

Federal COVID-19 PRIMER

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INTRODUCTION

There is no avoiding it — this is a difficult time for businesses of all sizes and the people they employ. COVID-19's effect on the economy is dynamic and changing daily. People are worried, and that is *okay*. The fact is that we've weathered economic shocks in the past. We'll weather this one, too.

One thing we keep telling our clients is *do not panic*. We are in the very early stages of an economic shift. Few if any have the information they need, and much of the information that is available is incomplete, inaccurate, or short-sighted. In this environment, it is perfectly reasonable to want to make snap decisions, but that doesn't mean they are the right decisions. Business owners can pause, take a deep breath, and recognize that things will calm down. Things will get better.

We made this Primer to answer the questions you may have as a small business owner. We focus on the things you need to know right now by answering the following questions:

- What financial assistance is available to your business?
- What are the eligibility requirements for assistance and how do you apply for it?
- How do you communicate with your employees during this pandemic?
- What are the new changes to paid family and sick leave?

The assistance, guidance, and rules affecting small businesses will continue to change over the coming months, weeks, and days. We will provide updates as new information becomes available. If you have any questions or would like to speak to one of our attorneys, please reach out to nic.turiciano@milgromlaw.com.



FINANCIAL ASSISTANCE

Businesses across the country are in need of financial assistance in the form of loans and grants to meet their payroll, rent, and mortgage obligations. Fortunately, there are existing federal and state programs in place that provide small businesses with loans during times of disaster. Additionally, the federal government will soon roll out financial assistance in the form of a \$2 trillion stimulus package.

This section covers available assistance from (1) the federal government's \$2 trillion CARES Act, (2) the Small Business Association ("SBA") Disaster Loan program, (3) the SBA Express Bridge Loan program, and (4) funding from private sources. Businesses can apply for both SBA Disaster Loans and payroll assistance loans under the CARES Act, but only so long as the applications are not duplicative.¹ More forms of assistance will continue to become available as the COVID-19 pandemic matures. Please reach out to us if you have any questions about these sources of funding or opportunities that exist in your city or state.

FEDERAL CARES ACT STIMULUS PACKAGE

The federal stimulus package, known as the CARES Act, will provide \$2 trillion in financial assistance to individuals, small businesses, and certain specific sectors such as the airline industry. The bill passed both houses of Congress and was signed into law by President Trump, but details about its implementation are still emerging. We will continue to provide updates as more information becomes available regarding how you can apply for federal assistance under the CARES Act on behalf of your business.

Has the Bill passed yet?

- The bill passed both houses of Congress and was signed into law by President Trump, but details regarding its implementation are still emerging.

Does it help our employees?

- Yes. Individuals earning less than \$75,000 per year will be entitled to a one-time relief payment of \$1,200 (or \$150,000 and \$2,400 in the case of a joint return).² This payment will be phased out by 5% of earnings over \$75,000, with no payment sent to individuals who earn more than \$99,000.³ Families will receive an additional \$500 per child.⁴ The Treasury has indicated that individuals can expect payments within 3 weeks if the IRS has their direct deposit information on file. Business owners should consider encouraging their employees to quickly file their 2019 tax returns and set up direct deposit with the IRS.

Does it help our small business in the form of loans?

- Yes. Under the CARES Act, the federal government will forgive loan proceeds allocated toward payroll, mortgage, lease, utility, and fixed debt payments, but the amount of forgiveness will be

¹ E.g. if you are applying for a payroll protection loan under the CARES Act, then you may not seek payroll assistance under an SBA disaster loan.

² CARES Act, Sec. 2201(a)

³ For example, an individual earning \$92,000 per year will receive \$350 under the bill (\$92,000 minus \$75,000 is \$17,000. \$17,000 times 0.05 is \$850. \$1,200 minus \$850 equals \$350).

⁴ <https://www.nytimes.com/2020/03/25/us/politics/coronavirus-senate-deal.html>



adjusted if the business lays off employees during the pandemic.⁵ The adjustment to loan forgiveness will be determined by comparing your historical employment data to the average number of full-time equivalent employees for the 8-week period beginning after the date of the loan's origination.^{6, 7} Generally speaking, for every employee that you lay off during the covered period, the amount of loans that will be forgiven will decrease. There are some nuances and exceptions to this rule, so we recommend that you speak with a lawyer prior to laying people off if you are anticipating loan forgiveness.

What is the interest rate?

- Interest rates on these loans will not exceed 4%.⁸

What is the process for loan forgiveness?

- A business is eligible for loan forgiveness by submitting an application with the lender servicing the loan. The application must: (1) verify the number of full-time employees, (2) verify payments on covered mortgage, lease and utility obligations, and (3) certify that the amount requested for forgiveness was used for permitted purposes.⁹
- The loan forgiveness will equal the amount spent by the borrower in the eight-week period after the loan origination date on the following items (not to exceed the original principal amount of the loan):
 - payroll costs (not to exceed \$100,000 of annualized compensation per employee);¹⁰
 - payments of interest on any mortgage loan incurred prior to February 15, 2020;¹¹
 - payment of rent on any lease in force prior to February 15, 2020;¹² and
 - payment on any utility for which service began before February 15, 2020.¹³
- Any amount outstanding after considering the amount forgiven will be repayable over a term not to exceed 10 years.
- The amount forgiven is not considered taxable income to the borrower.¹⁴

Will my loan's forgiveness be affected if I lay off or reduce compensation for employees?

- Yes. The amount your loan will be forgiven under the CARES Act will be decreased if you lay off employees or decrease their pay by more than 25% during the 8-week period beginning after the loan is awarded.¹⁵ The 25% reduction limit does not apply to any employee who earned an annualized rate of more than \$100,000 during any single pay period in 2019.¹⁶

⁵ CARES Act, Sec. 1102(a)(2)

⁶ Id.

⁷ For the purpose of determining payroll loan forgiveness, the employer may choose to use historical employment data for the periods of (1) February 15 to June 30, 2019, or (2) January 1 to February 29, 2020.

⁸ CARES Act, Sec. 1102(a)(2)

⁹ CARES Act, Sec. 1106(e)

¹⁰ CARES Act, Sec. 1102(a)(2)

¹¹ CARES Act, Sec. 1106(d)(3)

¹² Id.

¹³ Id.

¹⁴ CARES Act, Sec. 1106(i)

¹⁵ CARES Act, Sec. 1106(d)

¹⁶ CARES Act, Sec. 1106(d)(3)(B)



- In determining the amount your loan forgiveness will be reduced by, the CARES Act provides a calculation, [found here](#), for employee lay offs or decreases in employee pay. When can businesses expect to receive money?

What if I already laid off employees, but want to re-hire them?

- Your ability to qualify for loan forgiveness will not be affected if, by June 30, 2020, you re-hire any full-time equivalent employees that were laid off between February 15 and April 25, 2020.¹⁷

Who is administering the loans?

- Both SBA and FDIC insured banking partners are administering the loans.

How much funding can I expect to receive for my business?

- Your total loan amount will not exceed the smaller of either (1) your average monthly payments for payroll during the previous 12 months multiplied by 2.5, or (2) \$10,000,000.¹⁸ If your business is less than 12 months old, then you may use your average monthly payments for payroll during the period of January 1 to February 29, 2020.¹⁹

When and how can I apply for assistance?

- Secretary Mnuchin has stated a goal of implementing the loan application process by April 3, 2020. It is not yet clear exactly how business owners can apply for the loans. We will provide updates as this process becomes clearer.

When can businesses expect to receive money?

- Unfortunately, it is unclear at this time how long it will take for CARES Act assistance to be dispersed to qualifying businesses.

SMALL BUSINESS ADMINISTRATION DISASTER LOANS FOR BUSINESSES AFFECTED BY COVID-19

SBA Economic Injury Disaster Loans (“EIDLs”) are provided to small businesses negatively affected by emergency disasters. They are only made available during declared emergencies and provide up to \$2,000,000 loaned at low interest rates. These loans are administered by the SBA and are distinct from the pending CARES Act loans. These loans are available now.

How do I apply?

- You can [apply online through the Small Business Administration](#), but not before reading our guidance.

¹⁷ CARES Act, Sec. 1106(d)(5)

¹⁸ CARES Act, Sec. 1102(a)(2)

¹⁹ Id.



How do I know if my business qualifies for an SBA disaster loan?

- These loans are only available to small businesses. To qualify as a small business, the business must employ fewer than 500 employees. The SBA will also use discretion when making this determination. It may require your business to meet industry-specific metrics under the North American Industry Classification System (“NAICS”). The NAICS uses both annual receipts and number of employees as metrics. You can [use this link](#) to determine whether your company is a “small business” under the NAICS.²⁰
- Your business must have a tangible and significant *physical presence* in a declared disaster area. The SBA website allows you to [search which counties currently meet the criteria](#); most of the U.S. is included during this pandemic.
- Your business must be independently owned and operated.²¹ Generally this means that the business applying for the loan is not controlled by a parent corporation, but the SBA has wide latitude to interpret whether an entity is independently owned and operated.
- Enterprises that are *ineligible for SBA disaster loans include* casinos and racetracks, religious and charitable organizations, and certain agricultural enterprises.

How can the funds be used?

- Disaster relief funds are intended to be used to pay fixed debts, payroll, accounts payable, and other expenses that could have been paid had the disaster not occurred.

Can I receive an advance on the loan while my application is pending?

- Yes. Under the CARES Act, eligible applicants for EIDLs may request from their administrator an advance up to \$10,000.²² Advances will be provided within 3 days of receipt of the loan application.²³ You do not need to repay any amount received as an advance, even if you are ultimately denied for an EIDL.²⁴

What are the high-level terms of the disaster loans?²⁵

Credit Requirements

- Borrowers must have a credit history that is acceptable to the SBA.
- Applicants must show an ability to repay the loan.
- Collateral is required for all Disaster Loans exceeding \$25,000. The SBA takes real estate as collateral when it is available.

Interest Rates

- Interest rates are fixed for the term of the loan and dependent on circumstances, but in no case do they exceed 3.75%.

²⁰ The table is located at § 121.201.

²¹ When determining whether a business is independently owned and operated, the SBA will look to a wide range of factors including affiliates, ownership, and management. The determination is based on a totality of the circumstances. See: 13 C.F.R. § 121.103.

²² CARES Act, Sec. 1110(e)(3)

²³ CARES Act, Sec. 1110(e)(1)

²⁴ CARES Act, Sec. 1110(e)(5)

²⁵ U.S. Small Business Administration Fact Sheet — Economic Injury Disaster Loans: Colorado Declaration #16367



Repayment

- The SBA determines payment schedules and terms on a situational basis, but in no case will the term of the loan exceed 30 years.

Loan Limits

- SBA Disaster Loans are capped at \$2,000,000. The actual amount awarded is based on the actual economic damage caused to the business by the disaster, as determined by the SBA.

What documents do I need to provide to apply for an SBA loan on behalf of my business?²⁶

- A completed Business Loan Application [SBA Form 5](#).
- An [IRS Form 4506-T](#) submitted by each of (1) the business, (2) any principal who owns 20% or more of the business, (3) each general partner or managing member, and (4) any owner who has more than a 50% ownership interest in an affiliate.
- Complete copies, including all schedules, of the most recent federal tax returns for the business. If none exist, then you must provide an explanation. If the most recent federal tax return has not yet been filed, then you may provide a year-end profit and loss statement and balance sheet for the most recent year.
- A Personal Financial Statement [SBA Form 413](#) completed and signed by each principal owning 20% or more of the business and each general partner or managing member.
- A schedule of liabilities that lists all fixed debts using [SBA Form 2202](#).
- A filing of [SBA Form 1368](#) showing monthly sales figures.

SBA EXPRESS BRIDGE LOAN PROGRAM

SBA Express Bridge loans are intended to provide immediate assistance to small businesses while their Disaster Loan applications are pending. These loans are administered by qualifying banks and provided at higher interest rates than Disaster Loans.

How much can I borrow?

- SBA Express Bridge Loans (“EBLs”) are capped at \$25,000.

How can I use these funds?

- Proceeds can be used for ongoing obligations such as payroll, rent, and fixed debt payments.

Why would I choose this option?

- These loans can be issued and dispersed quickly and are designed to keep your business afloat while you apply for the SBA Disaster Loans outlined above.

²⁶ https://disasterloan.sba.gov/ela/Documents/Three_Step_Process_SBA_Disaster_Loans.pdf



What businesses can apply for EBLs?

- Any small business in the U.S. that is adversely affected by COVID-19 may apply so long as it was in operation as of March 13, 2020.

Can any lender service these loans?²⁷

- No. Only lenders who already had a “Supplemental Loan Guaranty Agreement SBA Express Program” in place with the SBA as of the date of the disaster may service these loans. Qualified lenders may only provide EBLs to businesses that they *already had a relationship with* on or before the date of the disaster. Contact your banking partner to find out whether they qualify for the program.

What are the terms of the loan?²⁸

- The loan must be structured as a term loan.
- The term may not exceed 7 years.
- The lender may require the borrower to prepay the outstanding principal on the loan if the borrower secures an SBA Disaster Loan.
- A lender may charge up to an additional 6.5% at their discretion over the [Prime rate](#).

What do I need to provide in the application?²⁹

- The business must have a credit score of at least 140 as issued by the SBA’s loan origination software.
- A personal credit score for each guarantor.
- An [IRS Form 4506-T](#) and an IRS tax Transcript.

PRIVATE AND LOCAL SOURCES OF FINANCIAL ASSISTANCE

Facebook Small Business Grants Program

- Facebook announced that it will provide \$100,000,000 in cash grants and ad credits to small businesses struggling as a result of the pandemic.
- At this time there are no additional details available, but [you can sign up for updates via this link](#).

Kiva Loans

- Kiva is a nonprofit lender that allows small businesses to solicit crowd-funded, 0% interest loans up to \$15,000. [Use this link](#) to apply to join the Kiva lending platform.

James Beard Foundation Food and Beverage Industry Relief Fund

- The James Beard Foundation is launching a fund to provide micro-grants to independent food and beverage businesses affected by COVID-19. [You can find more information here](#).

²⁷ <https://www.sba.gov/sites/default/files/2020-03/Express-Bridge-Loan-Pilot-Program-Guide-FINAL-3.25.20.pdf>

²⁸ <https://www.sba.gov/sites/default/files/2020-03/Express-Bridge-Loan-Pilot-Program-Guide-FINAL-3.25.20.pdf>

²⁹ <https://www.sba.gov/partners/lenders/7a-loan-program/pilot-loan-programs#section-header-8>



Are there local resources available?

- Yes. State and city-specific assistance is rolling out across the country but these are beyond the scope of this primer. Please contact us to find out whether there is any local assistance available in your area.

In this section we covered many of the sources of financial assistance currently available, but more options will continue to emerge. We will provide updates regarding the CARES Act, SBA Disaster and Emergency Bridge loans, private sources of financial assistance, and additional options as they become available.

EMPLOYMENT CONCERNS

The federal government has enacted new employment-related laws and issued guidance specific to the COVID-19 pandemic. This section details restrictions on how employers may communicate with their employees during a public health emergency as well as the Families First Coronavirus Response Act and its changes to the Family and Medical Leave Act.

COMMUNICATING WITH YOUR EMPLOYEES DURING A PANDEMIC

As you likely know, the Americans with Disabilities Act (“ADA”) prohibits all employers with 15 or more employees from asking their employees about medical history or disabilities.³⁰ In this turbulent time, it has become clear that these restrictions are inconsistent with broader public health goals during the pandemic. As a result, the Equal Employment Opportunity Commission (“EEOC”) and Centers for Disease Control (“CDC”) have issued specific guidance for employers during the COVID-19 outbreak.³¹

This guidance, the “Pandemic Preparedness In The Workplace And The Americans With Disabilities Act,” loosens some restrictions that are inconsistent with public health goals during a pandemic emergency. It is important to remember that generally *employers must keep confidential any medical information they learn about an employee or applicant*. Do not ask employees to provide medical information via any sort of public communication, such as a mass email or similar distribution.

What are best practices for managing employee questions and concerns related to COVID-19?

- Designate one person in your Human Resources department to serve as the point person for all COVID-19 related inquiries and let your employees know who that person is. If you do not have an HR department, we suggest designating the person who is in charge of onboarding new employees or someone in a managerial role. Be sure this individual is familiar with confidentiality obligations related to personal health information. We are happy to assist in advising on this issue.

What should I do if one of my employees is diagnosed with COVID-19?

- **KEEP THE IDENTITY OF THE INFECTED INDIVIDUAL CONFIDENTIAL.** You should require the individual to leave the premises if he or she has not already done so. Inform the rest of the team that they may have been exposed (but do not identify the sick employee) and request that they be attentive to potential symptoms.

³⁰ <https://www.eeoc.gov/facts/ada17.html>

³¹ https://www.eeoc.gov/eeoc/newsroom/wysk/wysk_ada_rehabilitaion_act_coronavirus.cfm



Can I require my employees to adopt infection-control practices?

- Yes. You may require your employees to adopt practices such as regular hand washing, coughing and sneezing etiquette, and to wear protective equipment.

May I ask my employee why they are absent from work?

- Yes. Asking an employee why they are absent from work is not prohibited by the ADA. You may always ask why your employee is absent from work.

May I ask my employee whether they have any pre-existing conditions that put them in a high risk category for COVID-19?

- No. Such a question may be defined as “disability-related” by the ADA and therefore not allowable.³²

If an employee feels ill, can I ask about their symptoms?

- Yes. You may ask employees about their illness to determine whether they have symptoms of COVID-19. These symptoms include fever, chills, cough, shortness of breath, and/or sore throat.³³

Can I take my employee’s temperature to determine if they have a fever?

- Yes. While medical examinations are ordinarily prohibited, the EEOC and CDC’s special rules during pandemics allow employers to take an employee’s temperature. The fact that an employee has a temperature (or exhibits other symptoms of COVID-19), however, is still subject to ADA *confidentiality* requirements.
- As a practical matter, an employee may be infected with COVID-19 without exhibiting recognized symptoms such as a fever, so temperature checks may not be the most effective method for protecting your workforce.

Can I send an employee exhibiting symptoms home?

- Yes. You may send home an employee if they have COVID-19 or exhibit symptoms of the illness.³⁴

If I am hiring right now, can I inspect applicants’ Form I-9s remotely?

- Yes, but *only* for workplaces that are currently operating remotely. Under normal circumstances, employers are required to inspect applicants’ Form I-9s in-person to confirm they may work in the U.S. The Department of Homeland Security announced that this is no longer a requirement during the COVID-19 pandemic.³⁵ Employers may view applicants’ I-9s remotely *so long* as they receive copies of the Form I-9s within three days. Additionally, employers should state “COVID-19” as the reason for the inspection delay in the Form’s Section 2 Additional Information field.

³² Inquiries and Exams, *supra* note 11, at § B.1 of “General Principles.” See also Conroy, 333 F.3d at 95-96 (citing ADA and relevant EEOC guidance and holding that an employer’s request for a “general diagnosis” from employees returning from sick leave absence is a disability-related inquiry regulated by the ADA because it “tend[ed] to reveal a disability”).

³³ https://www.eeoc.gov/facts/pandemic_flu.html

³⁴ https://www.eeoc.gov/facts/pandemic_flu.html

³⁵ <https://www.gands.com/en-us/knowledge-centre/blog-post/2020/03/20/form-i-9-compliance-change-physical-inspection-of-documents-is-not-required-during-the-pandemic>



If I am hiring right now, may I screen applicants for COVID-19?

- Yes. Employers may screen applicants for symptoms of the virus after giving the individual a conditional job offer, provided that the same screening is given to all entering employees in the same type of job.

What can I do if an applicant has or exhibits symptoms of COVID-19?

- You may delay their start date or withdraw their offer of employment.

FAMILIES FIRST CORONAVIRUS RESPONSE ACT

The federal government has responded to the COVID-19 pandemic by enacting new legislation affecting paid leave for your employees. The legislation provides extended leave in certain circumstances for employees affected by the pandemic. [COVERED EMPLOYERS NEED TO PLACE THIS POSTER IN A CONSPICUOUS LOCATION AT THEIR WORK FACILITY OR, IF WORKING REMOTELY, BY EMAILING THE POSTER TO EMPLOYEES OR PLACING IT ON AN INTERNAL OR EXTERNAL WEBSITE FREQUENTED BY YOUR WORKFORCE.](#)

What is it?

- President Trump signed the Families First Coronavirus Response Act (“FFCRA”) into law on March 18, 2020. The FFCRA goes into effect no later than April 2, 2020 and provides for (1) new paid leave criteria and (2) an expansion of the Family and Medical Leave Act (“FMLA”).

Who does the FFCRA apply to?

- The FFCRA applies to employers with *fewer* than 500 employees. The Department of Labor has the power to exempt certain businesses with fewer than 50 employees from having to comply with the law if doing so would jeopardize the viability of the business, but it is unclear at this time in which cases the DOL will do so.^{36,37}

What is the new paid leave criteria under the FFCRA?

- Employees who are (1) subject to a local, state, or federal quarantine, (2) who have been advised by a medical professional to self-quarantine, or (3) who are experiencing symptoms of COVID-19 and seeking medical treatment, are eligible for up to ten days (80 hours) of paid leave at their regular rate, not to exceed \$511 per day or \$5,110 total.³⁸
- Part-time employees are entitled to the “number of hours equal to the number of hours that such employee works, on average, over a 2-week period.”
- Employees who take leave to care for a loved one experiencing COVID-19 symptoms or to care for a child whose school is temporarily closed as a result of the virus are eligible for ten days (80 hours) of pay at two-thirds of their regular rate, not to exceed \$200 per day or \$2,000 total.

³⁶ <https://www.natlawreview.com/article/president-trump-signs-families-first-coronavirus-response-act-0>

³⁷ Additional DOL regulations clarifying this issue are expected in April of 2020. We will circulate an update at that time.

³⁸ <https://www.adp.com/resources/articles-and-insights/articles/e/eow-families-first-coronavirus-response-act.aspx?referrer=%7BE2920188-A93E-4144-90CE-442A865BF40B>



How has the Family and Medical Leave Act been expanded?

- Any individual employed by the employer for more than 30 days is eligible for 10 weeks of paid leave at the greater of the applicable minimum wage or two-thirds of their regular rate (though not to exceed \$200 per day or \$10,000 total) if the leave is needed to care for a child whose school is closed for a COVID-19 related reason.³⁹ The first 10 days, however, can be unpaid; the employee may elect to use accrued medical, personal, or vacation leave or sick leave during this time.⁴⁰
- THIS EXPANSION TO FMLA APPLIES TO EMPLOYERS WHO HAVE LESS THAN 50 EMPLOYEES.

Is FMLA time in additional to FFCRA time?

- Yes. Employees are entitled to a total of 12 weeks of job protected leave (i.e., leave under both FMLA and FFCRA is limited to 12 weeks total).⁴¹

Is the government sharing any of the cost of FFCRA?

- Right now, the federal government is not sharing any of the costs associated with the FFCRA, meaning that employers are on the hook for paying for their employees' leave under the Act.⁴² However, tax credits are available to employers affected by the FFCRA that effectively decrease the amount of federal employment taxes.

CONSIDERATIONS FOR PAYROLL MANAGEMENT

Many employers are finding it necessary to terminate employees in order to manage payroll costs at this time. Below are answers to some of the most commonly asked questions as well as some creative solutions for maintaining your workforce when your business is forced to close.

Can I terminate employees?

- Yes. All states except Montana are “at-will” employment states, meaning that unless the employee’s contract states otherwise, an employee can be fired for any reason or no reason so long as there is no discrimination. Many employers opt to offer some form of severance pay at termination, but there is no legal requirement to do so unless the employee’s contract specifically states they are owed severance pay.

Can I furlough employees or provide sabbatical leave?

- Yes. A furlough is when employees are required to take time off work with either no pay or reduced pay and with the expectation that their employment will restart at a later date.
- It is important that furloughed employees perform no work for their employer during a furlough, as even sending a single email may entitle an employee to a full day’s pay.
- Implementing a furlough or sabbatical leave requires the navigation of many federal and state specific

³⁹ https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave#_ftn1

⁴⁰ <https://www.adp.com/resources/articles-and-insights/articles/e/eow-families-first-coronavirus-response-act.aspx?referrer=%7BE2920188-A93E-4144-90CE-442A865BF40B>

⁴¹ Id.

⁴² <https://www.hrdiver.com/news/5-things-to-know-about-the-new-coronavirus-paid-leave-law/574611/>



laws and you should consult with an attorney before attempting to do so for your workforce. We are happy to assist you.

Can I fire and rehire employees?

- Yes. You may fire and rehire employees, but if you are applying for loan assistance under the CARES Act, it is important to consider that the termination of employees may affect the amount of loan forgiveness you can receive. The CARES Act provides that employees terminated between February 15, 2020 and April 26, 2020 but rehired by June 30, 2020 will not negatively affect the amount of loan forgiveness you can receive.⁴³

Can I withhold pay from employees?

- No. Employers are legally obligated to pay their employees. The Fair Labor Standards Act, in addition to analogous state laws, provides that even if an employer is having cash flow problems, it still must pay its employees their full wage and any overtime on their regularly scheduled payday.⁴⁴

Can I reduce my employees pay?

- Yes. You may reduce employee pay, however, there are several items to consider before doing so.
- For example, if you are applying for loan assistance under the CARES Act, decreasing employee pay by more than 25% may reduce the amount of loan forgiveness you can receive.⁴⁵ The 25% reduction limit does not apply to any employee who earned an annualized rate of more than \$100,000 during any single pay period in 2019.⁴⁶
- Decreasing pay to exempt salaried employees may cause them not to be exempt and thus require overtime pay. The amount necessary to continue an exempt classification varies state to state and you should consult with an attorney to avoid accidentally reclassifying your employees.

What is a work share program?

- Many states offer work share programs as an alternative to laying off employees. Generally, under a work share program employees' hours are reduced and the state will provide those employees a portion of their unemployment benefits while they are working reduced hours.
- This can help employers retain experienced staff and continue production until the economic situation improves. There are some disadvantages for employees, however, as generally they cannot take on a full-time job and remain eligible under the program. This means they will receive fewer hours and less income overall.
- Work share programs vary from state to state, and you should consult with an attorney and your state's specific rules to determine whether you meet eligibility requirements.

⁴³ CARES Act, Sec. 1106(d)(5)

⁴⁴ <https://www.dol.gov/agencies/whd/fact-sheets/70-flsa-furloughs>

⁴⁵ CARES Act, Sec. 1106(d)

⁴⁶ CARES Act, Sec. 1106(d)(3)(B)



What are some alternatives to termination for employees without work?

- Many employers find themselves having to pay employees to stay home. Here are some creative options employers can implement to keep their workforce motivated and active.
 - Pay employees to engage in training materials.
 - Pay employees to research and develop a new product or offering.
 - Pay employees to conduct community service.

OBLIGATIONS TO EMPLOYEES POST TERMINATION

When do I pay final wages for terminated employees?

- The time period required for payment of final wages varies from state to state. Generally, final wages must be paid within 24 hours of termination, but you should consult an attorney for your state-specific rules prior to terminating an employee.

What can I tell my employees about continuation of health insurance?

- The Consolidated Omnibus Budget Reconciliation Act, better known as COBRA, provides employees the right to temporarily continue group health coverage on termination. It applies to all employers who had 20 or more employees on more than 50% of the typical business days in the previous calendar year.
- As an employer, you must notify your group health plan administrator of the termination within 30 days. The plan administrator must then notify the employee of their COBRA continuation rights. The employee must then choose whether to elect COBRA coverage within 60 days and make their first premium payment within 45 days. Employees electing COBRA coverage are responsible for 100% of the premium payments.
- There are also state specific health insurance laws that generally extend coverage to employers with less than 20 employees. You should consult with an attorney to determine what health insurance continuation obligations you owe to terminated employees under these state specific rules.

CONCLUSION

This primer covered the CARES Act, loans for small businesses currently available through the SBA, and employment issues specific to the COVID-19 pandemic. We will continue to provide updates as new laws, regulations, and guidance is issued. Please reach out to nic.turiciano@milgromlaw.com if you would like assistance with any of the issues covered by this primer, or any other question related to COVID-19.



IMPORTANT LOAN INFORMATION

| | SBA ECONOMIC INJURY DISASTER LOANS | CARES ACT PAYCHECK PROTECTION PROGRAM |
|------------------------------|--|--|
| AMOUNT | <ul style="list-style-type: none"> Up to \$2,000,000 based on economic damage caused by the disaster, as determined by the SBA. | <ul style="list-style-type: none"> Up to 2.5x of average monthly payroll costs with a maximum amount of \$10,000,000. |
| INTEREST RATE | <ul style="list-style-type: none"> Capped at 4%. | <ul style="list-style-type: none"> Capped at 3.75% for for-profit businesses. Capped at 2.75% for nonprofits. |
| ELIGIBILITY | <ul style="list-style-type: none"> Affected small businesses with less than 500 employees physically located in an area suffering from a presidentially. Independent Contractors and Sole Proprietors. | <ul style="list-style-type: none"> Small businesses existing prior to Feb. 15, 2020 and with fewer than 500 employees. Certain employers with between 500 and 1,500 employees. Independent contractors and sole proprietors. |
| PERSONAL GUARANTY | <ul style="list-style-type: none"> Required for loans exceeding \$200,000. | <ul style="list-style-type: none"> None required. |
| GRANTS OR FORGIVENESS | <ul style="list-style-type: none"> Up to \$10,000 available in the form of an emergency advance grant. Recipients do not need to repay the grant even if the application is ultimately denied. | <ul style="list-style-type: none"> The SBA will forgive up to 8 weeks of payroll assistance, mortgage interest, rent, and utility payments between Feb. 15 and June 30, 2020. Forgiveness is decreased in relation to number of employees laid off and reduction in employee wages during the 8 week period after the loan is awarded. |
| USES | <ul style="list-style-type: none"> May be used for payroll, mortgage and rent payments, fixed debt payments incurred prior to the disaster, and utilities. | <ul style="list-style-type: none"> May be used for payroll, mortgage interest, rent, and utility payments. |
| AVAILABILITY | <ul style="list-style-type: none"> Availability is tied to presidentially declared disasters; COVID-19 qualifies. | <ul style="list-style-type: none"> Available only until June 30, 2020. |
| APPLICATION PROCESS | <ul style="list-style-type: none"> Issued by the SBA and banks approved by the SBA. The SBA will guarantee 100% of the loans. | <ul style="list-style-type: none"> Issued directly by the SBA |
| COLLATERAL | <ul style="list-style-type: none"> No collateral required for loans less than \$25,000. Real property used for loans exceeding \$25,000, though no loan will be denied solely for lack of collateral. | <ul style="list-style-type: none"> No collateral required. |
| DEFERRAL | <ul style="list-style-type: none"> All principal and interest payments on existing EIDLs are deferred until 2021. | <ul style="list-style-type: none"> Deferred for a minimum of 6 months and a maximum of 12 months. |