

April 28, 2020

COVID-19 Daily Briefing Recap

How Businesses Can Get in on the Next Wave of CARES Act Loans

Please note that the following is a recap of our COVID-19 Daily Briefing from April 28, 2020. Due to the rapidly evolving nature of the pandemic, we recommend that you consult the most up to date materials possible. Visit Jackson Lewis P.C.'s [COVID-19 resource page](#) for updates on workplace impacts and [sign up here](#) to receive invitations to future daily COVID-19 webinar briefings and email updates on ongoing legal and workplace health challenges.

New Funding for PPP Loans

- On April 24, President Trump signed a \$484 billion COVID-19 relief bill that included an additional \$310 billion in funding for the Paycheck Protection Program (PPP).
- Banks began accepting applications for the new round of funding on April 27.
- The funds are expected to run out quickly, so do not wait to apply.
- The new legislation does not include any changes to, or clarifications of, the PPP program; some questions around the program have not been resolved.
- As of today (April 28), Treasury Department guidance on forgiveness originally set to be issued by April 26.
- The Treasury Department has issued a series Q&As, some of which have been recently updated.

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Certification of “Necessity”

- The CARES Act requires applicants to certify “in good faith” that “the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient.”
- The SBA loan application puts the requirement in slightly different terms: “Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

On April 23, the SBA Issued Q&A 31 on the “Necessity” of PPP Loans

Q: Do businesses owned by large companies with adequate sources of liquidity to support the business’s ongoing operations qualify for a PPP loan?

A: “[B]orrowers must assess their economic need for a PPP loan” and “must certify in good faith that their PPP loan request is **necessary**.” Borrowers must “tak[e] into account their current business activity and 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**” (emphasis added).

“Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.”

What does this guidance mean?

- Q&A 31 raises more questions than answers.
- While the question implies that the guidance is applicable to “large companies,” the answer states that “all borrowers must assess their economic need for a PPP loan.” It is not clear that the guidance applies only to “large companies.” SBA subsequently clarified that Q & A 31 is not limited to publicly traded companies.
- The fact that the borrower could obtain funding elsewhere does not disqualify an employer from taking out a forgivable PPP loan. The CARES Act expressly suspends the SBA requirement that borrowers certify they are unable to obtain credit elsewhere.
- Because the answer does not provide clarity, each business must consider whether it can make the required certifications “in good faith.”

Our recommendations in light of SBA Q&A 31

- Consider the public relation risks:
 - Information about SBA loans is not private and borrowers should assume that if they obtain PPP funds the information will become public.
 - A number of large companies that took out PPP loans received negative media attention and ultimately returned the funds.
- If your business does receive PPP funds and are working towards forgiveness, thoroughly document the following:
 - 1) The reasons the loan was necessary, including:
 - Projections, at the time of the loan application, of business interruption.
 - Contracts that were cancelled or delayed due to the COVID-19 crisis.

- 2) The reasons that “other sources of liquidity” were not readily available or would be significantly detrimental to the business.
- 3) How the money has been used.

Other Certifications

- The CARES Act requires loan applicants to certify “in good faith” “that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments.”
- When applying for forgiveness the buyer must certify that “the amount for which forgiveness was requested was used to retain employees, make interest payments on a covered mortgage obligation, make payments on a covered rent obligation, or make covered utility payments.”

75% Rule

- The SBA’s Interim Final Rule, released on April 2, states that “[n]ot more than 25 percent of the loan forgiveness amount may be attributable to non-payroll costs.”
- The SBA determined that 75% is an appropriate percentage for “payroll costs” “in light of the Act’s overarching focus on keeping workers paid and employed.”
- The rule is included in the section of guidance on loan forgiveness:
 - Qualified non-payroll costs in excess of 25% will not be eligible for forgiveness.
- After the 8-week period (which begins on the date of first loan disbursement): remaining funds should be **either**:
 - Repaid, or
 - Used for “allowable uses” (even if not eligible for forgiveness).

What if I have more questions?

As issues and concerns around COVID-19 unfold daily, employers must prepare to address the threat as it relates to the health and safety of their workforce. Keep up to date with [Jackson Lewis’ latest available information and resources](#).

If you have any questions, please contact the Jackson Lewis attorneys with whom you regularly work.