Paycheck Protection Program Forgivable Loans Available Starting Friday, April 3 for 501(c)(3) and 501(c)(19) Organizations

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Starting on Friday, April 3, 2020, 501(c)(3) and 501(c)(19) organizations with 500 or fewer employees will be able to apply for loans under the Paycheck Protection Program provision of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). SBA expects many small businesses and nonprofits to apply, so eligible organizations should reach out to their banks and begin preparing their applications now to attempt to avoid long waits and processing periods as applications start to pile up.

The U.S. Department of the Treasury and the Small Business Administration (SBA) have released a revised application form and final interim regulations to obtain these loans from qualified lenders. To obtain a loan, an eligible nonprofit must submit an application through an SBA- and Treasury-approved bank, credit union, or nonbank lender. The SBA website has a list of current SBA lenders. Other lenders will be available to make loans as soon as they are approved and enrolled in the program.

To apply, borrowers must complete the application (**available here**) and submit payroll documentation.

Treasury also provided additional guidance about the Paycheck Protection Program, which includes the following information:

- All loans will have a maturity of two years and an interest rate of 1.0%. Terms will be the same for all borrowers.
- As noted below, at least a portion of the loans paid out may qualify for forgiveness. The SBA expects a high subscription, so 75% of the amount forgiven must be used to cover payroll costs. Only 25% of the forgiveness amount may be used for rent, utilities, and interest on mortgage.
- Loan forgiveness can be requested from the lender that is servicing the loan; such a request should include documents that verify the number of full-time equivalent employees and pay rates, as well as the payments on eligible mortgage, lease, and utility obligations.

As we previously highlighted, certain nonprofits are ineligible for the Paycheck Protection Program loans because they are organized under other sections of the Code, like social welfare organizations (501(c)(4)) or trade associations (501(c)(6)); those entities, along with many other types of entities, may apply for emergency financial relief in a separate section of the CARES Act providing emergency Economic Injury Disaster Loans (EIDLs).

Available Loan Amounts

501(c)(3) and 501(c)(19) nonprofit organizations can receive the lesser of $10 million or 2.5 times the average total monthly payroll costs from the prior year plus any outstanding amount of an EIDL made between January 31 and April 3, 2020 (not including the amount of any advance under an EIDL COVID-19 loan because it does not have to be repaid). The portions of employees' salaries exceeding $100,000 annually are excluded from the average monthly payroll costs. For example, the maximum loan amount calculation for an organization with some employees that make more than $100,000 annually and an outstanding EIDL loan of $10,000 is as follows:

1. Annual Payroll = $1.5 million
2. Subtract compensation amounts in excess of $100,000 = $1.2 million
3. Divide Step 2 by 12 to calculate average monthly payroll costs = $100,000
4. Multiple average monthly payroll costs by 2.5 = $250,000
5. Add outstanding EIDL of $10,000 = maximum loan amount of $260,000

Permissible Use of Paycheck Protection Program Loans

The loans must be used for the following types of expenses:

- Payroll costs (only the payroll costs incurred in the eight-week time frame after the date of the loan may be forgiven; loan amounts used for payroll costs outside that time frame must be repaid), including compensation to employees; payments for vacation, parental, family, or medical or sick leave; severance payments; payments required for group healthcare benefits (including insurance premiums), retirement benefits, and state and local employment taxes;
- Interest payments on any mortgage obligations or other debt obligations incurred before February 15, 2020 (but not any payments or prepayments of principal);
- Rent; and
- Utilities.

PPP loans also must be used to refinance an outstanding EIDL made between January 31 and April 3, 2020 that was also used for payroll costs. If an EIDL was not used for payroll costs, it does not affect an organization's eligibility for a PPP loan. PPP loans cannot be used to pay compensation of individual employees or independent contractors in excess of an annual salary of $100,000. Also, they may not be used to pay compensation of employees with a principal place of residence outside the United States or leave wages already covered by the Families First Coronavirus Response Act.

There is no clear guidance for nonprofits that have cost-sharing arrangements with related nonprofits that would not be eligible for Paycheck Protection Program Loans (such as a related 501(c)(6) or 501(c)(4) organization). Presumably, if the organization can show the proper documentation, it could use the loans to make payments to the other organization, if those payments are for payroll for leased employees, rent, or utilities. But this is not clear, and an organization may want talk to its lender about such arrangements if it is hoping to qualify for loan forgiveness.

Required Certifications

Borrowers must certify on the application that "current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." There is little guidance as to what exactly this means. It does not appear that nonprofits must spend down their reserves in order to qualify, although there is no clear guidance on this point. Applicants must also certify that they will use the funds to retain workers, maintain payroll, or make lease, mortgage, and utility payments and that they are not receiving duplicative funds for the same uses.

Payments of principal, interest, and fees will be deferred for six months. The SBA will not collect any yearly or guarantee fees for the loan, and all prepayment penalties are waived.

In addition, the SBA 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.

Loan Forgiveness Under the Paycheck Protection Program

501(c)(3) and 501(c)(19) nonprofit organizations are eligible for forgiveness up to the full principal amount of the loan and any accrued interest if the borrower uses the loan for qualifying purposes and employee and compensation levels are maintained.

The amount of loan forgiveness may be reduced if the organization reduces the number of employees as compared to the prior year, or if the employer reduces the pay of any employee by more than 25% as of the last calendar quarter. Organizations that re-hire workers previously laid off as a result of the COVID-19 crisis will not be penalized for having a reduced payroll for the beginning of the relevant period. Forgiveness may also include additional wages paid to tipped workers.

Organizations must apply for loan forgiveness to their lenders by submitting required documentation and will receive a decision within 60 days. If a balance remains after the organization receives loan forgiveness, the outstanding loan will have a maturity date of two years after the application for loan forgiveness.

Loan forgiveness is available for eight weeks of payroll costs, mortgage interest or rent payments, and utility payments. However, not more than 25% of the loan forgiveness amount may be attributable to non-payroll costs. To be eligible to receive loan forgiveness, a borrower must submit a complete application to the lender containing the following required documents:

- Documentation verifying the number of full-time equivalent employees on payroll and pay rates for pre- and post-covered periods, including payroll tax filings reported to the IRS and state income, payroll, and unemployment insurance filings;
- Documentation such as cancelled checks verifying mortgage interest, lease, and utility payments;
- Certification from a representative of the recipient that (a) the documentation presented is true and correct, and (b) the amount for which forgiveness is 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; and
- Any other documentation the SBA deems necessary.

The SBA will release additional guidance on forgiveness.

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For some answers to commonly asked questions regarding how to communicate with staff about COVID-19 challenges, click here. For additional information regarding COVID-19 legal issues, please visit Venable's COVID-19 legal resources page.

Nonprofit organizations with additional questions should contact George Constantine, Cynthia Lewin, Ronald Jacobs, James Tyrrell, or any other Venable Nonprofit Organizations Group attorney.