CLIENT ALERTS & INSIGHTS

Benesch COVID-19 Resource Center: The CARES Program Continues to Evolve

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In true government fashion, late Thursday evening the Small Business Administration (SBA) released updated guidance for CARES Act Loans. Below is a bullet point summary of the relevant changes.

1. Compensation paid to independent contractors can no longer be included in Payroll Costs for a company because the independent contractor can apply for a loan on its own.
2. Interest rate has been confirmed at 100 bps.
3. E-signing will be permitted.
4. For purposes of determining number of employees to qualify as a small business (i.e. less than 500 or lower than the applicable NAICS code threshold), only US based employees will count.
5. Affiliation survived, but the SBA has stated that it intends to issue updated guidance on affiliation, which leads me to believe affiliation will be waived or at least modified in some favorable way for many of our clients.
6. When calculating payroll costs, only FICA taxes paid between 2/15/20 and 6/30/20 are excluded.
7. Payroll costs are definitely calculated based on the trailing twelve month period. There was some confusion on this point previously as the application referenced 2019 payroll numbers.
8. Borrowers are now required to utilize 75% of loan proceeds for payroll costs. There previously was no requirement to use any percentage for payroll costs, it just affected the amount of loan forgiveness. The minimum percentage is now an affirmative requirement.
9. If loan proceeds are used for not permitted purposes (i.e. not for payroll, rent, utilities and interest expense) the loan will have to immediately be repaid and additional liability such as charges for fraud can be brought up.
10. Certification for those signing the application have been heightened and include an acknowledgment that the federal government can hold the signer legally liable if loan funds are used for an unauthorized purpose.
11. Headcount restrictions for non-profit organizations have been removed.

Note that the language in the guidance contains what we are fairly certain is a drafting error in section 2a, but could have the potential to make qualification more difficult. The language says that you now not only have to meet the headcount requirements, but that you also have to meet the

criteria of a small business concern under 15 USC 632 to be an eligible borrower. The CARES Act bill says that a borrower could qualify for the loan if it met the criteria for a small business concern, has less than 500 employees or has less than the number of employees required under its applicable NAICS code. Again, we feel this is a clear unintentional mistake in the drafting, and are advising clients to submit applications in spite of this.

The interim final rule of the Payment Protection Program (PPP) can be found here.

The PPP application can be found here.

If you have any questions regarding the CARES Act or the PPP, please reach out to a member of your Benesch team.

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Please note that this information is current as of the date of this Client Alert, based on the available data. However, because COVID-19's status and updates related to the same are ongoing, we recommend real-time review of guidance distributed by the CDC and local officials.

