



## **UPDATED ONE-PAGE SUMMARIES FOR STARTUPS**

### **Rent, SBA Financing and Employment Decisions during the COVID-19 Shutdowns**

**Updated: April 2, 2020**

If you have now read 2,000 articles on COVID-19 issues for your Startup, and you are still struggling to keep them straight, you are not alone. Each updated one-page summary that follows provides what your Startup needs to know today on each main issue to navigate the crisis.

We are here to help.

#### **Rent / Lease Obligations**

##### **Updates 4/2/20:**

- April 1 has now passed but many tenants will be in the grace period. Still read your lease or seek assistance.
- On Eviction Moratorium: Governor orders are trickling in, but vary from state to state. For example, in IL, explicit regarding residential only. In NY expressly applies to both residential/commercial. In CA, does not state whether residential/commercial/both, so it appears to apply to both.

##### **Force majeure**

- Most leases address events beyond the parties' control that make the lease impossible to use/fulfill.
- Few expressly consider pandemics. Its meaning will be a fact-based analysis.
- Most leases do not permit force majeure to delay rent obligations; some permit abatement or even termination.

##### **Communication**

- Communication with Landlords is critical, practically, but be mindful: communications have legal impact.
- It is important to reach out to your landlord and get color on their position / approach.
- Even if there are legal protections, consider the practical benefit of avoiding landlord disputes and disruption.
- Generally, a tenant still should not admit any default or intent to default to avoid triggering anticipatory breach.
- Alternatives to consider with your landlord. Again, do not admit breach or intent to breach while discussing:
  - Deferment/Forbearance: perhaps the landlord will agree to either:
    - Agree in writing to confirm no breach and spread 1-2 months over the remainder of the lease.
    - Or, landlord may state you are in breach, but reserve all rights while giving time to cure it.
  - Extensions: Consider willingness to offer to landlord adding months/years onto the end of the lease.

##### **State Actions:**

- Moratoriums on Eviction: e.g. N.Y. has just declared a 3-month moratorium on all evictions. Other states may follow but no guidance yet.
  - This does not relieve rent obligations or unwind a breach; practically gives 3 months to become current.
  - Pay close attention to additional guidance and regulations, which is varying state by state.



**Updated: April 2, 2020**

## CARES Act Paycheck Protection Program Loans – a Section 7(a) SBA Loan

### **Updates 4/2/20**

- **Here is the [Sample Application Form](#)** provided by the SBA on March 31. Each lender may have its own additions. Lenders will begin accepting April 3. Check with your own bank, and note many are accepting applications online.
- **See attached the [SBA PPP Borrower FAQ](#)**, which provides updated guidance from the SBA as of March 31.
- **20% Owner Certifications**: there are certifications that must be signed by all 20% or greater owners. Must review these carefully. If any concern with any certifications, must discuss, as it can cause liability (e.g. False Claims Act).
- **Includes SBA Affiliation Certification, updated guidance**: the “Affiliation Rule” has not yet been waived so existing rules still apply. The Rule under CFR 121.301 requires a review of your company’s specific minority investor control rights, whether by board representation or protective consent rights, together with cap table.
  - **Review updated guidance and analysis with counsel on the Affiliation Rule before applying. With new guidance we can make a preliminary determination same day.**
- **Loan Forgiveness**: anticipated not more than 25% of the forgiven amount may apply to non-payroll costs (e.g. rent, utilities).
- **Application Materials to be prepared with**: 2019 and 2020 monthly profit and loss statements, payroll reports, filings for income/payroll/unemployment insurance, EIN, capitalization summary, governance documents.

### **Eligibility Criteria**

- Business with less than 500 employees; see Affiliation Rule update above.
- Good Faith Certification when Applying: review page 2 of the [Sample Application Form](#) carefully.
  - Includes: Number of employees (subject to Affiliation Rule above); necessary for ongoing operations; not duplicative of other loans (for EIDL, if applying for both, must assign different purposes); and use of proceeds for payroll, mortgage, rent/lease, utility, increased materials costs, and existing debt/obligations that cannot be met due to revenue losses.

### **Amount Available per Business**

- 2.5x average monthly payroll costs (up to \$10M max), calculated using 2019 data.
  - Includes: salary/wages/tips, leave, severance, group health / retirement benefits, state/local taxes
  - Excludes: excess over \$100k in annualized salary per employee; payroll / fed income taxes; non-US based employees; sick/family leave allowed under Families First Coronavirus Response Act (FFCRA);

### **Loan Forgiveness**

- Equal to amount spent during the 8-week period after origination of the loan, including Payroll costs (same inclusions/exclusions as above), Rent and Utilities, Mortgage Interest in ordinary course.
- Reduction of Forgiveness is in proportion to any:
  - Reduction in average # of Full Time Equivalent Employees (FTEs) compared to prior period, and/or
  - Reduction of employee’s compensation below 75% of prior full quarter compensation.
  - To encourage rehiring, any Feb 15, 2020-April 26, 2020 reductions are ignored if by June 30, 2020, the FTE rehires or compensation, as applicable, reach or exceed the same prior average monthly FTE figure.

### **Loan Terms**

- Interest Rate: 4% max | Maturity: 1-10 years (if not forgiven) | Deferral: 6–12 months (if not forgiven)
- Collateral/Guarantee/Recourse: None (unless unauthorized purpose).
- Fees: No prepayment penalties or fees which would be applicable to other 7(a) loans.

### **Time to Process**

- Applications begin April 3, 2020. Prepare to cut through red tape, and note application volume will be high, so don’t delay.



Jordan Koss | Member | Head of Startup-VC  
E-mail: [jkoss@mcdonaldhopkins.com](mailto:jkoss@mcdonaldhopkins.com)  
Direct Dial: 312.642.2213

**Updated: April 2, 2020**

## Economic Injury Disaster Loans (EIDLs) – a Section 7(b) SBA Loan

**Apply at:** <https://covid19relief.sba.gov/#/>

### **Eligibility Criteria**

- Business with less than 500 employees; see Affiliation Rule update under the PPP Loan Summary on prior page.
- Suffering substantial economic injury as a result of COVID-19 Pandemic.

### **Use of proceeds**

- Pay fixed debts, payroll, accounts payable and other bills that can't be paid because of the disaster's impact.
- Cannot be used for lost profits or business expansion

### **Amount Available per Business**

- Up to \$2M

### **Loan Terms**

- Interest Rate: 3.75% | Maturity: Up to 30 years
- Collateral/Guarantee/Recourse:
  - Must provide collateral for loans over \$25,000. Must pledge what is available if there is no collateral.
  - Requires a personal guarantee for a loan of over \$200,000 from any owner of 20% or more of the Business. No specific guidance on the guarantee if only funds/entities own > 20%, or where there is no 20% owner.

### **Time to Process**

- The Treasury Secretary predicted availability within three weeks, i.e. approximately April 15, 2020.
- Prepare for red tape.



**Updated: April 2, 2020**

## Employment / Benefits / Unemployment - CARES Act and FFCRA

### **CARES Act – Unemployment Benefits**

- Includes persons not usually covered: self-employed and independent contractors (including gig / freelancers)
- Not eligible if one has the ability to telework with pay or if receiving paid sick leave / other paid leave benefits.
- Certification:
  - Available and unable to work due to a laundry list of reasons related to being diagnosed, quarantined, or caring for one who is diagnosed/quarantined, or due to one's company/job shutting down for such reasons.
- Amount / Timing of Unemployment Benefits:
  - \$600 per week for up to four months **on top of** what states pay as a base unemployment payment.
  - Funded as soon as unemployed, no one week waiting period
  - Employees with reduced hours will receive a pro-rated unemployment benefit.
    - Traditionally, once the employee earns over 25% of its prior base salary would it start to reduce the benefit; the CARES Act benefits are on top of any state benefits.

### **Families First Coronavirus Response Act (FFCRA) – Required Sick/Family Leave**

- From 4/1/20-12/31/20, as further detailed in this [Poster](#), if fewer than 500 employees, must provide paid sick leave (up to 10 days) and family and medical leave (up to 10 weeks) for reasons related to COVID-19
- The [Poster](#) must be "posted" by 4/1/20. May be satisfied by email to employees or post on employee website/portal.
- Employers are able to seek reimbursement through tax credits.
- Employers Exemption: if fewer than 50 employees, exempt from 10-week expanded family/medical leave for childcare, if it would jeopardize the solvency of the business. More [FAQs answered here](#).

### **Layoffs, Furloughs and Health Care Coverage**

- Furloughs for non-exempt employees (i.e. employees eligible for overtime):
  - If they do not work, they are not owed wages. Therefore, hours/time worked can generally be reduced.
  - To avoid "waiting time" claims, non-exempt employees should be completely relieved from duty.
- Furloughs for exempt employees:
  - Similar waiting time issue: exempt employees should not perform any work during workweek.
  - Eligibility for unemployment benefits will vary by state law, but subject CARES Act and FFCRA above.
- Immigration:
  - Confirm immigration status before any furlough, or will affect status and notification requirements.
- Health Care while Furloughed:
  - Generally: If below the 30-hours per week, laid off or furloughed, it would typically trigger a loss of coverage and trigger COBRA (if at least 20 employees; if less, then state mini-COBRA law could be triggered).
  - Employers can (but no obligation to) amend plans to cover part-time / laid off / furloughed employees.
    - If the plan is fully-insured or on stop-loss, this will require insurance company consent.
- Employers Considering Layoffs:
  - Federal WARN applies for companies with 100+ employees and requires 60 day notice of mass layoffs..
  - Important to determine whether state law WARN / mini-WARN, or natural disaster exceptions, apply.
  - If potentially applicable, a complex set of steps and notifications must be followed.