

FAQ Document

April 8, 2020

The Coronavirus Aid, Relief, and Economic Security (CARES) Act opens up new Small Business Administration (SBA) loan opportunities to support many companies and nonprofit organizations with 500 or fewer employees.

There are two loan programs offered by the SBA:

1. Paycheck Protection Program Loans (PPLs) which provide loans to businesses with 500 or fewer employees to help maintain payroll and cover additional costs such as mortgage interest, rent, and utilities; and
2. Economic Injury Disaster Loans (EIDLs), a pre-existing SBA program designed to assist those responding to disaster circumstances (in the past this was for hurricanes, tornadoes, etc.), and under the CARES Act, this program now applies nationwide as businesses respond to COVID-19.

Below are answers to common questions regarding PPLs and EIDLs under the CARES Act.

General:

Who is considered an employee for purposes of the 500-employee threshold?

- Full-time, part-time, temporary, and seasonal employees are all included when counting employees under existing SBA guidance. In addition, employees of staffing companies, employee leasing agencies, and professional employer organizations are considered employees of the company for whom they provide services. For purposes of determining PPL eligibility, only employees with a principal place of residence in the United States are required to be considered.

How do I determine if the 500-employee threshold is exceeded?

- The CARES Act does not identify the method for counting employees, but the SBA issued guidance on April 6th stating that applicants could use either the average number of employees over calendar year 2019 or the average number of employees over the 12 months preceding the loan application. To do this, you count the number of employees (all the categories noted above) that you had at each relevant pay period and divide by the number of pay periods. For example, if you pay employees once a month, you would take the number of employees that you had at the payroll date each month, add together, and divide by 12. In the absence of guidance to the contrary, this is one approach that is consistent with existing SBA regulations. If you have not been in business for 12 months, the average number of employees is used for each of the pay

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period that you were in business. Note, however, the EIDL program does address this specifically and requires an employee count as of the start date of the program.

Do independent contractors count as employees?

- No, consistent with its rules for other loan programs, the SBA has indicated that independent contractors do not count as employees for purposes of determining PPL eligibility. However, the SBA has also warned that it “will treat an independent contractor as an employee [for purposes of other loan programs] where there is evidence of an employee/employer relationship,” based on the “totality of the circumstances.”

Must I include employees of affiliates in determining how many employees I have?

- The SBA will consider the number of employees of both an applicant and an applicant’s “affiliates” when determining loan eligibility. In general, an affiliate is another company or other legal entity that has an ownership interest in your business and the ability to control your business but the rules on affiliation are detailed and fact specific.
- Exceptions: The statute and the existing guidance explicitly waive the SBA affiliation standards for (i) certain accommodation and food services businesses (i.e., “a business with not more than 500 employees that . . . is assigned a North American Industry Classification System (“NAICS”) code beginning with 72”); (ii) SBA-registered franchises listed on the [SBA Franchise List](#); and (iii) businesses that receive financial assistance from Small Business Investment Companies (“SBICs”).

How do I determine who my affiliates are?

- On Friday, April 3, 2020, the SBA released [new guidance](#) helping to clarify how it will apply its affiliation standards to PPL applicants.
- The guidance indicates that the SBA will apply four affiliation standards to PPL applicants to determine eligibility: affiliation based on ownership; affiliation based on management; affiliation based on identify of interest; and affiliation arising under stock options, convertible securities, and agreements to merge.
- In addition, the SBA’s existing affiliation exclusions apply to the PPP, including, for example, the exclusions under [13 CFR 121.103\(b\)\(2\)](#).
- This can be a complex area and you may need a lawyer to address affiliation if you have other companies or legal entities with ownership interests in your business.

Is the loan program only available to U.S. owned companies?

- Foreign ownership should not be an issue if the company is located, and has actual operations, in the United States. The calculation of both the number of employees for eligibility under the 500 employee limit and the amount of the loan is based, however, on employees whose principal place of residence is in the United States.

What is included in payroll costs?

- salaries, wages, commissions and tips (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips);
- paid vacation, parental, family, sick or medical leave;
- dismissal and separation allowances;

- group health benefits and insurance premiums;
 - retirement benefits; and
 - state and local payroll taxes.
1. Can I receive both a PPL and an EIDL?
 - Applicants may apply for both PPLs and EIDLs; however, applicants must certify that they are not applying for loans from multiple loan programs for duplicative purposes, e.g., the applicant may not use both a PPL and an EIDL for the same payroll costs.
 - If an applicant received an EIDL between January 31, 2020, and April 3, 2020, and the EIDL was used for payroll costs, any PPL received by the borrower must be used to refinance the EIDL.
 - If a borrower receives a \$10,000 EIDL advance as well as a PPL, the advance reduces the amount of PPL forgiveness for which the borrower is eligible.
 2. What factors are considered by the lender?
 - The SBA may approve the applicant based solely on the applicant's credit score and not require a tax return or tax return transcript or use alternative appropriate methods to determine the applicant's ability to repay the loan.

PPL-specific:

How do I calculate the PPL amount?

- The loan amount will be calculated by 250% of the monthly average of the applicant's payroll costs as defined above.¹
- Payroll costs with respect to an individual employee are limited to an annualized salary of \$100,000, but according to guidance released on April 6th, non-cash benefits of those employees can be added including:
 - employer contributions to defined-benefit or defined-contribution retirement plans;
 - payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums; and
 - payment of state and local taxes assessed on compensation of employees.
- The term "payroll costs" is defined to exclude federal payroll taxes, including federal income tax withholding and employer and employee social security and Medicare taxes imposed or withheld between February 15, 2020 and June 30, 2020. In the April 6th guidance, the government clarified payroll costs are not reduced by taxes imposed on an employee and required to be withheld by the employer, but payroll costs do not include the employer's share of payroll tax. For example, an employee who earned \$4,000 per month in gross wages, from which \$500 in federal taxes was withheld, would count as \$4,000 in payroll costs. The employee would receive \$3,500, and \$500 would be paid to

¹ Only payroll costs are considered when calculating the loan amount. The allowable uses are broader.

the federal government. However, the employer-side federal payroll taxes imposed on the \$4,000 in wages are excluded from payroll costs under the statute.

- NOTE: Because the statute, interim rule and guidance may not all be consistent, applicants may want to include an explanation of how the calculation was done and what costs were included.

What time period is used to calculate my monthly average?

- Depending on the circumstances of your business, there are a few options to calculate the monthly average:
 - According to the guidance released by the government on April 6th, Applicants can use either the average number of employees over calendar year 2019 or the average number of employees over the 12 months preceding the loan application.
 - If your business was **not** in operation from February 15, 2019 – June 30, 2019: the loan amount is 250% of the average monthly payroll costs from January 1, 2020 through February 29, 2020.
 - If you are a seasonal employer and your business was in operation from February 15, 2019 – June 30, 2019: The loan amount is 250% of your average monthly payroll costs during that period. If your business employs seasonal workers, then you can choose March 1, 2019 – June 30, 2019 as the basis for your monthly average.
 - If you are a seasonal employer and your business was **not** in operation from February 15, 2019 – June 30, 2019: The loan amount is 250% of the average monthly payroll costs from January 1, 2020 through February 29, 2020.

How can I use PPL funds (“Allowable Uses”)?

- At least 75% of the loan must be used for payroll costs as described above.
 - In addition to payroll costs, the remaining 25% of the PPL may be used for the following purposes:
 - mortgage interest, rent, and utility payments;
 - costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
 - interest payments on other debt obligations incurred before February 15, 2020; and
 - refinancing an EIDL made between January 31, 2020 and April 3, 2020.²

Can the loan be forgiven?

- Yes, loan amounts that are used for the following subset of Allowable Uses (as defined above) *during the 8 weeks following the origination of the loan* may be forgiven:
 - At least 75% of the loan must be used for payroll costs (including certain benefits, but excluding the prorated salaries of employees who receive an annual salary over \$100,000);
- Other 25% of costs that may be forgiven are used for the following:

² If the applicant used such an EIDL for payroll costs, its PPL must be used to refinance its existing EIDL.

- mortgage interest;
 - rent; and
 - utility payments.
- There is ambiguity as to whether the interest owed on the loan will be forgiven. Although the CARES Act states that the amount forgiven cannot exceed the loan principal, the interim final rule states that the amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest. This is consistent with a memorandum released by Senator Marco Rubio, Chairman of the U.S. Senate Committee on Small Business & Entrepreneurship, indicating that “if the full principal of the PPP loan is forgiven, the borrower is not responsible for the interest accrued in the 8-week covered period.”
 - Any forgiven amount is nontaxable.

What if I reduce my employee headcount or reduce compensation during the pandemic?

- The amount of a PPL eligible for forgiveness may be reduced if you reduce employee headcount or compensation. If layoffs and/or reductions occurred between February 15 and April 26, 2020 and are not corrected by June 30, 2020, the amount of the loan that will be forgiven will be reduced. The amount eligible for forgiveness will not be affected by reductions implemented from April 27 through June 30, 2020.
- Reduction in Employees: The amount eligible for forgiveness will be reduced if the average FTE employees from February 15 through June 30, 2020 is lower than either (1) the corresponding period in 2019, or (2) the first 2 months in 2020. Seasonal employers must use the first period for comparison. Note that this calculation is one comparing on an FTE basis rather than on the each employee basis used to determine eligibility.
- Reduction in Compensation: The amount eligible for forgiveness will similarly be reduced if compensation for an employee earning \$100,000 or less in 2019 is cut by more than 25%, relative to that employee’s most recent full quarter of compensation before February 15, 2020.

What if I rehire employees or restore their prior pay?

- The amount of a PPL eligible for forgiveness will not be reduced if you:
 - i. reduce FTEs from February 15 through April 26, 2020, but, by June 30, 2020, have no fewer FTEs that you had on February 15, 2020, and do not otherwise have a reduction from April 26 through June 30, 2020; or
 - ii. restore a reduction in the compensation of one or more of your employees, as described above, that occurred between February 15, 2020, and April 26, 2020, no later than June 30, 2020.

How do I request loan forgiveness?

- You will submit your request to the lender servicing the loan with documentation that verifies that the loan funds were used for the purposes eligible for forgiveness in the 8 weeks following the loan disbursement: payroll costs, mortgage interest, rent, or utilities. The lender must make a forgiveness determination within 60 days of the forgiveness application. This documentation could include (i) “documentation verifying the number of full time equivalent employees on payroll and pay rates” for the period of the loan; (ii)

“documentation, including cancelled checks, payment receipts, transcripts of accounts, or other documents verifying payments on covered mortgage obligations, payments on covered lease obligations, and covered utility payments”; (iii) a certification from the recipient that the documentation is true and that “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 (iv) any other documentation the bank determines necessary.

3. What certifications are required as part of the application?

- The application requires that applicants certify the following:
 - Your business was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC.
 - Current economic uncertainty makes this loan necessary to support your ongoing operations
 - The funds will be used to retain workers and maintain payroll or make mortgage, lease, or utility payments and that no more than 25% of loan proceeds will be used for non-payroll costs.
 - Documentation for these payments for the 8 weeks following receipt of the loan will be provided to your lender to determine loan forgiveness.
 - From February 15 to December 31, 2020 you have not and will not receive another PPL.
 - All of the information in your application is true and accurate (recognizing that making a false statement is a punishable civil or criminal offense).
 - Acknowledgement that the lender will use any tax information submitted to determine the applicable loan amount, and that tax documents are identical to those submitted to the IRA and that this tax information may be shared directly with the SBA.

EIDL-specific:

How does the 500-employee threshold for EIDLs differ from the threshold for PPLs?

- The method is substantially similar to the method for assessing PPL eligibility — with one important exception: Under the EIDL program, the SBA appears to be using the number of employees employed at the beginning of the “covered period,” i.e., January 31, 2020. This stands in contrast to what we believe will be the method for counting employees for PPLs, which is expected to be based on the average number of employees over the past twelve completed calendar months.

Is there a revenue threshold under which applicants must fall to be eligible for EIDLs?

- No revenue threshold exists for EIDLs.

Do the affiliation standards apply to EIDLs?

- In general, the same affiliation standards apply to EIDLs that apply to PPLs. However, unlike with PPLs, the affiliation standards for EIDLs are not waived for (i) certain

accommodation and food services businesses, (ii) SBA-registered franchises, or (iii) businesses that receive financial assistance from SBICs.

What amount is available for EIDLs and how can I use EIDL funds?

- Loans for up to \$2 million are available under EIDLs to use for a broad range of ordinary and necessary business expenses (outside of what the PPL covers).
- A key new feature of the EIDL is a \$10,000 advance or “grant” that businesses can apply for and are expected to receive within 3 days of application. The advance may be used to:
 - provide paid sick leave to employees who are unable to work due to COVID-19;
 - maintain payroll to retain employees during business disruptions or substantial slowdowns;
 - cover higher costs required to obtain materials from alternative supply chains, rent or mortgage payments; and
 - meet obligations that otherwise would not be paid due to revenue losses.
- The advance does not need to be repaid even if the application is denied. If the advance is used for payroll and the applicant also receives a PPL, the advance amount will reduce the amount that could otherwise be forgiven under a PPL.
- Although EIDLs are available for a number of business purposes, there are a handful of uses that are prohibited. EIDLs cannot be used to:
 - refinance prior indebtedness;
 - make payments on federal agency or SBIC loans;
 - pay any civil or criminal fine or penalty;
 - repair physical damage;
 - pay dividends or other disbursements to owners, partners, officers or stockholders, except for reasonable amounts directly related to their performance of services for the business; or
 - expand facilities or acquire fixed assets.

4. Can an EIDL be forgiven?

- There is no loan forgiveness provided with respect to EIDLs beyond the \$10,000 advance noted above.

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