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Summaries of:

I. Economic Injury Disaster Loan (EIDL) Program and Emergency EIDL Grants/Advances under the CARES Act (Sections 1107 and 1110) as enacted on March 27, 2020.

II. Paycheck Protection Program Loan ("PPP Loan") Key Provisions under the CARES Act (Sections 1102, 1106, 15010 and 15011 of the CARES Act), and under the Interim Final Rule issued by the Small Business Administration regarding "Business Loan Program Temporary Changes; Paycheck Protection Program" on April 2, 2020.

I. EIDL Program and Emergency EIDL Grants/Advances

Below is a summary of the key provisions of the EIDL program that already exists under Section 7(b) of the Small Business Act (15 U.S.C. 636(b)) and how the CARES Act that was signed into law by the President on March 27, 2020 expands the EIDL program, provides for emergency EIDL grants/advances and works with the Paycheck Protection Loan ("PPP Loan") Program as summarized below this April 2, 2020 update.

A. EIDL Program

What is the EIDL Program: The EIDL program is an existing loan program under Section 7(b) of the Small Business Act (15 U.S.C. 636(b)) that provides for low-interest federal loans to alleviate economic injury to small businesses and private nonprofit organizations experiencing economic injury as a result of a natural disaster. Section 1110 of the CARES Act expands the EIDL program to cover emergency declarations (i.e., the President's emergency declaration regarding COVID-19) in additional to disasters. An EIDL loan is a working capital loan of up to $2,000,000 and with a maximum maturity of 30 years. EIDL loans can be used to pay fixed debts, payroll, accounts payable and other bills that could have been paid had the disaster or emergency not occurred. Interest rates on EIDLs are 3.75% for small business concerns and 2.75% for private nonprofit organizations.

Eligible Entities: Small business concerns and private nonprofit organizations. The definition of "small" is determined by the size of a business' workforce and revenue and depends on the industry in which the business primarily operates. The SBA's Table of Size Standards, available on the SBA's website, provides the relevant workforce or revenue size limit for each industry based on NAICS codes. The SBA also offers a Size Standards Tool on its website. With respect to private nonprofit organizations, whereas PPP Loans are available only to those that are tax-exempt under Sections 501(c)(3) (charities) and 501(c)(19) (veterans organizations) of the Internal Revenue Code, EIDLs are available to all eligible private nonprofit organizations exempt under Section 501(c), including trade associations, advocacy organizations, unions and social clubs.

In addition to small business concerns and private nonprofit organizations that meet the applicable industry size standard, Section 1110 of the CARES Act expands the range of eligible entities for EIDLs from January 31, 2020 through December 31, 2020 to also include the following:

1. A business with not more than 500 employees,
2. An individual who operates under a sole proprietorship, with or without employees, or as an independent contractor,
3. A cooperative with not more than 500 employees,
4. An Employee Stock Ownership Plan (ESOP) with not more than 500 employees, and
5. A tribal small business concern with not more than 500 employees.

Approval Requirements: To be approved for an EIDL, applicants must demonstrate that they satisfy certain criteria as set forth in Section 7(b) of the Small Business Act (15 U.S.C. 636(b)) and as required by the Administrator of the SBA. However, under the CARES Act, the following criteria under Section 7(b) are waived:

1. Personal guaranties on loans of $200,000 or less during the period January 31, 2020 through December 31, 2020 (personal guaranties may be required for loans greater than $200,000),
2. Applicant to be in business for the one-year period before the disaster, except that no waiver may be made for a business that was not in operation prior to January 31, 2020,
3. Applicant to be unable to obtain credit elsewhere,
4. Applicant to provide tax returns to the lender (instead, the lender may base approval solely on the applicant's credit score), and
5. Business to be located in a state or county that received an economic injury disaster declaration from the SBA.

EIDLs and Paycheck Protection Program Loans: An eligible entity can apply for both an EIDL and a PPP Loan, but if the eligible entity receives both loans, the eligible entity must use the EIDL for a purpose other than covering payroll costs or other uses permitted for a PPP Loan. In deciding to apply for an EIDL, a PPP Loan or both, applicants should consider the following:

1. Eligibility Requirements – Somewhat differing eligibility requirements under each program.
2. Maximum Loan Amounts – EIDLs have a maximum loan amount of $2,000,000, and PPP Loans have a maximum loan equal to the lesser of (A) 2.5x average monthly payroll in the prior 12 months or (B) $10,000,000.
3. Loan Forgiveness – EIDLs are not forgivable, and PPP Loans are potentially forgivable in full or in part.
4. Maximum Maturity – EIDLs have a maximum maturity of 30 years, and PPP Loans will be offered with a maturity of 2 years (with the possibility of no loan payment for up to the first 6 months). We understand that the maturity for EIDLs will be determined for a particular borrower in the underwriting process.
5. Interest Rates – EIDL interest rates are 3.75% for businesses and 2.75% for private nonprofit organizations, and PPP Loan interest rates will be offered at 1%.
6. Collateral/Personal Guaranties – EIDLs may require collateral for loans greater than $25,000 and may require a personal guaranty for loans greater than $200,000. For PPP Loans, no collateral or personal guaranties are required.
7. Non-Discrimination Laws Apply – For both EIDLs and PPP Loans, borrowers will be required to certify compliance "whenever applicable" with federal laws and regulations prohibiting discrimination in employment on the basis of race, national origin, sex (which the EEOC interprets to include sexual orientation and gender identity), religion, and age, even if the borrower is otherwise exempt from such laws and regulations because of having fewer than 50 employees. Based upon concerns voiced by churches and religious nonprofit organizations, the Interim Final Rule seeks to assure such organizations that they will not be surrendering any applicable religious exemptions to antidiscrimination laws by participating—stating that the SBA nondiscrimination regulations would not apply to them regarding limiting employment or membership to fellow religious adherents. It also promises that further guidance will be promptly issued "with regard to religious liberty protections under the program."

B. Emergency EIDL Grants/Advances

What is an Emergency EIDL Grant/Advance: Because the EIDL approval process can take up to a month, Section 1107(a)(6) of the CARES Act provides that an eligible entity that applies for an EIDL between January 31, 2020 and December 31, 2020 may request a grant/advance of up to $10,000, to be disbursed to the applicant within three days after the SBA receives the EIDL application. Grants/advances are only available for EIDL applications related to COVID-19. To be eligible for a grant/advance, an applicant must self-certify as to EIDL eligibility. Grants/advances may be used for the following:

1. Providing paid sick leave to employees unable to work due to the direct effect of COVID-19,
2. Maintaining payroll to retain employees unable to work due to the direct effect of COVID-19,
3. Meeting increased costs to obtain material unavailable from the applicant's original source due to interrupted supply chains,
4. Making rent or mortgage payments, or
5. Repaying obligations that cannot be met due to revenue losses.

Repayment: A grant/advance does not need to be repaid, even if the SBA ultimately denies an eligible entity's EIDL application.

How Do an EIDL, an Emergency EIDL Grant/Advance and a PPP Loan Work Together: If an eligible entity receives an EIDL after January 31, 2020, the EIDL may be refinanced with a PPP Loan. If an eligible entity receives an emergency EIDL grant/advance and subsequently receives a PPP Loan, the grant/advance shall be subtracted from the permissible loan forgiveness amount of the PPP Loan.

II. PPP Loan Program

A. Section 1102 PPP Loans

What this Law is Part of: Section 1102 of the CARES Act amends Section 7(a) of the Small Business Act (15 U.S.C. § 636(a)) (the Small Business Act is the law under which SBA loans are made).

Loan Guarantor / No Personal Guarantee or Collateral: Payroll Protection Program loans are 100% guaranteed by the federal government during the first year; after that, the guarantee reduces to 75% (or a different percentage depending on certain factors). NO PERSONAL GUARANTEE OR COLLATERAL IS REQUIRED FOR PPP LOANS. There is no recourse against any individual shareholder, member or partner of an eligible recipient of a covered loan for nonpayment of any covered loan, except to the extent that such shareholder, member or partner uses the covered loan proceeds for a purpose not described under "Permitted Use of PPP Loan Proceeds" below.

Definition of "Employee": "Employee" includes individuals employed on a full-time, part-time or other basis.

When PPP Loans are Available: PPP loans may be made during the period from Feb. 15, 2020 through June 30, 2020 (it is not clear how loans made between Feb. 15, 2020 and March 27, 2020, the day the CARES Act and the PPP Loan program were enacted, will be treated as PPP Loans, other than through refinancing as PPP Loans). PPP Loans are available on a first-come, first served basis. Applications for PPP Loans may be submitted beginning on April 3, 2020.

Who Can Get a PPP Loan:

1. You are eligible for a PPP loan if you have 500 or fewer employees whose principal place of residence is in the United States (or whatever greater separate limit, if any, on number of employees is established for your specific industry), you were in operation on February 15, 2020 and either had employees for whom you paid salaries and payroll taxes or paid independent contractors, as reported on a Form 1099-MISC, <u>and</u> you are either:
    - A. A business entity (such as a corporation, partnership, or LLC), a non-profit organization exempt under Section 501(c)(3) (charities) or 501(c)(19) (veterans organizations) of the Internal Revenue Code, or a tribal business concern described in Section 31(b)(2)(C) of the Small Business Act (15 U.S.C. §681), or
    - B. A small business concern as defined in Section 3 of the Small Business Act and subject to the SBA's affiliation rules unless specifically waived in the CARES Act (see note below).
2. You are also eligible for a PPP loan is you are an "eligible self-employed individual" as defined under the CARES Act (includes a sole proprietor, a partner in a partnership, an independent contractor, etc.) and you were in operation on February 15, 2020.

Notes:
(1) The SBA's Table of Size Standards, available on the SBA's website, provides the relevant limit on number of employees for each industry based on NAICS codes. Not all industries have a "number of employees"-based limit in the Table of Size Standards, so for those industries that do not, the "500 or fewer employees" standard applies.
(2) For employers in the hospitality and accommodation industry (NAICS Code 72), the "500 or fewer employees" standard is applied <u>per location</u> rather than across all locations.
(3) Affiliation rules under the Small Business Act apply to non-profits for PPP loans in the same way as they generally apply to other eligible borrowers.
(4) Affiliation rules are waived for (A) franchises, (B) employers in the hospitality and accommodation industry (NAICS Code 72), and (C) companies receiving financial assistance from small business investment companies licensed under Section 301 of the Small Business Act.
(5) Further guidance on the applicability of the affiliation rules has been promised by the SBA.

From What Lenders Will PPP Loans be Made: Any approved SBA lender. The CARES Act includes provisions for rapid approval of additional lenders, including banks, credit unions insured under the Federal Credit Union Act (12 U.S.C. §1752), Farm Credit System lenders and other lenders. Also, lenders will have delegated authority to approve loans to speed up the time from application to advance of funds.

Permitted Use of PPP Loan Proceeds: The proceeds of the loans are to be used to cover:

1. "Payroll costs", which include
    - A. For business entities and non-profits:
        1. salary, wages, commissions or similar compensation,
        2. cash tips or equivalent compensation,
        3. paid leave (vacation, parental, family, medical, sick),
        4. separation pay,
        5. payments for group health benefits and insurance premiums,
        6. payments of retirement benefits, and
        7. payments of state and local taxes assessed on employee income.
    - B. For eligible self-employed individuals: The sum of payments of any compensation or income to a sole proprietor or independent contractor that is a wage, commission, income or net earnings from self-employment, or similar compensation, and that is not more than $100,000/year, as prorated for the "covered period".

    Note: "Payroll costs" do not include:
    - A. Compensation of an employee in excess of annual salary of $100,000/year as prorated for the "covered period",
    - B. FICA and railroad retirement tax imposed or withheld on employee compensation between February 15, 2020 and June 30, 2020,
    - C. Income taxes required to be withheld from employees,
    - D. Any compensation of an employee whose principal residence is outside the United States,
    - E. Qualified sick leave wages for which a credit is allowed under Section 7001 of the Families First Coronavirus Response Act ("FFCRA"), or
    - F. Qualified family leave wages for which a credit is allowed under Section 7003 of the FFCRA,
2. Costs for continued group health insurance benefits during periods of paid sick, family or medical leave, and insurance premiums,
3. Employee salaries, commissions or similar compensation,
4. Interest on any mortgage loans, but not including any prepayment or payment of principal,
5. Rent, including under any lease agreement,
6. Utilities,
7. Interest on any other debt obligations that were incurred before 2/15/2020, and
8. Refinancing an EIDL loan made between January 31, 2020 and April 3, 2020. **Note:** If your EIDL loan was used for payroll costs, your PPP Loan must be used to refinance your EIDL loan.

"Credit Elsewhere" Requirement is Waived: The "credit elsewhere" requirement, i.e., that the borrower is unable to obtain credit from other sources, is waived for PPP Loans.

Certifications and Acknowledgements of Borrower Regarding Use of Funds and Duplicate Loans: Among other things, the borrower must certify that it has not received an EIDL or other loan under Section 7(a)(2) of the Small Business Act for the purpose of paying payroll costs or other allowable uses for PPP Loans. The borrower must also make a good faith acknowledgement that, among other things:

1. The loan is necessary to support ongoing operations in view of the current uncertain economic conditions,
2. Funds will be used to retain workers and maintain payroll or make mortgage, lease and utility payments,
3. That the borrower understands that the borrower (and an individual shareholder, partner or member who misuses PPP Loan funds) can be held legally liable for knowing use of PPP Loan funds for unauthorized purposes, including charges of fraud, and
4. During the period from February 15, 2020 through December 31, 2020, the borrower has not received and will not receive another PPP Loan.

Note: There is relief for companies that have already laid off employees or reduced salaries to the extent employees are rehired or salaries are restored by June 30, 2020 – see below.

Maturity, Interest Rate, Payment Deferral: PPP Loans may be offered with up to a 2-year maturity (although the CARES Act authorizes up to 10 years) from the application date (to the extent not forgiven, see below) and at interest rates of 1% per annum (under the CARES Act, interest was capped at 4% per annum, but the SBA has set a lower rate). There is also deferral of payments for 6 months.

Counting the Number of Employees: For purposes of determining the number of employees, employees of affiliated companies are counted together (if affiliation rules apply). Affiliation is based on control between, or common control among, companies in the group (see 13 CFR §121.103), and control can be established through ownership, management, contractual rights and can even be indirect through third parties - essentially any circumstance that confers control in a legal or practical sense, including veto rights or other "negative control". This "control-affiliation" rule is the normal rule applied to SBA loans. There are some limited exceptions.

Maximum Loan Amount: The maximum loan amount is the lesser of:

1. $10,000,000 or
2. The sum of:
   - A. 2.5x the average total monthly payments by the borrower/applicant for "payroll costs" incurred in the 1-year period before (i.e., ending on) the date the loan is made (there is a special rule for payroll costs for seasonal employees), plus
   - B. The outstanding amount of any economic injury disaster loan that was made to the borrower/applicant on or after January 31, 2020 (i.e., those loans can be refinanced as PPP loans).

   Note: Relating to A above, there is a special rule for otherwise eligible applications that were not in business during the February 15, 2019 to June 30, 2019 period.

Calculation of Monthly Average "Payroll Costs": For purposes of determining the maximum loan amount for a borrower, monthly average payroll costs may be calculated as follows:

Step 1: Aggregate "payroll cost" (as described above) from the last 12 months for employees whose principal place of residence is in the United States.
Step 2: Subtract any compensation paid to an employee in excess of an annual salary of $100,000 and/or any amounts paid to an independent contractor or sole proprietor in excess of $100,000 per year.
Step 3: Divide the net amount from Step 2 by 12 to calculate monthly average payroll costs.
Step 4: Multiply the monthly average payroll costs from Step 3 by 2.5.
Step 5: Add the outstanding amount of any EIDL made between January 31, 2020 and April 3, 2020, less the amount of any EIDL Grant/Advance (described above) made in connection with an EIDL COVID-19 loan (because it does not have to be repaid).

Examples (from SBA's Interim Final Rule):

1. *No employees make more than $100,000; no EIDL loan or EIDL Grant/Advance*
   Step 1: Annual payroll: $120,000
   Skip Step 2 (not applicable)
   Step 3: Average monthly payroll: $10,000
   Step 4: x 2.5 = $25,000
   Skip Step 5 (not applicable)
   Maximum loan amount: $25,000

2. *Some employees make more than $100,000; no EIDL loan or EIDL Grant/Advance*
   Step 1: Annual payroll: $1,500,000
   Step 2: Subtract compensation amounts above annual salary of $100,000 (in this example, $300,000), leaves $1,200,000
   Step 3: Average monthly qualifying payroll: $100,000
   Step 4: x 2.5 = $250,000
   Skip Step 5 (not applicable)
   Maximum loan amount: $250,000

3. *No employees make more than $100,000; outstanding EIDL loan of $10,000*
   Step 1: Annual payroll: $120,000
   Skip Step 2 (not applicable)
   Step 3: Average monthly payroll: $10,000

Step 4: x 2.5 = $25,000
Step 5: Add EIDL loan of $10,000 = $35,000
Maximum loan amount: $35,000

4. *Some employees make more than $100,000; outstanding EIDL loan of $10,000*
Step 1: Annual payroll: $1,500,000
Step 2: Subtract compensation amounts above annual salary of $100,000 (in this example, $300,000), leaves $1,200,000
Step 3: Average monthly qualifying payroll: $100,000
Step 4: x 2.5 = $250,000
Step 5: Add EIDL loan of $10,000 = $260,000
Maximum loan amount: $260,000

Documentation to Support Loan Request: A borrower will be required to submit documentation as necessary to establish eligibility, such as payroll processor records, payroll tax filings, Form 1099-MISC, or income and expenses from a sole proprietorship, or if such records are not available, other supporting documentation such as bank records, sufficient to demonstrate the qualifying payroll amount.

Can a Borrower Obtain More Than One PPP Loan: No, eligible borrowers may obtain only one PPP loan, and therefore are encouraged to apply for the maximum amount for which they are eligible.

B. Loan Forgiveness (Section 1106 of the CARES Act):

Loan Forgiveness: PPP loans will be forgiven in an amount equal to the sum of the following costs incurred <u>and</u> payments made during the 8-week period beginning on the loan origination date (this may mean actual payments made plus accrued costs):

1. "Payroll costs" as defined above (this is the big item because it includes, among other things, salaries, wages, commissions and similar compensation and health insurance costs and premiums),
2. Interest payments on mortgage loans (mortgage on real or personal property) if the mortgage was in effect before 2/15/2020 ("covered mortgages"), not including prepayments or payments of principal,
3. Rent, if the lease was in effect before 2/15/2020 ("covered leases"), and
4. Payments for "covered utilities" (defined as payments for services for distribution of electricity, gas, water, transportation (it is unclear what is meant by "transportation" as a utility), telephone or internet access for which service began before 2/15/2020

Limits on Loan Forgiveness:

1. Loan forgiveness cannot exceed the principal amount of the loan (i.e., accrued interest might not be forgiven)
2. Not more than 25% of loan forgiveness may be attributable to non-payroll costs; in other words, to the extent more than 25% of a PPP loan is used for non-payroll costs, that excess will not be forgiven.
3. Independent contractors do not count as employees for purposes of loan forgiveness, because independent contractors can apply for their own PPP Loan.
4. The amount forgiven will be reduced <u>based on reductions in salary and wages</u> as follows: If an employee's salary or wages are reduced by more than 25% of the employee's total salary/wages during the most recent full quarter of the employee's employment, the reduction amount in excess of 25% will not be forgiven. However, it appears that loan forgiveness is not reduced by salary reductions of employees who received, during <u>any single pay period in 2019</u>, wages or salary at <u>an annualized rate</u> greater than $100,000.
5. The amount forgiven will be reduced based on <u>reduction in the number of employees</u> as follows: (A) The otherwise forgivable amount (as described under "Loan Forgiveness" above), <u>multiplied</u> by (B) the following fraction:

<u>Average # of full-time equivalent employees per month employed during the 8 weeks after the loan is made</u>
Either (at the borrower's election):
Option 1: the average number of FT equivalent employees per month for the period 2/15/2019 - 6/30/2019, or
Option 2: the average number of FT equivalent employees per month for the period 1/1/2020 - 2/29/2020

Note: To figure the average number of FT equivalent employees per month, use the average number of FT equivalent employees for each pay period in the month. Special rules apply for employers with seasonal workers.

Relief for employers who have laid off employees or reduced salaries: Loan forgiveness will not be reduced to the extent an employer who, between February 15, 2020 and April 26, 2020, has laid off or lays off employees and/or reduced salaries rehires them by June 30, 2020, and/or restores the salaries by June 30, 2020.

Relief for employers with tipped employees: Loan forgiveness is available for additional wages paid to tipped employees.

Documentation Required for Loan Forgiveness: The following documentation will be required to be submitted to the lender in order for a PPP loan recipient to receive loan forgiveness:

1. Payroll tax filings reported to the IRS,
2. State income, payroll and unemployment insurance filings,
3. Documents including cancelled checks, payment receipts, transcripts of accounts, or other documents verifying payments on covered mortgage obligations, covered lease obligations, and covered utility payments, and
4. Certification that:
   A. The documentation submitted is true and correct, and
   B. The amounts for which forgiveness is requested was used to retain employees, make interest payments on covered mortgage obligations, make payments of rent on covered lease obligations, and make covered utility payments, and
5. Any other documentation the SBA Administrator determines necessary.

C. Reporting by Borrowers (Sections 15010 and 15011 of the CARES Act):

Required Reporting: PPP Loan borrowers who are business entities and receive loans in excess of $150,000 will be required to file quarterly reports regarding uses of the loan funds, such as jobs retained/created, other uses, etc. Some of this information may become public information (though it is unclear to what extent information related to specific borrowers would become public). The first quarterly report will be due no later than May 12, 2020. It appears that some online method may be made available for reporting, but existing ways of reporting such uses for SBA loans can also be used.

If you have any questions about this summary or would like assistance with EIDL Loans, EIDL Emergency Grants/Advances, PPP Loans or other aspects of the CARES Act, the Families First Coronavirus Response Act, or other matters related to the effects of the COVID-19 emergency, please contact:

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