

Marcum Coronavirus and the Healthcare Industry Webinar Responses to FAQ from April 3, 2020 Webinar

The guidance around the provisions of FFCRA and CARE are continually changing. This guidance is based on the best available information as of April 3, 2020.

PPP and SBA Loan Application Questions

1. Do you know if the PPP loan portal will be through US Treasury dept. or SBA?

An organization applies for a PPP loan through an SBA lender not directly with the SBA.

2. Exactly what 2019 payroll returns, etc. will be needed to be provided to the lender: W3, 941, 940, W-2 or what?

You should contact your lender to determine their exact requirements. This is an evolving document list that lenders may request according to the PPP (this will likely continue to be updated):

- 2019 IRS Form 940 (typically not required for a c-3), Form 941 or Form 944 payroll tax report;
- Payroll reports for the 12 months of 2019 that show:
 - Gross wages for each employee (including officers if paid w-2 wages)
 - Paid time off for each employee
 - Vacation pay for each employee
 - Family medical leave pay for each employee
 - State and local taxes assessed on an employee's compensation;
- Documentation showing a total of all group health insurance premiums paid by the NPO under a group health plan. Include all employees;
- Document the sum of all retirement plan funding that was paid by the NPO. Include all employees and all qualified plan (403(b), 401(k), SARSEP, Simple IRA, SEP IRA).

3. Not clear to me what constitutes payroll costs for 2.5x calculation. If someone earned \$99,000 had retirement contributions into DC plans by employer of \$5,000 and benefits provided of \$10,000 is the total capped at \$100,000 or is total \$99k + \$5k + \$10k

Guidance issued clarified that the wages are capped at \$100k per employee, and then the company can add in company paid health and retirement benefits. In this example, the payroll costs are \$99k+\$5k+\$10k

4. The current PPP application asks for average monthly payroll, not payroll costs as your slide indicates, which is correct?

Loans can be up to 2.5 times the borrower's average monthly payroll costs, not to exceed \$10 million. The Calculation of average monthly payroll costs:

- Non seasonal employers – average monthly payroll costs for the 2019 or the 12 months prior to the loan date
- Businesses not in operation during the period February 15, 2019 through June 30, 2019 – average monthly payroll costs for the period January 1, 2020 through February 29, 2020
- Seasonal employers – average monthly payroll costs for the 12 week period beginning February 15, 2019 or March 1, 2019 (decided by the recipient) and ending June 30, 2019

5. *The current PPP application asks for number of jobs. Does this mean number of employees as of 12/31/19?*

Average number of employees for the preceding 12 months, as defined by the SBA, which is any employee who worked 40 hours in a month.

6. *The current PPP application question 3. The way it is written, it implies that you must list all businesses in which a 20% owner of the applicant is an owner. Is this correct, or has it been misstated? There is no room on page 2 for more than 1 20% owner to sign. What to do about this – add a page, or what?*

Question 3 is correct, all those businesses must be listed.
Only one owner is required to sign the application.

7. *Does dental expense count as group health, or just the health portion?*

If dental is part of a group health insurance program, it should count.

8. *I understand that state/local taxes should be calculated in the loan amount, however, is FICA included? If not, thoughts on why?*

Employer level state taxes, such as state unemployment, are allowed.

Employer paid federal payroll taxes (FICA, FUTA), railroad retirement taxes, and income taxes are excluded from the calculation.

9. *I went on the SBA website and I don't see where you can register for a user ID and Password. Can you send a link to that page?*

The SBA Economic Injury Disaster Loan (EIDL) can be applied for online a through the following link:

<https://disasterloan.sba.gov/ela/Account/Login>

10. *If our business increased during 2019 (we added employees), can we apply for full current payroll amount or are we limited to average of 2019 payroll amount?*

You are limited to the average of 2019 payroll, but you can use the loan proceeds to pay the added employees.

11. *If we closed due to state order to close essential businesses and we have employees that filed for unemployment, how will that impact our ability to apply for PPP loans? We are planning to pay them with the loan.*

You can rehire them and pay them with the loan proceeds. In order to be eligible for full forgiveness, you need to maintain average FTE headcounts during the 8 weeks immediately following the loan disbursement compared to the two look back periods noted above

12. *I contacted our bank to apply for the Paycheck Protection loan. There seems a lot of confusion and has not responded to me. Are you recommending we file online as opposed to going through the bank?*

You apply for a PPP loan through a bank. You apply for an EIDL loan through the SBA website.

13. *How do you get the SBA loan number? From SBA Website?*

You receive the loan number from the bank.

14. *Applied for EIDL loan. There was no place to add for a specific amount, do they come back and if approved tell us how much?*

Yes, the SBA will provide you with a loan amount that you can accept or decline.

15. *Can any NFP apply for PPP regardless of the number of employees?*

No, a NFP is subject to the same 500 employee threshold as for profit organizations.

Employee Aggregation Questions

16. For PPP, has there been any additional guidance on affiliate employers with less than 500 employees per location, but over 500 in the aggregate based on common ownership?

The SBA has posted the Interim Affiliation rules for purposes of SBA funding to their website.

<https://www.sba.gov/document/policy-guidance--ppp-affiliation-interim-final-rule>

Key points related to the Affiliation Rules found at 13 C.F.R. section 121.103 are noted below:

- Key determination: If one company controls or has the power to control another or where a third party (or parties) controls or has the power to control the entities.
- This can arise through majority voting ownership, common management or other relationships or interactions between the parties.
- Negative control (i.e., where a minority shareholder has the ability, under the company's charter, by-laws, shareholder agreements, other contractual arrangements to prevent a quorum or block action by the board of directors or equity owners. However, not all negative control rights will cause affiliation – those intended to merely protect an investment are generally ignored.
- There is also SBA guidance on employers with over 500 employees who can qualify if the company is under certain equity and net income thresholds

17. Is the 500 employee cut off for the PPP by Tax ID?

If you have several organizations that meet the Affiliation test noted in question, the total number of employees from all affiliated organizations will be included for purposes of the 500 employee count.

18. If you are considered to be over 500 employees for the purposes of FFCRA, can you apply for any of these small business loans? I.e. could the criteria for a small business be different for FFCRA and CARES? For PPP, has there been any additional guidance on affiliate employers with less than 500 employees per location

Different standards apply in aggregating companies in three areas of the new laws for when separate companies may have to be considered together.

- SBA Rules: Employees of “Affiliates” must be combined in determining if a business is considered a small business (has fewer than 500 employees)
- FFCRA: The new Emergency Sick Pay and Expanded Emergency Family and Medical Leave apply to employers with fewer than 500 employees. For this purpose the rules under the Family and Medical Leave Act apply
 - Joint Employer
 - Single Integrated Business
- Employer Retention Credit (CARES Act) – the calculation differs depending upon whether the companies are under IRC sec 52(a) and (b) (controlled group of

corporations or commonly controlled businesses) or under IRC sec 414(m) and (o) (affiliated service groups or certain management company arrangements)

The SBA Aggregation Rules are noted in question 16 above.

The FFCRA rules are complex and we advise you to consult your labor counsel for the proper interpretation of the rules. An overview of the FFCRA rules Aggregation rules are as follows:

- Under the Department of Labor rules, separate entities are generally treated as separate regardless of ownership.
- Exception #1: Employees under a joint ownership arrangement are considered employees of both entities.
- Exception #2: Integrated Employer Test – determinations are highly fact specific and determination is based on an analysis of several factors:
 1. Interrelation of operations – e.g., common offices, common record keeping, shared bank accounts and equipment.
 2. Common management, common directors and boards.
 3. Centralized control of labor relations and personnel – e.g., having the right to hire or fire employees, engage in employee training.
 4. Common ownership and financial control.

Of these factors, #4 is the least significant.

19. All indications seems to be <500 employees. We do not but we have multiple locations that we serve with far less at 500 employees at each location.) If there is common ownership control in multiple organization is this limiting for all of common ownership companies.

If the organizations meet the requirements of affiliation for SBA loan purposes and there are more than 500 employees, it will preclude all the organizations from applying for the loans.

- There is also SBA guidance on employers with over 500 employees who can qualify if the company is under certain equity and net income thresholds.

Health Care Provider Questions

*20. How does a health care company elect out?
What was/is the opt out requirements for Healthcare from FFMLA?*

We suggest you consult with your labor attorney on the proper mechanism to elect out of participation in either the Sick Leave or expanded Medical leave provisions of the FFCRA.

21. In Families First Act, do you know the definition of "Health Care Providers"? Is there a list somewhere to understand if this means therapy as well?

The Department of Labor has provided the definition below for Healthcare Providers as question 56 of the FAQ.

For the purposes of Employees who may be exempted from Paid Sick Leave or Expanded Family and Medical Leave by their Employer under the FFCRA, a health care provider is anyone employed at any doctor's office, hospital, health care center, clinic, post-secondary educational institution offering health care instruction, medical school, local health department or agency, nursing facility, retirement facility, nursing home, home health care provider, any facility that performs laboratory or medical testing, pharmacy, or any similar institution, Employer, or entity. This includes any permanent or temporary institution, facility, location, or site where medical services are provided that are similar to such institutions.

This definition includes any individual employed by an entity that contracts with any of these institutions described above to provide services or to maintain the operation of the facility where that individual's services support the operation of the facility. This also includes anyone employed by any entity that provides medical services, produces medical products, or is otherwise involved in the making of COVID-19 related medical equipment, tests, drugs, vaccines, diagnostic vehicles, or treatments. This also includes any individual that the highest official of a State or territory, including the District of Columbia, determines is a health care provider necessary for that State's or territory's or the District of Columbia's response to COVID-19.

To minimize the spread of the virus associated with COVID-19, the Department encourages employers to be judicious when using this definition to exempt health care providers from the provisions of the FFCRA

The full set of FAQ questions and answered can be found on the DOL website at the following link: <https://www.dol.gov/agencies/whd/pandemic/ffcra-questions>

Medicare Sequestration

22. On the slides it said the Medicare 2% sequestration would be effective May 1st. In your presentation, you said it was April 1st. Could you please clarify?

At this time CMS as stated that Sequestration would be temporarily eliminated effective May 1st until the end of the calendar year.