



Federal COVID-19 Legislation Impacting Contractors with More than 500 Employees

Congress has passed three major pieces of legislation to address the coronavirus crisis: The Families First Coronavirus Response Act (“FFCRA”), the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”), and the Paycheck Protection Program and Health Care Enhancement Act (“Interim Relief Bill”). These laws are intended to provide relief to employers and employees affected by the current crisis. The CARES Act in particular contains provisions, which are summarized below, that may provide financial relief to contractors.

Note: This guidance is as of May 8, 2020. Text in ***bold and italics*** is new since the last revision, and has been added to provide further clarification.

The CARES Act: Loans, Grants, and Tax Relief

1. Employee Retention Tax Credit: The CARES Act provides a tax credit to encourage employers to retain employees. Eligible employers can take a payroll tax credit equal to 6.2% of wages (including employer payments to group health plans) paid to some or all of their employees. Eligibility for the tax credit is determined quarterly. The maximum amount of the credit that can be taken for the year is \$5000 per employee.

To qualify in the applicable quarter, an employer must experience either (1) a full or partial suspension of operations due to orders from a governmental authority limiting commerce, travel or group meetings due to COVID-19; or (2) more than a 50% decline in gross receipts, as compared to the same quarter in 2019.

Employers of all sizes may be eligible for the tax credits. However, the amount of the tax credits depends on the size of the employer:

- Contractors with *100 or fewer full-time employees* may take the credit for wages paid to *all* employees, regardless whether they are providing services for the employer.
- Contractors with *more than 100 full-time employees* may take these credits only for wages paid to employees who are not providing services due to the COVID-19-related circumstances described above.

The legislation provides that employers will not be penalized if they deduct the amount of the allowed credit from their otherwise-required employment tax deposits. In other words, employers opting to take these credits may simply deduct them from their payroll taxes.



As discussed above, to qualify for a tax credit, an employer must experience either (1) a full or partial suspension of operations due to orders from a governmental authority limiting commerce, travel or group meetings due to COVID-19; or (2) more than a 50% decline in gross receipts, as compared to the same quarter in 2019.

The IRS recently issued guidance on what constitutes a “full or partial suspension of operations.”

Essential Businesses: If a governmental order requires non-essential businesses to suspend operations but allows essential businesses to remain open, an employer that operates an essential business is not considered to have a full or partial suspension of operations. There are, however, exceptions to that rule. An employer with an essential business may be considered to have a full or partial suspension of operations if:

- The business’s suppliers are unable to make deliveries of critical goods or materials due to a governmental order that causes the supplier to suspend its operations;***
- It reduces its operating hours due to a governmental order; or***
- It experiences a significant decline in gross receipts. For information on how to calculate a significant decline in gross receipts, go to [IRS FAQ Nos. 39-46](#).***

Closed workplaces: The IRS also provided guidance on when an employer’s workplace is closed by a governmental order. In that circumstance, if the employer is able to continue operations “comparable to its operations prior to the closure by requiring its employees to telework,” the employer’s operations are not considered to have been fully or partially suspended. The guidance does not explain what “comparable” means, but provides the following example: Employer C, a software development company maintains an office in a city where the mayor has ordered that only essential businesses may operate. Employer C’s business is not essential under the mayor’s order and must close its office. Prior to the order, all employees at the company teleworked once or twice per week, and business meetings were held at various locations. Following the order, the company ordered mandatory telework for all employees and limited client meetings to telephone or video conferences. Employer C’s business operations are not considered to be fully or partially suspended by the governmental order because its employees may continue to conduct its business operations by teleworking.

If, however, an employer’s workplace is closed by a governmental order for certain purposes, but the employer is allowed to remain open for other limited purposes, the employer’s operations would be considered to be partially suspended (e.g., a restaurant that no longer provides in-room dining, but offers carry-out). Similarly, an employer that reduces its operating hours due to a governmental order is considered to have partially suspended its operations. Additionally, employers that operate a trade or business in multiple locations and are subject



to State and local governmental orders limiting operations in some, but not all, jurisdictions are considered to have a partial suspension of operations.

For more information, go to [IRS Frequently Asked Questions](#).

(Source: Sec. 2301 of CARES Act)

2. Federal Payroll Tax Deferral: The CARES Act allows businesses and nonprofit organizations, including unions and labor-management training committees, to delay paying certain 2020 payroll taxes. Businesses and nonprofit organizations may delay paying the employer portion of the Social Security or Railroad Retirement (RRTA) payroll tax that would otherwise be due from March 27 through December 31, 2020. Employers must pay 50% of the deferred amount by December 31, 2021, and the remainder by December 31, 2022. This deferral is not available to organizations whose loan under the Paycheck Protection Program is forgiven.

A business or nonprofit wishing to take advantage of the payroll tax deferral program will still need to file the IRS Form 941 to report the amount of payroll taxes it owes and is choosing to defer. For additional information, go to [IRS Notice 2020-22](#).

(Source: Sec. 2302 of CARES Act)

3. Paycheck Protection Program (“PPP”): The CARES Act creates a Small Business Administration (SBA) loan program, called the Paycheck Protection Program, for companies struggling to maintain operations and keep employees on the payroll. Under the PPP, private lenders make zero-fee loans directly to small businesses and other organizations, and SBA guarantees 100% of each loan. PPP loans have a maturity of 2 years and an interest rate of 1%. As discussed in detail below, PPP loans may be fully or partially forgiven.

Eligible borrowers include “any business concern,” 501(c)(3) nonprofit organizations, and veterans organizations with no more than 500 employees. The term “any business concern” is not defined in the Act, but existing SBA regulations define a “business concern” as a for-profit organization. 13 C.F.R. §121.105. Eligible borrowers also include certain “small business concerns” with over 500 employees. To determine whether your organization qualifies under that category, go to [SBA’s Size Standards](#).

Generally, the loan amount maximum is determined by taking the borrower’s average monthly payroll cost for 2019 (excluding costs over \$100,000 on an annualized basis for each employee) and multiplying that by 2.5. Loans are capped at \$10 million. For additional information on how to calculate your maximum loan amount, go to [SBA Interim Final Rule](#) (pages 8-11).

PPP loans may be used for various purposes, including payroll costs, continuation of group health care benefits, employee salaries, interest on any mortgage, rent, utilities, and interest on any



other debt obligation incurred before February 15, 2020. However, not more than 25% of loan proceeds may be used for non-payroll costs (e.g., mortgage, rent, utilities).

Additional Information on PPP loans:

- All payments, including principal and interest, shall be deferred for a period of 6 months.
- No personal guarantee is required for the loan
- No collateral is required for the loan
- SBA has no recourse against any individual shareholder, member or partner for nonpayment
- Borrower need not show it is unable to secure credit elsewhere
- No prepayment penalty
- Eligible borrowers may only receive one PPP loan

Starting April 3, 2020, eligible entities may apply for loans through any existing SBA lender, federally insured depository institution, or federally insured credit union that is participating. Application forms are available here: [PPP Application Info](#).

Note that eligible organizations can take either a PPP loan or the employee retention tax credit, if eligible, but not both.

On May 6, 2020, SBA updated its [PPP guidance](#). Among other things, SBA emphasized that to determine eligibility for a PPP loan, all applicants must assess their economic need at the time of the loan application. Applicants must certify in good faith that “[c]urrent economic uncertainty makes th[e] loan request necessary to support the ongoing operations of the Applicant.” In making that certification, applicants must take into account “their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.” SBA’s guidance provides that any borrower who applied for a PPP loan prior to April 24, 2020, and repays the loan in full by May 14, 2020, will be deemed by SBA to have made the required certification in good faith. An employer that applied for a PPP loan, received payment, and repays the loan by the safe harbor deadline (May 14, 2020), will be eligible for an Employee Retention Tax Credit.

To ensure that PPP loans are limited to eligible borrowers in need, SBA announced that it will review all loans in excess of \$2 million, following the lender’s submission of the borrower’s loan forgiveness application.

Finally, the IRS recently issued a [notice](#) explaining that no tax deduction will be allowed for an expense that is otherwise deductible if the payment of the expense results in forgiveness of a PPP loan. On Wednesday, May, 6, 2020, a bipartisan group of lawmakers introduced legislation



to enable certain small businesses to deduct their expenses even if they have received a PPP loan that was later forgiven.

(Source: Sec. 1102 of CARES Act, amending 15 U.S.C. § 636(a))

4. PPP Loan Forgiveness: A borrower may be eligible for forgiveness of the PPP loan in an amount equal to the sum of the following costs incurred during the 8-week period beginning on the date of loan origination: (1) payroll costs, (2) interest on a mortgage obligation incurred before February 15, 2020, (3) rent under a lease in force before February 15, 2020, and (4) utilities for which service began before February 15, 2020. According to SBA's guidance, "due to likely high subscription, at least 75% of the forgiven amount must have been used for payroll." The current guidance is not clear on whether the amount of loan forgiveness will include accrued interest. The Act reduces the amount of loan forgiveness if an employer reduces its number of employees or reduces their compensation by more than 25% eight weeks after getting the loan. The SBA may make limited exceptions to that rule.

(Source: Sec. 1106 of CARES Act, amending 15 U.S.C. § 636(a))

5. Economic Injury Disaster Loan ("EIDL") Program: The CARES Act amends the SBA's existing EIDL program by expanding the list of entities eligible for such loans and waiving certain requirements. Like PPP loans, EIDL loans are issued by private lenders and backed by the SBA. According to SBA's website, the program offers loans of up to \$2 million. EIDL loans are available to eligible entities that have "suffered a substantial economic injury" as a result of the COVID-19 crisis. Under existing regulations, a "substantial economic injury" means an organization is unable to meet its obligations as they mature or to pay its ordinary and necessary operating expenses.

Eligible borrowers include private nonprofit organizations, independent contractors, sole proprietorships, and cooperatives or other businesses with no more than 500 employees. Eligible borrowers also include certain "small business concerns" with over 500 employees. To determine whether your organization qualifies under that category, go to [SBA's Size Standards](#).

According to SBA's website, EIDL loans may be used to pay fixed debts, payroll, accounts payable and other bills that can't be paid because of the current crisis. The interest rate for businesses is 3.75%. The expanded EIDL program is available through December 31, 2020.

Additional Information on Expanded EIDL Loans:

- Payments of principal and interest may be deferred for up to four years
- No personal guarantee is required for loans capped at \$200,000
- The borrower may be approved for a loan solely on its credit score



- The borrower had to be in operation by at least January 31, 2020
- The borrower need not show it is unable to secure credit elsewhere
- These loans are not subject to loan forgiveness

Eligible entities may apply for EIDL loans here: [EIDL Application Form](#)

The Interim Relief Bill added \$10 billion to the EIDL Program established in the CARES Act. The Interim Relief Bill also added agricultural enterprises with not more than 500 employees to the list of eligible borrowers. SBA recently announced that, due to limited funding, it will now only accept new EIDL applications from agricultural enterprises.

(Source: Sec. 1110 of CARES Act, amending 15 U.S.C. § 636(b)(2), 13 C.F.R. § 123.300(a))

6. Emergency Grants: Entities that apply for an EIDL loan may request from SBA an immediate advance of up to \$10,000 in the form of a grant. Such grants may be used for providing sick leave, payroll to retain employees, making rent or mortgage payments, and repaying obligations that cannot be met due to revenue losses. Such grants will be available through December 31, 2020. EIDL grants do not need to be repaid even if the applicant is ultimately denied an EIDL loan.

(Source: Sec. 1110(e) of CARES Act)

7. Express Loans: The CARES Act amends the SBA's Express Loan Program by temporarily increasing the current loan amount of \$350,000 to \$1 million. SBA guarantees 50% of each loan. The Program features an accelerated turnaround time for SBA review. The SBA will respond to Express Loan applications within 36 hours. If approved, funds become available to the business owner within 90 days. Lenders and borrowers negotiate the interest rate, which can be fixed or variable. However, rates may not exceed SBA's maximum rates (up to 4.5% over base rate for loans over \$50,000). Those loans may be used for plant acquisition, construction, conversion, or expansion, including the acquisition of land, material, supplies, equipment, and working capital. Eligible entities include "small business concerns." Depending on the industry and trade, an employer with more than 500 employees may be deemed a "small business concern." To determine whether your organization qualifies under that category, go to [SBA's Size Standards](#).

(Source: Sec. 1101(c) of CARES Act, amending 15 U.S.C. § 636(a)(31)(D))

8. Mid-Size Employer Loans: The CARES Act directs the Treasury Secretary, in partnership with the Federal Reserve, to finance a new direct loan program for businesses and nonprofit organizations with between 500 and 10,000 employees. Banks and other private lenders would issue the federally-financed loans. The interest rate may not exceed 2% per annum. For the first six months, no interest or principal would be due. The CARES Act gives the Treasury Secretary discretion to extend the deferment period beyond the first six months.



Among other things, eligible borrowers must certify that:

- The uncertainty of economic conditions makes a loan necessary to support ongoing operations
- They are based in the U.S., have significant operations in the U.S., and the majority of their employees are based in the U.S.
- The loan will be used to retain at least 90% of their workforce
- They are not a debtor in bankruptcy
- They will not abrogate existing collective bargaining agreements for the loan's duration plus two years
- They will remain neutral in any union organizing effort for the term of the loan
- They will not pay dividends or buy back stock with the loan

The details of this potential mid-size lending program are yet to be established.

(Source: Sec. 4003(c)(3)(D)(i) of CARES Act)

9. Main Street Lending Program: The CARES Act encourages the Federal Reserve to establish a lending program to help “small and mid-sized businesses.” The Act does not define the term “small and mid-sized businesses.” On April 9, 2020, the Federal Reserve released information about this new program. The Main Street program will offer 4-year loans to companies employing up to 10,000 workers or with revenues of less than \$2.5 billion in 2019. ***The Federal Reserve recently issued [guidance](#) changing the eligibility criteria for MSLP loans. Under the new rules, a company must employ 15,000 workers or fewer, or have 2019 annual revenues of \$5 billion or less.***

The Main Street loans will be a minimum of \$1 million and a maximum of either \$25 million or an amount that when added to the borrower's existing outstanding and committed but undrawn debt, does not exceed four times the borrower's 2019 earnings before interest, taxes, depreciation, and amortization, whatever is less.

Principal and interest payments will be deferred for one year. Prepayment is permitted without penalty. Borrowers must have significant operations in the U.S. and a majority of employees in the U.S. Companies seeking Main Street loans must commit to make reasonable efforts to maintain payroll and retain workers. Borrowers must also follow certain compensation, stock repurchase, and dividend restrictions. Firms that have taken advantage of the PPP may also take out Main Street loans. For additional information, go to [Main Street Loan Info](#).

(Source: Sec. 4003(c)(3)(D)(ii) of CARES Act)



10. Bankruptcy Relief: The CARES Act amends a provision of the U.S. Bankruptcy Code that gives businesses with debts that are under a certain threshold (approx. \$2 million) a faster and less expensive option for reorganizing. The Act increases that debt threshold to \$7.5 million. Therefore, businesses with debts of \$7.5 million or less will now qualify to file bankruptcy reorganization cases under the expedited and less costly process. The threshold, however, will revert to the \$2 million amount one year after the enactment of the CARES Act.

(Source: Sec. 1113 of CARES Act, amending 11 U.S.C. § 1182)

10. Reimbursements for Federal Contractors: The CARES Act gives federal agencies the ability to reimburse federal contractors for the costs of keeping their “employees and subcontractors” in a “ready state” during the COVID-19 crisis. Specifically, federal agencies may reimburse contractors for paid leave (up to an average of 40 hours per week) through September 30, 2020. Such reimbursements shall only be provided to a contractor whose employees or subcontractors cannot perform work on a site that has been approved by the Federal Government, including a federally-owned or leased facility or site, due to facility closures or other restrictions, and who cannot telework because their job duties cannot be performed remotely during the public health emergency declared on January 31, 2020 for COVID-19.

(Source: Sec. 3610 of CARES Act)

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