

Federal, State and Local Resources Available to Small Businesses and Non-Profits Dealing With the COVID-19 Outbreak

April 10, 2020

Client Advisory

April 10, 2020 by Alexander G. Malyshev, Christopher Rizzo and Bryan J. Hall

This advisory was updated on April 10, 2020, to provide an update about the various problems the crisis relief programs below have faced in the first few weeks of their roll-out.

April 10 Update: It has now been a week since the opening of the application window for small business loans under the Paycheck Protection Program under the Coronavirus Aid, Relief, and Economic Security (CARES) Act,[1] and the application window opens to independent contractors today. The Payroll Protection Program is meant to operate through some 1,800 banks that engage in lending with the U.S. Small Business Administration. It has been widely reported that the roll-out of the Payment Protection Program has been rocky, with many banks unprepared to begin taking applications on April 3. The problem was compounded by the fact that guidance about the program from the Treasury Department and the Small business Administration was released both immediately before, as well as after, the application window has opened.[2] In addition, some state and local level programs are now fully subscribed and have closed their application windows (either temporarily or permanently).

In an effort to control the spread of the COVID-19 pandemic the federal government, as well as various states, enacted a number of mandates aimed at promoting social distancing. This included temporarily expanding unemployment benefits, and issuing a variety of “workforce reduction” and “stay at home” executive orders. Our analysis of these various pieces of legislation can be found in our toolkit (which is being updated as the response develops).[3]

Many small businesses and non-profits will not qualify as “essential” during the shut-down, and will likely remain closed for a month or more if their work cannot be done remotely. A number of federal and state programs are coming on-line to help them weather the economic storm, and we outline them below. Because these programs are being updated in real time, please check the links in the advisory regularly.

A. The U.S. Small Business Administration’s Economic Injury Disaster Loan Program

Small business owners and non-profits in designated states and territories are eligible to apply for low-interest loans due to COVID-19. The SBA will work directly with state Governors to provide targeted, low-interest loans to small businesses and non-profits that have been severely impacted by the Coronavirus (COVID-19).

Generally, the SBA’s Economic Injury Disaster Loan program provides small businesses and non-profits with working capital loans of up to \$2 million, which can provide vital economic support to small businesses to help overcome the temporary loss of revenue they are experiencing.

These loans carry an interest rate of 3.75% for small businesses and 2.75% for nonprofits. Loan repayment terms vary by applicant, up to a maximum of 30 years. They may be used to cover accounts payable, debts, payroll and other bills COVID-19 has affected the ability to pay. The SBA loan application is contingent on the following:

- Credit History – Applicants must have a credit history acceptable to SBA.
- Repayment – Applicants must show the ability to repay the loan.
- Collateral – Collateral is required for all EIDL loans over \$25,000. SBA takes real estate as collateral when it is available.

See New Jersey's FAQ on SBA loans.[4]

SBA will not decline a loan for lack of collateral, but the SBA will require the borrower to pledge collateral that is available. The CARES Act was meant to significantly streamline the program by, among other things, waiving personal guarantees for loans up to \$200,000, limiting other criteria for consideration, and providing temporary grants of \$10,000 while the loan application is pending.[5]

While Economic Injury loans are available for amounts of up to \$2,000,000, the actual amount of each loan is limited to the economic injury determined by the SBA, less business interruption insurance and other recoveries up to the administrative lending limit. The SBA also considers potential contributions that are available from the business and/or its owner(s) or affiliates.

It has been reported that the program (which predates the pandemic, and was not meant to serve so many businesses at once), is already under considerable strain. In some regions the SBA is limiting initial loan disbursements to two months' working capital, up to a maximum of \$15,000 per applicant. This is in addition to the \$10,000 advance that the SBA will provide under the CARES Act.[6]

B. New Payroll Protection Program (Forgivable) Loans Under the CARES Act

The \$2 trillion CARES Act significantly expands the available SBA programs, while also creating new programs that will be administered through the SBA. It also significantly expands what qualifies as a "small business" for the purpose of these programs, generally applying to businesses employing up to 500 employees (the same threshold to which the sick leave provisions of the previous Families First Coronavirus Response Act, applied). Businesses that are assigned a North American Industry Classification System code beginning with 72 (Accommodations and Food Services) are eligible if they employ no more than 500 employees per physical location.[7] Businesses that qualify as a "small business" under the SBA's pre-existing size standards[8] are also eligible. Those size standards vary based on industry (NAICS code) and, in some industries, accommodate businesses with more than 500 employees.

The key provision is the new Payroll Protection Program, which provides for forgivable loans that can be used to cover things like payroll, continuation of group health care benefits during sick leave, and mortgage, rent, and utility expenses.[9] At least 75% of the loan proceeds must be used to cover payroll.[10] An eligible business can borrow the lesser of (1) 2.5 times the business's average monthly payroll in the prior 12 months (capped at \$100,000 in annualized salary per employee) and (2) \$10,000,000. The forgiveness feature of the loans can, in many situations, convert some or all of the loan principal into the equivalent of a grant.

Key terms of the Payroll Protection Program include: (1) the loan amount is reduced by previously obtained loans refinanced into the program; (2) the loans are non-recourse, and personal guarantees are waived[11]; (3) the loans carry a 1% interest rate and have a maturity of up to 2 years; (4) the principal of the loans is forgivable, up to a maximum amount of 8 weeks of covered expenses (including payroll, rent and utilities with 75% going to payroll); (5) independent contractors should be included in head count but not payroll (such contractors can do their own applications; and (6) the amount of forgiveness is reduced if the number of employees of a business, or the wages of employees who make less than \$100,000/year on an annualized basis, are reduced. However, if, in the period beginning on February 15, 2020 and ending 30 days after

adoption of the CARES Act, a business reduces its employees, or their wages, but the business subsequently rehires those employees or restores their wages by June 30, 2020, that reduction will not affect the business's eligibility for forgiveness. See Section 1106(d).

Loan amounts forgiven under the Payroll Protection Program are excluded from the borrower's income for federal income tax purposes. Certain IRS-certified tax exempt organizations like 501(c)(3) and 501(c)(19) are eligible. This is discussed at greater length in a separate advisory.[12]

As noted above, the roll-out has been rocky. It is predicted that the \$349 billion in funds that Congress appropriated for the program will be exhausted, and banks are facing an onslaught of applications they have never dealt with before. Many of the larger banks are, for now, limiting applications to existing customers with loans and lines of credit. Small business applicants are therefore facing the dual challenge of SBA and bank paperwork as well as finding a bank that is open to receiving their application.

C. State Specific Loans and Grants

In addition to the SBA's program, a number of states have set up their own programs to address the impact of COVID-19 on businesses they ordered closed.

New Jersey: New Jersey' Economic Development Authority (NJ EDA) set up a resource page to address COVID-19's impact on small businesses and non-profits.[13]

As the EDA explains, there are a number of existing loan programs available to small and mid-size businesses. These range from "micro" loans of \$50,000, to "direct loans" of up to \$2,000,000 (with up to \$750,000 available to use as working capital). The interest rate for these direct loans is based on the 5-year US Treasury or floor of 2%, whichever is higher, with basis point additions for credit risk.[14] The EDA also has a pilot "Access" program which includes loan participation and a guarantee by the EDA of up to \$1,000,000 for businesses that are more reliant on cash flow (as opposed to hard collateral).[15] The EDA has a number of other programs (including technical assistance, and programs targeted at minority, woman, and veteran owned businesses).[16]

Separate from the EDA, the Governor's Office set up a resource page with live updates regarding the impact of COVID-19, and the Governor's Executive Orders (<https://cv.business.nj.gov>). Specific questions can be addressed through the "live chat" feature on the website (though a thorough review of the Q&A first is strongly encouraged). The resource page indicates that the State is currently working on additional programs to address the economic impact of the outbreak.[17] This includes implementation of the legislation signed by Governor Murphy to allow the EDA to provide grants for the planning, designing, acquiring, constructing, reconstructing, improving, equipping, and furnishing of a project, including, but not limited to, grants for working capital and meeting payroll requirements.[18]

One such grant program was the "Small Business Emergency Assistance Grant Program," which provides eligible businesses (of up to 10 employees) \$1,000 per full time employee, up to a maximum of \$5,000, to support payroll and working capital during the outbreak. It is restricted to businesses operating within the following industries (as defined by the two-digit North American Industry Classification ("NAICS") code): Retail; Accommodation & food services; Arts, entertainment & recreation; and Other services (restricted to businesses with 3-digit NAICS of 811 and 812).[19] Applications for the grant opened on April 3, is now closed. Completed applications are now being evaluated on a first come first served basis, with a total of \$5,000,000 allocated to the program.

New Jersey also announced a new low-cost "Small Business Emergency" Loan Program, for businesses with less than \$5 million in revenue, have been in existence for more than one year, and have a physical location in New Jersey (among other things).[20] The business must certify that it will do its best not to lay off employees, and may borrow up to \$100,000. Terms features include 10-year term and amortization, 0% interest

rate (years 1-5), NJEDA's prevailing interest rate floor (capped at 3.0% years 6-10), and deferred repayments for 12 months. Applications will become available April 13, 2020.

New Jersey created an "eligibility wizard" to help businesses navigate available programs.[21]

New York: Both the Empire State Development Corporation (ESDC) and New York City have created centralized portals to help small businesses address COVID-19.[22]

The ESDC provides guidance on the SBA's Economic Injury Disaster Loan, the process for having a business designated as "essential" if it is not already listed in the guidance issued on March 21, 2020, and for sending specific business-related questions directly to the ESDC.

New York City's portal provides additional detail on programs available to City businesses. These included a zero-interest loan of up to \$75,000 to help retain employees and ensure business continuity for business with fewer than 100 employees who have seen sales decreases of 25% or more. However, due to overwhelming demand, the application window was "paused." The City was also offering small businesses with fewer than 5 employees (including nonprofits) a grant to cover 40% of payroll costs for two months to help retain employees, but the applications are no longer being accepted. Business owners should check the portal regularly for updates.

D. Deferring and Negotiating Liabilities

Finally, businesses and non-profits should consider if they are able to defer or modify some of their ongoing liabilities. This includes reaching out to their landlords and other creditors to see if they are able to modify or defer payments. While some lenders may already have hardship deferral procedures in place, business owners should check if any specific programs are in place in response to COVID-19.

For instance, the New York Department of Financial Services issued a circular letter to insurers urging all regulated entities to provide small businesses that can demonstrate financial hardship caused by COVID-19 payment accommodations (including no-cost extension of payment due dates). DFS also urges all regulated entities, in their capacity as creditors to businesses of all sizes, to work with and provide accommodations to their borrowers, including refraining from exercising rights and remedies based on potential technical defaults under material adverse change and other contractual provisions that might be triggered by the COVID-19 pandemic.[23]

While some cities (like New York) announced eviction moratoriums during the outbreak, this does not generally relieve a tenant of the obligation to pay. This does not mean that the landlord will be unwilling to negotiate a different payment schedule or other accommodation. It is much preferable to have this discussion before a payment is missed and a default is triggered.

Certain payments and filings, like federal quarterly and annual taxes and returns due on April 15, have been delayed to July 15, without interest or penalty.[24] States have discretion to set their own deadlines for payment and filing of state-level taxes and returns. However, some states, including New York, have announced that they are following the federal example and delaying their payment and filing deadlines for taxes and returns due on April 15 to July 15.[25] Small business owners and non-profits should use the time to discuss the tax changes in pending and passed legislation. For instance, the added costs of mandatory federal paid sick leave during the outbreak is offset (to an extent) by a corresponding tax credit.[26]

E. Conclusion

The situation is quickly evolving, so this advisory should only serve as a starting point. New programs may be announced, in part based on how this situation evolves. Small business owners and non-profits are encouraged to get in contact with the relevant city, state and federal agencies as soon as possible, as they will likely be dealing with an overwhelming administrative burden during a time when resources are stretched to the limit.

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[1] See H.R. 748 *available at* <https://www.congress.gov/bill/116th-congress/house-bill/748>.

[2] The most recent guidance is the Paycheck Protection Program Loans FAQ, published by the SBA in consultation with the Department of the Treasury (updated as of April 8, 2020). *Available at* <https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Frequently-Asked-Questions.pdf>.

[3] *Available at* <https://www.clm.com/practice/coronavirus>.

[4] <https://faq.business.nj.gov/en/articles/3789809-what-financial-assistance-is-available-from-the-u-s-small-business-administration-sba>.

[5] See Section 1110.

[6] See <https://int.nyt.com/data/documenthelper/6871-sba-note-about-15000-cap/optimized/full.pdf>.

[7] See, Sections 1101-1114 (Keeping Workers Paid and Employed, Health Care System Enhancements, and Economic Stabilization); 2301-2308 (the "Business Provisions" of Assistance for American Workers, Families and Businesses).

[8] See 13 C.F.R. 121.201.

[9] See Section 1102(a)(1)(F).

[10] Docket No. SBA-2020-0015, Section 2(r).

[11] Sections (F); (J).

[12] See Relief for Nonprofits Under the CARES Act, *available at* <https://www.clm.com/publication.cfm?ID=5704>.

[13] See <https://www.njeda.com/about/Public-Information/Coronavirus-Information>.

[14] These direct loans are for businesses in need of financing that are committed to job creation and retention when conventional financing is not available. See https://www.njeda.com/financing_incentives/programs/direct_loans.

[15] See https://www.njeda.com/financing_incentives/small_midsize_business/Access.

[16] See https://www.njeda.com/small_midsize_business/services.

[17] <https://faq.business.nj.gov/en/articles/3789888-what-programs-are-being-developed-by-the-state-to-support-businesses-that-are-financially-or-operationally-impacted-by-the-outbreak>.

[18] <https://covid19.nj.gov/faqs/announcements/all-announcements/governor-murphy-signs-legislation-authorizing-the-eda-to-provide-grants-during-periods-of-emergency-and-to-extend-documentation-submission-deadlines>.

[19] See <https://www.njeda.com/Press-Room/News-Articles/News-Articles/NOFA-Small-Business-Emergency-Assistance-Grant-Pro>.

[20] <https://faq.business.nj.gov/en/articles/3835238-how-do-i-apply-to-the-njeda-small-business-emergency-assistance-loan-application-open-april-13-2020-at-9-00-a-m>.

[21] <https://faq.business.nj.gov/en/articles/3838662-what-new-state-financial-support-programs-is-my-business-eligible-for-how-do-i-use-the-eligibility-wizard>.

[22] See ESDC (<https://esd.ny.gov/novel-coronavirus-faq-businesses>); New York City (<https://www1.nyc.gov/site/sbs/businesses/covid19-business-outreach.page>).

[23] See "Guidance to New York State Regulated and Exempt Mortgage Servicers Regarding Support for Borrowers Impacted by the Novel Coronavirus (COVID-19)," (March 19, 2020) available at https://www.dfs.ny.gov/industry_guidance/industry_letters/il20200319_coronavirus_mortgage_relief; "Guidance to Department of Financial Services ("DFS") Regulated Insurance Entities Regarding Support for Consumers and Businesses Impacted by Novel Coronavirus (COVID-19)," Insurance Circular Letter No. 7 (March 19, 2020) available at https://www.dfs.ny.gov/industry_guidance/circular_letters/cl2020_07.

[24] See "IRS Extends Due Date for April 15th Tax Filings and Payments Until July 15th" <https://www.clm.com/publication.cfm?ID=5687>.

[25] New York State Governor Andrew M. Cuomo and Budget Director Robert Mujica announced this delay at a March 20, 2020 press conference, and it appears on this New York State Assembly website: https://nyassembly.gov/coronavirus/?sec=updates_nys. The New York State Department of Taxation and Finance has not yet issued a formal announcement of the delay.

[26] See "Summary of Recent Federal and New York State Legislation Providing Paid Sick Leave in Response to the Coronavirus Pandemic" <https://www.clm.com/publication.cfm?ID=5683>.

*Carter Ledyard has created a COVID-19 Response Group to monitor the evolving legal landscape, address client questions and ensure client compliance with the laws and regulations issued in response to the COVID-19 pandemic. The Carter Ledyard COVID-19 Response Group consists of **Jeffery S. Boxer** (212-238-8626, boxer@clm.com), **Judith A. Lockhart** (212-238-8603, lockhart@clm.com), **Bryan J. Hall** (212-238-8894, hall@clm.com), **Alexander G. Malyshev** (212-238-8618, malyshev@clm.com), **Melissa J. Erwin** (212-238-8622, erwin@clm.com), and **Leonardo Trivigno** (212-238-8724, trivigno@clm.com). Clients should contact the attorneys listed above or their regular CLM attorney for any questions concerning legal obligations arising from the COVID-19 pandemic.*

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