



Federal COVID-19 Legislation Impacting Labor Unions as Organizations and Employers

Below is a summary of the legislation passed recently from the perspective of benefits available to labor unions, as well as those impacting unions' options and obligations to their 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 contain important provisions relevant to labor unions in their capacity as organizations and employers. This document summarizes the provisions relevant to unions.

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

The CARES Act provides relief for small businesses and certain nonprofit organizations. Below is a list of relief programs for which your union may be eligible.

1. Employee Retention Tax Credit: The CARES Act provides a tax credit to encourage employers to retain employees. Eligible employers, including labor organizations, 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, a union 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:

- Organizations 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.
- Organizations 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 (RTTA) 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. Economic Injury Disaster Loan ("EIDL") Program: The CARES Act amends the Small Business Administration's (SBA) existing EIDL program by expanding the list of entities eligible for such loans and waiving certain requirements. 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 small business concerns, private nonprofit organizations, independent contractors, sole proprietorships, and cooperatives or other businesses with no more than 500 employees. The Act does not define the term "private nonprofit organizations," but the current SBA application form suggests that the term includes not only 501(c)(3) organizations, but also



501(c)(4), (5), and (6) organizations. Almost all unions are organized as 501(c)(5) organizations and are therefore eligible to participate in this program.

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 nonprofits is 2.75%. 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 an additional \$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)

4. 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)

5. Paycheck Protection Program ("PPP"): The CARES Act creates an SBA loan program called the Paycheck Protection Program. 501(c)(5) entities do not qualify for this program, but if your union has 501(c)(3) affiliated organizations, those organizations may be able to take advantage.

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%. The last day to apply for and receive a loan is June 30, 2020. 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 an organization qualifies under the latter 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

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) and Sec. 2301 of the CARES Act)

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))

6. Retirement Provisions

a. Tax-Favored Withdrawals from Defined Contribution Retirement Plans

- The CARES Act provides that defined contribution plans may permit participants to take a "coronavirus-related distribution" of up to \$100,000 between January 1, 2020 and December 31, 2020, which will not be subject to the 10% early distribution penalty tax for distributions made prior to age 59 ½.
 - "Coronavirus-related distributions" mean distributions from an eligible retirement plan:
 - made to an individual:
 - who is diagnosed with COVID-19 by a CDC-approved test;
 - whose spouse or dependent is diagnosed with COVID-19 by such a test; or
 - who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, or having work hours reduced due to



COVID-19; being unable to work due to lack of child care, closing or reducing hours of a business, or other reasons related to COVID-19.

- Plan administrators may rely on employees' certification that the employee satisfies these conditions.
- Individuals who take coronavirus-related distributions may make one or more contributions back to eligible retirement plans, not to exceed the amount of the distribution received.
- The distributions are also generally taxable over a three-year period and are not treated as eligible rollover distributions (i.e., they are not subject to mandatory 20% withholding).

(Source: Section 2202(a) of CARES Act)

b. Loans from Qualified Plans

- The bill increases the amount of loans a participant can receive from a qualified plan that is not treated as a distribution from \$50,000 to \$100,000, for the period of 180 days after the bill's enactment.
- The bill extends the amount of time an individual with an existing plan loan can repay the loan. If the due date of an existing loan falls between the date of the enactment of the bill and December 31, 2020, the due date of the loan is delayed for 1 year, or, if later, 180 days after this law is enacted. Subsequent payments are also adjusted.

(Source: Section 2202(b) of CARES Act)

c. Plan Amendments Related to Use of Retirement Funds

- Retirement plans are not required to permit withdrawals, provide for participant loans, or provide for loans in the maximum amounts allowed as stated in this bill, but plans that wish to do so must be amended to comply with these provisions on or before the last day of the plan year beginning on or after January 1, 2022. Before the plan is amended, the plan must operate as if such plan amendment was in effect, and the plan amendment must apply retroactively.

(Source: Section 2202(c) of CARES Act)

d. Single-Employer Plan Funding Rules



- Any single-employer defined benefit plan that is required to make a minimum required contribution in 2020 may delay making that payment until January 1, 2021.
- Interest is imposed on any delayed payment, for the period between the original due date and the date on which the payment was made.
- A sponsor of a single-employer defined benefit plan may elect to treat the plan's adjusted funding target attainment percentage for the last plan year ending before January 1, 2020 as the adjusted funding target attainment percentage for the plan years that include any part of the calendar year 2020.

(Source: Section 3608 of CARES Act)

e. Expansion of DOL Authority to Postpone Certain Deadlines

- Section 518 of ERISA is amended to permit DOL to postpone certain ERISA deadlines.
- Examples of deadlines that could be postponed under this provision are those relating to:
 - Filing annual reports with the DOL;
 - Filing terminal and supplementary reports;
 - Providing notices to beneficiaries and participants of a failure to meet minimum funding standards; and
 - Filing plan funding notices with the PBGC.

(Source: Section 3607 of CARES Act)

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