SBA ECONOMIC INJURY DISASTER LOANS AND EMERGENCY ECONOMIC INJURY GRANTS AVAILABLE AS A RESULT OF COVID 19

Jason J. Herron
Michael G. Trachtman
Wisler Pearlstine, LLP
http://www.wislerpearlstine.com

____

What is an SBA Economic Injury Disaster Loan? The SBA Economic Injury Disaster Loan Program ("EIDL") is a loan program administered by the U.S. Small Business Association ("SBA"), which offers low interest disaster loans of up to $2 million, to support working capital needs for small businesses suffering economic injury as a result of COVID 19. The amount that can be borrowed by a business will be determined by SBA's assessment of that company's business losses resulting from COVID 19. *The standards described in this fact sheet apply to loans made during the period beginning January 31, 2020 and ending December 31, 2020. The terms and conditions of the EIDL program have been modified by the newly-enacted Coronavirus Aid, Relief, and Economic Security Act ("CARES" Act).*

What is an SBA Economic Injury Grant? SBA Emergency Economic Injury Grants are grants of up to $10,000, available through the SBA, for businesses that have been harmed by COVID 19 and have applied for an EIDL. These grants are available upon request, within three days of applying for an EIDL, and they do not have to be repaid, even if the application for the EIDL loan is denied.

What businesses are eligible? The following types of small businesses are generally eligible for an EIDL, *provided that they have been in operation since January 31, 2020 (The CARES Act has waived the typical requirement that the business be in operation for 1 year prior to the disaster)*:

- Business entities (including sole proprietorships, with or without employees)
- Independent contractors
- Cooperatives and employee-owned businesses
- Private non-profits
- Tribal small businesses

How do I know if my business qualifies as a "small" business? Generally, a business of 500 employees or less will qualify as a "small" business. However, you should visit https://www.sba.gov/size-standards/ to find out if your business meets SBA's small business size standards. You will need your 6-digit North American Industry Classification Code (NAICS) and your business's 3-year average annual revenue.

Do I need to be able to demonstrate ability to repay the loan? The CARES Act has relaxed some of the typical SBA standards that require the applicant demonstrate ability to repay the loan. EIDL loans may now be approved solely on the basis of an applicant's credit score or by use of alternative methods to gauge the applicant's ability to repay.

Do I need to be able to show that I don't have access to credit elsewhere? The CARES Act waives the typical SBA requirement that the business not have access to credit elsewhere.

What can you use the money for? You can use the EIDL Loan and/or grant to alleviate economic injury resulting from COVID 19, including the payment of payroll, sick leave, accounts payable, fixed debt service, rent, increased supply chain costs, and other expenses that you would have been able to pay if the business had not been affected by COVID 19.

What are the terms? The terms of an EIDL Loan are determined on a case-by-case basis. But, generally, the terms are:

- Interest rate of 3.75% for for-profit businesses and 2.75% for non-profits.
- Term of up to 30 years.
- Collateral is generally required for loans in excess of $25,000, if the borrower has collateral to pledge.
- No-prepayment penalty.
- Personal guaranties will generally not be required on loans of up to $200,000.

How do I apply? Applications are to be made directly to the SBA (not to local SBA lenders). The application is available at https://www.sba.gov/page/disaster-loan-applications. EIDL loans are funded directly by the U.S. Treasury.

Jason J. Herron and Michael G. Trachtman are partners in Wisler Pearlstine, LLP. Mr. Herron represents a wide variety of businesses in real estate, commercial lending and transactional matters. Mr. Trachtman serves as the outside general counsel for MEA and is the founder and Director of the *General Counsel Initiative*, which provides multidisciplinary, proactive and preventive outside general counsel services to companies throughout the region – a primary care physician for businesses. For more information, www.wislerpearlstine.com/general-counsel-initiative/

This article represents our best effort to assemble accurate information on an accelerated basis. However, the subject is complex, and many details have been summarized or omitted in the interest of focusing on key points. In addition, the law and the guidance issued by the government is constantly changing. You should not rely on the accuracy or completeness of this information for your business and personal decisions but, rather, should seek updated, personalized legal advice as needed.

EMPLOYEE RETENTION CREDITS UNDER THE CARES ACT

Michael G. Trachtman
Wisler Pearlstine, LLP
mtrachtman@wispearl.com
http://www.wislerpearlstine.com

March 30, 2020

What's an Employee Retention Credit? In the effort to incentivize employers to keep employees on their payrolls – even if the employees are not working -- the CARES Act provides certain employers with a payroll tax credit in the amount of 50% of the wages and health benefits paid to employees between March 12, 2020 and December 31, 2020, with a cap of $5,000 of credit per employee. The credit is taken against the employer's portion of FICA taxes, among others. If the credit exceeds the amount of taxes you paid, the excess is refundable by the IRS.

Who is eligible for the tax credits? There are lots of exceptions and conditions in the law, but here are the most important points …

- If you are a **for-profit** business that conducted business in 2020, you are eligible for the tax credit if your business is fully or partially suspended due to a COVID-19 government-mandated shut-down order, or if your gross receipts declined by greater than 50 percent when compared to the corresponding calendar quarter of the prior year.

- **Nonprofit**, tax-exempt 501(c)(3) employers are eligible for the credit if their operations are fully or partially due to a COVID-19 government-mandated shut-down order, without regard for any decline in gross receipts. This credit is NOT available if you have received a forgivable SBA loan through the Paycheck Protection Program.

How much is the tax credit? Again, there are lots of complexities, but here are the fundamentals …

- You can claim the tax credit in the amount of the "qualified" wages you paid between March 12, 2020 and before January 1, 2021. The credit is computed on a calendar-quarter basis.

- If your average number of employees is **greater than 100**, "qualified" wages are wages paid while an employee is *not* providing services due to a government order, or due to a 50 percent decline in gross receipts – cutting through the legalese, it's the wages you paid to employees who would otherwise be laid off.

- If your average number of employees is **100 or fewer**, qualified wages are wages paid during the period when operations are fully or partially suspended *or* during a period in which you had a 50 percent decline in gross receipts…whether or not your employees are providing services.

- The credit is reduced by certain other tax credits to avoid double-dipping, most notably credits taken for the new paid sick leave and family and medical leave mandated by the Families First Coronavirus Response Act.
- The credit is capped at $10,000 of wages per employee (equalling a $5,000 per employee credit).

How do you get the Employee Retention Credit? The credit is used against your quarterly payroll tax returns. If you overestimate the credit and underpay taxes, you will not be hit with penalties as long as your overestimation was in reasonable anticipation of the tax credit. For refunds of credit amounts you cannot use, the IRS will provide a form you can use to claim the Employee Retention Credit when you file your tax return.

Michael G. Trachtman is a partner in Wisler Pearlstine, LLP, and serves as the outside general counsel for MEA. He is the founder and Director of the *General Counsel Initiative*, which provides multidisciplinary, proactive and preventive outside general counsel services to companies throughout the region – a primary care physician for businesses. For more information, www.wislerpearlstine.com/general-counsel-initiative/

This article represents our best effort to assemble accurate information on an accelerated basis. However, the subject is complex, and many details have been summarized or omitted in the interest of focusing on key points. In addition, the law and the guidance issued by the government is constantly changing. You should not rely on the accuracy or completeness of this information for your business and personal decisions but, rather, should seek updated, personalized legal advice as needed.

EXPANDED UNEMPLOYMENT COMPENSATION BENEFITS UNDER THE CARES ACT

Michael G. Trachtman
Wisler Pearlstine, LLP
mtrachtman@wispearl.com
http://www.wislerpearlstine.com

March 30, 2020

Many businesses view the CARES Act's changes in unemployment compensation as a key consideration in the decision to stay open or close – they are willing to stay open even if it means incurring some losses in order to take care of and retain their employees, but if the increased scope of available unemployment compensation will adequately support their personnel, that may tilt the balance in favor of at least a partial closure.

Here is a summary of the expansion of unemployment compensation – but note that while the increased costs are being funded by the federal government, individual states will still administer their unemployment compensation programs, and exactly how that will unfold remains to be seen.

Key Changes in Eligibility for Unemployment Compensation

- Individuals who have exhausted their unemployment compensation entitlements will still be covered.

- Business owners, self-employed individuals, independent contractors, gig workers and those with a limited work/wage history will be eligible.

- Unlike current requirements, an individual, even if able to work in an available job, will be eligible for unemployment compensation if the individual is not working for one of the following reasons:

  - The individual is diagnosed with COVID-19;
  - The individual has symptoms of COVID-19 and is in the process of seeking a medical diagnosis;
  - A household member has COVID-19;
  - The individual is providing care to a household member with COVID-19;
  - A child or other person in the household for which the individual is the primary caregiver is unable to attend school or daycare due to COVID-19;
  - The individual is unable to reach work due to a quarantine;

- The individual is unable to attend work because a healthcare professional advised the individual to self-quarantine;

- The individual is scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of COVID-19;

- The individual is the sole wage earner in his or her household due to death of the head of household as a result of COVID-19;

- The individual was required to quit his or her job as a result of COVID-19;

- The individual's place of employment closed due to COVID-19; or

- The individual is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for unemployment benefits under another state unemployment program.

- NOTE: Individuals who are able to maintain employment through telework or who are receiving sick leave or other paid leave benefits are not eligible.

Expansion of Coverage and Benefits

- State unemployment benefits will be extended to a total of 39 weeks. Depending on future events, this period may be further extended.

- All unemployed workers will be entitled to an additional $600 per week of compensation (even if this takes the employee above their pre-unemployment earnings).

- The usual one-week waiting period for benefits is eliminated.

- Non-profits can be reimbursed for half of what they pay in unemployment compensation.

Michael G. Trachtman is a partner in Wisler Pearlstine, LLP, and serves as the outside general counsel for MEA. He is the founder and Director of the *General Counsel Initiative*, which provides multidisciplinary, proactive and preventive outside general counsel services to companies throughout the region – a primary care physician for businesses. For more information, www.wislerpearlstine.com/general-counsel-initiative/

This article represents our best effort to assemble accurate information on an accelerated basis. However, the subject is complex, and many details have been summarized or omitted in the interest of focusing on key points. In addition, the law and the guidance issued by the government is constantly changing. You should not rely on the accuracy or completeness of this information for your business and personal decisions but, rather, should seek updated, personalized legal advice as needed.

FORGIVABLE LOANS UNDER THE PAYCHECK PROTECTION PROGRAM

Michael G. Trachtman
Wisler Pearlstine, LLP
mtrachtman@wispearl.com
https://www.wislerpearlstine.com/

March 30, 2020

The Paycheck Protection Program sounds too good to be true. For some, it will be as advertised, and will provide invaluable assistance. For others, not so much. In some respects, we simply do not know and time will tell.

We have done some digging, beyond what members of Congress have been saying, what commentators have reported, and what many of you have heard from the "experts."

What's the Paycheck Protection Program? The CARES Act established a $349 billion loan program, designated the "Paycheck Protection Program." The stated purpose of the Paycheck Protection Program is to get cash into the hands of as many businesses as possible in order to minimize layoffs and maximize continued employment.

The gargantuan carrot that the Program dangles in front of potential business borrowers that might otherwise close their doors is that if they use the loan to pay employees and stay open, the loans are subject to forgiveness – *they can become nontaxable grants.*

Should you apply? There will be a huge demand – some speak of a stampede – to obtain Paycheck Protection Program loans. If you need the money and there is a reasonable chance that you will satisfy the criteria for forgiveness, explained below, you should apply. Even if you do not satisfy the criteria, the terms remain favorable, particularly the fact that personal guaranties and collateral are not required.

The Paycheck Protection Program forms and procedures have not yet been provided by the SBA to the lenders, and it will probably be weeks before that takes shape. *Nevertheless, especially if you are an existing customer or have a relationship with an SBA lender, and if you are interested in obtaining a loan, we strongly advise you to work with your professional advisors to submit a request for the loan, along with the financial information typically required in a loan application and the information required by the Paycheck Protection Program requirements, and to do so ASAP*. This may get you toward the front of what is likely to be a very long line.

We can assist you in this effort.

How do I apply? What are the eligibility requirements? Virtually all businesses are eligible, including for-profit businesses, 501(c)(3) nonprofit organizations, certain self-employed individuals, independent contractors, and sole proprietorships.

You will need to apply through an SBA-approved lender. The eligibility criteria are minimal.

The CARES Act authorizes SBA lenders to approve the loans so long as the applicant was in operation on February 15, 2020, and so long as the applicant paid employees and payroll taxes or paid independent contractors since that time. You will also have to certify that the loan is necessary and will be used to "retain workers and maintain payroll or make mortgage payments, lease payment and utility payments," and that you are not applying for and have not received loans for the same purpose.

Applicants must have 500 or less employees (fulltime and part-time). Banks will review affiliates, such as whether the applicant is owned by another company, in determining if this requirement is satisfied.

Will you get the loan? To get as much cash as possible into the hands of operating businesses, the qualification criteria is minimal and does not consider the borrower's ability to repay the loan (see below). To make it easy for lenders to loan the money, the federal government has guaranteed repayment to the lenders.

So why *wouldn't* you get a Paycheck Protection Loan?

If you have an existing relationship with an SBA-approved lender who knows your business and believes that it presents an acceptable risk, you should have no problem at all.

But what if you do not have that kind of relationship? Lenders want to take care of their existing customers first. If they have the processing capacity, they may consider other businesses with a track record and favorable financials, but you will likely be at the back of the queue. In any case, you should be able to find a lender, but for a fee. Lenders will make money by making these loans, and they will be seeking out attractive borrowers.

What if your business does not have a great track record, or is burdened by existing debt? According to the Act, you qualify merely by being in business since February 15 (see below). It should not make a difference to the lender because, again, the federal government is guarantying that the lender will get paid.

Nevertheless, we have learned that lenders may be reluctant to make these loans to risky borrowers, despite the federal guaranty, for at least two reasons.

First, the federal guaranty is not a panacea for a lender who makes a loan to a borrower who defaults. The bank will still have to chase the borrower before it can apply for the guaranty, and even then it will take time and effort to obtain the money from the government.

Second, like any legislation of this scope and, in view of how quickly it was put together, the language is often vague, and lenders cannot be sure if the federal government will erect unforeseen hurdles in the path of their ability to collect on the guaranty if and when they try to do so. Vagueness breeds uncertainty which breeds caution.

How much can you borrow? Loans are available for the *lesser* of your "average monthly payroll costs" (a carefully defined term under the Act) times 2.5 (plus the amount of any

Economic Injury Disaster Loans received after January 31, 2020 that you choose to refinance under this program); or $10 million.

- **"Average monthly payroll costs"** are calculated based on the one-year period prior to the loan disbursal date, with certain exceptions for seasonal employers and new employers not in business between February 15, 2019 and July 30, 2019.

- **Payroll costs include**: employee salary, wages and commissions; payment of cash tips; payment of vacation; parental, family, medical or sick-leave; allowance for dismissal or separation; payment required for group health benefits (including insurance premiums); payment of retirement benefits; or payment of state or local tax assessed on employee compensation; and sole proprietor income or independent contractor compensation not in excess of $100,000.

- **Payroll costs exclude**: compensation of an individual person in excess of $100,000 (as prorated for March 1, 2020 through June 30, 2020); federal employment taxes imposed or withheld taxes; compensation to an employee whose principal residence is outside of the U.S.; qualified sick leave or family leave for which a payroll tax credit is allowed under the Families First Coronavirus Response Act.

<u>What can you use the money for?</u> You can spend the loan for the following purposes:

- Employee compensation (but not for wages in excess of $100,000 annually, prorated for the period of March 1, 2020 to June 30, 2020) and payroll support (including paid sick, medical, or family leave, and costs related to the continuation of group health care benefits during those periods of leave;)

- Continuation of health care benefits;

- Mortgage interest obligations, rent and utilities; and

- Interest on debt incurred before the "covered period" -- January 31, 2020 and December 31, 2020.

<u>Terms are *very* favorable</u>.

- Paycheck Protection Loans do not require personal guaranties or collateral. That is a *very* significant difference between these loans and other SBA loans.

- The term of the loans will be a maximum of 10 years at a maximum 4 percent interest rate, with six months (and up to one year) deferral of principal and interest payments.

- The usual SBA requirement that you prove that you cannot obtain funds elsewhere is waived.

- No SBA fees (you may still have to pay lender processing fee).

- No prepayment fee.

<u>The elephant in the room … *what about the loan forgiveness*?</u> The amount forgiven is the amount actually paid for payroll costs, mortgage interest, rent and utilities.

- *But*, the forgiveness amount will be reduced pro rata by (a) the reduction of the number of full-time equivalent employees and (b) the reduction in pay of an individual employee in excess of 25 percent.

- *However*, workforce reductions or reductions in pay that occur from February 15, 2020 to April 26, 2020 will be disregarded so long as the reductions are eliminated by June 30, 2020.

You must apply to your lender for forgiveness. Any portion of the loan that is forgiven will be excluded from gross income. You will need documentation for forgiveness – including proof of the number of employees, payroll tax filings (including federal, state and unemployment filings), receipts/cancelled checks for mortgage interest, leases, etc.

Some of the details of the Paycheck Protection Program remain unclear, there will be adjustments and clarifications, and exactly how the Program will function in practice remains to be seen. We will keep you updated.

Michael G. Trachtman is a partner in Wisler Pearlstine, LLP, and serves as the outside general counsel for MEA. He is the founder and Director of the *General Counsel Initiative*, which provides multidisciplinary, proactive and preventive outside general counsel services to companies throughout the region – a primary care physician for businesses. For more information, www.wislerpearlstine.com/general-counsel-initiative/

This article represents our best effort to assemble accurate information on an accelerated basis. However, the subject is complex, and many details have been summarized or omitted in the interest of focusing on key points. In addition, the law and the guidance issued by the government is constantly changing. You should not rely on the accuracy or completeness of this information for your business and personal decisions but, rather, should seek updated, personalized legal advice as needed.