

**CLEARY GOTTLIB**

# Federal Financial Relief for Small Businesses under the CARES Act (COVID-19)

Updated as of April 24, 2020

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# Updates as of April 24, 2020

*Updates are reflected in the subsequent slides and relate to the interim final rule issued by the SBA regarding the Paycheck Protection Program (the “PPP”) (<https://content.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL.pdf>) as well as other updates and clarifications provided by Treasury and the SBA.*

- **Use of Proceeds:** Not more than **25%** of loan proceeds can be used for non-payroll costs (i.e., at least **75%** of the proceeds **must** be used for payroll costs)
  - This applies with respect to the use of proceeds and not just amount eligible for forgiveness (SBA noted that they will issue additional guidance on forgiveness in the future)
  - In determining the percentage of proceeds used for payroll purposes, the amount of any EIDL refinanced will be included (see below)
- **Eligibility:** payroll costs only includes employees whose principal place of residence is the US
- **Payroll Costs Calculation:** SBA clarified calculation of payroll costs:
  - Step 1: Aggregate payroll costs from the last twelve months for employees whose principal place of residence is the United States.
  - Step 2: Subtract any compensation paid to an employee in excess of an annual salary of \$100,000 or, in the case of an independent contractor or sole proprietor, any amounts paid in excess of \$100,000 per year.
  - Step 3: Calculate average monthly payroll costs (divide the amount from Step 2 by 12).
  - Step 4: Multiply the average monthly payroll costs from Step 3 by 2.5.
  - Step 5: Add the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020, less the amount of any “advance” under an EIDL COVID-19 loan (because it does not have to be repaid).
- **Exclusions from Definition of Payroll Costs:** Federal employment taxes imposed or withheld from 2/15/20 – 6/30/20 or qualified sick and family leave wages for which a credit is allowed under the Families First Coronavirus Response Act
- **EIDLs:** If an EIDL was used for payroll costs, then applicant **must** use the PPP loan to refinance its EIDL

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# CARES Act Overview and Background

- **Coronavirus Preparedness and Response Supplemental Appropriations Act, 2020 (Mar. 6, 2020):**  
Provided additional funding to the SBA’s Disaster Loan Program Account and deemed the coronavirus to be a disaster in response to which the SBA may make economic injury disaster loans
- **Families First Coronavirus Response Act (Mar. 11, 2020):** Requires small businesses to provide paid sick and family medical leave to employees, to be covered by refundable federal tax credits
- **The Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) (Mar. 27, 2020):**  
Provided a \$2 trillion economic relief package to help individuals and businesses affected by COVID-19
  - Appropriations for the Small Business Administration (“SBA”) have now been fully committed
    - \$349 billion to guarantee small business lending via a streamlined process and on more generous terms
    - An additional \$10 billion for economic injury disaster loans to more types of businesses and on more generous terms
- **The Paycheck Protection Program and Health Care Enhancement Act (April 24, 2020):** \$484 billion package including funds to replenish the SBA’s loan and grant programs, among other forms of relief
  - \$310 billion for the SBA’s Paycheck Protection Program (“PPP”) with \$60 billion allocated for loans made by small lenders and community-based institutions
  - \$50 billion for the SBA’s Economic Injury Disaster Loan (“EIDL”) program
  - \$10 billion for the SBA’s Emergency Economic Injury Grant program

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# Paycheck Protection Program – Key Features

*New program under the CARES Act to provide small businesses with support to cover payroll and certain other expenses over an 8-week period.*

- **Principal Amount:** the lesser of \$10 million or 2.5 times the average monthly payroll costs (over the prior 12-month period), in addition to any EIDL obtained between 1/31/20 and 4/3/2020 (less any advance received under the EIDL grant program)
- **Interest Rate & Fees:** **1.00%** fixed rate and all customary SBA loan fees are waived
- **Repayment:**
  - Principal, interest and fee payments will be deferred for the first 6 months, but interest accrues during the 6 month deferral
  - No prepayment penalty
  - All or a portion of the loan may be eligible for forgiveness based on number of full time-equivalent employees and salaries maintained on payroll (as described below)
- **Term:** 2 years
- **Use of Proceeds:** Payroll costs for US resident employees (such as employee salaries and benefits), mortgage interest payments, rent, utilities, interest on existing debt and refinancing EIDLs. **Not more than 25% of loan proceeds may be used for non-payroll costs.** In calculation of payroll, employee salaries are capped at \$100,000.
- **Other Terms:** Loans are uncollateralized, do not require a personal guarantee and are nonrecourse to borrower's shareholders/members/partners
- **Deadline for Applying:** You can apply for loans through June 30, 2020. The initial \$349 billion appropriated to the program were depleted, but an additional \$310 billion in funds was authorized on April 24, 2020. The additional funds will likely be distributed on a first come, first served basis. *Note: It is unclear whether individuals who applied before the funds were depleted, but did not receive funding, will need to reapply. Please confirm with your lender.*
- **How to Apply:** You can apply at a participating bank or platform (such as PayPal, Square and Intuit). To find an eligible lender, the SBA has set up a search tool (<https://www.sba.gov/paycheckprotection/find>). Please note that each institution may use its own form (<https://home.treasury.gov/system/files/136/Paycheck-Protection-Program-Application-3-30-2020-v3.pdf>)

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# Paycheck Protection Program – Eligibility

- **Active:** Business must have been in operation on or before 2/15/20
- **Employees:** Business must have either had employees for whom they paid salaries and payroll taxes or paid independent contractors
  - Note: Independent contractors are not counted as employees for purposes of PPP loan calculations for businesses (since they and sole proprietors can apply for PPP loans on their own)
- **Impact:** Current economic uncertainty must make this loan request necessary to support the ongoing operations of the business, and the business must make a good faith certification to this effect
  - If the borrower received funds, and did not require them, they may repay the loan in full by May 7, 2020 and be deemed to have made the required good faith certification
- **Size:** Entities with fewer than 500 employees (including both full time and part time workers). Potentially more than 500 employees if the SBA has established size standards for any industry with more than 500 employees. Moreover, businesses classified under NAICS codes beginning with 72—covering hotels, restaurants and other accommodation and food services—are eligible if they have fewer than 500 employees per physical location
  - Affiliation rule (requiring the business to count all subsidiaries, parent companies and affiliates in determining its size) is waived for: (i) businesses classified under NAICS codes beginning with 72 (hotels, restaurants, food services), (ii) Eligible Franchises ([https://www.sba.gov/sites/default/files/2020-03/FrnchsTbl\\_03232020\\_UPLOAD.pdf](https://www.sba.gov/sites/default/files/2020-03/FrnchsTbl_03232020_UPLOAD.pdf)) and (iii) Businesses owned by small business investment companies
- **Certifications:** Must certify in good faith that, among other things, you will use the funds to retain workers and maintain payroll or make mortgage interest payments, lease payments and utility payments, and that not more than 25% of proceeds of the forgiven amount may be for non-payroll costs
- **Other Loans:**
  - Each business can receive only one PPP loan
  - Borrowers may apply for both PPP loans and other SBA financial assistance (including EIDLs and EIDL grants) as long as you don't use your PPP loan for the same purpose as your other SBA loans. If you used an EIDL for payroll, then you must use the proceeds of the PPP to refinance the EIDL
    - *e.g.*, if you use your PPP to cover payroll for the 8-week covered period, you cannot use another SBA loan for the same costs in that period, *but* you could use the other loan for payroll in a different period or for different workers

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# Paycheck Protection Program – Loan Forgiveness

*The loan amounts will be forgiven as long as (1) at least 75% of the loan proceeds are used to cover payroll costs and the remainder is used for mortgage interest, rent and utility costs over the 8 week period after the loan is made, and (2) the number of employees and compensation levels are generally maintained.*

- **Formula (calculated over an 8 week period):** Amount Forgiven = Payroll Costs (as defined below) + existing interest payments on mortgages + rent payments + leases + utility service agreements
  - Any advance amount received under the Emergency Economic Injury Grant Program would be subtracted from the amount forgiven
  - While you can use proceeds of the PPP loans for other business-related expenses, that portion will NOT be forgiven
  - No more than 25% of the forgiven amount may be for non-payroll costs
- **Payroll Costs:** Expenses such as: employee compensation, leaves (vacation, family, medical or sick), payment for group health benefits (including insurance premiums), payment for any retirement benefit and state and local taxes (*see next slide for examples*)
  - Certain compensation will be excluded from payroll costs including: (1) an employee's salary to the extent it exceeds \$100,000 (on an annualized basis) during a single period in 2019, (2) compensation paid to employees with a principal residence outside of the U.S., and (3) certain taxes and qualified sick leave wages for which credits are available under the existing SBA law
- **Requirements for Forgiveness:**
  - Reductions in Salaries or Employees: Borrowers that have reduced their average number of full-time equivalent employees or reduced the salary (in excess of 25%) of any employee whose salary is not more than \$100,000 (on an annualized basis) may have their eligibility for forgiveness reduced proportionately
    - For reductions made during the period of February 15, 2020 until April 26, 2020, borrowers may rehire workers and eliminate the reductions in salary prior to June 30, 2020 without reducing their eligible forgiveness amount
  - Process: Businesses must apply through their lenders for forgiveness on the loan. Documentation required to verify employees on payroll, pay rates and other eligible expenses (further guidance from the SBA will be forthcoming)
- **After the Loan is Forgiven:**
  - The Borrower is not responsible for the interest accrued on the forgiven amount in the 8-week covered period
  - Any loan amounts not forgiven are carried forward as an ongoing loan; payments begin 6 months after disbursement of the loan
  - Forgiven loan amounts are not taxable to Borrowers

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# Examples of Payroll Costs Calculations (from SBA)

Example 1 (No employees make more than \$100,000): Annual payroll: \$120,000

Average monthly payroll: \$10,000

Multiply by 2.5 = \$25,000

Maximum loan amount is \$25,000

Example 2 (Some employees make more than \$100,000): Annual payroll: \$1,500,000

Subtract compensation amounts in excess of an annual salary of \$100,000: \$1,200,000

Average monthly qualifying payroll: \$100,000; Multiply by 2.5 = \$250,000

Maximum loan amount is \$250,000

Example 3 (No employees make more than \$100,000, outstanding EIDL loan of \$10,000): Annual payroll: \$120,000

Average monthly payroll: \$10,000; Multiply by 2.5 = \$25,000

Add EIDL loan of \$10,000 = \$35,000; Maximum loan amount is \$35,000

Example 4 (Some employees make more than \$100,000, outstanding EIDL loan of \$10,000): Annual payroll: \$1,500,000

Subtract compensation amounts in excess of an annual salary of \$100,000: \$1,200,000

Average monthly qualifying payroll: \$100,000; Multiply by 2.5 = \$250,000

Add EIDL loan of \$10,000 = \$260,000; Maximum loan amount is \$260,000

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## SBA Economic Injury Disaster Loans – Key Terms

The US Small Business Administration (“SBA”) is offering Economic Injury Disaster Loans (“EIDL”) for small businesses impacted by COVID-19.

**Principal Amount:** Up to \$2 million

**Term:** Up to 30 years

**Interest Rate:** 3.75% for small businesses; 2.75% for non-profits

**Collateral requirements:** Collateral may be requested for loans over \$25,000

**Use of Proceeds:** Expenses the business would have paid if the disaster had not occurred (e.g., fixed debts, payroll, accounts payable, other bills)

**When do you receive funds:** The SBA generally takes 4-6 weeks to process disaster loans, but it will likely take longer at this time due to substantial demand. *Pending applications will be processed in the order they were received before the initial funds were depleted.*

**When does repayment start:** On the 12th month of the term (payments are deferred for the first 11 months)

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# SBA Economic Injury Disaster Loans – Eligibility

## To be eligible the business must have the following characteristics:

- **Jurisdiction**: Applicant must have physical presence in a state or territory where a declaration has been made.  
*All 50 states are covered*
- **Business Activity**: The primary activity of the business must be eligible as well as the activity for which the loss is being claimed. Generally, business activity is considered “eligible” unless it is in one of the enumerated categories of ineligible businesses (*e.g.*, religious organizations & casinos)
- **Size**: (i) From 1/31/20 until 12/31/20, this requirement will generally be satisfied if the business has less than 500 employees and (ii) combined with its affiliates, the applicant must not exceed the size standard for either its primary activity or the primary industry of the applicant and its affiliates, whichever is higher
  - **Size Chart**: To determine whether a business of over 500 employees qualifies, the attached chart should be used as a guide:  
<https://www.sba.gov/document/support--table-size-standards>
  - **Affiliates**: In order to determine whether you fall under the affiliate requirement, please reference the below guide:  
[https://www.sba.gov/sites/default/files/affiliation\\_discussion\\_0.pdf](https://www.sba.gov/sites/default/files/affiliation_discussion_0.pdf)
- The business must be **independently owned and operated**

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## SBA Economic Injury Disaster Loans – Eligibility (cont'd)

### Employers must be able to show:

- The business must have suffered “**substantial economic injury**,” meaning that it is unable to meet its obligations and pay its ordinary and necessary operating expenses
- **Impact**: The business must have been directly affected by COVID-19, be engaged in services directly related to COVID-19 and / or have suffered indirect harm related to the business’ industry
- **Credit Requirements**: SBA must find credit history acceptable and applicants must demonstrate the ability to repay any loans they incur.
- **Collateral Requirements**: If the loan requested is for an amount over \$25,000, the applicant must pledge available collateral, and will take real estate (if available). If no real estate is available, the SBA will ask for a security interest in all of the business’s assets.

**Application available at <https://covid19relief.sba.gov/#/>**

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## SBA Economic Injury Disaster Loans – Grants

Under the CARES Act, if the EIDL applicant is seeking an immediate influx of funds, they can receive a \$10,000 emergency advance on their EIDL within 3 days in the form of a grant

To access, first apply for an EIDL and then request the advance

The proceeds of the grant can be used for payroll costs, increased material costs, rent or mortgage payments, or for repaying obligations that cannot be met due to revenue losses

The grant would not need to be repaid, even if the loan application is subsequently denied

Borrowers may apply for an EIDL grant in addition to a loan under the Paycheck Protection Program, provided the loans are not used for the same purpose

SBA's practice has been to limit grants to \$1,000 per employee

# Comparing the PPP and EIDL

	Paycheck Protection Program	Economic Injury Disaster Loan
<b>Principal Amount / Term</b>	Up to the lesser of \$10 million or 2.5 times average monthly payroll costs / 2 years	Up to \$2 million / up to 30 years
<b>Interest Rate</b>	1.00% fixed rate	3.75% fixed rate (2.75% for nonprofits)
<b>Eligibility</b>	<ul style="list-style-type: none"> <li>• Business operational on or before 2/15/20</li> <li>• Small business (generally &lt;500 employees, with some exceptions)</li> </ul>	<ul style="list-style-type: none"> <li>• Business operational on or before 1/31/20</li> <li>• Small business (generally &lt;500 employees, with some exceptions); must be independently owned &amp; operated</li> </ul>
<b>Forgiveness</b>	<ul style="list-style-type: none"> <li>• Borrowers may receive forgiveness equal to 8 weeks of payroll costs, mortgage interest, rent and utilities</li> <li>• <u>No more than 25% of the forgiven amount may be for non-payroll costs</u></li> </ul>	<ul style="list-style-type: none"> <li>• Applicants may receive an ‘advance’ grant of up to \$10,000, which does not need to be repaid</li> <li>• The rest of the loan is not forgivable</li> </ul>
<b>Use of Proceeds</b>	<ul style="list-style-type: none"> <li>• Payroll costs for US resident employees (such as employee salaries and benefits), mortgage interest payments, rent, utilities, interest on existing debt and refinancing of EIDLs</li> <li>• <u>No more than 25% of the proceeds may be used for non-payroll costs</u></li> </ul>	<ul style="list-style-type: none"> <li>• Expenses the business would have paid if the disaster had not occurred (e.g., fixed debts, payroll, accounts payable, other bills)</li> </ul>
<b>Repayment</b>	<ul style="list-style-type: none"> <li>• Principal, interest and fee payments will be deferred for 6 months (however, interest will continue to accrue on unforgiven amount)</li> </ul>	<ul style="list-style-type: none"> <li>• Payment is deferred for the first 11 months</li> </ul>
<b>Other Terms</b>	<ul style="list-style-type: none"> <li>• Loans are uncollateralized, do not require a personal guarantee and are nonrecourse to borrower’s shareholders/members/partners</li> </ul>	<ul style="list-style-type: none"> <li>• Collateral may be requested for loans over \$25,000</li> <li>• Personal guarantee may be required for loans &gt; \$200K</li> </ul>
<b>Application Process</b>	<ul style="list-style-type: none"> <li>• Apply through any participating lender</li> <li>• <u>Link</u> to sample application</li> <li>• Deadline: June 30</li> </ul>	<ul style="list-style-type: none"> <li>• <u>Apply</u> through the SBA</li> <li>• Deadline: December 2020</li> </ul>

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# SBA Economic Injury Disaster Loans – Express Bridge Loans

The Express Bridge Loans program provides expedited bridge loan financing from SBA-authorized lenders on an emergency basis in amounts up to \$25,000. These loans are generally intended to support the business while it applies for and waits to receive a disbursement of funds from an EIDL (or other longer-term financing).

## — Eligibility

- **Jurisdiction:** Applicant must have physical presence in a state or territory where a declaration has been made. All 50 states are covered
- **Size:** Must qualify as a small business (generally < 500 employees)
- **Existing Relationship:** Applicant must have existing relationship with lender
- **Impact:** Applicant must be organized for profit and have had an operating business as of March 13, 2020, and the business must have been adversely impacted by COVID-19
- **Credit Score:** Small Business Scoring Service score for the business will be reviewed
- **Need:** Credit not available elsewhere

## — Key Terms

- **Deadline:** March 13, 2021
- **Term:** Maximum of 7 years
- **Principal Amount:** \$25,000
- **Interest Rate:** up to 6.5% over the prime rate
- **Use of Proceeds:** Support the survival and/or reopening of the small business. Lenders may require a borrower to pay down or pay off the Express Bridge Loan if the borrower is approved for an EIDL.

## — Additional Information

- Apply directly through lender
- Express Bridge Loan Pilot Program Guide: <https://www.sba.gov/sites/default/files/2020-03/Express-Bridge-Loan-Pilot-Program-Guide-FINAL-3.25.20.pdf>

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# SBA Express Loans

The CARES Act expanded the existing SBA Express Loans program by raising the maximum principal amount to \$1 million. SBA Express Loans are business loans that are partially guaranteed by the SBA and feature faster turnaround times than other non-disaster related SBA loan.

— **Eligibility:**

- **Size:** Must qualify as a small business (generally < 500 employees)
- **Credit requirements:** Credit decisions are made by the lender
- **Status:** Must be a for-profit operating business located in the US
- **Need:** Credit not available elsewhere

— **Key Terms**

- **Term:** Up to 7 years (with maturity extensions permitted at the outset)
- **Principal Amount:** Up to \$1 million
- **Interest Rate:** Negotiated with lender, but may not exceed SBA maximum (principal amount < \$50,000, prime + 6.5%; principal amount \$50,000 <, prime + 4.75%); may be fixed or variable
- **Collateral:** Lenders are not required to take collateral for loans up to \$25,000; may use their existing collateral policies for larger loans
- **Deadline:** Ongoing program, but on January 1, 2021 the maximum principal amount will decrease to \$350,000

— **How to apply:** Apply via a bank that is approved for the SBA 7(a) loan program

- Lender primarily uses its own forms, plus SBA Form 1919

— **Additional information:** SBA Small Business Resource Guide, New York City Edition  
[https://www.sba.gov/sites/default/files/files/resourceguide\\_3135.pdf](https://www.sba.gov/sites/default/files/files/resourceguide_3135.pdf)

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# Other CARES Act Small Business Assistance

## Additional Information

- US Senate Committee on Small Business & Entrepreneurship “Small Business Owner’s Guide to the CARES Act” ([https://www.sbc.senate.gov/public/\\_cache/files/9/7/97ac840c-28b7-4e49-b872d30a995d8dae/F2CF1DD78E6D6C8C8C3BF58C6D1DDB2B.small-business-owner-s-guide-to-the-cares-act-final-.pdf#page=6&zoom=100,0,482](https://www.sbc.senate.gov/public/_cache/files/9/7/97ac840c-28b7-4e49-b872d30a995d8dae/F2CF1DD78E6D6C8C8C3BF58C6D1DDB2B.small-business-owner-s-guide-to-the-cares-act-final-.pdf#page=6&zoom=100,0,482))

## Small Business Debt Relief Program

- **What it does:** Provides immediate relief to small businesses with on-disaster SBA loans, including 7(a), 504, and microloans. **SBA will pay all loan payments, including principal, interest, fees and expenses under these loans for six months.**
- **Who should consider it:** Small businesses who already have other SBA loans outstanding.

## Bankruptcy Protection for Small Businesses

- **What it does:** Expands the threshold for qualifying as a “small business debtor” under Chapter 11 of the Bankruptcy Code, which can simplify reorganization procedures and reduce expenses. Businesses with aggregate debts up to \$7.5 million may qualify (up from ~\$2.7 million currently).
- **Who should consider it:** Small businesses who are considering bankruptcy and are not able to negotiate forbearance or forgiveness of outstanding debts of the business. Consider the range of other programs available under these exceptional circumstances before making a bankruptcy determination.

## Student Loan Repayment

- **What it does:** Allows employers to repay student loans of employees on a tax-free basis for employees (but not deductible by businesses).
- **Who should consider it:** Businesses repaying student loans of employees.

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## Other CARES Act Small Business Assistance (cont'd)

### Employee Retention Tax Credit

- **What it does:** Provides a refundable payroll tax credit for 50 percent of wages paid to certain employees (up to \$10,000 per eligible employee) through December 31, 2020
- **Who should consider it:** Small businesses whose operations have been fully or partially suspended due to COVID-19; small businesses who have experienced a greater than 50 percent reduction in quarterly receipts, measured on a year-over-year basis **other than** businesses who are receiving assistance under the Paycheck Protection Program

### Delay of Payment of Employer Portion of Payroll Taxes

- **What it does:** Delays the due date of the employer portion of 2020 payroll taxes (50% due 12/31/2021, 50% due 12/31/2022)
- **Who should consider it:** All businesses with employees **other than** businesses who are receiving assistance under the Paycheck Protection Program

### Increased Flexibility of Tax Deductions

- **What it does:** For 2020 tax year, lifts restriction that net operating loss carryovers could be used to offset a maximum of 80% of a taxpayer's taxable income. For 2019 and 2020 tax years, limitation on deductibility of interest expense is increased to 50% from 30%. 2018, 2019 and 2020 losses may be carried back five years
- **Who should consider it:** Owners with business losses in the current year applying those losses to personal income; owners who deduct interest expense; owners with gains to offset in prior years



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