

CARES Act Signed Into Law

Contains Massive Relief and Stimulus Provisions for Nonprofits

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Reflects changes based on SBA “interim final rule” released on April 2, 2020

Reflects changes based on additional SBA “interim final rule” and FAQ document for faith-based organizations released on April 3, 2020

On March 27, 2020, the United States Congress passed and President Trump signed into law the Coronavirus Aid, Relief, and Economic Security (CARES) Act – legislation that provides an unprecedented and massive array of relief, benefit, and stimulus measures designed to help Americans, businesses, nonprofits, and state and local governments amid the coronavirus crisis.

Key Provisions Relevant to Nonprofit Organizations

The information contained herein is based on the author’s understanding of the topics covered at the time the information was prepared and may contain inaccuracies. All information herein is subject to correction and/or clarification as more complete and reliable guidance and interpretations regarding the law become available. The information contained herein is for informational and educational purposes only and does not constitute professional advice. For professional advice regarding the subject matter addressed herein, the services of a competent professional should be obtained.

“Paycheck Protection Program” Loans/Grants

Nonprofit organizations should consider all available types of relief available to them in addition to considering a Payroll Protection Program loan. Some types of aid/relief/loans are incompatible with obtaining a Payroll Protection Program loan or forgiveness of such a loan.

1. Employers with 500 or fewer employees whose principal place of residence is in the United States are eligible for loans guaranteed by the federal government and facilitated by local banks and other authorized lenders; overseen by the Small Business Administration (SBA).
 - a. The law seems to provide that measurement of the employee count is a straight headcount (full-time and part-time employees each count as one employee)
 - We are hearing reports, however, of banks allowing employers to calculate their employee counts on an FTE basis for the 12-month period for which they are measuring payroll costs (see information about payroll costs below). This issue would matter to an employer whose employee count would be below the 500-mark using the FTE method and above it using a straight head count

- b. Special rules for determining employee count apply to organizations with affiliates
 - SBA guidance states that affiliation rules do not apply to religious organizations whose affiliations exist as part of their religious exercise
 - c. Each entity that has a federal employer identification number and employees and that is not subject to the affiliation rules will apply for its own loan
 - For entities that are subject to the affiliation rules, it is not clear whether the SBA permits one entity within an affiliated group to make a single application covering the applicant and other entities in the group
2. Eligible recipients include 501(c)(3) tax-exempt organizations
- a. SBA guidance clearly acknowledges and affirms participation by churches and religious organizations
 - An FAQ document issued by the SBA contains explicit assurances to faith-based organizations about matters related to religious exercise
 - The SBA's guidance does not include a requirement to submit a copy of the applicant's 501(c)(3) determination letter.
 - An FAQ issued by the SBA explicitly states that churches and their integrated auxiliaries are not required to have or obtain an IRS 501(c)(3) determination letter
3. Maximum loan amount is 2.5x the average monthly payroll costs for the one-year period preceding the date of the loan or \$10 million, whichever is less
- a. SBA guidance seems to permit use of the 2019 calendar year for measurement purposes
 - b. Special rules for measuring average monthly payroll costs apply to seasonal employers
 - c. Special rules for measuring average monthly payroll costs apply to employers not in existence for a full year prior to the loan date
 - d. Based on SBA guidance, BMWL believes that a reasonable method for calculating payroll costs for purposes of calculating the maximum loan amount is to include the following (We do not take the position that this is the best method or the only acceptable method):
 - Gross wages from the calendar year 2019 (before deductions for employee deferrals such as 401(k); health insurance; etc.)
 - We believe it is reasonable to include clergy housing allowance in gross wages for this purpose, but individual lenders and future guidance could dictate otherwise.
 - Do not include in this amount more than \$100,000 of compensation for any employee
 - Do not include in this amount any compensation paid to employees whose principal residence is outside the United States
 - Do not include in this amount emergency sick leave or emergency family leave payments that qualify for a credit under the Families First Coronavirus Response Act
 - Employer-paid health care benefits
 - Employer-paid retirement benefits
 - Employer-paid state and local taxes assessed on employee compensation (if any)

- e. Our understanding of the SBA guidelines is that payments to individual independent contractors of the type typically reported on Form 1099 are not to be included in an organization's measurement of "payroll costs."
 - f. The SBA guidelines provide some examples of the types of documentation required to be submitted to the lender to establish eligibility for a PPP loan, including payroll processor records and payroll tax filings.
 - If the borrower doesn't have the above records, other supporting documentation may be submitted such as bank records, sufficient to demonstrate the qualifying payroll amount.
4. Loan funds may be used for:
- a. Payroll costs
 - The SBA guidelines impose a use restriction on the loan proceeds that was not clear in the CARES Act – at least 75% of PPP funds must be used for "payroll costs"
 - b. Group health care benefits and insurance premiums
 - c. Mortgage interest (but not principal)
 - d. Interest on other debt obligations incurred before February 15, 2020
 - e. Rent
 - f. Utilities
 - Consider utilizing a separate bank account for administration of loan funds to facilitate tracking the use of the funds
5. Loan underwriting requirements:
- a. Borrower was in operation on February 15, 2020
 - b. Borrower had employees for whom it paid salaries and payroll taxes as of February 15, 2020
 - c. No personal guarantees and no collateral required
 - d. No recourse to any individuals unless the loan funds are used for an unauthorized purpose
 - e. Borrower must make a "good faith certification":
 - That the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the borrower.
 - Acknowledging that loan funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments and specifically certifying that not more than 25% of loan proceeds may be used for non-payroll costs.
 - Acknowledging that the applicant will provide sufficient information to the lender in order for the lender to calculate loan forgiveness.
 - That the borrower does not have an application pending for a duplicative loan.
 - During the period from February 15, 2020 through December 31, 2020, the borrower has not received a duplicative loan.
6. Loan forgiveness – Other than the requirement to use the loan proceeds at least 75% for payroll costs, the recently-issued SBA guidance does not specifically address the detailed calculations of the loan forgiveness amount. The SBA has indicated that it will issue additional guidance in the future regarding the loan forgiveness calculations.
- a. Borrower is eligible for forgiveness of the loan

- b. Amount eligible for forgiveness is the amount spent during the 8-week period beginning on the date of the loan for:
 - Payroll costs (definition might differ from the definition above, subject to additional SBA guidance)
 - At least 75% of the loan forgiveness must be attributable to payroll costs
 - Mortgage interest payments for loans incurred before February 15, 2020
 - Rent for leasing arrangements in force before February 15, 2020
 - Utilities (including electricity, gas, water, transportation costs, telephone, or internet access for which service began before February 15, 2020)
 - Unverified reports exist that the SBA may allow some variation in the 8-week measurement period
 - c. Forgiveness amount is reduced by:
 - An amount calculated pursuant to a formula (with multiple variables) designed to measure whether the borrower reduced its workforce during a specific period in early 2020
 - (This is intended as an incentive to retain employees)
 - Special rules apply for seasonal employers
 - Re-hiring furloughed/laid off/terminated workers by June 30, 2020 can mitigate or eliminate the reduction in loan forgiveness that would otherwise apply due to a reduction in the work force
 - If salary or wages of an employee are reduced by more than 25% during the period February 15, 2020 through June 30, 2020, loan forgiveness is reduced by the amount of the salary or wage reduction in excess of 25%
 - d. Loan forgiveness is not taxable income
7. Terms of repayment for amount not forgiven
- a. Payments deferred for 6 months
 - b. Maximum maturity of 2 years
 - c. 1% interest rate per annum
 - Accrued interest will be forgiven in proportion to the portion of the loan amount that is forgiven
 - d. No prepayment penalty

Expanded Unemployment Benefits

- 1. Provides federal funding of expanded unemployment benefits
 - a. Appears to provide a flat amount of \$600 per week in addition to what an individual may qualify for under state unemployment systems
 - Expanded benefits funded by the federal government will be administered by state unemployment agencies
 - b. Provides unemployment benefits to unemployed workers from churches, religious organizations, and small nonprofits where employment would not normally be covered under state unemployment law (understanding confirmed by US Senator's office)
 - Expanded benefits funded by the federal government will be administered by state unemployment agencies

2. Provides federal funding to assist nonprofits that have elected the reimbursement method for participation in state unemployment coverage
 - a. Expanded benefits funded by the federal government will be administered by state unemployment agencies

Deferral of Payment of Employer's Share of Social Security Taxes

1. Payment of employers' share of Social Security tax deposits due on or after the enactment date of the CARES Act and through December 31, 2020 may be deferred
 - a. It appears that the deferrable portion of employer payroll taxes is limited to the 6.2% Social Security tax and does not include the 1.45% Medicare tax
 - b. Half is due by December 31, 2021
 - c. Remainder is due by December 31, 2022
2. No apparent employer size restrictions apply to this deferral option
3. This provision is not available to an employer who has had its debt forgiven in connection with the Paycheck Protection Program (described above)

Employee Retention Credit for Employers Subject to Closure or Substantial Revenue Loss

1. Provides eligible employers – including tax-exempt organizations – a refundable credit against the employer's share of payroll taxes
 - a. Eligible employers must have carried on a trade or business during 2020 and satisfy one of two tests (for tax-exempt organizations, all operations of the organization are considered a trade or business for this purpose):
 - Have fully or partially suspended business operations due to orders from a governmental entity limiting commerce, travel, or group meetings; or
 - Experience a reduction in gross receipts of at least 50%
 - In any calendar quarter of 2020 as compared to the same calendar quarter of 2019
 - Until gross receipts for a calendar quarter of 2020 exceed 80% of the amount for the corresponding quarter of 2019
2. Credit is 50% of the first \$10,000 in wages per employee (including value of health plan benefits)
3. Credit is reduced by any credits claimed for emergency sick pay or emergency family leave pay under FFCRA ([see separate Alert on FFCRA](#))
4. To the extent the credit exceeds the employers' Social Security tax due, the excess is considered a refundable overpayment
5. For employers with more than 100 full-time employees in 2019, only wages paid to employees who are not currently providing services are eligible for the credit
 - a. Aggregation of employee counts of affiliated entities may be required
6. The employee retention credit is effective for wages paid after March 12, 2020, and before January 1, 2021

7. An employer who obtains a Paycheck Protection Program loan (described above) is not eligible for this credit

Above-the-Line Charitable Contribution Deduction

1. For the year 2020, individual taxpayers who do not itemize deductions may claim up to \$300 of charitable contributions made as a deduction in arriving at adjusted gross income

Charitable Contribution Deduction Limits Increased

1. Cash contributions made by individual taxpayers in 2020 to public charities are subject to a limit of 100% of adjusted gross income – not the 60% limit that regularly applies
 - a. Contributions to supporting organizations or donor advised funds do not qualify for the increased limit
2. Cash contributions made by corporations in 2020 to public charities are subject to a limit of 25% of pretax income – not the 10% limit that regularly applies
 - a. Contributions to supporting organizations or donor advised funds are not eligible for the increased limit
3. Excess contributions above these limits may be carried over
4. The limit on deductible food inventory contributions is increased from 15% to 25% of pretax income

Additional Information

1. Nonprofits with an employee base of more than 500 employees may be eligible for loans from the Federal Reserve under a program separate from the Paycheck Protection Program
2. Colleges and universities (and possibly other educational organizations) should evaluate the significant provisions of the CARES Act that uniquely apply to educational organizations. Such provisions are separate from the topics addressed in this Alert.

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