



CAPES SOKOL

COVID-19 RESPONSE LEGISLATION - ECONOMIC RELIEF FOR SMALL BUSINESSES

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THIS PRESENTATION IS ORGANIZED AS FOLLOWS

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- Employer Payroll Tax Delay - Laura E. Krebs Al-Shathir
- Employee Retention Payroll Tax Credit - Laura E. Krebs Al-Shathir
- EIDL Loans - Michelle F. Schwerin and Danielle M. Durban)
- PPP Loans - Michelle F. Schwerin and Danielle M. Durban

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Laura has served as a standing guest lecturer for Corporate Tax at the Washington University School of Law LL.M. in Taxation Program, and she is an adjunct professor of law at the University of Missouri-Columbia School of Law, teaching Basic Business Principles for Lawyers.

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Dani believes the law is just one part of a client's needs. Because of that, she is committed to thoroughly understanding each of her client's business goals, mission, and values in order to provide effective and efficient solutions unique to each client's business. In doing so, she relies on more than just legal knowledge.

Having worked with a variety of businesses as a graphic and web artist for over a decade, Dani learned the importance of figuring out how to translate a client's vision into a client's reality. Applying this approach to the legal world, Dani makes sure to always view a client's legal needs in relation to their business goals, striving to create harmony between the two. This creative and results-driven approach has proven successful—in both the legal outcome and in the satisfaction of the client.

Dani has worked with television production companies, movie production companies, digital entertainment companies, software development companies, restaurateurs, artists, actors, authors, and entrepreneurs in connection with their business formation, deal structure, network contracts, rights acquisition, IP licensing, software licensing, and copyright and trademark protection.

Dani specializes in entity formation and structuring, business disputes, commercial transactions, real estate, copyrights, and trademarks.

CONGRESS EXPRESSES ADDITIONAL CARE(S) FOR SMALL BUSINESSES SUFFERING ECONOMIC INJURY²

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In a blog post we published last week³, we discussed the U.S. Small Business Administration's (the "SBA") issued revised criteria for states (or territories) seeking an "economic injury declaration" related to COVID-19, which were released on **Tuesday, March 17, 2020**. The SBA expected the revised criteria would allow small businesses easier access to the **Economic Injury Disaster Loan** ("7(b)(2) Loan" or "EIDL" or "SBA Disaster Loans") program.

On **Friday, March 27, 2020**, Congress followed suit, passing the Coronavirus Aid, Relief, and Economic Security Act (the "**CARES Act**"), with provisions further simplifying the application process for a **7(b)(2) Loan** and appropriating \$10 billion specifically to fund these SBA Disaster Loans.

SBA Disaster Loans, with CARES Act modifications as described below, are available through December 31, 2020.

ECONOMIC INJURY DISASTER LOANS ELIGIBILITY REQUIREMENTS RELAXED

First, under the CARES Act **all states** have been deemed to suffer an "economic injury," such that 7(b)(2) Loans are available to *all* eligible businesses within every single state in the United States.⁴

Second, Section 1110 of the CARES Act relaxed requirements for businesses to qualify for the SBA Disaster Loan program:

Between January 31, 2020 and December 31, 2020, if a business falls within a list of enumerated entities, including an "**eligible entity**," "**small business concern**," or "**private nonprofit organization**," such business will be eligible for a 7(b)(2) Loan.

Each of the following entities now qualifies to participate in the 7(b)(2) loan program:

ELIGIBLE ENTITY

An "**eligible entity**" is defined as

- A business with not more than 500 employees;
- An individual who operates under a sole proprietorship or as an independent contractor between January 31 through December 31, 2020;

² <https://www.capesokol.com/insights/congress-expresses-additional-cares-for-small-businesses-suffering-economic-injury/>

³ [SBA's Disaster Assistance Loan in the Age of COVID-19: "Economic Injury Declaration" by SBA Required for Missouri](#)

⁴ Section 1110(f)(7) of the CARES Act

- A cooperative with not more than 500 employees;
- An ESOP with not more than 500 employees; or
- A tribal small business concern with not more than 500 employees.

Such eligible entities are not subject to the revenue limitations that previously would have disqualified many small businesses.

SMALL BUSINESS CONCERN

A “**small business concern**” is defined by statute as “one which is independently owned and operated, and which is not dominant in its field of operation.”⁵

- The SBA further determines a “small business concern” by its size. The SBA published a “size standard”, that sets a maximum size of a “small business concern” as measured by employees or average annual receipts as compared to its industry.
- Thus, whether a company is deemed a “small business” for SBA purposes and qualifications, is completely fact dependent.

Please see the link below for a table with the applicable “size standards.”⁶
[*Small Business Size Standards by NAICS Industry table.*](#)

PRIVATE NONPROFIT ORGANIZATION

The term “**private nonprofit organization**,” is defined in the **Federal Regulations**, titled “Is my business eligible to apply for an economic injury disaster loan?”⁷

The Regulation defines an eligible “private nonprofit organization” as “. . . a non-governmental agency or entity that currently has (1) an effective ruling letter from the [IRS], granting tax exemption under sections 510(c), (d), or (e) of the Internal Revenue Code of 1954 OR (2) satisfactory evidence from the State that the non-revenue producing organization or entity is a non-profit organized or doing business under State law.”

Section 3.30(C)(3) of the latest “Standard Operating Procedure” from the SBA, dated **May 31, 2018** and applicable to the SBA Disaster Loans procedures prior to the CARES Act, directs SBA employees that “**private nonprofit organizations of any size are eligible**” for a 7(b)(2) Loan.⁸

- Although the SBA’s Standard Operating Procedure does not have the legal authority of a statute or regulation, it will guide the SBA personnel’s’ determinations of eligibility.

⁵ 15 U.S.C. §§ 632 and 636

⁶ 13 C.F.R. § 201

⁷ 13 C.F.R. § 123.300

⁸ Section 1110(a) of the CARES Act

- Per the Standard Operating Procedure, to the extent a business meets the definition of “private nonprofit organization”, then there is no size limitation with regard to applying for a 7(b)(2) Loan.

ABOUT THE ECONOMIC INJURY DISASTER LOAN⁹

- The SBA is authorized to extend a 7(b)(2) Loan to a business based on the business’ actual economic injury and financial needs up to **\$2,000,000**.
- The SBA is further authorized to extend loan terms for up to 30 years at **3.75%** interest to for-profit entities and **2.75%** for nonprofits).

[SBA Disaster Assistance in Response to COVID-19](#)

7(B)(2) LOAN APPLICATION PROCESS¹⁰

A business seeking a 7(b)(2) Loan must fill out an application through the SBA’s online portal. The SBA **may** approve a borrower purely based on the borrower’s application and credit score (*without* requiring supporting information, such as a tax return). However, it may require a business to fill out further forms and provide additional information.

[Covid-19 Economic Injury Disaster Loan Application](#)

Additionally, through the CARES Act, Congress eliminated the requirements for a business seeking a 7(b)(2) Loan to:

- Provide a **personal guarantee** for loans of less than \$200,000; however, the SBA will likely provide further guidance concerning guarantees
- Be in business for 1 year prior to the disaster (to participate in the 7(b)(2) Loan program a business must merely have been operating on or before **January 31, 2020**)
- Show that the business is unable to obtain credit elsewhere

ALLOWABLE USES OF THE 7(B)(2) LOAN¹¹

Upon receipt of a 7(b)(2) Loan, proceeds may be used to pay fixed debts, payroll, accounts payable and other obligations that cannot be paid as a result of the coronavirus disaster.

Specifically, the SBA Regulations provide that loans are designed to provide:

“working capital necessary to carry your concern until resumption of normal operations and for expenditures necessary to alleviate the specific economic injury, but not to exceed that which the business could have provided had the injury not occurred.”¹²

⁹ Section 1110(e)(7) of the CARES Act

¹⁰ Section 1110(d) of the CARES Act

¹¹ Section 1110(e) of the CARES Act

¹² 13 C.F.R. § 123.303

Loan proceeds are **not** intended to replace lost sales or profits and **cannot be used for** refinancing debt, making payments on loans owed by another federal agency, paying tax penalty obligations, repairing physical damages, and/or paying dividends to stockholders.

ECONOMIC INJURY DISASTER LOAN APPLICANT MAY REQUEST AN IMMEDIATE EMERGENCY GRANT

A business that meets the above criteria for eligibility, “may request that the [SBA] provide an advance [to the loan of *no more than \$10,000*] . . . to the [business] within 3 days of the [SBA] receiv[ing] an application” from the business.

A business may submit this “request” by checking a box during the online application process. Before disbursing an advance, the SBA **will** verify that the borrower is eligible to participate in the 7(b)(2) Loan program by reviewing the borrower’s a **self-certification**. The self-certification is made under penalties of perjury and may expose the borrower to criminal liability should the individual make a false self-certification.¹³

An advance made as an Emergency Grant may be used for any “allowable use” (as defined above”) including¹⁴:

- providing paid sick leave to employees unable to work due to COVID-19;
- maintaining payroll to retain employees;
- covering increased costs resulting from interrupted supply chains;
- making rent or mortgage payments; **AND/OR**
- repaying obligations that cannot be met due to revenue losses.

A business is not required to repay such advance, even if subsequently denied for a 7(b)(2) Loan.¹⁵ However, to the extent the business applies for and is approved for a 7(a) Loan (more about those here: [CARES Act: Paycheck Protection Program Provides Small Businesses an Opportunity for Relief](#)), the advance shall reduce the forgivable portion of the 7(a) loan.

¹³ Section 1110(e) of the CARES Act

¹⁴ Section 1110(e)(4) of the CARES Act

¹⁵ Section 1110(e)(5) - 6) of the CARES Act

BUSINESSES SHOULD CARE(S) ABOUT THIS: THE SBA IS RELEASING NEW INFORMATION REGARDING 7(A) LOANS¹⁶

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Late on **Tuesday, March 31, 2020**, the Small Business Administration (the “SBA”) updated their site with further information regarding **7(a) Loans** under the **Paycheck Protection Program**.

After the passage of the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”) on **Friday, March 27, 2020**, further guidance from the SBA was highly anticipated, particularly since Section 1102(a)(2)(F)(ii)(I) of the CARES Act delegated authority to approved lenders, who expressed a need for such guidance before implementing the Paycheck Protection Program.

[Paycheck Protection Program Application Form](#)

PAYCHECK PROTECTION PROGRAM

While more is forthcoming, the SBA’s site has thus far provided the following:

- **1% interest rate** (the CARES Act stated the interest rate was “not to exceed **4%**”);
- **maturity date of 2 years** (the CARES Act stated a “maximum maturity of **10 years**”); and
- **6-month deferral** (the CARES Act stated deferment relief for “not less than **6 months . . .** and not more than **1 year**”).

Additionally, the SBA site provided a sample application—which is subject to change with the following items worth noting:

ELIGIBLE LOAN AMOUNT CALCULATION BASED ON TAX DOCUMENTS:

“I acknowledge that the lender will calculate the eligible loan amount using tax documents I have submitted. I affirm that these tax documents are identical to those I submitted to the IRS.”

LOAN FORGIVENESS LIMITATION:

“Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities. Due to likely

¹⁶<https://www.capesokol.com/insights/businesses-should-cares-about-this-the-sba-is-releasing-new-information-regarding-7a-loans/>

high subscription, it is anticipated that not more than twenty-five percent (25%) of the forgiven amount may be for non-payroll costs.”

Meaning at least 75% of the forgiven amount must have been used for “payroll costs.”

“PAYROLL COSTS” CALCULATION:

“For purposes of calculating “Average Monthly Payroll”, most Applicants will use the average monthly payroll for 2019, excluding costs over \$100,000 on an annualized basis for each employee.”

Further guidance is needed as to whether “costs over \$100,000” is exclusively related to salary or includes costs such as health benefits.

IMPRISONMENT AND FINANCIAL FINES FOR PROVIDING FALSE INFORMATION:

“I further certify that the information provided in this application and the information that I have provided in all supporting documents and forms is true and accurate. I realize that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under 18 USC 100117 and 357118 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 64519 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a Federally insured institution, under 18 USC 101420 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.”

AMERICAN MADE REPRESENTATION:

“To the extent feasible, I will purchase only American-made equipment and products.”

¹⁷ [18 USC 1001](#)

¹⁸ [18 USC 3571](#)

¹⁹ [15 USC 645](#)

²⁰ [18 USC 1014](#)

CARES ACT: PAYCHECK PROTECTION PROGRAM PROVIDES SMALL BUSINESSES AN OPPORTUNITY FOR RELIEF²¹

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Please note this blog post relates to a different program than the “Emergency EIDL Grants” program (relating to 7(b) Economic Injury Disaster Loans) under the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”).

The recently passed Coronavirus Aid, Relief, and Economic Security Act (“**CARES Act**”) has important provisions for small businesses under what is called the “**Paycheck Protection Program**,” which addresses temporary changes to 7(a) loans.²²

Under the program, the Small Business Administration (“**SBA**”) will make loans of up to **\$10 million** available to “**small business concerns**”, defined as a business that employs not more than the **greater** of **500** employees **or** the business’ applicable size standard²³ [Section 121.201] in number of employees.

If you qualify, money will be available to cover payroll, employee salaries, mortgage payments (*interest only*), rent, utilities and pre-existing debt obligation. The following is a summary of the key provisions.

WHO IS ELIGIBLE?

From March 1, 2020 to December 31, 2020, the CARES Act directs the SBA to make loans available to businesses (and certain nonprofits) that employ not more than the **greater** of **500** employees **or** the business’ applicable size standard in number of employees.

In effect, if your business has **fewer** than **500** employees (or whatever amount applies to your industry via the size standard chart), you are eligible for these loans (with the limited list of excepted industries – e.g. financial, gambling, private clubs) **so long as** your business:

- (i) was in operation as of February 15, 2020 and
- (ii) had employees it was paying salaries and payroll taxes to.

²¹<https://www.capessokol.com/insights/cares-act-paycheck-protection-program-provides-small-businesses-an-opportunity-for-relief/>

²² [P.L. 116-136](#).

²³ [Section 121.201](#)

The complicated portion, unfortunately, may be in determining your total number of employees, as it may not just include *your* business' employees. Unless you are in the accommodation (e.g. hotels, motels, inns) **or** the food industry (e.g. fast food service, restaurants) **or** are a franchise, nonprofit, or veteran's organization, in determining your business' number of employees, you **must** factor in affiliates.

The test in determining whether or not your business has any “**affiliates**” is easiest described as the ability to control. If two businesses—even *if in unrelated industries*—have the same controlling owner or manager, those two businesses will be deemed to be affiliated and **both** of their employees will need to be aggregated to determine if the business applying for the loan meets the eligibility requirement regarding maximum number of employees.

HOW MUCH IS AVAILABLE?

The loans are limited to the **lesser** of \$10 million or the...average total monthly payments by the applicant for payroll costs multiplied by 2.5. Payroll costs do not include the portion of an employee's annual compensation which exceeds \$100,000 . For example, if your business' payroll, as defined in the act, averages \$1 million a month over the last year, you could borrow up to \$2.5 million under this program.

Additionally, to the extent your business has a 7(b) Economic Injury Disaster Loan, the outstanding amount of such loan will be **added** to the previous calculation, with such loan being rolled into this loan.

DO I HAVE TO GIVE A PERSONAL GUARANTEE OR COLLATERAL?

The loans under this program do not require personal guarantees from the business owners nor collateral. **However**, to the extent a member, shareholder, etc. uses the proceeds of the loans for an unauthorized use, then recourse is available.

WHAT ARE THE TERMS?

Any portion of the loan which is not forgiven (see below) will have a **10-year term** at not more than **4%**. Such loan can be **deferred**, though (including principal, interest, and fees), for a period not less than 6 months but not more than 1 year.

WILL I HAVE TO PAY IT BACK?

A portion of this loan may be forgiven by the SBA. The forgivable amount is equal to the amount spent by the borrower over the eight-week period after the loan was originated on payroll costs, rent, and/or mortgage payments (*interest only*) and utilities. The amount of such loan forgiveness **cannot exceed the principal loan amount**.

Additionally, the amount of loan forgiveness **will be reduced if**:

- the average number of **full-time equivalent** employees employed by the business during the **8-week period** beginning on the loan origination date *is less than* the average number of full-time equivalent employees between either February 15, 2019 through June 30, 2019 **or** January 1, 2020 through February 29, 2020

AND/OR

- any employees' (that did not receive, during any single pay period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000) **total** wages or salaries, during the **8 week period** beginning on the loan origination date, were **reduced** *in excess of* 25% of the employee's total wages or salary during the most recent full quarter for which the employee was employed *prior to* the 8 week period

UNLESS

- *no later than* **June 30, 2020**, the business has *eliminated* the reduction of full-time employees **and/or** the business has *eliminated* the reduction in salary or wages of employees

The portion of any loan forgiven under this program is excluded from gross income and is therefore not subject to income tax.

WHAT IF I ALREADY HAVE AN SBA LOAN?

The CARES Act also includes provisions for those with pre-existing SBA loans. Under the Act, lenders are obligated to give a complete payment deferment for one year. If you have such a loan, it is important that you reach out to your lender or the SBA to document the deferment. Unfortunately, you can't just stop paying for one year without contacting the SBA and securing the deferment in writing.

CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY (“CARES”) ACT: PAYROLL TAX IMPLICATIONS²⁴

LAURA E. KREBS AL-SHATHIR, SHAREHOLDER

The Coronavirus Aid, Relief, and Economic Security (“CARES”) Act includes two very important payroll tax provisions: An Employer Payroll Tax Delay and an Employee Retention Payroll Tax Credit.

EMPLOYER PAYROLL TAX DEFERRAL

EPTD: WHAT IT IS?

For the remainder of the year, employers may elect to defer the employer’s portion of social security taxes, effectively 6.2% of employees’ covered wages. Employers may start deferring these payroll taxes for employee compensation paid on or after **March 27, 2020**.

EPTD: WHEN ARE DEFERRED PAYROLL TAXES DUE?

Half of the deferred amount will be due by **December 31, 2021**, and the other half of the deferred amount will be due by **December 31, 2022**.

EPTD: ELIGIBILITY

Employers who receive forgiveness of Paycheck Protection Program (“PPP”) loans (SBA 7(a) loans) under the CARES Act are not eligible for payroll tax deferral. Employers will not know for some time whether their PPP loans will be forgiven, and accordingly, some employers may not know whether they are eligible for payroll tax deferral in the near term. Additional guidance is needed to determine the impact on employers who defer payroll taxes and then have PPP loans forgiven.

EMPLOYEE RETENTION PAYROLL TAX CREDIT

ERPTC: WHAT IT IS?

Certain employers are entitled to receive a payroll tax credit based on “qualified wages” paid after **March 12, 2020**, and before **January 1, 2021**. The credit is claimed each calendar quarter. If the amount of the credit exceeds the employer’s liability, the excess will be refundable to the employer.

ERPTC: ELIGIBLE EMPLOYERS:

- Employers whose business was fully or partially suspended in 2020 due to COVID-19;

²⁴ <https://www.capersokol.com/insights/coronavirus-aid-relief-and-economic-security-cares-act-payroll-tax-implications/>

- Employers who experience a significant decline in gross receipts, meaning gross receipts for any particular calendar quarter in 2020 are less than 50% for that same quarter in 2019 due to COVID-19; and
- Tax exempt employers.
- Employers who receive a PPP loan are not eligible to receive the Employee Retention Payroll Tax Credit.

ERPTC: QUALIFIED WAGES AND THE AMOUNT OF THE CREDIT

The determination of “qualified wages” eligible for the credit depends on the number of employees employed each calendar quarter.

- For employers with **more than 100 employees**, qualified wages are wages paid to employees not providing services due to COVID-19.
- For employers with **100 or fewer employees**, “qualified wages” are essentially all wages paid, regardless of whether or not the employee is providing services. In all cases, the credit is limited to \$5,000 per employee for the year.