

# *COVID-19 Legal Update*

*April 3, 2020*

## **FREQUENTLY ASKED QUESTIONS REGARDING THE CORONAVIRUS AID, RELIEF AND ECONOMIC SECURITY ACT AND THE FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

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### CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY (“CARES”) ACT

#### SBA PAYCHECK PROTECTION PROGRAM

**1. What businesses are eligible for the program?**

- Businesses with 500 employees or less (certain specific types of businesses may be subject to higher limits), sole proprietors, independent contractors, and self-employed individuals.

**2. What can my business use the Paycheck Protection Program loan for?**

- A business can use the loan for certain expenses incurred between February 15 and June 30, 2020. Eligible expenses include payroll costs, group health benefit payments, employee salaries, commissions, or similar compensation, interest on mortgages, rent, utilities, interest on debt incurred before February 15, 2020, as well as all other uses already permitted under the SBA’s business loan program. Payroll costs are capped at \$100,000 per year for each employee.

**3. Where do I apply for the Paycheck Protection Program loan?**

- You can apply for the Paycheck Protection Program Loan at an SBA-approved lender.

**4. Will using a lender that is an SBA Preferred Lending Partner (“PLP”) be faster?**

- We cannot guarantee that using a PLP will have a significant impact on how quickly a loan is approved. PLPs, however, have certain authority delegated to them by the SBA that may make the process faster.

**5. When should I apply for the Paycheck Protection Program Loan?**

- While you have until June 30, 2020, it would be advisable to apply as soon as you can. There is a “cap” on how much the government is making available to eligible borrowers, and loans are going to be made on a first-come / first-serve basis.
- The government said that loan applications will open on April 3, 2020. Many lenders, however, have indicated that they are not ready. You should check with the lender you wish to use.

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**6. What information or documents do I need to supply in order to obtain a Paycheck Protection Program Loan?**

- In addition to providing your lender with a completed application, you will need to provide your lender with payroll documentation and various certifications.

**7. What are the terms on a Paycheck Protection Program Loan?**

- Interest is 1% (it was previously set at 0.5% but the government recently increased the rate), no personal guarantees are required, and no collateral is required.

**8. What about repayment of the Paycheck Protection Program Loan? Is there any forgiveness?**

- A business can have the loan forgiven in an amount equal to the loan amount that is used, during an 8-week period after the loan originated, for payroll costs, payment of interest on any mortgage, payment of rent, and covered utility payments. Due to likely high subscription, the Treasury Department has indicated that to qualify at least 75% of the forgiven amount must have been used for payroll.
- BUT, this forgiveness is conditioned on the business retaining its employee and payroll levels between February 15 and June 30, 2020. Failure to do so will reduce the amount of forgiveness.

**9. What if I already laid off employees and/or reduced wages?**

- There is an exemption for businesses that, by June 30, 2020, eliminate any reduction in employees and payroll that occurred between February 15, 2020 and April 26, 2020.

**10. Does taking a Paycheck Protection Program loan restrict my ability to take advantage of other programs?**

- Yes. Businesses that take Paycheck Protection Program Loans cannot take advantage of the Employee Retention Credit (discussed below). Additionally, businesses cannot utilize the Payroll Tax Deferral (discussed below) and also obtain forgiveness of the Paycheck Protection Program loan.

**11. Has the SBA published any information or guidance about this program?**

- Yes. The SBA website has more information on the program. [Click here](#) to go to that page.
- Additionally, the Department of Treasury has published an information sheet for borrowers. [Click here](#) for that information.
- The borrower application form is available by clicking [here](#).

**DISASTER LOANS**

**12. What is a disaster loan?**

- The SBA provides low-interest federal disaster loans to provide working capital to small businesses suffering as a result of COVID-19, if the business is in an area declared to be an Economic Injury Disaster Loan (“EIDL”) area.

**13. Am I in an area eligible for an EIDL loan?**

- According to the SBA website, “Small business owners in all U.S. states and territories are currently eligible to apply for a low-interest loan due to Coronavirus (COVID-19).”

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#### **14. Where do I apply for a Disaster Loan?**

- You can apply for a Disaster Loan through the SBA.

#### **15. I heard there was a way to get a \$10,000 advance on a Disaster Loan quickly. How do I apply for that?**

- You can also apply for that loan through the SBA. Click [here](#) to go to the SBA's website application process.

#### **16. How soon can I get the \$10,000 advance?**

- Within three days of a successful application.

#### **17. Do I have to pay the advance back?**

- According to the SBA website, “[t]his loan advance will not have to be repaid.”

#### **18. Can I get a Disaster Loan or advance and still obtain a Paycheck Protection Program Loan?**

- Yes, but you cannot get them both for the same amount and for the same purpose. So, taking these loans may limit the amount of the Paycheck Protection Program Loan.

### **INDIVIDUAL STIMULUS CHECKS**

#### **19. I hear that taxpayers are getting payments from the government. How much are the payments?**

- Eligible individuals that are entitled to a full payment will receive \$1,200 (joint filers will receive \$2,400) plus \$500 for each qualifying child under the age of 17.

#### **20. Why wouldn't someone get the full payment?**

- The payment is reduced by \$5 for every \$100 that one's adjusted gross income exceeds: (a) \$150,000 for joint filers; (b) \$112,500 for those filing as head of household; and (c) \$75,000 for all other taxpayers.

#### **21. What tax return will the IRS use to determine my adjusted gross income?**

- For those that have already filed returns for 2019, the IRS will use that information. For those that have not yet filed, the IRS will use information from their 2018 tax returns.

### **EMPLOYEE RETENTION CREDIT**

#### **22. What is the Employee Retention Credit?**

- This is a tax credit that provides an employer with a credit against employment taxes equal to 50% of the qualified wages for each employee for each quarter, up to a limit of \$10,000 in total wages (\$5,000 in credits) for each employee.

#### **23. Does it restrict my ability to take advantage of other programs?**

- Yes. You cannot use the Employee Tax Credit and also obtain an SBA Paycheck Protection Program Loan.

#### **24. Has the IRS provided any additional guidance?**

- Yes. The IRS published an FAQ on its website. [Click here](#) to go to the FAQ.

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## **PAYROLL TAX DEFERRAL PROGRAM**

### **25. What is the Payroll Tax Deferral Program?**

- This program allows employers to defer payment of the employer's share of certain employment taxes during the period from March 27 (when the CARES Act was enacted) until January 1, 2021.

### **26. When are the deferred payments due?**

- Half of the deferred taxes are due on December 31, 2021, and the other half are due on December 31, 2022.

### **27. Does the Deferral Program restrict my ability to take advantage of other programs?**

- Yes. Businesses that want to use the payroll tax deferral program cannot also obtain forgiveness of Paycheck Protection Program Loans (or certain other forgiveness available under the CARES Act).

## **UNEMPLOYMENT EXPANSION**

### **28. Do independent contractors qualify for the new unemployment benefits?**

- Yes. The expanded benefits are designed to cover people that would otherwise not be covered. This includes independent contractors, freelancers, self-employed workers, and "gig" economy workers. Please check with the unemployment office in your state regarding applying for the expanded benefits.

## **FAMILIES FIRST CORONAVIRUS RESPONSE ACT**

### **29. What is the Families First Coronavirus Response Act ("FFCRA")?**

- It is a piece of legislation designed to provide emergency relief to address the profound impact of the coronavirus (COVID-19) and help to soften its effects on millions of Americans.
- The FFCRA contains two specific Acts providing employee leave relating to COVID-19: the Emergency Family and Medical Leave Expansion Act (the "Expansion Act") and the Emergency Sick Leave Act (the "Sick Leave Act").

### **30. Has there been any general guidance regarding FFCRA?**

- Yes. The Department of Labor ("DOL") published FAQs regarding (a) the Expansion Act and the Sick Leave Act, and (b) the required Notice poster. You can find the general FAQ by [clicking here](#). You can find the FAQ regarding the required Notice poster by [clicking here](#).

## **EMERGENCY FAMILY AND MEDICAL LEAVE EXPANSION ACT**

### **31. What businesses does the Expansion Act cover?**

- Businesses with less than 500 employees. This includes temporary employees and employees on leave, but does not include independent contractors.

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### **32. Is there an exemption for small businesses?**

- Yes, there is an exemption for businesses with less than 50 employees from providing leave if they meet certain criteria. Those criteria and how to claim the exemption will be set forth in greater detail in DOL regulations. The DOL has released a Temporary Rule that is expected to be published on April 6, 2020, and provides guidance regarding various FFCRA requirements. To read the Temporary Rule, click [here](#).

### **33. What if there are a number of businesses, all run separately, but affiliated? How are their employees counted?**

- It depends.
- The various establishments of one corporation are generally a single employer (adding all of the employees together).
- If a corporation owns an interest in another corporation, the two are generally separate employers, but they may be considered a “joint employer” if they meet the test under the Fair Labor Standards Act.
- Two separate entities may still be a single employer if they meet the integrated employer test under the FMLA.
- You should consult your legal counsel to determine how to answer this question for your specific entity.

### **34. What are the qualifying reasons for leave under the Expansion Act?**

- The only qualifying reason for Expansion Act Leave is if the employee is unable to work (**or telework**) because the employee needs to care for a child because the child’s school or place of care has been closed, or the child’s child care provider is unavailable due to a declared public health emergency due to COVID-19.

### **35. Is this leave paid or unpaid?**

- The first 10 days of leave may be unpaid (unless the employee chooses to use other available paid leave for those 10 days), but the remainder (up to the 12-week ceiling under the FMLA) is paid.

### **36. Are there limits on the amount my business has to pay for this leave?**

- Yes, there is a cap of \$200 per day and \$10,000 in the aggregate per employee for Expansion Act leave.

## **EMERGENCY SICK LEAVE ACT**

### **37. What businesses does the Sick Leave Act cover?**

- It is the same as the Expansion Act, *i.e.*, businesses with less than 500 employees.

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### **38. Is there an exemption for smaller businesses?**

- Just as in the Expansion Act, there is an exemption for businesses with less than 50 employees if they meet certain criteria. Those criteria and how to claim the exemption will be set forth in greater detail in DOL regulations. The DOL has released a Temporary Rule that is expected to be published on April 6, 2020, and provides guidance regarding various FFCRA requirements. To read the Temporary Rule, click [here](#).

### **39. What if there are a number of businesses, all run separately, but affiliated? How are their employees counted?**

- See the answer with respect to the Expansion Act.

### **40. What are the qualifying reasons for leave under the Sick Leave Act?**

- Sick leave is available if the employee cannot work (**or telework**) because of any of 6 qualifying reasons:
  - 1) The employee is subject to a quarantine or isolation order relating to COVID-19;
  - 2) A health-care provider has advised the employee to self-quarantine due to COVID-19;
  - 3) The employee is experiencing COVID-19 symptoms and is seeking a medical diagnosis;
  - 4) The employee is caring for an individual who is subject to a quarantine or isolation order relating to COVID-19, or who has been advised by a health-care provider to self-quarantine due to COVID-19;
  - 5) The employee is caring for a child whose school or place of care has been closed, or the child's child care provider is unavailable, due to COVID-19; or
  - 6) Any other similar condition specified by the Secretary of Health and Human Services.

### **41. Is the sick leave paid or unpaid?**

- The Sick Leave Act provides for up to 80 hours of paid leave total for full-time employees for any combination of the qualifying reasons. Part-time employees are provided paid leave for the average amount of hours they work during a two-week period.

### **42. Are there limits on the amount my business has to pay for sick leave?**

- Yes, but it differs based on the reason for the leave.
- If the leave is due to the employee's **own condition**, the payment is the greater of the employee's regular pay or the applicable minimum wage. An employer is not required to pay more than \$511 per day and \$5,110 in the aggregate for each employee.
- If the leave is due to the employee **caring for another**, the payment is the greater of 2/3 of the employee's regular pay or the applicable minimum wage. An employer is not required to pay more than \$200 per day and \$2,000 in the aggregate for each employee.

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**43. Do employees have to use Sick Leave Act leave before using other leave?**

- They do not, and an employee cannot be required to do so.

**FEDERAL ASSISTANCE TO EMPLOYERS**

**44. Is the federal government offering any assistance to employers who have to provide paid Expansion Leave or paid Sick Leave?**

- Yes. Tax credits will be provided to employers and self-employed individuals for amounts paid under the Expansion Leave Act and the Sick Leave Act under various circumstances; however, there will be caps on them. The Secretary of the Treasury will be issuing regulations regarding the credits. There is also a reimbursement option.

**45. Is there anything else you think I should know?**

- Yes. Because the COVID-19 pandemic is a fluid and rapidly evolving situation, the laws discussed in this FAQ may be amended or interpreted through regulations or court decisions. Moreover, Congress will likely pass other laws to provide additional support to employees and businesses affected by the COVID-19 pandemic.

For more details regarding the CARES Act and the FFCRA, please click on the links below to access FVLD's latest coronavirus (COVID-19) newsletters:

- [Breaking News: CARES Act Relief for Small Businesses and Individuals](#)
- [Updated: Breaking News: Families First Coronavirus Response Act](#)
- [The Coronavirus and the Law](#)

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