



News & Types: Client Advisories

# Payroll Protection Program SBA Loans UPDATED

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Practices: Corporate, Finance & Acquisitions, Employment, Labor & Benefits

## EXECUTIVE SUMMARY

Small businesses with no more than 500 employees may take advantage of expanded eligibility criteria for the Small Business Administration (“SBA”) Paycheck Protection Program (“PPP”) loans. The Department of the Treasury released guidance the night of April 6, 2020 that clarified that, while the affiliation rules apply for determining the number of employees, a business and its affiliates is considered a small business and eligible for a PPP Loan if they have 500 or less employees residing in the U.S.

**The clarification greatly expands the availability of PPP Loans to foreign owned U.S. subsidiaries. Updated information is indicated in bold and underline.**

## PPP LOAN BACKGROUND

The CARES Act authorizes PPP loan availability for certain small businesses (those that do not employ more than 500 employees) between March 1, 2020 and December 31, 2020.

Depending upon the North American Industry Classification System (“NAICS”) code of the potential borrower, certain businesses can have up to a maximum of 1,500 employees and still qualify for a PPP loan.

**The Department of Treasury provided more clarification in a Frequently Asked Questions publication the night of April 6, 2020 (“FAQ”) that a business is eligible for a PPP loan if:**

- **it has 500 or fewer employees and its employees’ principal place of residence is in the U.S. (“CARES Act Small Business”); or**
- **its business meets the SBA employee-based or revenue-based size standards for its NAICS code (“Small Business Concern”).**

The affiliation rules for PPP Loans were not waived for any potential borrower other than those with NAICS code starting with 72 (accommodation and food services). This means that a potential borrower with other NAICS codes will need to count employees of it and any of its affiliates **to determine if it is a CARES Act Small Business or Small Business Concern.**

**However for CARES Act Small Businesses, only employees residing in the U.S. are counted for affiliation purposes based upon the FAQ.**

In general, another entity is an affiliate if there is common ownership/control of 50% or more. For example, a U.S. subsidiary that is 100% owned by a foreign parent would count the U.S. subsidiary's employees, the employees of the foreign parent residing in the U.S. and the employees residing in the U.S. of any other entity the foreign parent owns 50% or more.

**As the FAQ was recently issued by the Treasury and there are some inconsistencies between current rules and regulations, some SBA lenders may disagree with providing PPP loans based upon counting employees only residing in the U.S.**

**For Small Business Concerns, the traditional SBA rules apply including the affiliation rules and all employees of a business and its affiliates would be counted, not just those employees residing in the U.S.**

**The FAQ can be found here (link).**

The SBA provided guidance in the form of an Interim Final Rule ("Interim Rule") in the evening of April 2, 2020, that can be found at (link).

The SBA provided the new following form for PPP loans the night of April 2, 2020 that can be found at (link).

The Interim Rule provides that PPP loans will have an interest rate of 1% and mature in two years.

PPP loan proceeds can be used for:

1. 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;
2. employee salaries;
3. mortgage interest payments;
4. rent (including rent under a lease agreement);
5. utilities; and
6. any other debt obligations that were incurred before the covered period.

Other key points:

- Collateral and personal guarantee requirements are waived.
- Complete deferment of PPP loan payments will now be up to 6 months (SBA decided 6 months was the limit and not up to one year). Interest accrues during the 6 month period.
- Loan forgiveness for 8 weeks after the loan is disbursed is possible for up the amount spent by the borrower on qualifying expenses until June 30, 2020, but this is subject to reduction based on the number of employees that remain employed according to a formula. In addition, the Interim Rule provides that only up to 25% of the PPP loan can be forgiven for non-payroll expenses.
- Supporting documentation must be provided to obtain a PPP loan and to apply for loan forgiveness.

Masuda Funai is individually consulting with employers that are deciding on obtaining PPP loans and/or possible layoffs or reductions in force and the impact those decisions could have on the PPP loan and loan forgiveness.

#### **MASUDA FUNAI'S GUIDANCE**

**PPP Loans are first come first served.** If you qualify as a CARES Act Small Business or a Small Business Concern, please reach out to your lender if you are interested in applying for a PPP loan. PPP loans are first come, first served, and funds under the PPP loan program are quickly being allocated to borrowers under the program.

Please contact your relationship attorney or a member of the Employment Group with any questions regarding the Families First Act, CARES Act, or other legislation including questions related to compliance with the Americans With Disabilities Act, OSHA, the Fair Labor Standards Act, wage and hour compliance, sick leave, working from home policies, immigration, delayed litigation, and any business contract issues, such as the application of force majeure provisions.

Please contact Jennifer R. Watson or a member of the Corporate, Finance or Acquisition Group with any questions regarding PPP loans.