2020 CARES Act - FAQs for Nonprofit Organizations and Donors

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Overview

1. What is the CARES Act?

In response to the COVID-19 (coronavirus) pandemic, President Trump signed a $2.2 trillion stimulus plan — the Coronavirus Aid, Relief, and Economic Security Act (CARES Act or the Act).

2. Which Provisions in the CARES Act are relevant to nonprofit organizations and donors?

The Act includes several relevant provisions for non-profit organizations, including:

- Paycheck Protection Program (PPP) (Sections 1101-1106) (charities eligibility for small business loans);
- Economic Injury Disaster Loans (EIDL) (Sections 1110) (nonprofit eligibility for small business loans);
- Expanded unemployment benefits to employees who lose their job due to COVID-19 (Sections 2101-2116);
- Enhanced charitable deductions on 2020 taxes for non-itemizers, individuals who itemize their deductions, and corporations (Sections 2204-2205);
- Employment tax incentives for employers to retain employees during the pandemic (Sections 2301); and
- Deferment of certain payroll taxes for employers.

These FAQs provide information about the above topics as of April 1, 2020; we will continue to update these FAQs as additional information becomes available about these various programs and incentives. We also have an in-depth analysis of these topics along with additional details about expanded unemployment benefits for employers, and other topics of potential interest to nonprofits, available here: Arnold & Porter’s Analysis of CARES Act for Non-Profit Organizations. For a comparison of the PPP and EIDL programs, see page 15 below.

Paycheck Protection Program (PPP) (CARES Act, Sections 1101-1106)

3. What is the PPP?

The CARES Act provides $349 billion for the “Paycheck Protection Program” (PPP), which expands the Small Business Administration (SBA) 7(a) loan guaranty program to small businesses (including 501(c)(3) organizations, tribal business concerns and 501(c)(19) veterans organizations) impacted by the coronavirus.

4. What is the purpose of the PPP?

The goal of the PPP is to expand the existing SBA 7(a) loan guaranty program to quickly assist small businesses (including eligible nonprofits, as defined in question (“Q”) #6) impacted by the coronavirus by offering them significant funds (up to $10M to each qualified borrower) in fully-guaranteed loans (at an affordable interest rate (capped at 4% under the Act, but Treasury guidance says the rate will be set at 0.5%)) to cover payroll and other operating costs that they may be facing. The covered period for the PPP is February 15, 2020 through June 30, 2020.

5. Which types of organizations are eligible for the PPP?

Any business that already qualified as a “small business concern,” under the SBA’s existing loan programs, plus businesses, nonprofit organizations that are tax-exempt under sections 501(c)(3)
and 501(a) of the Internal Revenue Code (IRC), 501(c)(19) veterans organizations, and tribal business concerns, provided that have 500 or fewer employees or meet the SBA's size standard for their industry. Nonprofit organizations that are not tax-exempt under sections 501(c)(3) or 501(c)(19) of the IRC, such as trade associations, advocacy organizations, unions, and social clubs, are not eligible, though they may be eligible for other programs (see Q #6 for additional information).

6. **Which are the size requirements for eligibility?**

501(c)(3) organizations, 501(c)(19) veterans organizations, and tribal business concerns that employ not more than either 500 employees, or otherwise meets the [SBA's existing size standard](https://www.sba.gov) are eligible for a loan under the PPP (a “PPP loan”) (collectively these entities are referred to in the FAQ PPP section as “eligible nonprofits”).

501(c)(3) organizations, tribal business concerns and 501(c)(19) veterans organizations that exceed the PPP 500 employee limit, and other types of nonprofit organizations that do not qualify for the PPP, may be still be eligible for emergency loans through the Emergency Economic Injury Disaster Loan (EIDL) program (discussed below at Qs #30-#45) and/or able to take advantage of other benefits or tax credits available under the CARES Act (e.g. employee retention credits (see Qs #49-#57), deferred payroll taxes (see Qs #58-#61), or loans under the Exchange Stabilization Fund).

7. **Are churches and other religious institutions eligible to participate in the PPP, even if the institution does not have a 501(c)(3) determination letter from the IRS?**

Yes. Churches, including synagogues, temples and mosques, as well as integrated auxiliaries of churches and conventions or associations of churches that meet the requirements of IRC Section 501(c)(3) are automatically considered tax exempt and are not required to apply for and obtain recognition of tax-exempt status from the IRS. Despite this, many churches and religious institutions seek and obtain tax-exempt status under Section 501(c)(3). The Act states that any organization “described in section 501(c)(3) .... and that is tax exempt under section 501(a)” is eligible to participate in the PPP. The Act does not require that eligible section 501(c)(3) be recognized by the IRS as tax exempt. Therefore, all churches and religious institutions should be eligible to participate in the PPP, regardless of whether the particular organization has obtained recognition from the IRS or if it is automatically deemed exempt due to its status as a house of worship or other religious institution.

8. **Do part-time employees count as “employees” for purposes of determining whether our organization exceeds the 500-employee limit?**

Yes, for purposes of determining whether your organization employs fewer than 500 employees under the PPP, the term “employee” includes all individuals employed on a full-time, part-time or other basis by the organization. If an organization employs seasonal employees, they will still be counted in the total number of employees in determining eligibility for a PPP loan; however, the SBA will apply a different formula when determining the PPP loan amount. (See additional details in Q #10.)
9. Do the employees of an affiliate organization count towards the total number of our organization’s employee count under the PPP?

Yes, under the Act, the SBA’s affiliation rules will continue to apply to nonprofit organizations exempt from taxation under Section 501(c)(3), veterans organizations exempt from taxation under Section 501(c)(19), and tribal business concerns. (Note that the SBA rules include various exceptions to affiliation coverage for certain Indian Tribes.) These SBA rules would aggregate the number of an applicant’s full-time and part-time employees with those of their domestic and foreign affiliates. As a general matter, entities are considered affiliates when one controls or has the power to control the other, regardless of whether an entity exercises that power. Entities that are commonly controlled by another entity, often called brother/sister companies, are also treated as affiliates of each other and of the controlling entity. In the case of nonprofit organizations, this control is not exhibited in the form of stock ownership, rather nonprofits are considered controlled under IRS definitions when there are overlapping boards of directors or officers. The SBA’s definitions review similar factors, such as whether there is a shared or dependent economic interest between the two entities or common management. (Additional information about SBA’s affiliation rules are available in Arnold & Porter’s advisory Small Business Loan Relief from CARES Act and in the SBA’s affiliation rules.)

10. How much money can an eligible nonprofit receive through the PPP?

The maximum PPP loan size is $10 million. The formula on the PPP loan application to calculate the loan amount is the following:

\[
\text{Amount of Average Monthly Payroll Costs} \times 2.5 = \text{Total Loan Amount.}
\]

The “Average Monthly Payroll Costs” are measured over the following periods, depending on your eligible nonprofit’s situation:

- **If you were operational between February 15, 2019 – June 30, 2019:** Your max loan is 2.5x average monthly payroll costs incurred during the year prior to the loan date. (If your business employs seasonal workers, you can opt to choose a twelve-week period beginning February 15, 2019 or March 1, 2019 and ending June 30, 2019.)

- **If you were not operational between February 15, 2019 – June 30, 2019:** Your max loan is equal to 2.5x average monthly payroll costs incurred between January 1, 2020 and February 29, 2020.

- **If you took out an Economic Injury Disaster Loan (EIDL) between February 15, 2020 and June 30, 2020** and you want to refinance that loan into a PPP loan, you would add the outstanding loan amount to the payroll sum.

11. For purposes of calculating “payroll costs” under the PPP, what is included or excluded in the definition?

**Included:** salary, wages, commission, tips, vacation, family leave, sick pay, contributions to maintain group health care, payment of retirement benefits, allowances for dismissal or separation, and state and local tax payments assessed on the compensation of employees.
Excluded: compensation of any individual employee in excess of an annual salary of $100,000 (as prorated for the covered period), taxes withheld or paid by the borrower for income tax or FICA and sick leave or paid family medical leave for which a credit is allowed under the recently passed Families First Coronavirus Response Act (FFCRA), and compensation for an employee whose principal place of residence is outside of the U.S.

12. If my organization receives a PPP loan, what are allowable uses for the funds?

PPP loan recipients (borrowers) can use funds from the PPP for the following purposes: (1) payroll costs (as defined above in Q #11), retirement benefits and state and local employment taxes; (2) rent for a lease entered into before February 15, 2020; (3) utilities, including electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020; and (4) interest payments on mortgage obligations or any other debt obligations incurred before February 15, 2020 (but not prepayments or payments of principal).

13. Can an existing loan that my organization has be refinanced into a PPP loan?

Generally, no. Funds from the PPP may be used to pay interest on debt obligations incurred before February 15, 2020. Funds from the PPP may also be used to refinance an SBA Emergency Economic Injury Disaster Loan (EIDL), discussed further beginning at Q #30 made between January 31, 2020 and the date on which PPP loans are made available.

14. When do I have to begin repaying the loan?

Treasury issued in their recent guidance that the loan terms will be the same for all borrowers under the PPP, with a term of 2 years and an interest rate of 0.5%. A lender must defer PPP loans for six months and may forgive some portion of the loan principal (see below at Qs #16-19 for additional details) if requested by the borrower. The borrower is responsible for repaying the amount of the loan not forgiven at the end of the deferred repayment period, plus additional interest, prior to the end of the loan term.

15. Under the PPP, is there a deferred repayment period due to COVID-19?

Yes, upon the request of the borrower within the first year of the loan, the lender must defer loan repayments for six months, but interest will continue to accrue during this period.

16. What is the PPP loan forgiveness program?

Under the PPP, lenders are required to forgive the loan principal equal to the amount paid by the borrowing organization, during the eight-week period after the loan is made, for operational expenses including: payroll costs; mortgage interest payments; rent payments; and utility payments (see above at Q #12 for what these terms mean under the PPP). (For more information on how you apply to loan forgiveness and what documentation is required, see Qs #20 and #22.)

17. What, if any, are the restrictions to the PPP loan forgiveness program?

First, the forgiven amount cannot exceed the loan principal (i.e., the loan amount prior to the application of interest). Second, the amount forgiven will be reduced proportionally by any reduction in the number of employees compared to the prior year and reduced, dollar-for-
dollar, by the reduction in pay of any employee beyond 25% of their compensation the prior year.

Specifically, the formula to calculate the reduction in the number of employees is:

(i) the average number of full-time equivalent employees per month employed by the borrower during the covered period,

divided by

(ii) at the election of the borrower:

(a) the average number of full-time equivalent employees per month from February 15, 2019-June 30, 2019, or

(b) the average number of full-time equivalent employees per month from January 1, 2020-February 29, 2020.

For seasonal employers, the February 15, 2019-June 30, 2019 period must be used.

To encourage employers to rehire employees who may already have been laid off due to COVID-19, the Act provides an exception to the reduction if the organization re-hires employees and/or eliminates the reduction in salaries by June 30, 2020. The Treasury Department provided guidance that the loan will be fully forgiven if the funds are used for payroll costs, interest on mortgages, rent, and utilities (at least 75% of the forgiven amount must have been used for payroll). If an employer takes advantage of the June 30, 2020 rehire date, it is unclear if that restarts or impacts the covered period for calculating eligible loan forgiveness payments. There may be additional guidance coming from Treasury on these points.

18. If we have already laid people off and want to take advantage of the loan forgiveness program, and rehire employees before the June 30, 2020 deadline, do they have to be the same individuals that we laid off?

No, the program is aimed at incentivizing nonprofits and other eligible businesses to maintain their headcount during the ongoing crisis but does not focus on whether the individual employee filling each position in an organization remains the same during the covered period.

19. If we cut positions or staff after the end of the covered period will we still be eligible for the loan forgiveness program?

Yes, for now. The Act does not prohibit organizations from taking advantage of the loan forgiveness program if they were to reduce their workforce after the June 30, 2020 cut off. However, this may change in coming weeks when the SBA issues final guidance on the PPP (which we expect will include additional details about the loan forgiveness program and whether borrowers would need to meet ongoing eligibility criteria to remain eligible to participate in it) or if additional stimulus packages are put in place.

20. When and how can my organization apply for the PPP?

The PPP’s sample application and instructions are now available on the U.S. Department of Treasury’s website. The application period opens on April 3, 2020, and the Treasury
Department recommends applying as soon as possible due to the funding cap to the PPP under the Act. Applicants will need to connect with an eligible lender in order to submit a PPP application (see Q #21 for additional information).

21. Who are eligible lenders under the PPP?
Lenders authorized to issue SBA 7(a) loans and that opt into the PPP will be authorized to issue loans under the program. We recommend reaching out first to existing lenders to determine whether any are already approved 7(a) participants. A borrower can also contact its local SBA office to find a list of approved 7(a) lenders in their area. In addition, SBA maintains a list of the 100 most active SBA lenders in the country. (The Treasury Department will establish criteria for allowing other lenders to participate in the PPP within 15 days of enactment, which would be April 12, 2021.)

22. What do I need to do to have all or part of my loan forgiven?
You must apply to your lender. The application must include: (1) documentation (including payroll filings) verifying the number of FTEs you employ and employed during the relevant periods and the compensation that you paid them, and documentation (including cancelled checks, payment receipts, transcript of accounts, etc.) verifying payments of mortgage obligations, rent, and utilities; (2) a certification representing that the documentation is true and correct and that the amount of forgiveness requested was used for retaining employees and paying mortgage interest, rent, and utilities during the covered period; and (3) any additional information that the lender requires.

23. How will my lender determine my loan forgiveness amount?
A lender will determine the loan forgiveness amount based on the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities. The lender will issue a decision on your loan forgiveness within 60 days of receiving the completed application. Importantly, if a nonprofit receives an EIDL or the $10,000 EIDL advance (discussed below at Qs #37-#43) and then is approved for a Paycheck Protection Program loan, the $10,000 advance will be subtracted from your PPP loan forgiveness.

24. Will the SBA have recourse against my organization for nonpayment?
If a borrower fails to repay a Paycheck Protection Program loan and the lender receives payment from the SBA under the guarantee, the SBA will be able to go after the business to collect the amount paid by the SBA. Nevertheless, the SBA will not be able to try to collect from a shareholder, member, or partner of the borrower for nonpayment except to the extent the loan was not used for the authorized purposes.

25. What if my loan has a remaining balance after application of forgiveness?
You, as the borrower, will have to continue to repay the remaining balance, plus ongoing interest accruals. The SBA will continue to guarantee the remaining balance. The loan will have a maximum maturity of 10 years from the date on which the borrower applies for loan forgiveness under section 1106 of the CARES Act.

26. Will there be further guidance regarding loan forgiveness?
Yes. The SBA Administrator is required to issue further guidance regarding loan forgiveness within 30 days of the enactment of the CARES Act (by April 27, 2020). As of April 2, 2020, the Treasury Department has provided some guidance that the loan will be fully forgiven if the funds are used for payroll costs, interest on mortgages, rent, and utilities (at least 75% of the forgiven amount must have been used for payroll). We expect additional details may continue to be released in the coming weeks.

27. As a nonprofit, can my organization take advantage of the income tax credit against unrelated business income taxes that we pay if we receive a PPP loan?

Generally, under the Act, an employer who receives a PPP loan is ineligible for the Employee Retention Credit in Section 2301 of the CARES Act. (The Employee Retention Credit is explained in Q #49 below.) However, it is not clear under current guidance whether a nonprofit will be able to take a tax credit against unrelated business income that they pay if they are also receiving a PPP loan.

28. As a nonprofit, can my organization take advantage of deferring our payroll taxes if we receive a PPP loan?

Employers who benefit from the loan forgiveness program under the PPP are not eligible to defer payroll taxes as provided under Section 2302 of the Cares Act. (The payroll tax deferral is explained in Q #58 below.)

29. As a 501(c)(3) (or other eligible nonprofit), can my organization take advantage of both the PPP and EIDL?

Yes, the outstanding amount of an EIDL made after January 31, 2020 and up to the date on which PPP loans are made available may be refinanced into a PPP loan. In addition, if a borrower received the $10,000 EIDL advance (as described in Q #37) and the borrower subsequently receives a PPP loan, the $10,000 advance will be subtracted from the amount the borrower’s PPP loan that will be forgiven. (See additional information about the PPP loan forgiveness plan in Q #23.)

Emergency Economic Injury Disaster Loan (EIDL) Program (CARES Act, Section 1110)

30. What is the EIDL program?

Emergency Economic Injury Disaster Loans (EIDLs) are available through the SBA to small businesses or “private nonprofit organizations” that have sustained an economic injury and are in a disaster-declared county. (See additional details regarding how an organization sustains an “economic injury” in Q #32.) EIDLs are typically available for eligible borrowers in amounts up to $2M at a fixed interest rate of 2.75% for nonprofits (3.75% for businesses), for a term of no more than 30 years.
31. **Which nonprofits are eligible for EIDLs?**

EIDLs are available to a much broader set of nonprofits than those eligible under the Paycheck Protection Program. For the EIDL program, eligible “private nonprofit organizations” include any entity exempt under section 501(c), including the trade associations, advocacy organizations, unions, and social clubs that are excluded from the Payroll Protection Program. The EIDL program also includes certain organizations tax-exempt under 501(d) (apostolic organizations) or 501(e) (cooperative hospital service organizations). There are no size limitations for nonprofits accessing EIDLs.

32. **How does an organization show they have suffered economic injury?**

In general, an organization that was in existence at the start of the U.S. COVID-19 national emergency (January 31, 2020), as declared by President Trump under the Robert T. Stafford Disaster Relief and Emergency Assistance Act, has sustained an “economic injury.” While this term is not defined in the Act, the SBA’s website describes eligibility as small businesses or private nonprofits that have experienced temporary loss of revenue due to the ongoing crisis. (Economic injury would also likely include any harm to the business who shut down, had to lay off workers, had supply chain interruption, or potentially those who suffer economic loss in their endowment.)

33. **Does eligibility for an EIDL depend on state disaster declarations in my state?**

No, there is a national disaster declaration as discussed in Q #32, therefore, making it not necessary to have a disaster declared in your state. (Before the CARES Act, a governor of a state or territory had to request that a disaster declaration be made. However, the Act eliminates the state declaration requirement if the President declares, as he has done for COVID-19, a national emergency under the Robert T. Stafford Disaster Relief and Emergency Assistance Act.)

34. **How much may we receive under an EIDL, and how may we use the funds?**

The maximum loan size is $2 million to cover operating costs and financial obligations that may be necessary due to provide vital economic support to small businesses or nonprofits to help overcome the temporary loss of revenue they are experiencing. EIDL applicants may ask the SBA for the appropriate amount based on their own calculations and cashflow needs.

35. **When do I have to begin repaying an EIDL?**

You may defer your first repayment for one year after the origination date, though interest will accrue during this deferment. The amount of the loan at the end of the deferred repayment period will be carried forward as an ongoing loan subject to the terms negotiated between each lender and borrower, with a maximum term of 30 years and a maximum interest rate of 2.75% for nonprofit organizations (3.75% for businesses).

36. **Under an EIDL, is there a loan forgiveness program?**

No, unlike the PPP program, there is not a loan forgiveness program with an EIDL. However, in response to the COVID-19 crisis, applicants can now request advance funds in the amount of $10,000 when submitting their request for an EIDL with the SBA.

37. **What are EIDL advance funds?**
Recognizing that the EIDL approval process can be as long as a month, the CARES Act provides that all EIDL applicants (including nonprofits) whose applications are submitted between January 31 and December 31, 2020 can receive an advance of up to $10,000 within 3 days after the SBA receives the application. These advances are available only for applications related to COVID-19, and no other economic injury disaster loans (EIDLs). Importantly, applicants that receive EIDL advance funds are not required to repay them, even if the applicant is denied for an EIDL, thus, making this initiative, in effect, a grant program available to all small businesses and nonprofits eligible to apply for EIDLs. However, if you receive a PPP loan, the $10,000 grant will be subtracted from the forgiveness amount.

38. **Who is eligible to receive an EIDL (and advance funds)?**

To be eligible for an emergency EIDL grant, an applicant must be eligible to receive an EIDL and have been in operation since at least January 31, 2020, when the COVID-19 public health crisis was announced. All “private nonprofit organizations” that are eligible for purposes of the EIDL program, including any entity exempt under Section 501(c) of the IRS Code, including trade associations, advocacy organizations, unions and social clubs otherwise excluded under the PPP, in addition to certain organizations tax-exempt under 501(d) (apostolic organizations) or 501(e) (cooperative hospital service organizations).

39. **Are faith-based organizations without IRS determination letters eligible to apply for an EIDL (and receive advance funds)?**

Yes. The CARES act permits “private nonprofit” organizations that meet the size requirements to apply for EIDL advance funds, which we interpret to include faith-based organizations that qualify as 501(c)(3) nonprofits, but may have not obtained an exemption letter from the IRS. The SBA may further clarify the eligibility of religious institutions for EIDLs later, as the SBA has done as part of prior disasters.

40. **When and how can my organization apply for an EIDL? Can we request for our advance funds in the same application?**

Eligible nonprofits or businesses can apply for EIDLs at any time through the SBA’s website, and applicants are now able to request their $10,000 advance funds at the same time through a streamlined online application process.

41. **How will SBA approve which organizations receive EIDL advance funds?**

The advance funds are available to all EIDL applicants that are submitting loan applications due to the COVID-19 crisis. The applicants can request the advance funds with their EIDL online application submission and should be paid within 3 days of submitting their request (with all application materials attached).

42. **If my organization receives EIDL advance funds, when would we receive the funds and how may we use them?**

The CARES Act requires the SBA to pay the $10,000 advance funds within three days of receiving the request from the EIDL application. If received, EIDL advance funds can be used to cover payroll costs (including providing sick leave to employees unable to work due to direct effect of the COVID-19), meeting increased costs to obtain materials unavailable from the applicant’s original source due to interrupted supply chains, making rent or mortgage payments, or repaying obligations that cannot be met because of revenue losses.
43. **If my organization receives EIDL advance funds, are we required to pay them back?**

No, an EIDL applicant that receives EIDL advance funds is not required to repay them, even if the applicant is subsequently denied for an EIDL, provided that the funds are used only to cover eligible expenses. It also appears that an EIDL applicant can elect not to accept a loan, even if approved, and still is able to retain the advance funds. EIDL advance funds, however, a subtracted from any PPP loan forgiveness that a borrower may receive under the PPP. (See Q #23 above.)

44. **I am not sure whether my organization will need an EIDL this year -- should we still apply so that we can receive EIDL advance funds?**

Yes, if you are approved for an EIDL, you are not obligated to take the loan, but by applying you would still be eligible for EIDL advance funds of $10,000. If you believe the EIDL advance funds could help your nonprofit through the COVID-19 crisis, then we recommend that you apply for an EIDL and use the advance funds as a form of grant to assist with covering permitted emergency costs that your organization may currently be facing.

45. **What if a business receives an EIDL or the $10,000 advance and then is approved for a Paycheck Protection Program loan?**

The outstanding amount of an EIDL made after January 31, 2020 and up to the date on which PPP loans are made available may be refinanced into a PPP loan. In addition, if a borrower received the $10,000 EIDL advance and the borrower subsequently receives a PPP loan, the $10,000 advance will be subtracted from the amount the borrower’s PPP loan will be forgiven. (See additional information about the PPP loan forgiveness plan in Q #23.)

**Enhanced Charitable Giving Incentives for Individuals** (CARES Act, Sections 2204-2205)

46. **What are the enhanced charitable giving incentives for individuals under the CARES Act?**

The Act includes a one-time, above-the-line deduction (available to taxpayers who do not itemize deductions) for cash contributions of up to $300 made to charitable or religious organizations. The incentive covers all cash contributions made in calendar 2020 and should be claimed on the taxpayer’s 2020 Form 1040 filed in 2021. (Note that the incentive does not apply to contributions made to donor advised funds, private non-operating foundations or Section 509(a)(3) supporting organizations, but all other contributions for which a deduction is allowable under Section 170 are covered by the incentive.)

47. **What are the modified limits on charitable contributions for individuals under the CARES Act?**

The Act increases the limits on charitable deductions made by individuals who itemize their taxes. The current limits for individuals for deductions for charitable contributions of cash (60% cap of adjusted gross income) are suspended for contributions made in 2020, making cash contributions fully 100% deductible. (Note that this incentive also does not apply to contributions made to donor advised funds, or private non-operating foundations or Section 509(a)(3) supporting organizations).
**Enhanced Charitable Giving Incentives for Corporations** (CARES Act, Sections 2204-2205)

48. What are the modified limits on charitable contributions for Corporations under the CARES Act?

For corporations, the limit on deductions for charitable contributions of cash is increased from 10% to 25% for contributions made in 2020. Additionally, the Act increases the limitation on deductions for food donations by corporations in 2020 from 15% to 25%.

**Employee Retention Credit for Employers** (CARES Act, Section 2301)

49. What is the Employee Retention Credit for Employers under the CARES Act?

The Employee Retention Credit is a refundable tax credit for 50% in “qualified wages” (up to a $10,000 cap) paid for each employee by an “eligible employer” whose business has been financially impacted by COVID-19. This means that an eligible employer receives a $5,000 credit for each employee who is paid $10,000 or more in qualified wages.

50. Who are “eligible employers” for the Employee Retention Credit?

The credit is available to all employers in the U.S. (including all nonprofit organizations) whose (1) operations were fully or partially suspended, due to a COVID-19-related shut-down order, or (2) gross receipts declined by more than 50 percent when compared to the same quarter in the prior year.

51. What are “qualified wages” under the Employee Retention Credit?

As explained by the IRS Employee Retention Credit FAQs, qualified wages are wages (as defined in Section 3121(a) of the Internal Revenue Code) and compensation (as defined in Section 3231(e) of the Code) paid by an eligible employer to employees after March 12, 2020 and before January 1, 2021. Under the Act, qualified wages include the eligible employer’s qualified health plan expenses that are properly allocable to the wages.

The definition of qualified wages depends, in part, on the average number of full-time employees (as defined in Section 4980H of the Code) employed by the eligible employer during 2019.

If the eligible employer averaged more than 100 full-time employees in 2019, qualified wages are the wages paid to an employee for time that the employee is not providing services due to either (1) a full or partial suspension of operations by order of a governmental authority due to COVID-19, or (2) a significant decline in gross receipts. Qualified wages may not exceed what the employee would have been paid for working an equivalent duration during the 30 days immediately preceding the period of economic hardship.

If the eligible employer averaged 100 or fewer full-time employees in 2019, qualified wages are the wages paid to any employee during any period of economic hardship described in (1) and (2) above.

52. What are “Qualified Health Plan Expenses”?

Under the Act, qualified health plan expenses means the amounts paid or incurred by the eligible employer to provide and maintain a group health plan.
53. **How is the maximum amount of Employee Retention Credit available to an eligible employer determined?**

The credit is equal to 50 percent of the qualified wages (including qualified health plan expenses, as discussed in Q #52) that an eligible employer pays in a calendar quarter. The maximum amount of qualified wages is $10,000 for each employee for each quarter; therefore, the maximum credit is $5,000 for each employee.

54. **How does my organization apply the credit?**

The eligible employer applies the credit to the employment taxes payable by the employer in the next calendar quarter.

The IRS provides the following example: if an eligible employer pays $10,000 in qualified wages to employee A in Q2 2020. The Employee Retention Credit available to the eligible employer for the qualified wages paid to Employee A is $5,000. This amount may be applied against the employer share of social security [FICA] taxes that the eligible employer is liable for with respect to all employee wages paid in Q2 2020. Any excess over the employer’s share of social security taxes is treated as an overpayment and refunded to the eligible employer after offsetting other tax liabilities on the employment tax return and subject to any other offsets under section 6402(a) of the Code.

55. **How does an Eligible Employer claim the refundable tax credit for qualified wages?**

Eligible employers can report their total qualified wages and the related credits for each quarter on their quarterly employment tax returns (Form 941) beginning with the second quarter of 2020. If the employer’s employment tax deposits are not sufficient to cover the credit, then, the employer may receive an advance payment from the IRS by submitting a newly released Form 7200, Advance Payment of Employer Credits Due to COVID-19.

56. **If my organization has received a PPP loan under the CARES Act, may we also be eligible for the Employee Retention Credit?**

No, an eligible employer may not receive the Employee Retention Credit if they have received a PPP loan. (See additional information about the PPP program in Qs #3-29).

57. **May our organization receive tax credits for the qualified wages under the FFCRA and the Employee Retention Credit?**

Yes, but not for the same wages. (The amount of qualified wages the organization can claim under the Employee Retention Credit does not include the amount of qualified and family leave wages that the employer received tax credits under FFCRA. See Arnold & Porter’s recent advisory for additional information about the Families First Coronavirus Response Act (FFCRA) and the Department of Labor’s Frequently Asked Questions about the regulations).

**Delay of Certain Payroll Taxes** (Cares Act, Section 2302)

58. **Are nonprofits able to delay making payroll tax deposits due to the ongoing COVID-19 crisis?**

Yes, under the Act, all employers, including all nonprofit organizations, may defer payment of the employer share of the Social Security tax they otherwise are responsible for paying to the
federal government with respect to their employees, that is incurred from March 27, 2020 to December 31, 2020.

59. **If we delay our payroll taxes, when should they be paid?**

Under the Act, the full amount of the deferred employment tax must be paid over the following two years, with half of the amount required to be paid by December 31, 2021 and the other half by December 31, 2022. (For example, if an organization owed $2,000 during the covered period (March 27, 2020 to December 31, 2020), they could defer payment of their payroll taxes and pay $1,000 by December 31, 2021 and the other $1,000 owed by December 31, 2022.)

60. **If we were to take this opportunity to defer our payroll taxes, would it affect our ability to secure a loan under the CARES Act (either through EIDL or PPP)?**

Yes. The deferral benefits are not available to employers (including nonprofits) if the same organization secures PPP relief under the CARES Act.

61. **Will there be interest owed or a penalty fee charged against the organization if we elect to defer our payroll tax payments?**

No. Under the Act, there will be no interest or penalties charges, and there are no caps or limits on the amount that an organization can defer so long as it is split equally over the two years. The Act does not permit for any debt forgiveness under this financial opportunity, and, the amount of payroll taxes that is deferred must be paid back by the end of the deferral period.

**Donor Questions**

62. **I work with a donor organization, should we be encouraging our grantee organizations to apply for a PPP or an EIDL and seek to obtain the advance funds?**

Yes, we recommend communicating to grantees about these financial opportunities to cover their unexpected costs related to the COVID-19 crisis.

63. **If yes, how can we assist them in this process?**

Funder can get the word out to their grantees and provide training and other resources to help them access this funding, negotiate with lenders, and understand their options.
# Chart Comparing PPP vs. EIDL

<table>
<thead>
<tr>
<th>Program</th>
<th>Paycheck Protection Program (PPP)</th>
<th>Economic Injury Disaster Loans (EIDL)</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Key Elements</strong></td>
<td>Forgivable loans at 0.5%* interest rate and 2 year* maturity</td>
<td>Low interest Federal loans at 2.75% for nonprofits (3.75% for other businesses) and 30-year maximum maturity</td>
</tr>
<tr>
<td></td>
<td>The original terms (4% interest rate and 10 year term) were changed by Treasury guidance.</td>
<td></td>
</tr>
<tr>
<td><strong>Maximum Amount of Loan</strong></td>
<td>Up to $10M*</td>
<td>Up to $2M</td>
</tr>
<tr>
<td></td>
<td>*Organizations that qualify for the PPP may also obtain an EIDL, though there are limitations to their loan forgiveness calculations. (See additional information about the PPP loan forgiveness plan in Q #23.)</td>
<td></td>
</tr>
<tr>
<td><strong>Eligibility</strong></td>
<td>Small businesses, nonprofits exempt under sections 501(a) and 501(c)(3) of the IRS Code, 501(c)(19) veterans organizations, and tribal business concerns that employ no more than <strong>500</strong> employees or otherwise meet the SBA’s size standard</td>
<td>“Private nonprofit organizations” including any entity of any size exempt under Section 501(c) of the IRS Code, including trade associations, advocacy organizations, unions and social clubs, in addition to certain organizations tax-exempt under 501(d) (apostolic organizations) or 501(e) (cooperative hospital service organizations) (Importantly, an EIDL does not have the 500 employee cap for “private nonprofit organizations.”)</td>
</tr>
<tr>
<td></td>
<td>*500 employee limit includes all full-time, part-time or any other status; the SBA calculates number of employees in accordance with <a href="https://cfr.federalregister.gov.FR.gov/cgi-bin/texis/vanchor?SID=5075320660E8B3B7D64B53E97B958935&amp;HREF=13%20CFR%20121%2E106">13 CFR 121.106</a></td>
<td></td>
</tr>
<tr>
<td></td>
<td></td>
<td>Tribal small business concern, as described in 15 U.S.C. 657(a)(2)(C), with not more than 500 employees</td>
</tr>
<tr>
<td></td>
<td></td>
<td>A business with not more than 500 employees</td>
</tr>
<tr>
<td><strong>Affiliates</strong></td>
<td><a href="https://www.sba.gov/document/program-guidance/affiliation-rules">SBA’s affiliation rules</a> apply for calculating size eligibility (except for businesses in hospitality and restaurant industries, or other limited circumstances not likely to be eligible to nonprofits)</td>
<td><a href="https://www.sba.gov/document/program-guidance/affiliation-rules">SBA’s affiliation rules</a> apply</td>
</tr>
<tr>
<td><strong>Administrator</strong></td>
<td>An already-approved SBA 7(a) lender (credit union or bank)</td>
<td>The SBA</td>
</tr>
<tr>
<td><strong>Covered Period</strong></td>
<td>February 15, 2020 - June 30, 2020</td>
<td>January 31, 2020 - December 31, 2020</td>
</tr>
</tbody>
</table>
### How amount of loan is calculated

<table>
<thead>
<tr>
<th>Employers Type</th>
<th>Calculation Method</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Non-seasonal Employers</strong></td>
<td>2.5x average total monthly payroll costs* incurred during the year prior to the loan date</td>
</tr>
<tr>
<td><strong>Businesses not in operation in 2019</strong></td>
<td>2.5x average monthly payroll costs incurred for January and February 2020</td>
</tr>
<tr>
<td><strong>Seasonal Employers</strong></td>
<td>2.5x average total monthly payment for payroll costs for the 12-week period beginning February 15, 2019 or March 1, 2019 (decided by the loan recipient) and ending June 30, 2019</td>
</tr>
</tbody>
</table>

The maximum loan size is $2 million to cover permitted uses for the funds; applicants may ask the SBA for the appropriate amount based on their own calculations and cashflow need.

Applicants may also request advance funds of up to $10,000 from the SBA (these funds will be paid out within 3 days).

### Permitted Uses

<table>
<thead>
<tr>
<th>Permitted Uses</th>
<th>What is Permitted</th>
</tr>
</thead>
<tbody>
<tr>
<td>PPP loans can be used for: “payroll costs”; mortgage interest payments; rent; utilities; and interest on debt obligations incurred before February 15, 2020.</td>
<td></td>
</tr>
<tr>
<td>(See Q #11 for definition of “payroll costs”)</td>
<td></td>
</tr>
<tr>
<td>Operational or financial obligations that cannot be met because of COVID-19, including: providing paid sick leave to employees unable to work due to COVID-19; maintaining payroll; meeting increased costs due to interrupted supply chains; making rent or mortgage payments; and repaying obligations that cannot be met due to revenue losses.</td>
<td></td>
</tr>
</tbody>
</table>

### Debt forgiveness?

Yes, the principal amount of a loan may be forgiven in an amount equal to payroll costs, interest on mortgage obligations incurred before February 15, 2020, rent payments for leases in force before February 15, 2020, and utility payments for service which began before February 15, 2020 during the 8-week period following the origination of the loan.

Loan forgiveness amount cannot exceed the loan principal and may be reduced in the event the business has laid off employees or decreased their compensation during the covered period.

$10,000 advance funds do not need to be repaid so long as they are used for the permitted uses (even if borrower is denied loan).

### Deferral

6 months (includes payments of principal, interest, and fees)  
12 months (interest accrues during deferment period)

### How do you apply?

SBA Instructions and sample application. (Application period opens on April 3, 2020.)  
Apply here now.

### Certification

Good-faith certifications that need for the loan is based on economic conditions and funds to be used to retain workers or other permitted uses,  
Self-certification under penalty of perjury
| Other Restrictions | If a borrower received the $10,000 EIDL advance and the borrower subsequently receives a PPP loan, the $10,000 advance will be subtracted from the amount the borrower’s PPP loan will be forgiven. (See additional information about the PPP loan forgiveness plan in Q #24.)  

A PPP loan borrower is ineligible for the Employee Retention Credit in Section 2301 of the CARES Act. (See additional information about the Employee Retention Credit in Q #49.) (Unclear under current guidance whether a nonprofit could also take a tax credit against unrelated business income that they pay if they are also receiving a PPP loan.)  

Employers who benefit from the loan forgiveness program under the PPP are not eligible to defer payroll taxes as provided under Section 2302 of the Cares Act. (The payroll tax deferral is explained in Q #58.) | If a borrower received the $10,000 EIDL advance and the borrower subsequently receives a PPP loan, the $10,000 advance will be subtracted from the amount the borrower’s PPP loan will be forgiven. (See additional information about the PPP loan forgiveness plan in Q #24.) |