

SBA Paycheck Protection Program: Is Your Business Eligible?

By Callie Whatley, George Morrison and Jennifer Leaphart

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The Coronavirus Aid, Relief, and Economic Security Act, or “CARES Act,” is anticipated to be signed into law by the end of this week. The CARES Act adds a new program to the arsenal of Small Business Administration (“SBA”) Section 7(a) loans: the Paycheck Protection Program (“PPP”), which is intended to provide greater benefits to a greater number of recipients than existing SBA Section 7(a) loan programs and is described in greater detail [here](#). In general, the PPP loan program provides businesses with an advantageous platform to borrow money to cover costs to continue to operate and retain employees during this crisis.

Summarized below are some key considerations you should keep in mind as you determine whether your business may be eligible to apply for a PPP loan. We anticipate that the SBA will provide further guidance on PPP loans, including rules pertaining to the eligibility of businesses for these loans. The following summary is intended to be a useful guide in making an initial determination on whether your business could qualify for a PPP loan, based upon the CARES Act, as passed by the Senate, and existing SBA regulations, while we await SBA guidance.

The PPP loan program covers businesses with no more than the greater of: 500 employees or, with respect to a business that operates in an industry for which the SBA has issued a size standard for number of employees, the size standard for number of employees applicable to such business. In addition, individuals operating under a sole proprietorship, independent contractors and certain self-employed individuals are eligible. In making this determination, businesses must ask the following questions.

Who counts as an “employee”?

- The CARES Act explicitly contemplates that employees include active full-time and part-time employees, as well as individuals employed on some other basis. In counting employees, based upon existing SBA guidance, you should generally include all temporary employees, leased employees, and employees on leave. Any person on the payroll must be included as one employee regardless of hours worked or temporary status.
- Per existing SBA guidance, the SBA will consider the totality of the circumstances, including criteria used by the Internal Revenue Service for federal income tax purposes, in determining whether individuals are employees of a business.
- Volunteers (*i.e.*, individuals who receive no compensation, including no in-kind compensation, for work performed) are *not* considered employees.

How is the number of employees calculated?

- According to general SBA guidance, in determining whether a business is “small” for purposes of qualifying for SBA benefits as a “small business concern,” you reference a business’s average number of employees, calculated as the average number of individuals employed for each pay period over the business’s preceding completed 12 calendar months. Given the PPP loans are extended to more than just traditional small business concerns, it is unclear under the CARES Act if the employee count is the actual number of employees at a given point in time or if an averaging technique should be used.
- The text of the CARES Act does not suggest an averaging technique is used to determine the number of employees counted, but it’s likely that the SBA may default into its traditional rules for employee counting. The SBA may provide further guidance on eligibility, and the lenders that extend these PPP loans will likely provide clarity by providing their own requirements in determining if a business is eligible for a PPP loan.

Do you include employees of your affiliates?

- Generally, you do include affiliates’ employees. Under existing SBA regulations, affiliation with another business is based on the power to control, whether exercised or not. The control provisions in the SBA regulations are complex, and the SBA considers various factors, including ownership, management, previous relationships with or ties to other businesses, and contractual relationships.
- Under the CARES Act, certain businesses are permitted to waive the affiliation rules in determining their eligibility for a PPP loan. These businesses are generally (i) those in the restaurant or hospitality industry (*i.e.*, those assigned a North American Industry Classification System code beginning with 72), (ii) those operating as franchises and assigned a franchiser identifier code by the SBA, and (iii) those receiving financial assistance from a small business investment company licensed by the SBA.
- You should carefully evaluate your particular situation if you believe you may be affiliated with other entities.

Who makes the determination that your business is eligible and on what basis?

- The CARES Act provides eligible lenders with authority to make and approve PPP loans.
- The CARES Act explicitly provides that these lenders will consider if a business had employees for whom that business paid salaries and payroll taxes. In conjunction with SBA guidance, we expect that these lenders will provide requirements on the documentation they will require to confirm that your business is eligible for a PPP loan.

At what time is the number of employees determined?

- The CARES Act is silent on specific timing of determination on employee count. Pending specific SBA guidance on these PPP loans, existing regulatory guidance suggests the determination may be made at the time of the loan application.
- Note that one of the particularly beneficial aspects of the PPP loan program is loan forgiveness. The amount eligible for forgiveness, however, is generally reduced on a proportionate basis to a business's reduction in full-time employees. Prior to applying for a PPP loan, you should consider the effect any workforce reduction may have on the amount of such loan that could otherwise be eligible for forgiveness.

To discuss this further, please contact:

Any of the attorneys listed below or the Burr & Forman attorney with whom you normally consult.

[Callie Whatley](mailto:cwhatley@burr.com) at cwhatley@burr.com or (205) 458 5441

[George Morrison](mailto:gmorrison@burr.com) at gmorrison@burr.com or (843) 973 6862

[Jennifer Leaphart](mailto:jleaphart@burr.com) at jleaphart@burr.com or (803) 753 3252

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