Frequently Asked Questions (FAQ): Federal Stimulus Bills and Other Legal Considerations During COVID-19

Answers provided by Bromberger Law

EIDL/CARES/Families First-related

(A) Our social enterprise is a division of a larger social service agency. The social enterprise itself is quite small – meeting both the threshold for headcount and revenue – but if we include the entire social service agency it looks like we may no longer be eligible for PPP. Are we thinking about this the right way?

1. In order to qualify for PPP, you must have fewer than 500 employees, calculated as an average number of employees over the past 12 months. There are affiliation rules:

2. When determining if a business has fewer than 500 employees, the SBA considers the average number of employees for each pay period for the preceding 12 months. Part-time and temporary employees are counted the same as full-time employees.

3. Affiliation exists when one business controls or has power to control the other, or a third party controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists. Control may arise through ownership, management, previous relationships with or ties to another business, and contractual relationships. Control may be affirmative or negative. Affiliation between businesses may be found where an individual, concern, or entity exercises control indirectly through a third party. Affiliation can be waived in some cases.

4. 501(c)(3) organizations can have fewer than 500 employees and still qualify, but PPP amount will be limited to 500 employees.

5. Faith-based organizations related to other organizations are not considered to be affiliates if the relationship is based on a religious teaching or belief or otherwise constitutes a part of the exercise of religion.

6. Anecdotal evidence suggests that employers applied for portions of their workforce and ignored the affiliation rules in the First Round. Those issues are getting more scrutiny in the Second Round, which is part of the reason why things are being delayed.
b. How would this be different if the social enterprise were an LLC, wholly owned by the parent nonprofit?

If the social enterprise is an LLC under a parent, the 500 person limit becomes rigid, and the affiliation rules (mentioned above) will make it much less likely that you will qualify.

7. Fraud is always an issue. If you answer untruthfully, you may be subject to penalties, including no forgiveness of the loan.

(B) Under what conditions is the PPP forgivable? How do we know we won’t be stuck with a loan we can’t repay? What pitfalls might cause the loan not to be forgiven?

1. PPP loan will be fully forgiven if the funds are used for payroll costs, interest on mortgages, rent, and utilities (due to likely high subscription. At least 75% of the forgiven amount must have been used for payroll).

2. Payroll costs includes all cash compensation paid to employees, subject to the $100,000 annual compensation per employee limitation.

3. The amount of forgiveness of a PPP loan depends on the borrower’s payroll costs (and other eligible costs) over an eight-week period; beginning on the date the lender makes the first disbursement of the PPP loan to the borrower.

4. There is no prepayment penalty, so you can repay the unforgiven portion of the loan any time you want.

5. The biggest issue is whether you can retain or rehire your workforce. If you do not have sufficient headcount over the 8-week period, you may only get partial forgiveness.

6. If you do not qualify for forgiveness, loans are at 1% for two years. Payments are to start 6 months after the loan is made.

7. A PPP loan may be sold into the secondary market at any time after the loan is fully disbursed. A secondary market sale of a PPP loan does not require SBA approval. A PPP loan sold into the secondary market is 100% SBA guaranteed. A PPP loan may be sold on the secondary market at a premium or a discount to par value.

(C) If we’re awarded the max amount of PPP dollars (2.5x payroll) but are not able to fully spend it – what happens?

The amount of forgiveness will be based on the amount spent on qualified expenses over the designated 8-week period. You would be required to repay amounts not spent, under the terms of the PPP loan.

(D) If I already laid off many staff and participants and now am below 500 employees, does my SE qualify for PPP or does it have to have less than 500 employees in February?

Yes, you can qualify even if you have laid people off. Qualification is based on your average employee headcount in the prior 12 months, so that is the number you need to determine to figure out if you qualify. The forgiveness is based on whether you use the
funds for permitted purposes. Compensation paid to workers that are rehired during the 8-week period count towards the total forgiveness, based on the actual amount they were paid.

(E) We’re a nonprofit and don’t understand how we get a tax credit for paying out mandated leave through Families First. Can you explain how this works?

The CARES ACT provides an “employee retention tax credit” equal to 50% of qualifying wages paid to employees who are not working due to the employer’s full or partial suspension of business as a result of COVID-19 or significant decline in gross receipts.

This applies to PPP and EIDL.

Nonprofits are eligible for the credit.

The eligible employer applies the credit to the employment taxes payable by the employer in the next calendar quarter.

a. How quickly should we expect to receive the tax credit after we’ve administered paid leave?

The credit is an offset against payroll taxes that would otherwise be due. There is no cash payment.

(F) Have nonprofits ever before been eligible for small business assistance? How do we stay on top of (likely?) shifting regulations and guidance?

Generally nonprofits are not eligible for SBA loans or assistance. The best way to stay on top of this is to subscribe for bulletins, or just keep an eye out. Whenever there are new developments, information will be online within minutes.

It is very important to also stay on top of state, county and municipal directives and programs, especially concerning re-opening and employment issues, contract disputes, litigation, etc. These issues are all in the purview of state and local authorities.

(G) We’re hearing that there may be additional money being put towards small business assistance. If we’ve already applied for PPP, do we have to apply again? What if we’ve been approved?

If you have applied and your application has been cleared by the lender, you should not have to reapply. If your application was not processed, you may have to reapply.

(H) We contract with our state government to provide services and subsequently pay our employees with funds received from those contracts. Due to covid/safety concerns, business activities have temporarily ceased. Can we use PPP funding to pay wages to those workers?

Yes you can use PPP to pay your employees during a period of inactivity, even if they aren’t busy. PPP is an income security program, and not a pay-for-services program.

**General Covid-related**
We’re struggling to stabilize but once we do, we know we’ll be living in a different world and need to adjust. What are some of the legal considerations we should be thinking about in the wake of covid? Do social enterprises have any advantages that regular, for-profit small businesses do not? How do we get smart about our response?

Social enterprise advantages have mostly to do with customer, employee, and supplier loyalty, trusted brands, and their values-driven business philosophy. It is possible that access to capital will be easier because social enterprises deal more often with patient investors who see social return as part of their payoff. The only legal advantage is the ability of benefit corporations to write off 100% of charitable contributions, which makes cause-related marketing cheaper. Also, in some places there may be procurement preferences for social enterprises. Otherwise, there may not be much advantage for social enterprises, but there’s a lot we don’t know about what recovery will look like in the coming months.

What flexibility do I have to renegotiate terms with landlords or vendors? We are in a serious cash crunch and are looking for ways to find breathing room.

There is a lot of negotiation going on right now. Many commercial tenants have stopped paying rent and are seeking concessions. The landlord’s ability to make concessions may be limited by their own lenders. If the lenders provide relief to the landlords, generally that relief will be passed down to the tenants.

Right now, the most common deals are to suspend rent payments during the crisis and add the balance to the end of the lease, or have the tenant pay out the suspended rent payments over a period of time (6 mos- 1 year), effectively increasing the tenant’s rent for that period once the crisis is over.

The best approach is as follows:

- Be reasonable in your request to your landlord.
- Make your case. It is best if you have data showing the impact on your business. Cash Flow data is the most important.
- Address any issues with subtenants and licensees.
- Consider renegotiating the lease terms. For example, if you have a one-year lease, can you agree to a new two-year lease now, in exchange for rent concessions from your landlord?
- Remember that nonpayment is an option. Courts are closed. It will take a long time to resolve these issues through a judicial process, and replacement tenants will be hard to find. This gives the tenant a lot of leverage in negotiations with their landlord.

As we start to plan for the re-opening of our social enterprise business, how do we make sure to comply with the law around worker safety?
1. There are a lot of bulletins regarding workplace safety and employment issues. These are usually state-specific. Find one or two local, reputable law firms and subscribe to their updates.

2. Review your existing employment policies to see if changes are needed.

3. Follow government updates on workplace issues, including employer obligations.

4. Keep documentation of the steps you are taking to keep your workers safe.

5. CDC has rules for re-opening.
   a. Re-opening decision tree.
   b. Workplace Cleaning and Disinfecting protocols.

Second batch – sent in 5/7/20

PPP-related

(L) To confirm, PPP eligibility is determined by headcount (i.e., sum of full and part-time workers, regardless of hours worked), but PPP loan forgiveness is determined by payroll costs (i.e., money paid to employees, regardless of whether headcount went up or down). Is this correct?

   a. That is not correct – both employee headcount and expenses paid will impact eligibility for loan forgiveness.

   b. The forgivable amount is the amount of the PPP loan spent on eligible expenses. At least 75% must be spent on payroll costs, and up to 25% may be spent on other eligible expenses, such as rent and utilities. As long as the full amount of the PPP loan is spent during the 8-week period after the loan is received, it will be fully forgivable.

   c. However, the loan amount eligible for forgiveness will be reduced proportionally for reductions in the average number of full-time equivalent (FTE) employees during the 8-week period as compared to the average number of FTE employees per month during either, at the borrower’s election, 2/15/19 – 6/30/19 or 1/1/20 – 2/29/20. In short, your organization must maintain the same number of employees (or FTEs) for the loan to be fully forgivable. Note that workforce reductions that occur between 2/15/20 and 4/26/20 will not reduce the forgiveness amount if restored by 6/30/20.

(M) We received PPP funds but have some questions on different potential use cases. Can we use PPP funds to support the following cases?
a. We have several federally awarded contracts through offices like HUD or GPD for Vets. Currently, we pay our employees with proceeds from these contracts. Can we use PPP funds to support the wages of these individuals?
   
i. Yes, PPP funds may be used to support wages of individuals normally paid through government contracts. However, if your organization is still receiving those contract funds, and has adequate funds to pay its employees without the PPP loan funds, that may indicate that your organization was not in need of the PPP funds to maintain its operations. But, if there are delays in receiving your contract payments due to the pandemic, or other reductions in income that have created a shortfall, there is no reason that you cannot use PPP funds to pay wages for those employees.

b. In the question above, would anything be different if those contracts were from state, county, or local gov’t?
   
i. Answer is same as above.

c. We receive gov’t funding to pay for things like utilities. Can we use PPP funds to cover those expenses?
   
i. Answer is same as above.

d. We own several buildings for which we pay no interest or rent. However, we do pay for utilities. Can we use PPP funds for this?
   
i. Yes – as long as utilities expenses do not exceed 25% of expenses covered by your PPP loan.

e. Can we use PPP to cover the employer portion of FICA?
   
i. No – the employer portion of FICA is excluded from eligible expenses.

f. Some of our employees receive low income/discounted housing from us. We do not pay them wages, stipends, or allowances. To confirm, we cannot use PPP funds to pay for the costs of housing in that situation, right?
   
i. I am not aware of direct guidance on this issue. However, if the only compensation that these individuals receive is in the form of a housing allowance, they are likely not considered employees for purposes of the PPP program. In which case, you likely could not use a PPP loan to cover their housing costs. However, if they are properly classified as employees, and receiving a housing allowance as part of their overall compensation, a PPP loan could be used to pay their housing allowance, in addition to other cash and non-cash compensation.

(N) We know the PPP use window is 8 weeks but we unfortunately received our funds on the same day as our payroll was paid out. So, we’re looking at one fewer pay period than we had anticipated. Can we use funds to pay more than 8 weeks-worth of wages to our employees to make up for the lost pay period?
a. The 8-week period begins as of the date that the organization receives the loan proceeds, and the organization is required to spend the loan proceeds within that 8-week period. Industry groups have proposed changing that rule so that the 8-week period begins at the start of a payroll period, but that rule change has not yet been adopted. So, for now, you’re required to pay the full amount of your PPP loan within 8 weeks from the date of receipt, regardless of how that squares with your payroll schedule. You are permitted to increase your employees’ compensation during the 8-week period, or provide bonuses with your PPP loan proceeds.

(O) We have a couple questions regarding PPP loan payback:

a. How soon can we ask for forgiveness to minimize interest expense? We’re worried that some of what we received will not be forgivable.
   i. Forgiveness is generally requested at the end of the 8-week period. If it looks like some of what you received will not be forgivable, set that money aside so that it is available to pay back. You may also want to contact your lender directly to discuss the issue.

b. If we anticipate unused loan dollars, will paying back unused money limit our interest expense?
   i. Yes – you can pay back unused loan dollars at any time, which will reduce the amount of interest that accrues.

c. If we pay interest on the PPP loan (for the portion that isn’t forgivable), can that be treated as a deductible interest payment?
   i. A PPP loan that is not forgiven will be treated as a regular business loan, meaning that payments of interest will be treated as deductible as ordinary business expenses.