

Tackling the New Normal – Financing, Employment and other Business Strategies During the Time of COVID-19

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Overview

- CARES Act Funding Options
- USDA / FSA Loan Programs
- Alternative Financing Options
- Contract Considerations
- Employment Considerations



CARES Act Funding

Paycheck Protection Program

- Additional **\$310 billion** available as of 4/27/2020; provides loans up to **\$10MM**
- **Available for:**
 - “small businesses”: (a) less than 500 employees, or (b) fits within SBA’s revenue based standards (for most agricultural producers, this is average annual receipts of \leq \$1MM), or (c) a tangible net worth of \leq \$15MM and average net income after federal income taxes of \leq \$5MM for the 2 prior FYs → include “affiliates” in calculations
 - Sole proprietorships, independent contractors, and self-employed
- **Key considerations:**
 - 75% for “payroll costs”; 25% for mortgage interest, rent, utilities, interest on other debt
 - In calculating employees and “payroll costs,” do not include independent contractors or employees whose primary residence is not in the U.S.
 - Must be necessary to support ongoing operations in light of economic uncertainty
- **Terms of loan:**
 - Potentially 100% forgivable, based on payroll + other eligible expenses during 8 week period after loan origination (reduced for reductions in FTEs or salaries in excess of 25% that are not cured by 6/30/2020)
 - 1% interest, 2 year maturity, 6 month deferral, no personal guarantee or collateral

CARES Act Funding

EIDL Loans

- Additional **\$10 billion** available; loans up to \$2 million (may be limited to \$15k per SBA)
- **Available for:** eligible “small businesses” (based on SBA size standards), including small agriculture enterprises (as of 4/24/2020) and agricultural cooperatives, as well as sole proprietorships, independent contractors, and self-employed
- **Key considerations:**
 - Grant of up to \$10k (\$1k / employee), which doesn’t need to be repaid
 - Entire U.S. is a “disaster” zone
- **Terms of loan:**
 - For working capital and other expenses
 - Up to \$200k loan with no personal guarantee; no collateral for loans up to \$25k; for larger loans, a general (non-real estate) security interest will be required
 - Can obtain both an EIDL and a PPP, but must be for different purposes
 - Loan issued based on credit scores only

CARES Act Funding

Other CARES Act Loan Changes

CARES Act created a 6-month subsidy for existing and new (i.e. through 9/27/2020) non-PPP SBA 7(a), 504, and microloan programs → SBA pays principal, interest, and fees for 6 months

- **Non-PPP 7(a) Loans:** loans up to \$5MM; generally aimed at supporting working capital, inventory, or refinancing debt. Administered through approved lenders
- **504 Loan Program:** loans up to \$5.5MM; for fixed assets (machinery, real estate, buildings) for expansion or modernization projects. Low interest, long-term payment options. Administered through Certified Development Companies
- **Microloan Program:** loans up to \$50k; generally aimed at assisting women, low income, veteran and minority entrepreneurs. Administered through approved lenders.

USDA / FSA Funding Options

USDA / FSA Loan Options

- **Coronavirus Food Assistance Program (CFAP)**
 - Up to \$19 billion for farmers and ranchers → \$16 billion for direct support to farmers for actual losses due to prices or supply chains disruptions from COVID-19, and \$3 billion for food redistribution to food banks and non-profits
 - Per available guidance, it appears “losses” will be calculated based on the period from Jan. 1 to April 15, 2020
 - Per Senator Hoeven, \$9.6 billion will go to the livestock industry, \$3.9 billion to row crop producers, \$2.1 billion to specialty crop producers, and \$500 million to producers of other crops. This is not definitive guidance
- **FSA Direct and Guaranteed Farm Ownership Loan (FO) and Guaranteed Operating Loan (OL) Programs**
 - FSA direct loans for farm ownership (FOLs) up to \$600,000 or operating loans (OLs) up to \$400,000
 - FSA guaranteed FOLs or OLs up to \$1,776,000 (adjusted annually for inflation); interest rate and repayment term determined by lender
 - FOL uses: purchase farmland, construct or repair buildings, develop farmland for water / soil conservation
 - OL uses: general operating expenses (i.e. equipment, livestock, feed, seed, fuel, insurance), minor improvements or building repairs, refinance certain farm-related debts (excluding real estate)
 - Applicant must be an eligible family farm or ranch owner or operator who is unable to obtain a loan without a guarantee yet demonstrates the ability to repay
 - FOL and OL microloans are also available up to \$50,000

Alternative Financing Options

- **General Considerations**

- Fiduciary duty considerations
- Participation Rights
- Consent requirements

- **Convertible Debt**

- Pros and Cons
- General Negotiated Terms (conversion discounts and caps; secured versus unsecured; interest)

- **Equity Financing**

- Pros and Cons
- Process and General Negotiated Terms (negotiating the LOI; standard investor rights)

Contract Considerations to Stay Afloat

- **Force Majeure**

- May be available where the contract *cannot* be performed due to causes outside of either party's control
- Based on contract and state law → read your contracts to see if performance is excusable due to pandemics / government shut-downs

- **Impossibility**

- Based on state law (not contract), and may be available where an intervening event makes performance essentially impossible. May also apply where performance is forbidden or prevented by law (i.e. due to mandatory closures). Mere economic hardship is rarely sufficient
- May allow for suspension of performance (if the impossibility is temporary) or rescission (where impossibility is permanent)

- **Frustration of Purpose**

- Based on state law (not contract) and may be available where both parties could technically perform, but the contract has been rendered essentially valueless to one party due to unforeseeable events outside of their control (i.e. the very basis of inducement for one party to enter into the contract have been eviscerated)
- May allow rescission of the contract

- **Strike a Deal**

- Communicate early and often
- Avoid admitting (in writing) that you cannot pay your debts as they become due (this is often a default trigger in loan documents, leases, etc.)

CARES Act Unemployment Insurance Provisions

- States must voluntarily implement the programs into their existing UI systems
- Provides three federal programs related to unemployment insurance (“UI”) benefits:
 - (1) **Emergency increase in UI compensation** - \$600 / week increase in benefits paid through July 31, 2020
 - (2) **Pandemic Emergency UI compensation** - 13 weeks of additional federally-funded UI benefits for workers who have exhausted existing state UI benefits, through December 31, 2020
 - States must relax active work search requirements if claimant (a) has COVID-19; (b) is quarantined; or (c) is subject to mandatory movement restrictions
 - (3) **Pandemic Unemployment Assistance program** - Federally-funded emergency unemployment assistance for workers otherwise ineligible for UI benefits if claimant is able to self-certify that s/he is able to work but cannot due to being impacted by COVID-19 in one of 11 enumerated ways

CARES UI Q&A



- What are the 11 different grounds an unemployed worker can establish in order to receive benefits under CARES' Emergency Unemployment Assistance program for workers traditionally ineligible for workers compensation benefits?
- Are recipients of partial unemployment benefits entitled to the \$600-per-week additional benefit under CARES?
- How does the CARES Act unemployment insurance expansion interact with existing state unemployment programs?

FFCRA

- Signed into law March 18, 2020, effective as of April 1, 2020 until December 31, 2020
- Applies to employers with less than 500 employees, with exclusions for healthcare providers and employers with less than 50 employees
- Two related paid leave entitlements:
 - 80 hours of **Emergency Paid Sick Leave** for full time employees who fall into one of 6 defined categories
 - 12 weeks of **Emergency Family Medical Leave** for qualifying employees to care for their children due to COVID-19 related closures
- The payments are fully reimbursable through tax credits against payroll taxes

Questions?...



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