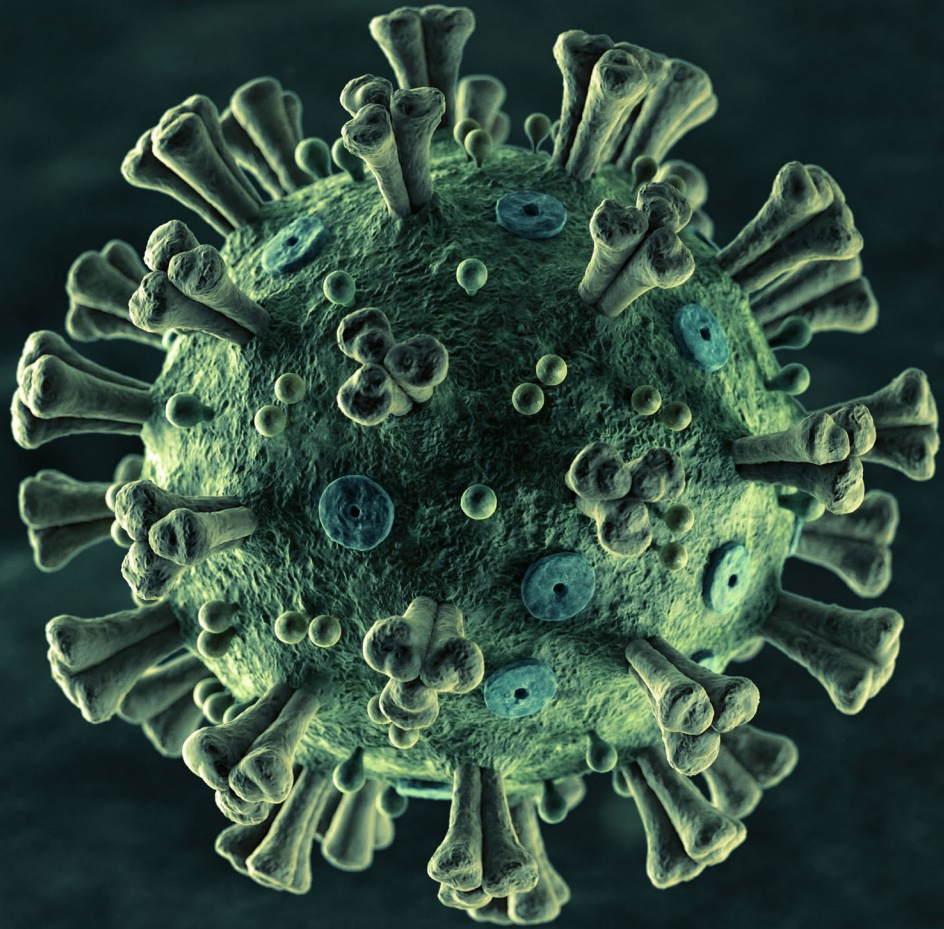


Washington Update: The CARES Act Is Signed into Law



Overview of the CARES Act and Its Impact

The following information was compiled in conjunction with Steptoe & Johnson LLP.

On March 27, 2020, President Trump signed into law “Phase Three” of the congressional response to the COVID-19 emergency. The legislation, titled the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act), follows intense negotiations over the last week.

In addition to support for certain distressed segments of our economy, the CARES Act provides direct financial aid in the form of \$1,200 checks for individuals earning less than \$75,000 (\$2,400 for married households earning less than \$150,000) with an additional \$500 per child. The Act additionally provides expanded unemployment insurance, financial support for state and local governments, a loan program for small businesses and not-for-profits, a payroll tax deferral for employers, and financial assistance to small businesses and certain industries.

For more insight on the impact of COVID-19 as it unfolds, access our [Latest Insights](#) and watch for client-tailored newsletters addressing the pandemic. In addition, please refer to NFP’s [Compliance Corner](#) for a summary of provisions relating to employee benefits.



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Assistance for American Workers, Families and Businesses

Unemployment Insurance Provisions

The Relief for Workers Affected by Coronavirus Act provides federal funding for unemployment compensation (UC) to gig-economy workers adversely impacted by COVID-19 if such workers are not otherwise covered by state UC laws or if such workers have exhausted state UC benefits. If covered by this provision, a gig-economy worker will receive the same UC benefit as regular employees receive under the pertinent state's UC law.

States are provided the opportunity to enter agreements with the federal government to provide enhanced UC benefits under existing state UC benefit programs. The Subtitle provides for immediate UC payments (i.e., no one-week waiting period), an additional \$600/week for up to four months (even if the employee is currently making less), and an additional 13 weeks of UC benefits for participating states.

States are also provided the opportunity to enter agreements with the federal government to receive funding for state enacted "short-time compensation" programs to subsidize employees who have their hours reduced in lieu of a layoff, where the federal government would fund the delta between reduced hour payments and the UC benefit.

Rebates and Other Individual Provisions

Recovery Rebates

The CARES Act provides for recovery rebates of up to \$1,200 (\$2,400 for joint filers) for US taxpayers. The mechanism for paying the rebates is an advance refundable tax credit. The rebates are subject to certain special rules:

- Amounts are increased by \$500 for each child
- Amounts are phased out for taxpayers making \$75,000 or more (\$150,000 for joint filers, and as added by the CARES Act, \$112,500 for heads of household)

The rebates are available even if the taxpayer has no income, and no action is generally required to claim the rebates. The IRS will use the taxpayer's 2019 tax return, if filed, or in the alternative, their 2018 return. The CARES Act exempts the rebates from offset to pay debts owed to other federal agencies, state income tax obligations and unemployment compensation debts (but not for past-due support).

Retirement Provisions

On March 24, the IRS issued FAQs that make clear that the due date for IRA contributions and plan contributions is extended to July 15. In addition, the CARES Act makes several welcome changes in the retirement space:

Waiver of 10% Tax for Premature Distributions

The CARES Act waives the 10% additional tax for premature distributions related to the coronavirus for amounts not to exceed \$100,000 from all plans of the controlled group, subject to the following rules:

- The penalty free distribution provision covers retirement plans and IRAs.
- Amounts distributed may be repaid at any time over the three-year period commencing on the date the distribution was received (and there is no requirement that the repayment occur in one tranche).
- Amounts can be paid to a qualified plan or an IRA so long as the account is one to which a rollover contribution could be made under the Code.
- The distribution provision applies to individuals who have been diagnosed with SARS-CoV-2 or COVID-19 by a test approved by the Centers for Disease Control (CDC); their spouse or dependent who has been diagnosed by such a test; or a person who experiences adverse financial consequences as a result of being quarantined, furloughed, laid off, or suffered reduced working hours, or who is unable to work due to lack of child care. The CARES Act allows a plan to rely on a certification provided by the participant.
- To the extent that the amounts are not repaid, the income inclusion with respect to any coronavirus-related distribution can be included ratably over the three taxable years beginning with the taxable year in which the distribution was received.
- Distributions will be deemed to meet the permissible distribution requirements of section 401(k), which essentially means that they will satisfy the hardship distribution provisions of the code. They will be treated as exempt from tax withholding and exempt from the trustee to trustee transfer rules (that require a plan to offer a trustee to trustee transfer to participants taking distributions).



Increase in Dollar Amount for Loans

The CARES Act increases the dollar amount available for loans from qualified plans from \$50,000 to \$100,000 and increases the percentage test limit for loans from half the present value of the participant's benefit to the present value of his entire benefit under the plan.

Furthermore, if the loan repayment is due between the date of the CARES Act's enactment and before the end of the year, the CARES Act allows the repayment to be delayed for one year from the original due date. Subsequent loan repayments must be adjusted to reflect the delay in the 2020 repayment and any interest accruing during that delay. The five-year limit on loan repayments in section 72(p) disregards the one-year delay for 2020. The individuals to whom this provision applies are the same as those covered by the provision permitting penalty-free distributions.

Delay in Required RMDs

The CARES Act adds a provision permitting a one-year delay in required minimum distributions (RMDs) for defined contribution plans described in Code section 401(a), as well as for defined contribution plans described in section 403(a) and (b), IRAs, and section 457 plans. Thus, the change does not appear to apply to defined benefit plans. The delay applies to both 2019 RMDs that needed to be taken by April 1, 2020, and 2020 RMDs. The CARES Act also adds the special rollover rule similar to the one enacted in 2009, allowing amounts subject to the RMD rules in 2020 to be rolled over.

Delay for Plan Amendments

The CARES Act delays the due date for amendments to plans, so long as the plan is operated as if the amendment is in effect and any subsequent writing is retroactive, as follows:

- Amendments required because of the Act need only be made by the last day of the plan year beginning on or after January 1, 2022.
- In the case of governmental plans, that date is the last day of the plan year beginning on or after January 1, 2024. And exempt from the trustee to trustee transfer rules (that require a plan to offer a trustee to trustee transfer to participants taking distributions).

The Act makes clear that the retroactive amendment will not violate the cutback provisions of Employee Retirement Income Security Act of 1974 (ERISA) or the Code.

Delays Minimum Funding Contributions

The CARES Act also delays minimum funding contributions for qualified plans, including quarterly contributions until January 1, 2021. The amount of each such minimum required contribution shall be increased by interest accruing for the period between the original due date and the payment date, at the effective rate of interest for the plan for the plan year in which the payment is made.

Effective Date for Retirement Provisions

The amendments made by to the retirement provisions apply for calendar years beginning after December 31, 2019, allowing participants who have already taken plan distributions the benefit of these provisions.

Charitable Contributions

The CARES Act encourages individuals to contribute to churches and charitable organizations in 2020 by relaxing some of the limitations on charitable contributions:

- Allowing a deduction of up to \$300 of cash contributions, whether or not the taxpayer itemizes deductions
- Suspending the 50% limitation on individuals, increasing to 25% the 10% limitation on corporations, and increasing to 25% the 15% limitation on food inventory

Treatment of Student Loans

The CARES Act expands the definition of employer-provided educational assistance that is excluded from gross income to include up to \$5,250 in student loan payments made by an employer between the date of enactment and the end of 2020.

The CARES Act also suspends involuntary collections on student loans, including by offsetting an income tax refund.

Employee Retention Credit

The CARES Act provides eligible employers – including tax-exempt organizations but not governmental entities – a refundable credit against payroll tax (Social Security and Railroad Retirement) liability equal to 50% of the first \$10,000 in wages per employee (including value of health plan benefits).



Eligibility for Retention Credit

Eligible employers must have carried on a trade or business during 2020 and satisfy one of two tests:

1. Business operations were fully or partially suspended operations due to orders from a governmental entity limiting commerce, travel or group meetings
2. Experienced a year-over-year (comparing calendar quarters) reduction in gross receipts of at least 50% — until gross receipts exceed 80% year-over-year

For employers with more than 100 full-time employees, only employees who are currently not providing services for the employer due to COVID-19 causes are eligible for the credit. The employee retention credit is effective for wages paid after March 12, 2020, and before January 1, 2021.

Delay of Employer Payroll Taxes

The CARES Act postpones the due date for depositing employer payroll taxes and 50% of self-employment taxes related to Social Security and Railroad Retirement and attributable to wages paid during 2020. The deferred amounts would be payable over the next two years — half due December 31, 2021, and half due December 31, 2022.

Treatment of Losses

Certain changes to the loss provisions made by the Tax Cuts and Jobs Act (TCJA) are suspended in an effort to allow companies to utilize greater losses as well as to claim refunds for certain losses. Specifically, the CARES Act:

- Suspends the TCJA's 80% of taxable income limit on net operating loss (NOL) carryovers for three years, so that the limit would not apply to tax years beginning in 2018, 2019 and 2020
- Allows NOLs arising in 2018, 2019 and 2020 to be carried back five years
- Suspends the limitations on excess farm losses and on the use of a pass-through business' losses against non-business income for three years, so that the limits would not apply to tax years beginning in 2018, 2019 and 2020

Corporate AMT Credits

The corporate AMT was repealed as part of the TCJA, but corporate AMT credits are allowed as refundable credits until 2021. The CARES Act accelerates the ability for companies to recover those AMT credits.

Limitation on Business Interest Expense

The CARES Act would temporarily increase the limitation on interest deductions imposed by the TCJA. Specifically, the Act would increase the 30% of adjusted taxable income (ATI) threshold to 50% of ATI, for tax years beginning in 2019 and 2020. (Special tax year 2019 rules would apply to partnerships.) It would also allow a taxpayer to elect to use tax year 2019 ATI in lieu of tax year 2020 ATI for the purpose of calculating its tax year 2020 limitation.

Supporting America's Health Care System in the Fight Against the Coronavirus

Coverage of Testing and Preventative Services

The CARES Act expands the types of testing that would be covered with no cost sharing beyond the scope of the types of testing contemplated by the Families First Act. In addition to the in vitro diagnostic testing approved, authorized or cleared by the FDA, it also covers in vitro diagnostic testing for which the developer has requested, or intends to request, emergency use authorization from the FDA or that a state (which has told HHS it is reviewing such test) has authorized. It leaves open for coverage other types of testing by covering any "other test that the Secretary determines appropriate in guidance."

The CARES Act also requires that the group health plan or insurer reimburse the provider for either the negotiated cost of the testing or, if there is no negotiated price between the group health plan (or insurer) and the provider, for the cash price of the diagnostic testing as reflected on its website. The provider is required to publicize that price on a publicly available website. If a provider fails to publicize the price of the testing, it is subject to a fine not to exceed \$300 per day.

The CARES Act provides that if preventive measures, defined as an "item, service, or immunization that is intended to prevent or mitigate coronavirus disease 2019" become available, then group health plans/insurers must also cover such preventive measures with no cost-sharing obligation. The item or service must meet certain criteria of the United States Preventive Services Task Force or must have a recommendation from the CDC "with respect to the individual involved." It is unclear how an individual-by-



individual approval is intended to work in practice.

Changes to Paid Leave and Family Leave Provisions from Families First Act

Expanded FMLA

The CARES Act provides a few clarifications and makes modest changes to the Family Medical Leave Act provisions in the previous Families First relief package. Those changes include:

- A new rule for rehired employees under which “eligible employee” (defined as employed for at least the last 30 calendar days) includes someone who:
 - Was laid off by the employer March 1, 2020, or later.
 - Had worked for the employer for at least 30 days in the last 60 calendar days prior to the lay-off.
 - Has been rehired by the employer.
- This rule allows for advances on anticipated tax credits for employers’ paid family leave costs (the details/process for which will be worked out in instructions provided by the Department of Labor (DOL), and provides penalty relief for failure to deposit tax amounts in anticipation of credits allowed under this section.
- The new package clarifies that the \$200 per day/\$10,000 total cap on paid leave is per employee, which was omitted from the Families First Act.

Emergency Paid Sick Leave

Similarly, there are parallel changes made to the paid sick leave provisions from the Families First Act, which include:

- Includes provisions intended to improve the ability of taxpayers to monetize the benefit of the recently enacted sick and family leave credits. Specifically, the CARES Act allows employers to receive an advance tax credit from the Treasury instead of having to be reimbursed on the back end. Also, it provides penalty relief for failure to deposit tax amounts in anticipation of credits allowed under this section.
- The CARES Act also makes a clarification that the paid leave dollar limits under these provisions are per employee.

DOL regulations are expected in April to address additional questions and details under these Families First Act provisions.

Health Savings Accounts

The CARES Act clarifies that for plan years beginning on or before December 31, 2021, a plan will not fail to be a high deductible health plan by failing to have a deductible for telehealth and other remote care services.

In addition, the CARES Act repeals the rule enacted in the Affordable Care Act that prohibited over-the-counter medicines (i.e., non-prescribed) other than insulin from being “qualified medical expenses.” Thus, users of health savings accounts or flexible spending accounts would be able to use funds in those accounts to cover over-the-counter medical products, including those needed in quarantine and social distancing, without a prescription. The provision also adds menstrual products to the definition of qualified medical expenses.

Keeping American Workers Paid and Employed Act

The CARES Act amends the Small Business Act (SBA) to create a new Business Loan Program category (hereinafter, the “program”). For the period from February 15, 2020, to June 30, 2020 (the covered period), the law allows the Small Business Administration (Administration) to provide 100% federally backed loans up to a maximum amount to eligible businesses to help pay operational costs like payroll, rent, health benefits, insurance premiums, utilities, etc. Subject to certain conditions, loan amounts are forgivable (see a more detailed discussion on loan forgiveness below).

General Loan Terms and Program Operations

The SBA allows the Administrator to provide loans directly or in cooperation with the private sector through agreements to participate on an immediate or deferred (guaranteed) basis. Lenders authorized to make loans under the SBA’s current Business Loan Program are automatically approved to make and approve loans under this new program, and they may opt to participate in the program under the terms and conditions established by the Department of Treasury (Treasury).

The Administrator may guarantee covered loans under this program on the same terms, conditions and processes as a loan made under the SBA’s current Business Loan Program. No collateral or personal guarantee is permitted to be required for a loan. The interest rate on loans under the program is not to exceed 4%. There will be no subsidy recoupment fee associated with the loans and no prepayment penalty for any payments made. Additionally, the Administrator has no recourse against any individual, shareholder, member or partner of an eligible loan recipient for non-payment, unless the individual uses the loan proceeds for unauthorized purposes (see discussion below of permitted uses).

A loan made under the SBA's Disaster Loan Program (the EIDL program) on or after January 31, 2020, may be refinanced as part of a covered loan under this new program as soon as these new loans are made available. The CARES Act specifically allows SBA EIDL recipients with economic injury disaster loans made since January 31, 2020, for purposes other than the permitted loan uses under this program, to receive assistance under this program.

Eligible Loan Recipients

In addition to "small business concerns" as currently defined under the SBA, eligible businesses for the new program include any business concern, nonprofit organization, veterans' organization, or Tribal business if it employs not more than the greater of:

- 500 employees (includes full-time, part-time and those employed on other bases)
- If applicable, the size standard in number of employees established by the Administration for the industry in which the entity operates

There is a special eligibility rule for businesses in the hospitality and dining industries. For businesses with more than one physical location, if it employs 500 or fewer employees per location and is assigned to the "accommodation and food services" sector (Sector 72) under the North American Industry Classification System (NAICS), the business is eligible to receive a loan.

SBA regulations on entity affiliations are waived for the covered period for business concerns, non-profits and veterans' organizations for:

- Businesses in Sector 72 under the NAICS with 500 or fewer employees
- Franchise businesses with SBA franchisor identifier codes
- Any business that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act

Sole proprietors, independent contractors and eligible self-employed individuals (as defined in the Families First Coronavirus Response Act) are eligible for loan recipients, subject to some documentation requirements to substantiate eligibility.

Loan Maximum, Borrower Eligibility Requirements and Permissible Uses

Loan Maximum

The maximum loan amount (capped at \$10 million) is the lesser of:

A) 2.5 times average total monthly payroll costs incurred in the one-year period before the loan is made*

PLUS the outstanding amount of a loan made under the SBA's Disaster Loan Program between January 31, 2020, and the date on which such loan may be refinanced as part of this new program

OR

B) Upon request, for businesses that were not in existence during the period from February 15, 2019, to June 30, 2019:

2.5 times the average total monthly payroll payments from January 1, 2020, to February 29, 2020;

PLUS the outstanding amount of a loan made under the SBA's Disaster Loan Program between January 31, 2020, and the date on which such loan may be refinanced as part of this new program

OR

C) \$10 million

**For seasonal employers, the average monthly payroll costs for the 12 weeks beginning on February 15, 2019, or from March 1, 2019, to June 30, 2019.*

Eligibility Requirements

There are very few borrower requirements to obtain a loan under the new program. Those requirements include a good-faith certification that:

- The loan is needed to continue operations during the COVID-19 emergency
- Funds will be used to retain workers and maintain payroll or make mortgage, lease and utility payments
- The applicant does not have any other application pending under this program for the same purpose
- From February 15, 2020, until December 31, 2020, the applicant has not received duplicative amounts under this program.



Required Uses of Loan Funds

Businesses may, in addition to uses already allowed under the SBA's Business Loan Program, use the loans for:

- Payroll costs
 - Includes: compensation to employees, such as salary, wage, commissions, cash, etc.; paid leave; severance payments; state and local payroll taxes; and compensation to sole proprietors or independent contractors (including commission-based compensation) up to \$100,000 in 1 year, prorated for the covered period
- Group health care benefits during periods of paid sick, medical or family leave, and insurance premiums
- Retirement benefits
- Salaries, commissions or similar compensations
- Payments of interest on mortgage obligations
- Rent/lease agreement payments
- Utilities
- Interest on any other debt obligations incurred before the covered period

In evaluating eligibility of borrowers, a lender must consider whether the borrower was operating on February 15, 2020, and had employees or independent contractors for whom the borrower paid.

Loan Forgiveness and Payment Deferral Relief

Regarding loan payment deferral rights, the CARES Act provides that businesses that were operating on February 15, 2020, and that have a pending or approved loan application under this program, are presumed to qualify for complete payment deferment relief (for principal, interest and fees) for six months to one year.

Specifically, indebtedness is forgiven (and excluded from gross income) in an amount (not to exceed the principal amount of the loan) equal to the following costs incurred and payments made during the covered period:

- Payroll costs
- Interest payments on mortgages
- Rent
- Utility payments

Forgiveness Limitations

Forgiveness amounts will be reduced for any employee cuts or reductions in wages.

The reduction formula for fewer employees is:

- The maximum available forgiveness under the rules described above multiplied by:
 - Average number of full-time equivalent employees (FTEEs) per month – calculated by the average number of FTEEs for each pay period falling within a month – during the covered period divided by:
 - Either (at election of the borrower):
 - Average number of FTEEs per month employed from February 15, 2019 to June 30, 2019; or
 - Average number of FTEEs per month employed from January 1, 2020 until February 29, 2020;
- Or, for seasonal employers:
 - Average number of FTEEs per month employed from February 15, 2019 until June 30, 2019.

Note that this formula will be used to reduce forgiveness amounts, but cannot be used to increase them.

“Employee” is limited, for purposes of this subparagraph only, to any employee who did not receive during any single pay period during 2019 a salary or wages at an annualized rate of pay over

\$100,000.

Relief of Forgiveness Limitations

There is relief from these forgiveness reduction penalties for employers who rehire employees or make up for wage reductions by June 30, 2020. Specifically, in the following circumstances, the forgiveness reduction rules above will not apply to an employer that between February 15, 2020, and 30 days following enactment of the CARES Act takes can be described in one of the following ways:

1. The employer reduces the number of FTEEs in this period and, not later than June 30, 2020, the employer has eliminated the reduction in FTEEs.

2. There is a salary reduction, as compared to February 15, 2020, during this period for one or more employees and that reduction is eliminated by June 30, 2020 (it is unclear whether this is also intended to be limited to employees who made under \$100,000 in 2019).

The CARES Act clarifies that employers with tipped employees (as described in the Fair Labor Standards Act) may receive forgiveness for additional wages paid to those employees.

Process to Apply for Loan Forgiveness

There are some required processes to apply for loan forgiveness. Borrowers seeking forgiveness of amounts must submit all of the following to their lender:

- Documentation verifying FTEE on payroll and their pay rates
- Documentation on covered costs/payments (e.g., documents verifying mortgage, rent and utility payments)
- Certification from a business representative that the documentation is true and correct and that forgiveness amounts requested were used to retain employees and make other forgiveness-eligible payments
- Any other documentation the Administrator may require

Lenders who rely on documentation and accompanying certifications are held harmless from SBA enforcement actions and penalties relating to the loan forgiveness.

Forgiveness amounts that would otherwise be includible in gross income for federal income tax purposes are excluded.

Additional Provisions

The CARES Act also:

- Waives certain fees that would otherwise apply under the SBA, as well as the usual requirement that a small business concern be unable to obtain credit elsewhere
- Provides that loan balances following any forgiveness reductions will continue to be guaranteed by the Administration in accordance with this program
- Establishes a maximum maturity date for loans under the program from the date the borrower applies for loan forgiveness
- For participating lenders, sets forth compensation (based on loan balance at time of disbursement) of:
 - 5% for loans of \$350,000 or less
 - 3% for loans above \$350,000 and less than \$2 million
 - 1% for loans \$2 million and above
- Prohibits agents helping applicants apply for loans under the program from receiving a fee in excess of limits established by the Administrator
- Increases the loan limit for the SBA's Express Loan Program to \$1 million (from \$350,000) with a prospective repeal date of January 1, 2021

Expansion of SBA Disaster Loan Program (EIDL Program)

In addition to expansion of the SBA's Business Loan Program described above, the CARES Act expands the SBA's EIDL Program. The covered period for this section is January 31, 2020 – December 31, 2020.

Eligibility for Expanded EIDL Program

In addition to current eligible entities, the following may receive SBA EIDL loans:

- A business with 500 or fewer employees
- Sole proprietorships with or without employees, and independent contractors
- Cooperatives with 500 or fewer employees
- ESOPs with 500 or fewer employees
- Tribal small business concerns

Changes to EIDL Program

The CARES Act makes the following additional changes to the SBA EIDL program during the covered period for loans made in response to COVID-19:

- Waives rules related to personal guarantees on advances and loans of \$200,000 or less for all applicants
- Waives the "1 year in business prior to the disaster" requirement (except the business must have been in operation on January 31, 2020)

- Waives the requirement that an applicant be unable to find credit elsewhere
- Allows lenders to approve applicants based solely on credit scores (no tax return submission required) or “alternative appropriate methods to determine an applicant’s ability to repay”

Emergency Advance

Entities applying for loans under the EIDL Program in response to COVID-19 may, during the covered period, request an emergency advance from the Administrator of up to \$10,000, which does not have to be repaid even if the loan application is later denied.

- The Administrator is charged with verifying an applicant’s eligibility by accepting a “self-certification.”
- Advances are to be awarded within three days of an application. Advances may be used for purposes already authorized under the SBA EIDL Program, including:
 - Providing sick leave to employees unable to work due to direct effect of COVID-19
 - Maintaining payroll during business disruptions during slow-downs
 - Meeting increased supply chain costs
 - Making rent or mortgage payments
 - Repaying debts that cannot be paid due to lost revenue

If an entity that receives an emergency advance transfers into, or is approved for, a loan under the SBA Business Loan Program (described in the section above), the advance amount will be reduced from any payroll cost forgiveness amounts.

The CARES Act would deem all states and their subdivisions to have sufficient economic damage to small business concerns to qualify for assistance under this loan program (rather than the current state declaration and certification approach).

Loan Payments Subsidies for Certain Loans

In addition to the SBA relief already provided under the CARES Act, SBA lenders are encouraged to provide payment deferments under each of the following:

- The SBA Business Loan Program (including the Community Advantage Pilot Program, but excluding the new payroll loan program established under Section 1102)
- Title V of the Small Business Investment Act
- Made by an intermediary to a small business concern using loans or grants received under the SBA’s Microloan Program

Additionally, for these loans, the Administrator must pay (and relieve the borrower of any obligation to pay) the principal, interest and any associated fees owed in a regular servicing status:

- For loans made before this bill is enacted not on deferment, for the six-month period beginning with the next payment due
- For loans made before this bill is enacted that are on deferment, for the six-month period beginning with the next payment due after deferment
- For loans made within six months of enactment of this bill, for six months after the first payment is due

This information has been provided as an informational resource for NFP clients and business partners. It is intended to provide general guidance, and is not intended to address specific risk scenarios. Regarding insurance coverage questions, each specific policy must be reviewed in its entirety to determine the extent, if any, of coverage available for the impact of the Coronavirus. If you have questions, please reach out to your NFP contact.