

**Financial Assistance Options for Staffing Agencies Under the CARES Act**

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**The Paycheck Protection Program**

The Paycheck Protection Program (“PPP”) provides \$349 billion of Small Business Administration (“SBA”) loans to small businesses to cover the cost of maintaining payroll, insurance, rent, health benefits, utilities and other expenses. Further guidance is anticipated with respect to many of the issues described below. Additional information regarding the PPP and the application form can be found [here](#). The Small Business Administration (SBA), in consultation with the Department of the Treasury, will provide timely additional guidance in the form of “Frequently Asked Question” (“FAQs”) that will answer borrower and lender questions concerning the PPP. Staffing agencies can access the FAQs for the latest guidance [here](#).

**Requirement of 500 Employees or Less.** Staffing agencies of 500 employees or less are eligible for the PPP. For this purpose, the PPP and SBA rules define “employee” to include individuals employed on a full-time, part-time or other basis. As a result, absent further guidance, staffing agencies should include their temporary employees in determining whether they meet the 500 employee or less limitation. SBA rules further provide that the definition of employee “includes employees obtained from a temporary employee agency, professional employee [sic] organization or leasing concern.” 13 CFR Section 121.106. Thus, absent further guidance, it appears that both staffing agencies and their clients must include the staffing agency’s temporary employees in their respective headcounts for purposes of determining eligibility under the PPP. Clients, however, likely cannot include payments made to staffing agencies for services provided by agency employees as payroll costs in determining the client’s loan amounts under the PPP (*see* discussion of maximum loan amounts below).

Related businesses with common ownership or management should be combined for purposes of calculating their employee count under the SBA’s “affiliation” rules. Entities may be considered affiliates based on factors including stock ownership, overlapping management, and identity of interest. The CARES Act waives the affiliation rules in the case of hospitality and food services establishments under North American Industry Classification System (“NAICS”) Code 72 and any business operating as a franchise that is assigned a franchise identifier code by the Administration. Hence, such entities will be considered separately for PPP loan purposes. A summary of the affiliation rules can be found [here](#).

**Maximum Loan Amount.** The maximum PPP loan amount for each borrower will equal the lesser of (i) \$10 million, or (ii) the average total monthly payments by the applicant for payroll costs (as defined below) incurred during the one-year period prior to the date on which the loan

is made multiplied by 2.5, plus the outstanding amounts of any Emergency Injury Disaster Loan (“EIDL”) obtained on or after January 31, 2020 which is to be refinanced under the loan (less any EIDL Emergency Advance, as described below).

Loan Terms. Loans are for a two-year term at a fixed rate of 1.00%. All payments are deferred for the first 6 months; however, interest will continue to accrue over this period. There are no prepayment penalties or fees. In addition, the loans are nonrecourse, no collateral is required and there is no personal guarantee requirement.

Application Process. Loan applications (including required payroll documentation) can be submitted to SBA lenders and other financial institutions between April 3, 2020 and June 30, 2020, although interested staffing agencies are encouraged to submit applications as soon as possible as the loans are being processed on a “first-come, first-served” basis. Loan applicants must make a number of representations and certifications, including good faith certifications regarding the necessity of the loan and the use of the loan proceeds.

Use of Loan Proceeds. Eligible recipients can use the proceeds from the loan for (i) payroll costs (as defined below); (ii) costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums; (iii) employee salaries, commission, or similar compensations; (iv) payments of interest on any mortgage obligation (excluding any prepayment); (v) rent; (vi) utilities; and (vii) interest on any other debt obligations that were incurred before the period. For this purpose, “payroll costs” include (i) salary, wage, commission, or similar compensation; (ii) payment of cash tip or equivalent; (iii) payment for vacation, parental, family, medical or sick leave; (iv) compensation for dismissal or separation; (v) payment required for the provision of group health care benefits, including insurance premiums; (vi) payment of retirement benefits; (vii) payment of state or local tax assessed on the compensation of employees; and (viii) compensation to sole proprietors or independent contractors (including commission-based compensation) up to \$100,000 in one year, prorated for the covered period.

“Payroll costs” do not include (i) individual employee compensation above \$100,000 per year, prorated for the covered period; (ii) employer and employee taxes imposed or withheld under FICA (Social Security and Medicare) and Federal income tax withholding; (iii) compensation to employees whose principal place of residence is outside of the U.S.; and (iv) qualified sick leave or family leave wages for which a credit is allowed under the Families First Coronavirus Response Act. At least 75% of the loan proceeds must be used for payroll costs. While staffing agencies can include the wages and other compensation paid to the temporary employees on their payroll as part of their “payroll costs,” clients cannot do so because the temporary employees are not on the client’s payroll.

Loan Forgiveness. A borrower is eligible for loan forgiveness equal to the amount spent by the borrower during an 8-week period after the origination date of the loan on (i) payroll costs, (ii) interest payments on any mortgage incurred prior to February 15, 2020, (iii) payment of rent on any lease in force prior to February 15, 2020, and (iv) payment on any utility for which service began before February 15, 2020. Not more than 25% of the loan forgiveness amount may be for

non-payroll costs. In addition, the SBA will be issuing additional guidance regarding loan forgiveness.

The amount of the loan forgiveness will be reduced for reductions in the number of employees or reductions relating to salary and wages. In this regard, the amount of loan forgiveness will be reduced by any reduction in the average number of full-time equivalent (“FTE”) employees employed by the borrower during the eight-week measurement period beginning upon origination of the loan, as compared to one of the following (at the borrower’s election): (i) the average number of FTE employees per month employed between Feb. 15, 2019, and June 30, 2019, or (ii) the average number of FTE employees per month employed between Jan. 1, 2020, and Feb. 29, 2020.

The percentage reduction for a reduction in workforce is calculated by a fraction with the numerator being the average number of FTE employees per month during the 8-week measurement period and the denominator being the average number of FTE employees per month during one of the two elective periods described above. In addition, the amount of loan forgiveness will also be reduced dollar-for-dollar by compensation reductions per employee of more than 25% versus compensation during the most recent full quarter for which the employee was employed before the eight-week measurement period. Employees who received compensation of more than \$100,000 per annum during 2019 are excluded from this calculation.

It should also be noted that the loan forgiveness calculation is made without regard for reductions in FTE employees or individual employee compensation between February 15, 2020 (as compared to the number of FTE employees and the amount of FTE employee compensation as of February 15, 2020), and 30 days after the date of enactment of the CARES Act (i.e., March 27, 2020), so long as those reductions are reversed by June 30, 2020. The American Staffing Association and other groups are urging that the June 30<sup>th</sup> date be extended to give employers more time to restore their workforces.

Pending future guidance, staffing agencies should assume that for purposes of the loan forgiveness calculation, the term “employee” includes individuals they employ on a full-time, part-time or other basis, including their temporary employees.

Interaction of PPP Loans with CARES Act Tax Relief Provisions. PPP loan recipients are not entitled to the new employee retention credit provided by the CARES Act. The employee retention credit provides for a refundable payroll tax credit for 50 percent of certain wages paid to furloughed employees by employers subject to closure or subject to a significant decline in gross receipts as a result of the coronavirus crisis. Further information regarding the employee retention credit can be found [here](#) and [here](#). In addition, the CARES Act provides that if a PPP loan recipient’s loan is forgiven, the recipient is not entitled to the delay of payment of employer payroll taxes as provided under the legislation. This provision allows employers to delay the payment of the employer’s share of the social security portion of FICA tax (6.2%) on employee wages from March 27, 2020 through the end of the year, with half of the amount required to be paid by December 31, 2021 and the other half required to be paid by December 31, 2022. The Internal Revenue Service has not yet issued guidance with respect to the interaction of the PPA loan forgiveness provision with the employer payroll tax deferral provision. However, since

employers can defer payroll tax on wages paid as of March 27, 2020 in advance of any loan forgiveness, it is assumed that future guidance will provide that employers can defer payment of applicable taxes until such time as their PPA loans are actually forgiven without being subject to the failure to deposit penalty. Staffing agencies should closely monitor future guidance with respect to this issue.

## Emergency EIDL Advance

Staffing agencies of 500 employees or less who apply to the SBA Economic Injury Disaster Loan (“EIDL”) Program can request a \$10,000 emergency grant (an “Emergency EIDL Advance”). Pending future guidance, it is assumed that the term “employee” includes individuals employed on a full-time, part-time or other basis such that staffing agencies should include their temporary employees for purposes of determining their eligibility for the Emergency EIDL Advance. The advance can be used to provide paid sick leave to employees unable to work due to the direct effect of the coronavirus, maintaining payroll to retain employees, meeting increased material costs, making rent or mortgage payments and repaying obligations that cannot be met due to revenue losses. An applicant is not required to repay the advance, even if they are subsequently denied the loan. EIDL loans offer up to \$2 million of assistance, carry an interest rate that will not exceed 4% per year and have a term that will not exceed 30 years. Additional information regarding the Emergency EIDL Advance and the application form can be found [here](#).

## The Exchange Stabilization Fund for Mid-Size Businesses

The CARES Act provides \$500 billion to the Exchange Stabilization Fund (“ESF”) to provide liquidity to eligible businesses, States and municipalities impacted by the coronavirus crisis through loans, loan guarantees and other investments. The legislation provides for a dedicated program or facility will be established to make direct loans to mid-size businesses with between 500 and 10,000 employees. Pending future guidance, it is assumed that the term “employee” includes individuals employed on a full-time, part-time or other basis such that staffing agencies should include their temporary employees for purposes of determining their eligibility for these loans.

ESF loans will bear an interest rate no higher than 2%, have a term no longer than 5 years and no loan payments will be made for at least the first 6 months. In contrast to the PPP loans, no loan forgiveness is available with respect to these loans. In addition, loan recipients must make a number of good faith certifications, including (i) the uncertainty of the economic conditions on the date of the application makes necessary the loan request to support the ongoing operations of the business; (ii) the funds it receives will be used to retain at least 90 percent of the recipient's workforce, at full compensation and benefits, until September 30, 2020; (iii) the recipient intends to restore not less than 90 percent of the workforce of the recipient that existed as of February 1, 2020, and to restore all compensation and benefits to the workers of the recipient no later than 4 months after the termination date of the public health emergency declared in response to the coronavirus crisis; (iv) the recipient is an entity or business that is domiciled in the United States with significant operations and employees located in the United States; (v) the recipient is not a debtor in a bankruptcy proceeding; (vi) the recipient is created or organized in the United States

or under the laws of the United States and has significant operations in and a majority of its employees based in the United States; (vii) the recipient will not pay dividends or engage in stock buybacks; (viii) the recipient will not outsource or offshore jobs for the term of the loan and 2 years after completing repayment of the loan; (ix) the recipient will not abrogate existing collective bargaining agreements for the term of the loan and 2 years after completing repayment of the loan; and (x) that the recipient will remain neutral in any union organizing effort for the term of the loan. In addition, loan recipients are subject to limitations with respect to the compensation of certain highly-compensated employees. Guidance with respect to the dedicated mid-size business program or facility is pending.

Regarding the 90 percent retention requirements described above, the American Staffing Association has urged the Department of the Treasury to take into account that staffing agencies are wholly dependent on their clients' demand for labor, which staffing agencies cannot control, and that this inherent economic uncertainty should not preclude mid-size staffing agencies from receiving ESF loans provided they certify their intention to achieve the 90 percent retention requirements.

*Interested staffing agencies should consult with their financial and tax advisors, as well as an SBA lender, in determining the relative benefits of the programs described above and their eligibility for such programs. As noted, future guidance is pending with respect to these programs which may modify the information contained above which is not intended to be, and should not be construed as, legal advice.*