

## **PAYCHECK PROTECTION PROGRAM FREQUENTLY ASKED QUESTIONS**

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We have been sharing [client alerts](#) about the Small Business Administration (“SBA”) Paycheck Protection Program (“PPP”) created by the CARES Act. Below are some frequently asked questions and answers with respect to the PPP that we hope will help you understand this program.

### ***What is the Paycheck Protection Program?***

The PPP is a loan program that allows eligible borrowers to obtain loans on favorable terms to cover payroll and other eligible expenses (rent, utilities, certain health care benefits and health insurance premiums, and certain interest expense). This loan program is for the specific purpose of helping eligible borrowers affected by the coronavirus pandemic to keep paying employees and to keep their doors open for business. To the extent the PPP loan is promptly used to pay payroll, rent, mortgage interest and utilities, *the loan never has to be repaid* (“terms and conditions apply,” naturally).

The first wave of PPP funding was exhausted on April 16, 2020. The government approved \$310 billion of new funding for the PPP on April 24, 2020. On April 27, 2020, the SBA resumed accepting PPP applications from participating lenders. About one fifth of the new PPP funding is earmarked for smaller banks, smaller credit unions, and community financial institutions that provide financing to underserved and economically disadvantaged communities. According to the SBA, as of June 17, 2020, about \$146 billion remains of the second round of PPP funding. This funding may go quickly. As the law is currently written, no new loans may be issued after June 30, 2020. It is possible Congress will extend this period.

UPDATE: The CARES Act was substantially amended on June 5, 2020, with the enactment of the Paycheck Protection Program Flexibility Act of 2020 (the “Flexibility Act”). The [Flexibility Act](#) updates many aspects of the PPP. As suggested by its name, the new law is intended to give PPP borrowers more flexibility in when and how they spend their PPP funds. New guidance from the SBA and Treasury Department will likely follow. Flexibility Act updates are included below.

### ***Who is eligible for a PPP loan?***

You are eligible for a PPP loan if you employ fewer than 500 employees (full-time and part-time) who live in the United States, AND you were in operation on February 15, 2020, AND you either (1) paid salaries and payroll taxes for employees or (2) paid independent contractors.

Some businesses may qualify under other applicable tests. Please check with your lender or advisor about eligibility on other grounds.

Be aware that two or more businesses under common control could be “affiliated” under SBA rules. “Affiliated” employers are lumped together in determining the 500-employee limit. This determination often requires detailed analysis. Check with your attorney even though you may think your organization stands 100% alone.

***Do independent contractors count as employees for purposes of PPP calculations?***

No. Independent contractors can apply for a PPP loan on their own; the entities that engage them cannot count them for purposes of a PPP loan application.

***I don’t have employees. Can I still qualify?***

Yes. The [rules](#) issued under the CARES Act state: “You are also eligible for a PPP loan if you are an individual who operates under a sole proprietorship or as an independent contractor or eligible self-employed individual . . .” In that case, you must submit documents such as payroll processor records, payroll tax filings, Forms 1099-MISC, income and expenses from a sole proprietorship, or other documents sufficient to demonstrate the qualifying loan amount.

***Can I apply for a PPP loan if I am receiving unemployment assistance?***

Yes, but proceed with caution. There is no restriction on receiving both benefits, but you cannot use the PPP loan to cover your own compensation while at the same time receiving unemployment benefits. If you are receiving unemployment benefits, you can use your PPP for other business expenses, such as other employees’ compensation, rent, or utilities.

At least 60% of the forgiven amount must be used for payroll costs; if you use all or most of your loan for non-payroll expenses, therefore, the forgivable amount may be low.

***How do I apply for a PPP loan?***

You should contact your existing lender or lending institution where you maintain your bank accounts. Many participating lenders are accepting applications only from existing customers. Most lenders are accepting applications through their own online portals. If your existing bank is not participating in the PPP program or is no longer accepting applications, you may wish to apply with a community bank such as [Northeast Bank](#), [Kabbage](#), or [Old Dominion Bank](#), or FinTech company such as PayPal. If you need additional help finding a qualified lender, this [SBA search tool](#) will identify lenders near you.

***When can I apply?***

Applications will be accepted through June 30, 2020, or until the funds for this program are exhausted, whichever is sooner. This program is supposed to operate on a “first come, first served” basis. APPLY AS SOON AS YOU CAN.

***What is the maximum amount I can borrow?***

It’s a formula amount: 2.5 times your average monthly payroll expenses for either (1) the 12 months before you apply for the loan or (2) calendar year 2019 (the bank to which you apply may require you to use (2), which many applicants who use payroll services will find more convenient anyway).

The Treasury Department has released guidance to help general partnerships, sole proprietors, and independent contractors calculate payroll. See [Paycheck Protection Program: How to Calculate Maximum Loan Amounts – By Business Type](#), for complete instructions.

If you are a seasonal business, you can borrow 2.5 times average monthly payroll costs from: (1) February 15 to June 30, 2019, (2) March 1 to June 30, 2019, or (3) during any consecutive 12-week period between May 1, 2019 and September 15, 2019, whichever generates the best result.

If you are a startup business that did not exist between February 15 and June 30, 2019, you can calculate your average monthly payroll costs based on payroll from January 1 to February 29, 2020.

Salary and wages above \$100,000 per employee are excluded from the calculation of average monthly payroll, but all benefits the business pays on behalf of such employees (e.g., health insurance, retirement benefits) are counted in the payroll calculation. If you already have an Economic Injury Disaster Loan, please inform your lender or lawyer.

Finally, there's an absolute cap of \$10 million on every PPP loan, and each borrower can get only one such loan.

### ***What information should I gather in order to apply for a PPP loan?***

You should have evidence of paying payroll or self-employment taxes. Any or all of the following information may be required by your lender for the relevant period; check before applying:

- 2019 IRS quarterly 940, 941, or 944 payroll tax reports;
- Documentation for the following:
  - Gross wages for each employee
  - Paid time off for each employee
  - Vacation pay for each employee
  - Family medical leave pay for each employee
  - State and local taxes assessed on the employee's compensation for each employee
  - Documentation showing the total health insurance premiums the company paid under a group health plan for all employees and owners
  - Documentation of the sum of all retirement plan funds the company paid (note: do not include money that came from employees' paycheck contributions); this includes 401K plans, simple IRAs, and SEP IRAs;
- Organizational documents for your business;
- Sole proprietors, independent contractors, and the self-employed must submit documents such as payroll processor records, payroll tax filings, Form 1099-MISC, or income and expenses from a sole proprietorship;
- Borrowers who do not have any of this documentation should provide supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount.

### ***What can I use the loan proceeds for?***

The loan proceeds can be used for:

- payroll costs;
- costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- payments of interest on any mortgage obligation (but not to pay principal or prepay a mortgage);
- rent (including rent under a lease agreement);
- utilities;
- interest on any other debt obligations that were incurred before the covered period; and
- refinancing an SBA Economic Injury Disaster Loan (EIDL) made between January 31, 2020, and April 3, 2020.

### ***When will I have to repay the loan?***

Flexibility Act Update: You now will not have to start making payments on the loan until after you submit your forgiveness application and the SBA pays the forgiveness amount to the lender. Interest will not accrue during this time.

For PPP loans made before the enactment of the Flexibility Act, the full amount will be due within 2 years of when you received the money. If you receive your PPP loan after the enactment of the Flexibility Act, you will have 5 years to repay the loan. Existing PPP loans can be extended up to 5 years if the lender and borrower mutually agree. If you want to pay earlier, there are no penalties for pre-payment.

***Are there any other PPP loan terms I should know about?***

- Interest rate will be 1%.
- No collateral will be required.
- No personal guarantees will be required.

***Will all or a portion of my PPP loan be forgiven?***

Flexibility Act Update: The loan amounts will be forgiven so long as:

- the loan is used to cover payroll costs, interest on mortgage, rent, and utility costs over the 24-week period after the loan is made or by December 31, 2020, whichever is earlier; and
- employee and compensation levels are maintained.

(Before the enactment of the Flexibility Act, to qualify for full forgiveness borrowers had to spend the funds over the 8-week period after the loan was made. The Flexibility Act gives borrowers the option to spend the funds over a longer period. Borrowers whose PPP loan was approved prior to the enactment of the Flexibility Act may keep the original 8-week period if they choose. Most businesses will find the 24-week period preferable, but some may wish to retain the original 8-week period so as to submit the forgiveness application as soon possible.)

Originally, the SBA indicated that at least 75% of the forgiven amount had to be used for payroll costs. The Flexibility Act reduces this percentage: PPP borrowers are now eligible for loan forgiveness so long as they use at least **60%** of loan proceeds for payroll expenses, with no more than **40%** of loan proceeds going to eligible non-payroll expenses.

Reductions to Forgiveness: Forgiveness is **reduced** based on headcount reductions and salary reductions. Both are hard to work through and may require the assistance of legal counsel.

Note that some reductions in workforce will not count against you for the purpose of loan forgiveness. Loan forgiveness will not be impacted if:

- you laid off workers between February 15, 2020 and April 26, 2020 and then rehire them by December 31. (Before the enactment of the Flexibility Act, employers only had until June 30, 2020 to rehire employees laid off between February 15 and April 26.)
- you fire an employee for cause; an employee voluntarily resigns; or an employee voluntarily requests and receives a reduction in hours.
- you have laid off employees, and then:
  - made a good faith, written offer to rehire,

- documented the employee’s rejection of that offer,
  - informed the state unemployment insurance office within 30 days of the employee’s rejection of the offer (employees who reject offers of reemployment may forfeit eligibility for continued unemployment compensation), and
  - documented your inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020.
- **Rehiring – Flexibility Act Update:** In addition to the above, forgiveness will not be reduced if you can document in good faith that your business is unable to return to the same level of activity it was operating at before February 15, 2020, due to compliance with operating restrictions related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.

***Is loan forgiveness automatic?***

No. You will need to submit an application for forgiveness directly to the lender that provided your PPP loan. On June 16, the SBA released a revised [7-page loan forgiveness application](#) that incorporates changes to PPP loan forgiveness requirements made by the Flexibility Act. On the same date, the SBA also released a simplified [3-page “EZ” loan forgiveness application](#) for borrowers who can satisfy any of the following requirements:

- the borrower applied for a PPP loan as a self-employed individual, independent contractor or sole proprietor who had no employees at the time of the PPP loan application.
- the borrower did not reduce salary or wages for any employee by more than 25% during the covered loan period as compared to the period between January 1, 2020 and March 31, 2020, and did not reduce the number or hours of employees between January 1, 2020 and the end of the covered loan period (ignoring reductions related to employees who refused offers of rehire and whose positions could not be filled with similarly qualified workers).
- the borrower did not reduce salary or wages for any employee by more than 25% during the covered loan period as compared to the period between January 1, 2020 and March 31, 2020, and was unable to return to the same level of business activity it was operating at before February 15, 2020, due to compliance with official requirements related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.

***Is the amount forgiven taxable?***

No. The amount of any loan forgiveness will not be considered gross income under the Internal Revenue Code, although state and local tax authorities may or may not tax the forgiven amount.

***What happens if PPP loan funds are misused?***

If you use PPP funds for unauthorized purposes, the SBA will direct you to repay those amounts. If you knowingly use the funds for unauthorized purposes, you will be subject to additional liability such as charges for fraud. If one of your shareholders, members, or partners uses PPP funds for unauthorized purposes, SBA will have recourse against the shareholder, member, or partner for the unauthorized use.

***Can I apply for more than one PPP loan?***

No.