

## CARES Act 2020 and the Hospitality Industry<sup>1</sup>

### TITLE I - KEEPING AMERICAN WORKERS PAID AND EMPLOYED ACT

#### 1102. Paycheck Protection Program.

The Administrator of the Small Business Administration (the “Administrator” and the “Administration”) may participate in a loan, which participation shall be 100%, and guarantee loans made between February 15, 2020 and June 30, 2020. ***Small businesses and sole proprietorships can apply through existing SBA lenders starting April 3, 2020. Independent contractors and self-employed individuals can apply through existing SBA lenders starting April 10, 2020.***

#### Loan Amount:

The maximum loan amount available pursuant to this section is the lesser of (1) (a) the average total monthly payroll costs made during the 1-year period before the date on which the loan is made (except for a seasonal employer, in which case the average total monthly payments shall be for the 12-week period beginning February 15, 2019 or March 1, 2019 and ending June 30, 2019) multiplied by 2.5, plus (b) the outstanding amount of a loan under a 7(A) loan that was made between January 31, 2020 and the date on which covered loans are made available to be refinanced, or (2) \$10,000,000.

“Payroll costs” include:

1. salary, wage, commission, or similar compensation,
2. payment of cash tip or equivalent,
3. payment for vacation, parental, family, medical, or sick leave,
4. allowance for dismissal or separation,
5. payment for group health care benefits including insurance premiums,
6. payment of any retirement benefit,
7. payment of state and local tax assessed on compensation of employees, and
8. the sum of payments of compensation or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation, which is not more than \$100,000 in 1 year.

Payroll costs do not include:

1. the compensation of an individual employee in excess of an annual salary of \$100,000,
2. taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code,
3. compensation to any employee whose primary place of residence is outside of the United States,
4. qualified sick leave wages for which a credit is allowed under section 7001 of the Families First Coronavirus Response Act (the “FFCRA”), or
5. qualified family leave wages under section 7003 of the FFCRA.

An alternative calculation method is available for eligible recipients which were not in business during the period beginning February 15, 2019 and ending June 30, 2019.

#### Eligibility:

Any business concern shall be eligible to receive a covered loan if the business concern employs not more than the greater of (i) 500 employees, or (ii) if applicable, the standard size in number of employees established by the Administration for the industry in which the business concern operates.<sup>2</sup> Fortunately, for the hospitality industry, any

<sup>1</sup> Particularly in light of the structuring nuances within the hospitality industry, further guidance in the form of regulations, rules, or supplemental legislation is necessary to determine the effect the CARES Act may have on the hospitality industry.

<sup>2</sup> We do not believe (ii) will apply to hotels.

business concern that employs not more than 500 employees per physical location of the business concern and is assigned a North American Industry Classification system code beginning with 72 at the time of disbursement is eligible for a covered loan.

Additionally, the affiliation rules applicable to affiliations under 13 C.F.R. 121.103 are waived with respect to eligibility for (i) any business concern with not more than 500 employees, as of the date on which the covered loan is disbursed, and is assigned a North American Industry Classification System code beginning with 72, (ii) any business concern operating as a franchise that is assigned a franchise identifier code, and (iii) any business concern that receives financial assistance from a company licensed under section 301 of the SBA.

Furthermore, the requirement that the small business concern shall be unable to obtain credit elsewhere shall not apply to a covered loan.

Eligible recipients must make a good faith certification (i) that the uncertainty of the current economic conditions makes necessary the loan request to support ongoing operations, (ii) acknowledging the funds will be used to retain workers and maintain payrolls or make mortgage payments, lease payments and utility payments, (iii) that the eligible recipient does not have a loan application pending under this subsection for the same purpose and duplicative of the amounts applied for, and (iv) for the period beginning February 15, 2020 and ending December 31, 2020, the eligible recipient has not received amounts for the same purpose and duplicative of the amounts applied for.

#### **Allowable Uses of Covered Loans:**

Covered loans may be used for payroll costs, health care benefits costs during paid leave, interest payments on mortgage obligations, rent, utilities, and interest, but not principal amortization, on other debt incurred before the covered period. Additionally, covered loans may be used to refinance a small business administration loan made under subsection (b)(2) made during the period beginning January 31, 2020 and ending on the date on which covered loans are made available.

***According to the SBA Interim Rules, not more than 25% of the loan forgiveness amount may be used for non-payroll costs. If PPP funds are used for unauthorized purposes, the amounts will have to be repaid. If funds are knowingly misused, the borrower will be subject to additional liability such as fraud charges.***

#### **Terms of Covered Loans:**

- Interest rate shall not exceed 4%. ***The SBA Interim Rules list the interest rate as 1% and the term as 2 years.***
- Non-recourse, except if the loan proceeds are used for an unauthorized purpose.
- Any amount of the loan that is not forgiven under section 1106 will not have an interest rate of more than 4% and will have a maximum maturity date of 10 years from the date on which the borrower applies for loan forgiveness. ***The SBA Interim Rules indicate that the interest rate is 1% and the term is 2 years.***
- No prepayment penalty.
- Payments deferred for six months to a year. ***Interest still accrues during this time. The SBA Interim Rules state that loans will only be deferred for 6 months.***
- A covered loan may be sold in a secondary market. The Administrator shall purchase loans that are sold on the secondary market if an investor declines to approve a deferral request.
- During the covered period, no personal guaranty or collateral is required.
- During the covered period, fees due under paragraphs (23)(A) and (18)(A) of the SBA are waived.

### **1106. Loan Forgiveness.**

Eligible recipients are eligible for loan forgiveness in an amount equal to (i) payroll costs<sup>3</sup>, (ii) interest payments, but not principal amortization, on any covered mortgage obligation, (iii) payments of covered rent obligations, and (iv) covered utility payments, incurred during the 8-week period after the date of the loan origination.

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<sup>3</sup> If the eligible recipient is paying additional wages to tipped employees, such amount is eligible for loan forgiveness.

**Limitations on Amount of Forgiveness:**

- The amount may not exceed the principal of the loan.
- The amount shall be reduced based on any reduction in the number of individuals employed by the eligible recipient. Such reduction shall be as compared to either a period from February 15, 2019 through June 30, 2019 or January 1, 2020 through February 29, 2020.<sup>4</sup>
- The amount shall be reduced to reflect a reduction in total salary or wages of any employee<sup>5</sup> during the covered period which exceeds 25% of the total salary or wages of the employee during the most recent full quarter during which the employee was employed before the covered period.

Notwithstanding, there is no reduction in forgiveness if not later than June 30, 2020, the employer has eliminated the reduction in the number of full-time equivalent employees and has eliminated the reduction in salary and wages.

**1110. Emergency EIDL Grants.**

From January 31, 2020 to December 31, 2020, the Administration is waiving the following requirements for emergency Economic Injury Disaster Loans (an "EIDL") made under 7(b)(2) of the SBA:

- Personal guarantee requirements for loans of not more than \$200,000.
- The requirement to have been in business for 1-year prior to the disaster.
- The requirement that the applicant be unable to obtain credit elsewhere.

Additionally, the Administrator may approve applicants on their credit score, without requiring tax returns, or use alternative methods of determining the applicant's ability to repay.

An eligible entity that applies for an EIDL may request the Administrator provide an advance, not to exceed \$10,000, within 3 days after the Administrator receives the application to be used for the following:

- Providing paid sick leave to employees directly impacted by COVID-19,
- Maintaining payroll to retain employees during business disruptions and substantial slowdowns,
- Meeting increased costs to obtain materials unavailable from the applicant's original source due to supply chain interruption,
- Making rent or mortgage payments, and
- Repaying obligations that cannot be met due to revenue losses.

Such advance will not need to be repaid even if the applicant is subsequently denied a loan.

**1112. Subsidy for Certain Loan Payments.**

The administrator will pay the principal, interest, and any associated fees for the 6-month period, beginning with the next payment, that are owed on a loan that is guaranteed by the Administration under section 7(a) of the Small Business Act or the Small Business Investment Act or made by an intermediary to a small business concern using loans or grants received under section 7(m) of the Small Business Act.

**TITLE II - ASSISTANCE FOR AMERICAN WORKERS, FAMILIES, AND BUSINESSES****SUBTITLE C - BUSINESS PROVISIONS****2301. Employee Retention Credit for Employers Subject to Closure due to COVID-19.**

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<sup>4</sup> Seasonal employers will be compared to the February 15, 2019 through June 30, 2019 period. Other employers may elect the period used for calculation of the reduction.

<sup>5</sup> This applies to employees who did not receive, during any single pay period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000.

Eligible employers are allowed credit of 50% of the qualified wages paid after March 12, 2020 and before January 1, 2021, which shall be credited against applicable employment taxes for the applicable calendar quarter. Employers who receive a Paycheck Protection Loan under 1102 of the Act are not eligible.

**Qualified Wages:**

- “Qualified wages” means wages paid with respect to which an employee is not providing services due to COVID-19 circumstances, and such wages shall not exceed the amount such employee would have been paid for working the equivalent duration during the 30 days preceding such period.
- The amount of qualified wages with respect to any employee shall not exceed \$10,000 for all calendar quarters.
- Any wages taken into account for this credit cannot be used to determine a credit under 45S of the Internal Revenue Code.
- Qualified wages shall not include wages taken into account under Section 7001 of the Act or Section 7003 of the FFCRA.
- Qualified wages shall include an eligible employer’s qualified health plan expenses (amounts paid or incurred to provide or maintain a group health plan as defined in Section 5000(b)(1) of the Internal Revenue Code of 1986, but only to the extent such amounts are excluded from the gross income of employees by section 106(a) of the Code).

**Employer Eligibility:**

To qualify as an “eligible employer” a business must meet the following requirements:

- The employer is carrying on a trade or business during calendar year 2020.
- The operation of its trade or business is
  - fully or partially suspended during the calendar quarter due to orders from an appropriate government authority limiting commerce, travel, or group meetings; or
  - such calendar quarter is within the period beginning with the first calendar quarter after December 31, 2019 for which gross receipts are less than 50% of gross receipts for the same calendar quarter in the prior year, and ending with the calendar quarter following the first calendar quarter for which gross receipts are greater than 80% of the gross receipts for the same calendar quarter in the prior year.
- All persons treated as a single employer under subsection (a) or (b) of Section 52 of the Internal Revenue Code of 1986, or subsection (m) or (o) of Section 414 of such code, shall be treated as one employer.

**Third Party Payors:**

Any credit allowed under this section shall be treated as a credit described in Section 3511(d)(2) of the Internal Revenue Code of 1986.

## **2302. Delay of Payment of Employer Payroll Taxes.**

The employment taxes accruing from the date of the Act through December 31, 2020 shall be considered timely paid if (i) at least 50% of the required payment payments are made on or before December 31, 2021, and (ii) the remaining balance is paid on or before December 31, 2022. This deferment does not apply to any taxpayer which has had indebtedness forgiven under Section 1106 of the Act or under Section 1109 of the Act.

## **2303, 2304, 2305, 2306, and 2307. Tax-Related Provisions.**

Sections 2303, 2304, 2305, 2306, and 2307 modify a number of sections in the Internal Revenue Code of 1986, which may impact entities involved in the hospitality industry. We recommend that you review these changes with your tax consultants to determine the extent to which they apply to your business. You can also access Perkins Coie’s tax summary at the following web address: <https://www.perkinscoie.com/en/news-insights/the-cares-act-tax-provisions-summary.html>.

## TITLE III - SUPPORTING AMERICA'S HEALTH CARE SYSTEM IN THE FIGHT AGAINST CORONAVIRUS

### SUBTITLE C - LABOR PROVISIONS

#### 3601. Limitation on Paid Leave.

An employer shall not be required to pay more than \$200 per day and \$10,000 in the aggregate for each employee for paid leave under FMLA.

#### 3602. Emergency Paid Sick Leave Act Limitation.

The Act amends Section 5102 of the FFCRA to cap employer liability as follows:

- \$511 per day and \$5,110 in the aggregate for each employee who is unable to work due to quarantine order, health care advice, or COVID-19 symptoms.
- \$200 per day and \$2,000 in the aggregate for each employee for who needs leave to care for another individual or a similar condition.

#### 3605. Paid Leave for Rehired Employees.

Rehired employees are eligible for leave under FMLA if (i) they were laid off after March 1, 2020, (ii) had worked for at least 30 of the last 60 calendar days, and (iii) have been rehired by their employer.

#### 3606. Advance Refunding of Credits.

The Act also amends the FFCRA to allow for an advance of the refundable portion of excess paid sick leave credits.

#### 3608. Single-Employer Plan Funding Rules.

The due date for minimum required contributions which would otherwise be due during calendar year 2020 are due January 1, 2021 with such amount being increased by interest accrued from the original due date to the payment date. Interest shall accrue at the effective rate of interest for the plan for the plan year which includes such payment date. A plan sponsor may treat the plan's adjusted funding target attainment percentage for the last plan year ending before January 1, 2020 as the adjusted funding target attainment percentage for plan years which include calendar year 2020.

## TITLE IV - ECONOMIC STABILIZATION AND ASSISTANCE TO SEVERELY DISTRESSED SECTORS OF THE UNITED STATES ECONOMY

### SUBTITLE A - CORONAVIRUS ECONOMIC STABILIZATION ACT OF 2020

#### 4002(4). Eligible Business.

A business is eligible for assistance under this title if it is an airline carrier or "a United States business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under this Act."

#### 4003. Emergency Relief and Taxpayer Protections.

In addition to relief for air carriers, air carrier-adjacent businesses, and businesses critical to national security, the Secretary is authorized to make loans and loan guarantees to, and other investments in, programs or facilities established by the Board of Governors of the Federal Reserve System for the purpose of providing liquidity to the financial system that supports lending to eligible business, States and municipalities by purchasing obligations directly from issuers, purchasing obligations in secondary markets, or making loans.

### **Creation of a Program or Facility to Provide Direct Loans:**

The Secretary may make loans, loan guarantees, or other investments as a part of a program or facility established by the Board of Governors of the Federal Reserve System that provides direct loans only if the eligible businesses agree to (i) not repurchase an equity security listed on a national exchange of the business or any parent company of the business until 12 months after the date that the direct loan is no longer outstanding, (ii) not pay dividends or make other capital distributions with respect to common stock of the business until 12 months after the date that the direct loan is no longer outstanding, and (iii) comply with the limitations on compensation set forth in Section 4004 of the Act (e.g., while the debt is outstanding, no officer or employee whose total compensation exceeded \$425,000 in 2019 will receive total compensation which exceeds that received in 2019). The Secretary may only waive these requirements if it is necessary to protect the interests of the Federal Government.

The Secretary shall seek to implement a program or facility that provides financing to banks and lenders to make direct loans to eligible businesses. The direct loans shall be an interest rate no higher than 2% per annum, and no principal or interest payments shall be due on such direct loans for at least 6 months after such direct loan is made.

Any eligible borrower applying for a direct loan under the program must make a good faith certification that:

1. Uncertainty of economic conditions makes necessary the loan to support ongoing operations,
2. The funds will be used to retain at least 90% of the recipient's workforce at full compensation and benefits until September 30, 2020,
3. Recipient intends to restore not less than 90% of the workforce that existed on February 1, 2020 and to restore all compensation and benefits no later than 4 months after the termination date of the public health emergency (COVID-19),
4. Recipient is an entity domiciled in the U.S. with significant operations and employees in the U.S.,
5. Recipient is not a debtor in bankruptcy,
6. Recipient is created or organized in the U.S. and has significant operations in and a majority of employees based in the U.S.,
7. Recipient shall not pay dividends with respect to common stock or repurchase equity security listed on a national stock exchange of the recipient or the parent company of recipient while the direct loan is outstanding,
8. Recipient will not outsource or off-shore jobs for the term of the loan and 2 years after completing repayment,
9. Recipient will not abrogate existing collective bargaining agreements for the term and 2 years after completing repayment; and
10. Recipient will remain neutral in any union organizing effort for the term of the loan.

### **4013. Temporary Relief from Troubled Debt Restructurings.**

From March 1, 2020 until December 31, 2020 (or the date that is 60 days after termination of the national emergency related to COVID-19), a financial institution may suspend requirements under GAAP for loan modifications that would otherwise be categorized as troubled debt restructuring and suspend a determination of a modified loan as being a troubled debt restructuring, including impairment for accounting purposes. Any such suspension shall only apply to any modification for a loan that was not more than 30 days past due as of December 31, 2019 and shall not apply to any adverse impact on the credit of a borrower that is not related to the COVID-19 pandemic.

### **4019. Conflicts of Interest.**

No covered entity is eligible for any transaction or program described in Section 4003 of the Act. "Covered entity" means an entity in which a covered individual directly or indirectly owns, controls, or holds not less than 20%, by vote or value, of the outstanding amount of any class of equity interest in an entity. "Covered individual" means (i) the President, the Vice President, the head of an Executive department, or a member of Congress; and (ii) the spouse, child, son-in-law, or daughter-in-law, as determined under applicable common law, of any of the individuals described in (i).