NAICS code beginning with '72' (as of the date the loan is disbursed). Those businesses will qualify for the loan *so long as they do not have over 500 employees per physical location*. Those businesses also will not have the employees of affiliate businesses aggregated for the purpose of determining whether the 500 employee threshold is met. The same is true for businesses operating as a franchise under the SBA's franchise identifier code as well as any business that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958 (15 U.S.C. 681).

Q. How do I know whether I need to count the employees of an affiliated business?

The SBA considers two companies to be affiliates when one business controls or has power to control another or when a third party controls or has the power to control both businesses. More detailed and specific rules for determining affiliation can be found at the following link: [How to Assess Affiliated Entities](#). We can assist you in determining whether another business is an "affiliate" under the SBA rules.

If an employer has "affiliates" then the number of employees is calculated by adding the average number of employees of the business with the average number of employees of each affiliate.

Q. If an employer currently employs just over 500 employees, is it permitted to terminate employees in order to meet the employee threshold so that it can qualify for a loan?

Generally, no. The number of employees will be calculated based on the average number of individuals employed over the business's last 12 months. So an immediate termination may not impact the calculation of whether an employer may qualify for the loan. Additionally, laying off employees will reduce the amount of the loan which is forgivable.

² This includes employees obtained from a temporary employee agency, professional employee organization or leasing concern. However, volunteers are not included.

Q. How much of the loan can be forgiven?

Forgiveness on a covered loan is equal to the sum of a few expenses³ and the payroll costs⁴ incurred during the 8-week period following receipt of the loan. Forgivable payroll costs do not include compensation over \$100,000.

Please Note: The amount of the loan forgiven can be reduced if the employer has reduced employee wages or laid off employees.

Q. How does the loan forgiveness reduction work?

The amount of the loan forgiven will be reduced by the amount of any reduction in employee wages that exceeds 25% of the employee's wages. To determine whether an employee's wages have been reduced in excess of 25%, the SBA will consider the amount of wages paid to the employee in the 8-week covered period compared to the employee's wages in the last full quarter the employee worked prior to the covered period.

The amount of the loan forgiven will also be reduced to the extent the employer has terminated or laid off employees. The SBA will divide the average number of full-time equivalent employees employed during the 8-week covered period by the average number of full-time equivalent employees that the employer employed between either February 15, 2019-June 30, 2019 or January 1, 2020-February 29, 2020. This fraction will be multiplied by the amount of the loan to be forgiven.

Q. Are employers that had to lay off employees prior to the passage of this act then automatically going to see a reduction in the forgivable amount of the loan when compared to employers who were not required to take such actions? Should an employer re-hire employees that it was previously required to lay off?

An employer that laid off an employee prior to the CARES Act being signed into law will only see a reduction in the "forgivable" amount of a PPP if the employer does not rehire the previously laid off employee.

To encourage employers to rehire employees who have already been laid off due to the COVID-19 crisis, the CARES Act ensures that employers that re-hire these former employees will not be penalized for having a reduced payroll at the beginning of the applicable period in that the forgivable amount of their loan will not be reduced by those employees who were rehired.

Q. Are there any other implications of rehiring a former employee?

³ Payments on rent obligations, interest on covered mortgage obligations, and utilities are forgivable so long as the duty to pay them was established prior to 2/15/20.

⁴ Including wages, salaries, continued benefits, and other related costs.

Under the Families First Coronavirus Emergency Response Act, the requirement that an employee has been employed with an employer for at least thirty (30) days prior to being entitled to the expanded FMLA leave will not apply to rehired employees assuming they had been employed with the employer for at least thirty days prior to initially being laid off due to COVID-19 concerns.

Q. If a business does not have enough work for all of its employees, should it fire, furlough, or keep the employees on its payroll?

Nothing stops an employer from taking any of these actions. However, the CARES Act created the PPP in order to provide incentives and benefits for retaining employees. These incentives are especially strong for the 8-week period that would follow the receipt of a PPP loan.

For example, the amount of the PPP loan that the employer is entitled to have forgiven will be reduced if the employer fires or lays off employees.

Q. What happens with the portion of a covered PPP loan that is not forgiven?

Any portion of a loan that is not forgiven is payable over a maximum of 10 years at a maximum of 4% interest. The CARES Act also provides for deferment for at least six (6) months and up to one year.

Q. If an employer lays off its employees, what benefits will they be eligible to receive?

The CARES Act contains a provision that expands eligibility for unemployment benefits to individuals who would normally not be eligible to receive those benefits. Covered employees include those who may have already exhausted their regular unemployment benefits, those that suffered partial unemployment, and those unable to work as a direct result of the coronavirus crisis during the period of 1/27/20 to 12/31/20.⁵

In addition, the CARES Act increases and extends benefits for both the newly eligible individuals and those who would be eligible under the normal unemployment laws. Such individuals will now be eligible to receive normal unemployment benefits in accordance with the applicable state laws, as well as an additional \$600 per week.

The \$600 increase applies from the date that their state enters into an agreement with the federal government through July 31, 2020. While employees should still be able and actively seeking work, this requirement is waived if they are unable to do so in light of a COVID-19 illness or restriction. Waiting periods can be waived by the applicable state.

Individuals can only receive benefits for 39 weeks, absent an extension.

Q. What if an employer has already received an SBA Economic Injury Disaster Loan (“EIDL”)?

⁵ Even independent contractors and self-employed individuals will be eligible for these expanded unemployment benefits.

Businesses that previously received an EIDL between January 31, 2020 and the date covered loans under the PPP first become available are allowed to refinance an EIDL into a PPP loan. The CARES Act also expanded EIDL eligibility requirements.

Q. What businesses are eligible for Emergency Economic Injury Disaster Loans under the CARES Act's expansion?

The CARES Act expanded the scope of employers that are eligible for Emergency Economic Injury Disaster Loans ("EIDLs"). Eligible entities now include:

- (1) Any business with less than 500 employees;
- (2) individuals operating under a sole proprietorship (with or without employees) or as an independent contractor; *and*
- (3) any cooperative, ESOP (as defined in 15 U.S.C. 632), and tribal small business concern with less than 500 employees.

Businesses may not use an EIDL loan and a PPP loan for duplicative purposes. Loans obtained after January 31, 2020, may be refinanced under the Program.

Q. How is the number of employees calculated under the expanded EDIL program?

It appears that this number will be calculated to include employees of affiliates. Methods for calculating employees is discussed in the sections above and additional guidance on determining whether an entity is an "affiliate" of another can be found at the following link: [How to Assess Affiliated Entities](#).

Q. If I don't want to take out a PPP, are there any other benefits available to me?

Yes, employers can be entitled to an "employee retention credit." Employers who: (a) were carrying on a trade or business during 2020 and (b) during a calendar quarter either:

- (i) the operation of business or trade is fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19; or
- (ii) during a covered calendar quarter (any beginning after 12/31/19) the gross receipts are less than 50% of gross receipts for the same calendar quarter in the prior year and ending with the quarter following the first quarter which gross receipts are greater than 80% of gross receipts for the same calendar quarter in the prior year. Tax exempt organizations will also be eligible.

For eligible employers with 100 or fewer full-time employees, all wages paid by the employer up to \$10,000 per employee are eligible for credit.

For eligible employers with more than 100 full-time employees, only wages paid to employees who are unable to provide services due to the COVID-19 pandemic, up to a maximum of 30 days, will qualify.

Employers seeking a PPP cannot also take the retention credit. Additionally, if an employer receives a “Work Opportunity Tax Credit” under the IRC or an “Employer Credit for Paid Family and Medical Leave” under the IRC, it will be prohibited from obtaining this retention credit for those same wages.

Q. How is the relevant number of employees (100) under the retention credit provisions calculated?

According to the applicable provisions in the CARES Act, for the purposes of this section, “full-time employees” are those that, with respect to a given month, are employed for at least 30 hours of service per week.