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SUMMARY OF RELIEF AVAILABLE TO BUSINESSES UNDER CARES ACT AND EXISTING LOAN PROGRAMS

The Coronavirus Aid, Relief, Economic Security (CARES) Act was enacted on Friday, March 27, and created and modified federal relief options available for small businesses and non-profits. Most available relief is being funneled through the U.S. Small Business Association (“SBA”). Below is a summary of the key components of the Act affecting small businesses and non-profits.

(*Note: This summary is not exhaustive, and additional guidance is being released daily that may modify the programs explained below. ELPO Law will continue to monitor the issues affecting businesses and individuals related to the COVID-19 pandemic.*)

I. OVERVIEW OF CARES ACT

1. CARES Act creates and modifies SBA loan programs/grants available to small businesses

- a. Creates Payroll Protection Program loans (See Section II of this memo for details)
- b. Modifies Economic Injury Disaster-Assistance Loan program (See Section III of this memo for details)
- c. Creates subsidy for existing SBA loans
 - i. Requires the SBA to pay all principal, interest, and fees on all existing SBA non-disaster loan products, including 7(a), Community Advantage, 504, and Microloan programs (except for the Paycheck Protection Program), for six months as relief to small businesses negatively affected by the COVID-19 pandemic.
 - ii. Loans that are already on deferment will receive six months of payment by the SBA, beginning with the first payment after the deferral period.
 - iii. Loans made in the first six months after enactment will also receive a full six months of loan payments by the SBA. The Act appropriates \$17 billion to implement this section.

2. Provides Tax Credits/Deferrals

- a. Employee Retention Tax Credit
 - i. Small businesses may be eligible for refundable payroll tax credit for 50 percent of wages paid by employers to employees from March 12, 2020 to January 31, 2021. The credit is available to employers whose (1) operations were fully or

partially suspended, due to a COVID-19 related shut-down order, or (2) gross receipts declined by more than 50 percent when compared to the same quarter in the prior year.

- b. Advanced Tax Credits for Paid Leave
 - i. The CARES Act allows employers to receive an advance tax credit for required paid sick leave (under the Families First Coronavirus Response Act) instead of having to be reimbursed
- c. Delay of Payment of Employer Payroll Taxes
 - i. Employers and self-employed individuals may defer payment of the employer share of the Social Security tax they otherwise are responsible for paying.
- d. Net Operating Loss Modifications
 - i. The provision relaxes the limitations on a company's use of losses. Net operating losses (NOLs) are currently subject to a taxable-income limitation, and they cannot be carried back to reduce income in a prior tax year. The provision also temporarily removes the taxable income limitation to allow an NOL to fully offset income. These changes will allow companies to utilize losses and amend prior year returns, which will provide critical cash flow and liquidity during the COVID-19 emergency.

II. PAYROLL PROTECTION PROGRAM LOANS

1. Timeline:

- a. Starting Friday, April 3: small businesses, non-profits, and sole proprietorships can apply through existing SBA lenders
- b. Starting Friday, April 10: independent contractors and self-employed individuals can apply through existing SBA lenders
- c. Other regulated lenders will be available to make these loans as soon as they are approved and enrolled in the program.
- d. Program closes June 30, but funding cap is expected to be met long before then

2. Eligible entities:

- a. All businesses – including nonprofits, veterans organizations, Tribal business concerns, sole proprietorships, self-employed individuals, and independent contractors – with 500 or fewer employees can apply.
 - i. Must certify they were affected by COVID-19 pandemic

3. Loan terms:

- a. Interest – 0.5% (Act says up to 4%, Treasury announced 0.5% on Tuesday)
- b. Term – 2 years (Act says up to 10 years, Treasury announced 2 year limit on Tuesday)

- c. Payments deferred for 6 months
- d. No loan fees

4. Amount of loan

- a. Up to 2.5 times employer's monthly "payroll cost"; capped at \$10 million
 - i. Average cost is based on 1 year period prior to loan application date
 - ii. Businesses not in existence on June 30, 2019 can use Jan.-Feb. 2020 averages
 - iii. Seasonal businesses can use 12-week period starting in Feb – March of 2019
- b. Payroll costs are defined as:
 - i. Salary, wages, commissions, or tips (capped at \$100,000 on an annualized basis for each employee);
 - ii. Employee benefits including costs for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payments required for the provisions of group health care benefits including insurance premiums;
 - iii. Payment of any retirement benefit;
 - iv. State and local taxes assessed on compensation; and
 - v. For a sole proprietor or independent contractor: wages, commissions, income, or net earnings from self-employment, capped at \$100,000 on an annualized basis for each employee.

5. Loan can be used for:

- a. Payroll costs, including continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- b. Interest payments on any mortgage incurred before Feb. 15;
- c. Rent and utility payments; and
- d. Interest payments on any other debt obligations that were incurred before February 15, 2020.

6. Loan Forgiveness

- a. The amount of forgiveness cannot exceed the principal amount of the loan, but may equal up to a business's costs during the 8 weeks following the date of the loan's origination for the following categories:
 - i. Payroll costs (as defined above);
 - ii. Interest on real or personal property mortgage obligations in existence before February 15, 2020 and incurred in the ordinary course of business;
 - iii. Rent under a lease agreement in force before February 15, 2020; and
 - iv. Utility payments for which service began before February 15, 2020.
- b. **US Treasury announced on Tuesday that due to likely high subscription, at least 75% of the forgiven amount must be used for payroll**
- c. The amount of loan forgiveness is subject to reduction based on a business's decline in headcount or wages.

- i. Declines in headcount or wages between February 15, 2020 and April 26, 2020 will not trigger a reduction in loan forgiveness if the business reverses the decline and returns to pre-decline levels by June 30, 2020.
 - ii. Loan forgiveness will not be included in a business's taxable income.
 - iii. Loan forgiveness will be reduced:
 - a. If businesses decrease full-time employee headcount
 - b. If businesses decrease salaries and wages by more than 25% for any employee that made less than \$100,000 annualized in 2019.
 - iv. Businesses have until June 30 to restore your full-time employment and salary levels for any changes made between February 15, 2020 and April 26, 2020 to be eligible for loan forgiveness
- d. Loan forgiveness will be handled through the SBA lenders who service the loan

7. Documents needed for loan application:

- a. SBA delegates the process to determine eligibility to lenders based on whether a borrower's business was operational on Feb. 15, 2020, and had employees for whom it paid wages/salaries and payroll taxes (or independent contractors who will receive 1099s).
- b. SBA has not yet issued guidance on what will be used to determine eligibility, and this may vary based on lender. Businesses should prepare the following documents in case requested:
 - i. Certified Articles of Incorporation/Organization of each borrowing entity (Kentucky businesses can obtain online on Kentucky's Secretary of State website);
 - ii. Good-standing certificate of recent date (Kentucky businesses can obtain online on Kentucky's Secretary of State website);
 - iii. Bylaws/Operating Agreement of each borrowing entity
 - iv. Payroll expense verification documents, which may include:
 1. IRS Form 940 and 941
 2. Payroll summary report, if available, or employee pay stubs as of February 15, 2020 with corresponding bank statements and a breakdown of payroll benefits
 3. 1099s (for independent contractors)
 4. Certification that all employees live within the United States
 5. Payroll records from a third-party payroll provider, if applicable.
 - v. Trailing 12-month Profit and Loss Statement
 - vi. Most recent mortgage or rent statement
 - vii. Most recent utility bills
 - viii. Most recent tax returns

8. Businesses (and each individual/entity owning 20% or greater of borrowing entity) must certify as part of application:

- a. Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.

- b. The funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments; if the funds are used for unauthorized purposes, the federal government may pursue criminal fraud charges.
- c. Documentation verifying the number of full-time equivalent employees on payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight week period following this loan will be provided to the lender.
- d. Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities. Due to likely high subscription, it is anticipated that not more than twenty-five percent (25%) of the forgiven amount may be for non-payroll costs.
- e. During the period beginning on February 15, 2020 and ending on December 31, 2020, the Applicant has not and will not receive another loan under this program.
- f. That the information provided in the application and the information provided in all supporting documents and forms is true and accurate. Applicant realizes that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a Federally insured institution, under 18 USC 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.
- g. Applicant acknowledges that the lender will calculate the eligible loan amount using tax documents submitted, and affirms that these tax documents are identical to those submitted to the IRS. Applicant also understands, acknowledges and agrees that the Lender can share the tax information with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

III. EIDL LOAN PROGRAM

The CARES Act modified the existing economic injury disaster-assistance loan program to provide additional relief to small businesses and non-profits. Applications for these loans are made directly to SBA. Applicants may apply online, receive additional disaster assistance information and download applications at <https://disasterloan.sba.gov/ela>.

1. Key terms.

- a. Loans up to \$2 million that will be backed by SBA. If the business is considered a major source of employment, the \$2 million limit can be waived.
- b. The interest rate will be a maximum of 3.75% for small businesses and 2.75% for nonprofits, with a maximum loan term of 30 years. Payments deferred for all of 2020
- c. Eligible businesses include small businesses, small agricultural cooperatives, small businesses engaged in aquaculture, and most private, non-profit organizations of all sizes.

- d. The loans can be used for a variety of business expenses including to compensate for short-term lost revenue, pay debt, payroll, accounts payable and other bills. The loans cannot be used to refinance long-term debt.
- e. The following credit requirements apply:
 - i. Credit History – Applicants must have a credit history acceptable to SBA.
 - ii. Repayment – Applicants must show the ability to repay the loan.
 - iii. Collateral – Collateral is required for all economic injury disaster-assistance loans over \$25,000. SBA takes real estate as collateral when it is available. SBA will not decline a loan for lack of collateral, but SBA will require the borrower to pledge collateral that is available.
 - iv. Personal guaranty for loans >\$200k
- f. The loan process is initiated by an eligible business filing an application with SBA online or by telephone. Applicants may apply online, receive additional disaster assistance information and download applications at <https://disasterloan.sba.gov/ela>.
- g. Applicants may also call SBA’s Customer Service Center at (800) 659-2955 or email disastercustomerservice@sba.gov for more information.

2. CARES Act modified the existing EIDL program as follows:

- i. Waives some requirements previously required for EIDL
 - 1. No personal guarantees for loans less than \$200k
 - 2. No “no credit elsewhere” reqmt.
 - 3. No reqmt. that businesses have been in existence for more than 1 year
- ii. Establishes Emergency Grants for EIDL applicants:
 - 1. Businesses can apply for a grant of up to \$10,000 to be available within 3 days of application if they have applied for EIDL but are not yet approved.
 - 2. Grant is approved based solely on applicant’s credit score or alternative method to gauge applicant’s ability to repay
 - 3. The applicant is not required to repay any advance payments, even if they are later denied an EIDL. If the EIDL loan is approved, the preliminary amount received is treated as an advance.
 - 4. The advance may only be used for (1) providing sick leave to employees unable to work due to the direct effect of COVID-19, (2) maintaining payroll to retain employees during business disruptions or substantial slowdowns, (3) meeting increased costs to obtain materials unavailable from the applicant’s original source due to the interrupted supply, (4) making rent or mortgage payments, and (5) repaying obligation that cannot be met due to revenue losses.

ELPO Law will continue to monitor the issues affecting businesses and individuals related to the COVID-19 pandemic. For questions, contact English, Lucas, Priest & Owsley, LLP at 270-781-6500.