



ACLU and Others File Lawsuit Against SBA Challenging SBA Guidance that Businesses and Individuals Are Not Eligible for a PPP Loan if They Have Criminal History

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Banks have loaned over \$500 billion in PPP loans under the CARES Act, and to over 4.6 million businesses and self-employed individuals. These PPP loans are critical for these businesses and individuals – and their employees – to survive the economic devastation wrought by the COVID-19 pandemic.

PPP loans are administered by the U.S. Small Business Administration (SBA), and the SBA has issued a steady stream of administrative guidance concerning its interpretation of the Payroll Protection Program. Some of this SBA guidance is based on the agency's interpretation of the CARES Act, but where the CARES Act does not support this agency's guidance.

An example includes the SBA's announced administrative position that individuals and businesses with a criminal history cannot qualify for a PPP loan.

This began with the SBA's issuance of initial interim guidance in early April that anyone "engaged in any activity that is illegal under federal, state, or local law" cannot qualify. This broad statement by SBA can include every imaginable violation of any criminal law – including a parking ticket. In this initial interim guidance, the SBA also specifically stated that a business cannot qualify for a PPP loan if "an owner of 20 percent or more of the equity of the applicant is incarcerated, on probation, on parole; presently subject to an indictment, criminal information, arraignment, or other

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means by which formal criminal charges are brought in any jurisdiction; or has been convicted of a felony within the last five years.

The SBA then added language to the form of PPP loan application (and as updated) where the PPP loan applicant must certify whether (A) the applicant (if an individual) or any individual owning 20% or more of the equity of the applicant [is] subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction, or presently incarcerated, or on probation or parole, and whether (A) within the last 5 years, for any felony involving fraud, bribery, embezzlement, or a false statement in a loan application or an application for federal financial assistance, or within the last year, for any other felony, has the applicant (if an individual) or any owner of the applicant 1) been convicted; 2) pleaded guilty; 3) pleaded nolo contendere; or 4) been placed on any form of parole or probation (including probation before judgment).

Finally, the SBA issued a series of updated “Frequently Asked Questions” and related answers from the SBA and which include the following:

Question: I need to request a loan to support my small business operations in light of current economic uncertainty. However, I pleaded guilty to a felony crime a very long time ago. Am I still eligible for the PPP?

Answer: Yes. Businesses are only ineligible if an owner of 20 percent or more of the equity of the applicant is presently incarcerated, on probation, on parole; subject to an indictment, criminal information, arraignment, or other means by which formal criminal charges are brought in any jurisdiction; or, within the last five years, for any felony, has been convicted; pleaded guilty; pleaded nolo contendere; been placed on pretrial diversion; or been placed on any form of parole or probation (including probation before judgment).

Due to these interpretations of the CARES Act by the SBA, the American Civil Liberties Union (ACLU) and others, and on behalf of named individuals and small businesses, filed a lawsuit against the SBA in United States District Court in Baltimore, Maryland seeking an order and injunction from the court that the SBA’s “criminal history” interpretation of the CARES Act is invalid, and that businesses and self-employed individuals with a criminal history can qualify for PPP loans. If the United States District Court grants the relief sought by the ALCU and parties in this lawsuit, Americans who may have some form of “criminal history” may be able to receive a PPP loan to help their business – and their employees – get through this exceptionally difficult time in U.S. history. Interested individuals and businesses should pay close attention to this lawsuit.

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