



## Federal COVID-19 Legislation Impacting Contractors with 500 Employees or Less

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Congress has passed two major pieces of legislation to address the coronavirus crisis: The Families First Coronavirus Response Act ("FFCRA") and the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act"). Both laws are intended to provide relief to employers and employees affected by the current crisis. The CARES Act in particular contains provisions, which are summarized below, that may provide financial relief to contractors. One cautionary note: The legislation is new, and the relevant government agencies are still developing guidance and regulations. We will update this as new information becomes available.

### The CARES Act: Loans, Grants, and Tax Relief

The CARES Act provides relief for small businesses and certain nonprofit organizations. Below is a list of relief programs for which contractors may be eligible.

**1. Employee Retention Tax Credit:** The CARES Act provides a tax credit to encourage employers to retain employees. Eligible employers, including labor organizations, can take a payroll tax credit equal to 6.2% of wages (including employer payments to group health plans) paid to some or all of their employees. Eligibility for the tax credit is determined quarterly. The maximum amount of the credit that can be taken for the year is \$5000 per employee.

To qualify in the applicable quarter, an employer must experience either (1) a full or partial suspension of operations due to orders from a governmental authority limiting commerce, travel or group meetings due to COVID-19; or (2) more than a 50% decline in gross receipts, as compared to the same quarter in 2019.

It is not entirely clear what constitutes a full or partial suspension of operations. Thus far, the IRS has said that, "[t]he operation of a trade or business may be partially suspended if an appropriate governmental authority imposes restrictions upon the business operations by limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19 such that the operation can still continue to operate but not at its normal capacity." The IRS then gives an unhelpful example of a restaurant that is only allowed to operate on a carry-out only basis. We hope that the IRS will issue further clarification on whether, for example, an organization that cannot operate at full capacity because a government shut-down order required it to close its office and have its employees telecommute, would be deemed to have experienced a partial suspension of operations.

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Employers of all sizes may be eligible for the tax credits. However, the amount of the tax credits depends on the size of the employer:

- Contractors with *100 or fewer full-time employees* may take the credit for wages paid to *all* employees, regardless whether they are providing services for the employer.
- Contractors with *more than 100 full-time employees* may take these credits only for wages paid to employees who are not providing services due to the COVID-19-related circumstances described above.

The legislation provides that employers will not be penalized if they deduct the amount of the allowed credit from their otherwise-required employment tax deposits. In other words, employers opting to take these credits may simply deduct them from their payroll taxes.

(Source: Sec. 2301 of CARES Act)

**2. Paycheck Protection Program (“PPP”):** The CARES Act creates a Small Business Administration (SBA) loan program, called the Paycheck Protection Program, for companies struggling to maintain operations and keep employees on the payroll. Under the PPP, private lenders make zero-fee loans of up to \$10 million directly to small businesses and other organizations, and SBA guarantees 100% of each loan. The interest rate is currently fixed at 0.5% (the Act states that it shall not exceed 4%). The program will last through June 30, 2020. As discussed in detail below, PPP loans may be fully or partially forgiven.

Eligible borrowers include small business concerns, “any business concern,” 501(c)(3) nonprofit organizations, and veterans organizations with no more than 500 employees. The term “any business concern” is not defined in the Act, but existing SBA regulations define a “business concern” as a for-profit organization. 13 C.F.R. §121.105.

PPP loans may be used for various purposes, including payroll costs, continuation of group health care benefits, employee salaries, interest on any mortgage, rent, utilities, and interest on any other debt obligation incurred before February 15, 2020. The Act suggests that borrowers may also use PPP loans for construction, expansion, and acquiring land, material, supplies, or equipment. We will have to wait for SBA to issue guidance to determine whether loans may, in fact, be used for such additional purposes.

Additional Information on PPP loans:

- All payments, including principal and interest, will be deferred for a period of between 6 months and 1 year
- No personal guarantee is required for the loan
- No collateral is required for the loan
- SBA has no recourse against any individual shareholder, member or partner for
- nonpayment
- Borrower need not show it is unable to secure credit elsewhere
- No prepayment penalty

Starting April 3, 2020, eligible entities may apply for loans through any existing SBA lender, federally insured depository institution, or federally insured credit union that is participating. Application forms are available here: [PPP Application Info](#).

Note that eligible organizations can take either a PPP loan or the employee retention tax credit, if eligible, but not both.

(Source: Sec. 1102 of CARES Act, amending 15 U.S.C. § 636(a))

**3. PPP Loan Forgiveness:** A borrower may be eligible for forgiveness of the PPP loan in an amount equal to the sum of the following costs incurred during the 8-week period beginning on the date of loan origination: (1) payroll costs, (2) interest on a mortgage obligation incurred before February 15, 2020, (3) rent under a lease in force before February 15, 2020, and (4) utilities for which service began before February 15, 2020. According to SBA's guidance, "due to likely high subscription, at least 75% of the forgiven amount must have been used for payroll." The amount of loan forgiveness may not exceed the principal amount of the loan, which means borrowers must pay the accrued interest even if the loan is completely forgiven. The Act reduces the amount of loan forgiveness if an employer reduces its number of employees or reduces their compensation by more than 25% eight weeks after getting the loan. The SBA may make limited exceptions to that rule.

(Source: Sec. 1106 of CARES Act, amending 15 U.S.C. § 636(a))

**4. Economic Injury Disaster Loan ("EIDL") Program:** The CARES Act amends the SBA's existing EIDL program by expanding the list of entities eligible for such loans and waiving certain requirements. Like PPP loans, EIDL loans are issued by private lenders and backed by the SBA. According to SBA's website, the program offers loans of up to \$2 million. EIDL loans are available to eligible entities that have "*suffered a substantial economic injury*" as a result of the COVID-19 crisis. Under existing regulations, a "substantial economic injury" means an organization is unable to meet its obligations as they mature or to pay its ordinary and necessary operating expenses.

Eligible borrowers include small business concerns, private nonprofit organizations, independent contractors, sole proprietorships, and cooperatives or other businesses with no more than 500 employees.

According to SBA's website, EIDL loans may be used to pay fixed debts, payroll, accounts payable and other bills that can't be paid because of the current crisis. The interest rate for businesses is 3.75%. The expanded EIDL program is available through December 31, 2020.

Additional Information on Expanded EIDL Loans:

- Payments of principal and interest may be deferred for up to four years
- No personal guarantee is required for loans capped at \$200,000
- The borrower may be approved for a loan solely on its credit score
- The borrower had to be in operation by at least January 31, 2020
- The borrower need not show it is unable to secure credit elsewhere
- These loans are not subject to loan forgiveness

Eligible entities may apply for EIDL loans here: [EIDL Application Form](#)

(Source: Sec. 1110 of CARES Act, amending 15 U.S.C. § 636(b)(2), 13 C.F.R. § 123.300(a))

**5. Emergency Grants:** Entities that apply for an EIDL loan may request from SBA an immediate advance of up to \$10,000 in the form of a grant. Such grants may be used for providing sick leave, payroll to retain employees, making rent or mortgage payments, and repaying obligations that cannot be met due to revenue losses. Such grants will be available through December 31, 2020. EIDL grants do not need to be repaid even if the applicant is ultimately denied an EIDL loan.

(Source: Sec. 1110(e) of CARES Act)

**6. Express Loans:** The CARES Act amends the SBA's Express Loan Program by temporarily increasing the current loan amount of \$350,000 to \$1 million. SBA guarantees 50% of each loan. The Program features an accelerated turnaround time for SBA review. The SBA will respond to Express Loan applications within 36 hours. If approved, funds become available to the business owner within 90 days. Lenders and borrowers negotiate the interest rate, which can be fixed or variable. However, rates may not exceed SBA's maximum rates (up to 4.5% over base rate for loans over \$50,000). These loans may be used for plant acquisition, construction, conversion, or expansion, including the acquisition of land, material, supplies, equipment, and working capital. Eligible entities include "small business concerns." Use SBA's [Size Standard Tool](#) to determine whether your organization qualifies as a "small business concern."

(Source: Sec. 1101(c) of CARES Act, amending 15 U.S.C. § 636(a)(31)(D))

**7. SBA Subsidies for Certain Loan Payments:** The CARES Act authorizes SBA to assist small businesses by making loan payments on their behalf. SBA may subsidize payments for loans made under the Section 7(a) Loan Program and SBA's Community Advantage Pilot Program, among others. SBA may not, however, provide subsidies for PPP loan payments. SBA will pay the principal, interest, and fees owed for six months. SBA has not yet posted its application for debt relief. You may check here for updates: [SBA COVID-19 Relief](#).

(Source: Sec. 1112 of CARES Act)

**8. Bankruptcy Relief:** The CARES Act amends a provision of the U.S. Bankruptcy Code that gives businesses with debts that are under a certain threshold (approx. \$2 million) a faster and less expensive option for reorganizing. The Act increases that debt threshold to \$7.5 million. Therefore, businesses with debts of \$7.5 million or less will now qualify to file bankruptcy reorganization cases under the expedited and less costly process. The threshold, however, will revert to the \$2 million amount one year after the enactment of the CARES Act.

(Source: Sec. 1113 of CARES Act, amending 11 U.S.C. § 1182)

**9. Reimbursements for Federal Contractors:** The CARES Act gives federal agencies the ability to reimburse federal contractors for the costs of keeping their "employees and subcontractors" in a "ready state" during the COVID-19 crisis. Specifically, federal agencies may reimburse contractors for paid leave (up to an average of 40 hours per week) through September 30, 2020. Such reimbursements will only be provided to a contractor whose employees or subcontractors cannot perform work on a site that has been approved by the Federal Government, including a federally-owned or leased facility or site, due to facility

closures or other restrictions, and who cannot telework because their job duties cannot be performed remotely during the current COVID-19 public health emergency.

(Source: Sec. 3610 of CARES Act)

### **FFCRA Provisions Providing Economic Protection for Employees**

In addition to the loan and tax relief programs just described, the CARES Act and the FFCRA both include important protections for workers affected by the current crisis. From an employer's perspective, the most important of these programs are FFCRA's **paid leave programs**, described below. Note that while the programs described above apply to employers with *500 or fewer employees*, these apply to employers with *fewer than 500 employees*.

Two laws passed as part of FFCRA – **the Emergency Paid Sick Leave Act and the Emergency Family and Medical Leave Expansion Act** – require employers to provide *paid leave* to employees who cannot work for COVID-19-related reasons. As described below, they provide different, but somewhat complementary benefits. Both, however, became effective on April 1, 2020, continue through December 31, 2020, and under both:

- Employers may take a credit against payroll taxes worth 100% of the amount they pay in required benefits (“qualified leave wages”) *plus* the costs of maintaining the employee’s health insurance during the period the employee is on paid leave, and the employer’s share of the Medicare payroll tax on the qualified leave wages. (Source: Secs. 7001(c) and 7003(c) of FFCRA)
  - The credit does *not* apply to any amounts the employer pays over what the law requires.
  - Information about how to claim the tax credit is available on the IRS website. [Claiming an FFCRA Tax Credit](#)
- Employers must maintain the employee’s coverage under a group health plan while the employee is on leave. For employers in multiemployer bargaining units, this means continuing to make contributions to the health and welfare fund while the employee is on paid leave. (Source: 29 C.F.R. §§ 826.110 and 825.211)
- Employers in multiemployer bargaining units have the option of satisfying their obligations by paying into a multiemployer benefit plan *if* the plan provides employees with the required benefits.
- There are notice requirements (see below).

**1. Emergency Paid Sick Leave Act (“EPSLA”):** This Act requires employers to provide employees with 2 weeks of paid leave if they have to be out of work for various COVID-19 related reasons. The benefits are available to *all employees*, regardless of how long they have worked for the employer. Employers are required to pay, for up to 80 hours (pro-rated for part-time):

- Regular wages, capped at \$511/day (\$5110 maximum) for employees unable to work because:
  - The employee is subject to a publicly-ordered COVID-19-related quarantine, isolation, shelter-in-place or stay-at-home order;
  - A health care provider has advised the employee to self-isolate; or
  - The employee is experiencing COVID-19 symptoms and seeking diagnosis.

- 2/3 of regular wages, capped at \$200/day (\$2000 maximum) for employees unable to work because the employee is:
  - Caring for an individual subject to a public quarantine or isolation order or who has been advised to self-quarantine;
  - Caring for a son or daughter if the school or childcare facility is closed or childcare provider is unavailable; or
  - Experiencing similar conditions, as specified by HHS.

(Source: Secs. 5102-5111 of FFCRA; 29 C.F.R. §§ 826.10 and 826.20)

**2. Emergency Family and Medical Leave Expansion Act (“EFMLEA”):** Congress expanded the Family and Medical Leave Act (“FMLA”) to provide paid leave to employees who cannot work because they need to care for their children whose schools are closed or childcare providers are unavailable due to the COVID-19 crisis. These benefits are available to employees who have been employed for *30 days or more* by the employer from which they are seeking the leave. The first two weeks are unpaid, although – unless they have used the pay for other reasons – employees are expected to finance that time with the paid sick leave available under the EPSLA. Otherwise, they may use any accrued leave available from their employer. The employee is then entitled to an additional 10 weeks of paid leave. Under the EFMLEA:

- Paid leave is 2/3 of regular wages, capped at \$200/day (\$10,000 maximum).
- Although this Act expands the reasons for which employees are entitled to leave under the FMLA and, for the first time, requires employers to pay for a portion of that leave, it does not expand the overall amount of FMLA time. In other words, employees who have already used some of their FMLA leave will have that amount of time deducted from the 12 weeks provided under the EFMLEA.
- DOL regulations (29 C.F.R. §§ 826.40(b)) exempt employers with 50 or fewer employees from the childcare leave requirements in both the EPSLA and EFMLEA if providing the benefits “would jeopardize the viability of the small business as a going concern.” A small business qualifies for this exemption if “an authorized officer of the business” determines that:
  - Paying the benefits would cause the business’s expenses to exceed its available revenue and cause it to cease operating at minimal capacity;
  - The employee(s) seeking the leave have specialized skills, knowledge of the business, or responsibilities the absence of which would cause a substantial risk to the business’ ability to function; or
  - Without the employee(s), there would be insufficient staff for the small business to operate at a minimal capacity.
- An employer claiming this exemption must document its decision, but need not apply to nor send any documentation to DOL.

(Source: Sec. 3103-3105 of the FFCRA, amending Secs. 102 and 104 of the FMLA, 29 U.S.C. §§ 2612 and 2614)

**3. FFCRA Notice Requirements:** DOL has produced a notice of these new paid leave rights, which is attached. (The notice is also available at [FFCRA Poster](#)) Employers must post the notice in a manner most likely to be seen by its employees -- either by physically posting it at conspicuous places in the workplace, by emailing or directly mailing it to employees, or by posting it via internal or external websites. The posting requirement went into effect April 1, 2020. If employees are working remotely, the posting requirement can be met by emailing the poster to employees.