
Steptoe

Paycheck Protection Program

Effective February 15, 2020 – June 30, 2020



Paycheck Protection Program

Overview

For additional guidance, please refer to [Step toe's COVID-19 Resource Center](#).

What are some of the main benefits of a paycheck protection loan (PPL)?

- Loan amounts up to \$10 million per eligible entity;
- Complete payment deferment relief (principal, interest, and fees) for 6 months to 1 year;
- Full loan amount forgiveness for employers that maintain or restore pre-crisis payroll;
- 100% federally guaranteed;
- No recourse against individuals, shareholders, members, or partners of loan recipients for non-payment, unless s/he uses loan dollars for impermissible purposes;
- No collateral or personal guarantee requirements, or fees; and
- Interest rate is capped at 4%.

Who is eligible?

Entities (including sole proprietors, independent contractors, and self-employed individuals) that were operating and paying workers on February 15, 2020, and that are:

- “Small business concerns,” as defined under current SBA laws and regulations (check existing SBA industry size requirements based on employees or revenue – **depending on your industry, your business may qualify, even if you have more than 500 employees**); or
- For-profit “business concerns,” 501(c)(3) non-profits, 501(c)(19) veterans organizations, and Tribal businesses with not more than the greater of –
 - 500 employees; or
 - The SBA’s “small” size standard in number of employees for the entity’s industry code.

How do I count my employees to figure out if I’m eligible?

General rules

All businesses count full-time, part-time, and “other basis” employees. You must count employees of all US and foreign affiliates. SBA affiliation determinations can be complex and generally are based on “totality of the circumstances” evaluations (e.g., ownership, management, common interests, economic dependence, etc.) to

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determine whether “control or ability to control” exists. This analysis can be quite involved for entities in private equity portfolios, for instance.

Special rules for certain industries

There are special employee counting rules for “business concerns” with NAICS industry codes starting with 72 (generally, “accommodations and food services”); namely:

- You are eligible for a PPL if you have 500 or fewer employees per location; and
- SBA affiliation rules are waived for these loan applicants.

SBA affiliation rules also are waived for “business concerns” that:

- Operate as a franchise under an SBA franchise identifier code (available on SBA website); or
- Receive financial assistance from Small Business Investment Act licensees.

A few more things to consider regarding these counting rules

If your business operates under multiple NAICS industry codes (perhaps one of which begins with 72), the SBA will look at the code of your “primary industry” based on average receipts, employees, costs of doing business, etc.

“Business concerns” under the SBA are for-profit businesses with US locations that have primary operations in the US or make a significant economic contribution in the US (e.g., by paying taxes). “Business concerns” may be organized as sole proprietorships, partnerships, LLCs, corporations, associations, trusts, cooperatives, or joint ventures with under 50% foreign business participation.

The CARES Act is very short on details pertaining to these employee counting rules and we anticipate some clarification in forthcoming SBA regulations. In the meantime, it likely is worth evaluating PPL eligibility from the perspective of each separately organized business concern.

How do I apply for a loan?

Loans will be delivered by banks that already issue SBA Business Loans and other private lenders authorized by the Department of Treasury.

The only blanket “borrower requirement” imposed by the CARES Act for PPLs is a good-faith certification by the applicant that:

- The loan is needed to “support ongoing operations” during the COVID-19 emergency;
- Funds will be used to retain workers and maintain payroll or make mortgage, lease, and utility payments; and
- They do not have an application pending for, nor have they received, any other SBA Business Loan for the same purpose since February 15, 2020.

Also, under the CARES Act, self-employed, independent contractor, and sole proprietor applicants must submit additional documentation (e.g., payroll tax filings, Form 1099-MISC, income and expense documents).

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The law explicitly waives some applicant requirements that normally would apply for SBA loans (e.g., proof that the applicant is not able to get credit elsewhere, personal guarantees, fees etc.). It is unclear, however, what else in existing SBA loan applications will be retained and/or what other documentation PPL lenders may require to, for instance –

- Establish payroll cost amounts for purposes of determining loan amounts;
- Verify the size of the entity;
- Identify affiliates of entities to which the SBA affiliation rules apply;
- Assign the industry code of the entity; and
- Verify that the business existed and paid workers as of February 15, 2020.

We urge clients to contact their lenders as soon as possible to determine what they will require and to start collecting those materials in preparation for PPLs' availability. It also is worth noting that lenders will be instructed to prioritize certain PPL applicants, including: rural businesses, women, businesses that were started in the last two years, and others.

What if I already got an SBA loan for economic injury due to the COVID-19 emergency?

SBA economic injury disaster loans (EIDLs) made under the SBA's Disaster Loan Program on or after January 31, 2020 may be refinanced as PPLs. You also may have a post-January 31, 2020 EIDL and a PPL if the EIDL is not for PPL-eligible purposes (see list below).

What is my maximum loan amount and how can I spend it?

Loan amounts generally are 250% of average monthly "payroll costs" during the last year (with different look-back period options for new and seasonal businesses), plus any outstanding EIDL amounts to be refinanced, up to \$10 million.

Loan dollars may be used for:

- Any uses already permitted for SBA Business Loans (e.g., inventory, supplies, building or land purchases, construction, site improvements, etc.);
- Payroll Costs
 - Includes: employee or sole proprietor/independent contractor compensation up to annual compensation of \$100,000, prorated for the covered period; paid leave; severance payments; payment for group health benefits, including insurance premiums; retirement benefits; and state and local payroll taxes;
 - Excludes: excess compensation above the \$100,000 threshold; certain federal taxes; compensation to non-US employees; and sick and family leave wages for which credit is allowed under the Families First Coronavirus Relief Act;
- Group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- Payments of interest on mortgage obligations;
- Rent (including rent under a lease agreement);

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- Utilities; and
- Interest on any other debt obligations incurred before February 15, 2020.

Notably, these expenditures are all permitted under the PPL program, but not all of them are eligible for loan forgiveness. So, for example, you could use the loan dollars to pay inventory expenses, but that portion of the loan will not be forgiven.

How much of my loan will be forgiven?

The maximum available forgiveness amount (up to the full principal amount of the loan) is the sum of the following incurred and paid within 8 weeks of your loan origination (the “forgiveness period”):

- Payroll costs (as defined above);
- Interest on mortgage obligations incurred before February 15, 2020;
- Rent obligations in place since before February 15, 2020; and
- Utility payments for services that began before February 15, 2020.

The forgiveness rules appear to incentivize quick deployment of loan dollars to these priority buckets of expenses. Note that your maximum forgiveness amount is tied to dollars that are spent in these four categories in the first 8 weeks of your loan. So, to the extent you do not spend your full loan amount in that timeframe on these specific items, your forgiveness amount will be less.

Because the policy goal of the PPL program is to encourage employers to keep employees on payroll at something at least close to their normal base pay, the maximum forgiveness amount will be reduced:

- Proportionately for reductions in average full-time equivalent employees (FTEEs) between pre-crisis levels and the 8-week forgiveness period;
- Via a straight reduction for payroll reductions over 25% (compared to the prior completed quarter of employment) for workers making less than \$100,000 annually; and
- For any advances taken on SBA EIDLs.

There is relief from these forgiveness penalties for businesses that restore payroll to pre-crisis levels in the next few months. Specifically, the reduction rules described above will not apply (i.e., eligibility for your maximum forgiveness amount is restored), if the employer eliminates by June 30, 2020:

- Reductions (compared to February 15, 2020) in the number of FTEEs made between February 15, 2020 and April 26, 2020; and/or, as applicable,
- Salary reductions (compared to February 15, 2020) made between February 15, 2020 and April 26, 2020 for 1 or more employees (*Note: the legislation does not specify whether this also is limited to employees making under \$100,000 per year).

The CARES Act does not include any further detail on payroll decisions/actions made by PPL recipients after June 30, 2020 (i.e., there do not appear to be longer-term payroll maintenance requirements beyond the expiration of the PPL program on June 30, 2020).

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How do I get my loan forgiven and what if I have unforgiven amounts?

To receive loan forgiveness, you must apply to the lender servicing your loan with documentation:

- Verifying FTEEs on payroll and their pay rates (IRS payroll tax filings and state income, payroll, and unemployment filings);
- On covered costs/payments (e.g., canceled checks, receipts, or other documents verifying mortgage, rent, and utility payments); and
- Certifying (by an authorized business representative) that the documentation is true and correct and that forgiveness amounts requested were used to retain employees and make other forgiveness-eligible payments.

For loan balances remaining after forgiveness, they will continue to be federally guaranteed under the SBA Business Loan Program rules, interest rates remain capped at 4%, and the loan maturity is capped at 10 years from the forgiveness application date.

Are there other considerations I should evaluate before I apply for a PPL?

There do appear to be some trade-offs for businesses that receive PPL loans and/or loan forgiveness with respect to some tax benefits in the CARES Act.

For instance, an employer that receives a PPL is not eligible for the employee retention credit in section 2301 of the law, which provides eligible employers a refundable credit against payroll tax (Social Security and Railroad Retirement) liability equal to 50% of the first \$10,000 in wages per employee (including value of health plan benefits). Eligible employers must have carried on a trade or business during 2020 and be experiencing either: at least a partial suspension of operations due to government orders (e.g., limiting commerce, travel, group meetings, etc.); or a year-over-year gross receipts reduction of at least 50%.

In addition, an employer that receives loan forgiveness on a PPL is not eligible for the employment tax deferral in section 2302 of the CARES Act, which postpones the due date for depositing employer payroll taxes and certain self-employment taxes.

Businesses will have to compare the benefits of PPLs and these tax credits/deferrals to determine which path provides the greater financial benefit (e.g., compare immediate liquidity needs with longer-term time value of money calculations).

When can we expect further guidance from the SBA on this new program?

The SBA has until April 10, 2020 to issue regulations implementing this new PPL program. That rulemaking will not be subject to typical public notice and comment processes, but we anticipate weighing in with the SBA on issues that need further clarification.

The SBA also has until April 26, 2020 to issue specific guidance on loan payment deferment relief and the loan forgiveness provisions.

Last modified: March 30, 2020