Practical Guidance for South Carolina Startups and Small Businesses Navigating the CARES ACT

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Today’s Presenters

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Firm Overview

• We represent management exclusively in every aspect of employment, benefits, labor, and immigration law and related litigation.

• As leaders in educating employers about the laws of equal opportunity, Jackson Lewis understands the importance of having a workforce that reflects the various communities it serves.

• With 61 locations and more than 950 attorneys, we offer local knowledge backed by the support of a national firm.

• We are founding members of L&E Global, a global alliance of premier employer’s counsel firms.
Agenda

- Paycheck Protection Program ("PPP")
- Economic Injury Disaster Loans ("EIDL")
- Assistance for American Workers, Families, and Businesses (i.e., the Unemployment Expansion Provisions)
- Q&A
Why Is There so Much Confusion?

- President Trump signed the Coronavirus Aid, Relief, and Economic Security (“CARES”) Act on March 27, 2020

- States, banks, and employers all need guidance on how to implement

- Department of Labor (“DOL”), Department of the Treasury, Internal Revenue Service (“IRS”), Small Business Administration (“SBA”)

- We are all witnessing, in real time, to how a law is made
Section 1102 – Paycheck Protection Program ("PPP")
Who is Eligible to Receive a Loan Under the PPP?

• **Eligibility**
  - Businesses with 500 or fewer employees, or
  - Businesses that operate in a certain industry and meet SBA size standards, or
  - Sole Proprietorship, Independent Contractor, Self-Employed Individual
    - General rule for “affiliates” applies

• **Requirements**
  - In operation on February 15, 2020, **and**
  - Had employees whom you paid salaries and payroll taxes
  - If you are an independent contractor or self employed then income or net earnings from self-employment

• Of note, payment to independent contractors does not count as employees for purposes of a PPP eligibility since independent contractors have the ability to apply themselves
What Is “Affiliation” and Why Is It Important to My Business?

- SBA is concerned about size of businesses eligible to receive loans under PPP.
- In determining size of companies, SBA looks to whether Company A is “affiliated” with Company B.
  - If companies are deemed affiliated, SBA will combine all companies together for purposes of determining size of business.
- Generally:
  - Affiliation exists when one business controls or has the power to control another or when a third party controls or has the power to control both businesses.
  - This control can be negative control as well (i.e., governing documents allow minority shareholder to stop or block action of the company; veto rights).
    - Does not matter whether control is actually exercised, the mere existence of control is sufficient.
- Exceptions For Restaurant Owners and Franchisees
  - Employers in the food service and hospitality industries qualify if they employ 500 or fewer per physical location.
  - Explicitly waives affiliation rules for franchises.
What Is “Affiliation” and Why Is It Important to My Business?

- Four Test in determining Affiliation:
  - Ownership
    - If individual, business, or entity owns or has the power to control more than 50% of voting rights for applying company – affiliation is also found where minority shareholder can prevent a quorum or block action by the board of directors
  - Stock options, convertible securities, and agreements to merge
    - SBA treats these contracts as present effect on the power to control a business
  - Management
    - Where CEO or President of applying company also controls management of another company
  - Identity of interest
    - Individuals or firms have identical or substantially identical business or economic interests may be treated as one (i.e., close relatives, common investments, economic dependence)
• If affiliation is determined to exist, the SBA may add together the applying company’s size with that of its VC Investor along with the VC Investor’s other startups making the applying company ineligible for the loan due to the combined size

• VC’s and other related investment firms should thoroughly review governing documents with their startup company to determine whether affiliation applies

• Important note: if a minority shareholder in a business irrevocably waives or relinquishes any right, the minority shareholder would no longer be an affiliate
How Much Am I Eligible to Borrow?

• **Loan Size**
  • The lesser sum of:
    • 2.5x the *average total monthly payroll costs* incurred during the one-year period prior to the date on which loan is made, **plus**
    • Any outstanding amount of a loan during period beginning on January 31, 2020, or
    • $10,000,000

• **Loan Terms (only for portion not forgiven)**
  • Interest: 1 percent
  • Maturity: 2 years
  • Deferment: will not have to make any payments for 6 months following date of disbursement
    • However, interest will accrue during 6-month deferment.
  • No collateral required; no personal guarantee required
What Qualifies as “Payroll Costs”?

• Payroll costs consist of compensation to employees in the form of:
  • Salary (capped at $100,000.00 on an annualized basis for each employee)
  • Wages
  • Commissions
  • Similar compensation
  • Cash tips or the equivalent
  • Payment for vacation, parental, family, medical, or sick leave
  • Allowance for separation of dismissal
  • Payment for employee benefits: group health care coverage, insurance premiums, and retirement
  • State and local taxes assessed on compensation of employees
What Are My Payroll Costs If I Am a Sole Proprietor, Independent Contractor, or Gig Economy Worker?

• SBA will accept:
  • Wages
  • Commissions
  • Income
  • Net earnings from self-employment, or
  • Similar compensation
Example of Calculating Maximum Loan Amount:

- Company A has no employees that make more than $100,000
  - Annual Payroll: $120,000
  - Average Monthly Payroll Costs: $10,000
  - Maximum Loan Amount = $25,000 ($10,000 * 2.5)

- Company B has some employees that make more than $100,000
  - Annual Payroll: $1,500,000
  - Subtract compensation in excess of annual salary of $100,000: $1,200,000
  - Average Monthly Qualifying Payroll Costs: $100,000
  - Maximum Loan Amount: $250,000 ($100,000 * 2.5)
Where Do I Apply and What Must I Provide?

• **Apply At:**
  - All SBA 7(a) lenders are automatically approved to make PPP loans
  - Any federally insured depository institution or any federally insured credit union
  - Any depository or non-depository financing provider that services business loans

• **Documentation:**
  - Payroll Processor Records
  - Payroll Tax Filings

• **If Sole Proprietor/Independent Contractor submit:**
  - Form 1099-Misc
  - Income and Expenses
  - If no documentation, submit supporting documentation, such as bank records, to show payroll
When Can I Apply for PPP?

• Small Businesses and Sole Proprietorships with employees were able to submit applications last Friday, April 3, 2020

• Independent Contractors and Sole Proprietors may apply on April 10, 2020

• PPP is on a “first-come, first-serve” basis
  • Apply early
  • Several reports that money is running out
  • Reports that President Trump and Congress are deciding whether to implement additional funds into the program
During Application, You Must Certify in Good Faith That:

- The uncertainty of the current economic conditions makes the loan request necessary to support ongoing operations of the business.

- The funds will be used to retain workers and maintain payroll, or make mortgage, lease or utility payments.

- You were in operation on February 15, 2020 and had employees you paid salaries and payroll taxes.

- Documentation verifying number of FTEs on your payroll, dollar amount of payroll costs, covered mortgage interest payments, covered rent payments and covered utilities for the 8 week period following the loan.
Once I Receive the Funds, What Can I Use the Money For?

• **Allowable Uses of Loan Proceeds**
  • Payroll costs
  • Payments of interest on any mortgage obligation (not on principal)
  • Rent arising under lease agreement (both real and personal property) in force before February 15, 2020
  • Utilities (including electricity, gas, water, transportation, telephone, or internet access)
  • Payment of interest on any other debt obligations incurred before covered period

• **There is a Catch for Forgiveness**
  • Must use loan proceeds over 8 week following the date of the loan (the “covered period”)
  • Not more than 25% of forgiven amount may be for non-payroll costs (i.e., at least 75% must be for payroll costs)
  • During the period beginning on February 15, 2020 and ending on December 31, 2020, you cannot receive another loan under the Paycheck Protection Program
Section 1106 – Loan Forgiveness
Paycheck Protection Program Forgiveness

• Reduction in Forgiveness
  • Based on Number of Employees

Loan Amount

Average Number of Full-Time Equivalent Employees (FTEs) Per Month for the 8-weeks Beginning on Loan Origination

Option 1:
Average number of FTEs per month from February 15, 2019 to June 30, 2019

Option 2:
Average number of FTEs per month from January 1, 2020 to February 29, 2020

For Seasonal Employers:
Average number of FTEs per month from February 15, 2019 to June 30, 2019
Company C is a non-seasonal employer effected by COVID-19
  • On March 31, 2020, Company C terminates 15 employees
  • On May 1, 2020, Company C obtains loan in the amount of $250,000 through PPP

Company C spends entire loan on payroll costs so full amount is eligible for forgiveness

Company C has an average of 35 FTEs between May 1 and June 27 (the 8 week “covered period”); whereas,
  • (a) The average number of FTEs between Feb. 15, 2019 and June 30, 2019 was 100; or,
  • (b) The average number of FTEs between Jan. 1, 2020 and February 29, 2020 was 50.

Company C is eligible for loan forgiveness in the amount of $175,000. The remaining $75,000 must be repaid back.
  • $250,000 * 35 / 50 = $175,000
Paycheck Protection Program Forgiveness

• Calculation Based on Reduction in Salaries

- Loan Amount
- The amount of any reduction in wages that is greater than 25% compared to their most recent full quarter.*

* The employee described is one who did not earn during any period in 2019 wages at an annualized rate more than $100,000
Example of Reduction in Workforce with PPP Loan Forgiveness

• On March 1, 2020, Company C also had to reduce salaries of 5 employees from $50,000 to $25,000
  • Assume each employee did not earn over $100,000 in 2019
• Since reduction is more than 25%, the loan forgiveness is further reduced by amount in excess of 25% of the reduction ($12,500 per employee)
  • ($25,000 * .25)
• The reduction amount totals $62,500 (5 employees * $12,500)
• Company C is now required to pay back $137,500 of the $250,000 loan
  • $75,000 + $62,500 = 137,500
• The loan amount forgiven is $112,500
  • $250,000 - $137,500 = $112,500
The Good News with Rehires and Salary Increases

• If you are able to rehire employees, then the loan will be forgiven to the extent you can bring back the same number

• Rate increases also count towards your overall loan forgiveness amount

• Back to Example:

• If Company C is able to rehire all FTEs it terminated on March 1, 2020 and rescinds the salary reductions on June 1, 2020, the entire $250,000 will be forgiven
  • Importantly, Company C does not have to rehire the same individuals
  • As long as the positions are filled, the SBA will forgive the loan
  • The employer needs to show documentation that the loan funds were used on payroll, lease, and verify the number of full-time equivalent employees
Economic Injury Disaster Loans ("EIDL")
Who is Eligible to Receive EIDL?

• **Eligibility**
  - Businesses with 500 or fewer employees, or
  - Cooperatives, ESOPs, and tribal small businesses with fewer than 500 employees,
  - Sole Proprietorship, Independent Contractor, Self-Employed Individual
    - General rule for “affiliates” applies
  - Most private nonprofits

• **Requirements**
  - In operation on January 31, 2020
How Much Am I Eligible to Borrow?

• **Loan Size:**
  • Maximum amount up to $2,000,000 (eligibility based on size and type of business)
  • Up to $200,000 can be approved without a personal guarantee
    • $25,000 or less require no collateral
    • Amount above $25,000 require collateral

• **Loan Terms:**
  • Interest rates: 3.75% for businesses, 2.75% for non-profits with up to a 30 year term
  • Payment are deferred for 1 year
  • Approval can be based on credit score (1st year tax returns not required)
Section 1110 – Emergency Economic Injury Disaster Loans (“EIDL”) Grant
• **Emergency Advance:**
  - Eligible applicants for an EIDL can receive a $10,000 emergency grant within 3 days of applying
    - Though, I am hearing this emergency grant is taking longer

• **No obligation:**
  - The $10,000 advance will be forgiven
  - Not necessary to have been approved of EIDL to receive $10,000

• **Deadline to submit:**
  - December 30, 2020

• **Combining PPP with Emergency Advance and EIDL**
  - If you receive $10,000 grant, then obtain a PPP loan, the grant will be subtracted from the forgiveness amount
  - If you receive a PPP loan, you cannot use EIDL for the same purpose as the PPP
Emergency Economic Injury Disaster Grant

- **EIDL is provides more flexibility:**
  - Used as working capital to pay fixed debts
  - Payroll
  - Accounts Payable
  - Other bills that could have been paid had COVID-19 not occurred.

- **Proceeds come from SBA**
  - As opposed to obtaining funds from lenders, EIDL is funded directly by the SBA

- **EIDL is not forgivable**
  - Except for an $10,000 grant/advancement
Section 2102 - 2107
Unemployment Insurance Expansion
What’s new?

• Pandemic Unemployment Assistance (PUA)
• Pandemic Emergency Unemployment Compensation (PEUC)
• Federal Pandemic Unemployment Compensation (FPUC)
What Is PUA and Who Is Covered?

• PUA provides up to 39 weeks of unemployment compensation coverage for those who generally are not eligible for regular unemployment compensation due to:
  • Lack of sufficient work history;
  • Self-employed; or,
  • Generally do not qualify under regular unemployment compensation

• Examples of workers who may fall into this category:
  • Gig economy workers
  • Independent contractors
  • Workers for certain religious entities
  • Individuals who own their own business/farm

• To qualify for PUA, an individual must confirm that their unemployment is related to COVID-19
How Do I Know If I Qualify?

- To qualify for PUA, an individual may provide **self-certification** that he or she is able and available to work, but is unemployed or partially unemployed, due to any of the following:
  - Has been diagnosed with COVID-19 or is experiencing symptoms and seeking a medical diagnosis
  - A member of the individual’s household has been diagnosed with COVID-19
  - The individual is providing care for a family member or household member who has been diagnosed with COVID-19
  - The individual is the primary caregiver for a child or other person in the household who is unable to attend school or another facility as a direct result of COVID-19
  - The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of COVID-19
  - The individual is unable to work because a health care provider has advised the individual to self-quarantine due to COVID-19 concerns
  - The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of COVID-19
  - The individual has become the breadwinner or major support for a household because the head of household has died as a direct result of COVID-19
  - The individual has to quit their job as a direct result of COVID-19
  - The individual’s place of employment is closed as a direct result of COVID-19
Recent Department of Labor Guidance re: Direct Result of COVID-19

• States should bear in mind that the qualifying circumstances are likely to be of short term duration

• Example:
  • Individual who has been advised to self-quarantine by health care provider may be able to return to work within two weeks of the exposure if they have not exhibited symptoms of COVID-19
  • Similarly, a school is not closed as a direct result of COVID-19 public health emergency after the date of the school year was originally scheduled to end.
  • Expectation that States will require individuals to continue actively seeking work

• “States should also note that an individual does not have to quit his or her job as a direct result of COVID-19 if paid sick leave or other paid leave benefits are available to the individual. Generally, an employee ‘has to quit’ within the meaning of this section only when ceasing employment is an involuntary decision”
South Carolina provides a maximum of 20 weeks of regular unemployment compensation (UC)

Pandemic Emergency Unemployment Compensation provides an additional 13 weeks on top for a total of 33 weeks
What Is FPUC and Who Is Entitled to It?

- Federal Pandemic Unemployment Compensation provides
  - Additional $600 per week payment to each recipient for up to four months (expires on July 31, 2020)
    - DOL Guidance: “if eligible to receive at least $1, the individual will receive the full $600 benefit”
  - South Carolina’s maximum weekly benefit is $326
    - Maximum benefit: $326 + $600 = $926
    - Minimum benefit: $42 + $600 = $642

- Individuals are **not** eligible if:
  - They are able to work remotely
  - They are receiving paid sick or paid family leave benefits under the FFCRA
  - Their salary has been reduced but regular work schedule remains the same
If I Was Recently Self-Employed, How Much Am I Entitled To?

• Self-employment income will be treated as wages and shall be the net income on the tax return

  • If an individual has not filed a tax return but submits documentation to substantiate employment or self-employment, DEW will determine the weekly amount of benefit due to the individual

  • If no net income from self-employment, the individual will be entitled to a weekly amount equal to 50% of the average weekly payment, $236. Accordingly, an individual may be entitled to $118 per week plus an additional $600
Partial Unemployment, Disqualifications, and Retaliation

• **Partial Unemployment:**
  • You may receive partial income from your employer
    • However, if your weekly income exceeds your weekly unemployment benefit, you will not be entitled to any unemployment compensation

• **Disqualifications and Fraud:**
  • Quitting a job without good cause to receive unemployment benefits is fraudulent
  • Subject to criminal prosecution and repayment of benefits

• **Retaliation:**
  • “Employees have the right to safe and healthy workplaces. Any worker who believes that their employer is retaliating against them for reporting unsafe working conditions should contact OSHA immediately.”
Application Process for Unemployment

- **Where to apply?**
  - South Carolina Department of Employment and Workforce (DEW)
  - Online is quickest way to get into system

- **What documents are necessary?**
  - Enter prior employment history
  - W-2
  - 1099-Misc

- **When do apply?**
  - Immediately following your termination
• Within a week of applying, the employee will receive a monetary determination by mail outlining their potential weekly and maximum benefits amount.

• Within 21 days of receiving the monetary determination, the employee will receive a final eligibility decision by mail.

• If deemed eligible, the employee will receive benefits within the first week (“first week rule” has been waived).

• Have not received guidance on whether $600 will pay separately or together with S.C. weekly benefit.
## Summary

<table>
<thead>
<tr>
<th>OVERVIEW</th>
<th>EIDL</th>
<th>EIDL ADVANCE</th>
<th>PPP</th>
</tr>
</thead>
<tbody>
<tr>
<td>Lender</td>
<td>SBA</td>
<td>SBA</td>
<td>SBA 7(a) Approved Lender</td>
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<tr>
<td>Maximum Loan Amount</td>
<td>$2MM</td>
<td>Advance of up to $10,000</td>
<td>2.5x average monthly payroll costs capped at $100K per employee, maximum of $10MM per borrower</td>
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<tr>
<td>Application Deadline</td>
<td>December 31, 2020</td>
<td>December 31, 2020</td>
<td>June 30, 2020</td>
</tr>
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</table>
| Eligible Borrowers | Businesses that meet the SBA size standards | - 500 or fewer employees  
- Sole proprietorship (with or without employees or as independent contractors)  
- Cooperative of 500 or fewer employees  
- ESOP (500 or fewer employees)  
- Tribal small business concern (500 or fewer employees) | Businesses with <500 employees  
Businesses in NAICS 72 with <500 employees per individual location. |
| Use of Proceeds* | - Payroll  
- Rent  
- Utilities  
- Interest on debt occurred  
- Accounts payable  
- Some bills that could have been paid had the disaster not occurred | - Payroll  
- Rent  
- Utilities  
- Interest on debt occurred  
- Accounts payable  
- Some bills that could have been paid had the disaster not occurred | - Payroll  
- Interest on mortgage payments (principal or prepayments excluded)  
- Rent  
- Utilities  
- Interest on any debt incurred prior to Feb. 15, 2020 |
<p>| Collateral        | No collateral for loan amounts up to $25,000 | N/A                                              | Waived                                  |</p>
<table>
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<th>EIDL ADVANCE</th>
<th>PPP</th>
</tr>
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<tbody>
<tr>
<td>Personal Guarantee</td>
<td>No personal guarantee for loan amounts up to $200,000</td>
<td>N/A</td>
<td>Waived</td>
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<tr>
<td>Affiliation</td>
<td>Applicable</td>
<td>Waived</td>
<td>Applicable</td>
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<tr>
<td>No Credit Elsewhere</td>
<td>Waived</td>
<td>Waived</td>
<td>Waived</td>
</tr>
<tr>
<td>Forgiveable</td>
<td>No</td>
<td>Yes</td>
<td>Yes, up to 100%. Forgiveness of indebtedness of an amount equal to the sum of the qualified costs incurred and payments made during the covered period (8-week period following loan origination). Forgiveness portion may be reduced by a reduction in retained employees or reduction in pay of retained employees.</td>
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<tr>
<td>Interest</td>
<td>3.75%</td>
<td>N/A</td>
<td>Up to 4% for non-forgiven portion Currently fixed at 1%</td>
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<tr>
<td>Term</td>
<td>Up to 30 Years</td>
<td>N/A</td>
<td>Up to 10 years for non-forgiven portion Currently 2 years</td>
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<tr>
<td>Prepayment Penalty</td>
<td>None</td>
<td>N/A</td>
<td>None</td>
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</table>

* You may apply for both the Economic Injury Disaster Loan and the Paycheck Protection Program, however advances or loan proceeds cannot be used for the same purpose during the same time period.
Questions?
Strategically Located to Serve Employers’ Needs

61 Locations Nationwide

950+ Attorneys
Thank you.