PAYMENT PROTECTION PROGRAM ("PPP"): A LIFELINE TO MISSISSIPPI SMALL BUSINESSES AND THEIR EMPLOYEES DURING COVID-19

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Mississippi is home to many small-business owners. Several of those businesses and their employees are currently wondering how they are going to weather the economic downturn caused by the coronavirus. A new law could help.

Congress recently passed the Coronavirus Aid, Relief, and Economic Security Act (the "CARES Act"), which President Trump signed into law on March 27, 2020. Part of the CARES Act includes a new program called the Payment Protection Program ("PPP"). Congress allocated $349 billion to fund the PPP, and it is being administered by the Small Business Administration ("SBA").

The goal of the PPP is to provide small businesses funds to cover their payroll costs, rent, utilities, and mortgage interest for eight (8) weeks. Commentators are referring to this capital injection as a "loan," but the PPP has one distinguishing and important feature: as long as you keep up with the correct paperwork, the entire loan can be forgiven (and without any tax implications to the business).

Let's back up, because a lot of terms have been thrown around that have confused the public and professionals alike. In the 1950s, Congress passed the Small Business Act. That Act allowed the SBA to guarantee several different types of loans, colloquially known as "7(a) Loans" (named after the section of the bill that created them). Among those 7(a) Loans was the Emergency Injury Disaster Loan ("EIDL"). Those emergency loans were available to small business before this current pandemic, but they came with a lot more restrictions. For example, in most instances, a Governor of a State would first have to seek an Economic Disaster Declaration before anyone could get an EIDL. Governor Reeves sought this declaration on behalf of Mississippi on March 17, 2020. The SBA ultimately loosened many of the restrictions, giving businesses the opportunity to obtain an EIDL with great terms (up to $2 million dollars; a 3.75% interest rate; and a potential 30-year term).

In the CARES Act, Congress went a step further. Small businesses can now apply for an EIDL "grant" (also known as an "advance"). The grant gives a business up to $10,000 to pay for things such as sick leave for employees, payroll, increased costs to obtain materials in the supply chain, rent, mortgage payments, and repayment of "obligations that cannot be met due to revenue losses."

There are two critical things to know about the EIDL grant: (1) a business can receive the grant even if it is denied additional amounts for an EIDL; and (2) an applicant is not required to repay the grant. Additionally, the law says that an applicant "may request" the SBA to provide the grant "within 3 days after" the application is filed. Based on anecdotal evidence, it does not appear that the grants are being issued within the 3-day time limit (but to be fair, the SBA has only so many employees, who have been flooded with applications). Small businesses can apply for the EIDL grant on the SBA's website.

Back to the bigger issue: the PPP. Small businesses (meaning 500 employees or less) can apply for the PPP loan (up to $10 million dollars) to cover four costs: (1) payroll costs; (2) rent; (3) utilities; and (4) interest on mortgage obligations. The costs are prorated for eight (8) weeks, meaning the business will receive an amount that will cover those costs for about two months. The PPP is eligible for forgiveness, meaning the business will not have to repay the loan. To be eligible for forgiveness, 75% of the amounts must go towards payroll costs, and the business must retain (or rehire) all of its employees. Small business-owners can apply for the loan through an SBA-approved bank (many local banks are SBA-approved).

Because the PPP is so new, a lot of confusion still surrounds it. Here are some answers to some of the most commonly asked questions:

Who can apply?

Any small business with 500 or less employees (including sole proprietorships, independent contractors, and self-employed persons), 501(c)(3) non-profit organizations, 501(c)(19) veterans organizations, and Tribal businesses that have been adversely affected by coronavirus. Your business must have been operational before February 15, 2020. The CARES Act presumes that any business which applies for the loan has been adversely affected by the coronavirus, but the applicant must certify that the loan is needed due to the "current economic uncertainty."

How can I apply?

While you can apply for an EIDL grant through the SBA's website, you cannot apply for a PPP loan through its website (as of this writing). The SBA likely has a large portion of its manpower handling the EIDL grants and other 7(a) loans. You can apply for a PPP loan only through an SBA-approved bank or other financial institution. Many local banks are SBA-approved, so call your local banker and ask. Note: many banks are following a "know-your-customer rule," which basically means your banker should be familiar with who you are before issuing a loan. This could delay the process if you apply for the loan through a new bank. If you do not have a primary lender, you can still apply with any SBA-approved bank, so do not let this deter you.

Why can't I apply through the SBA directly?

Congress approved banks to provide the loans because it wanted the funds to get to small businesses as quickly as possible. The SBA does not have the resources to process every application. Instead, SBA-approved banks use their capital for the loans, and they will seek reimbursement from the SBA (or get the loans off their books by selling to another entity, such as the Federal Reserve, which is setting up a facility for that purpose).

Are banks open?

Yes, most banks are still open. The majority of stay-at-home orders issued across the United States, including Governor Reeves' order, deem financial institutions as "essential" businesses.

Where can I get an application for a PPP Loan?

Most banks should be able to provide you with the necessary application materials. The application itself is two pages (with a couple of addendums that banks may include). You can also locate the application on the SBA's website.

When should I apply?

Now. The official last day to apply is June 30, 2020. However, Congress allocated only $349 billion to the PPP. That sounds like a lot, but it has been reported that Bank of America alone has already received applications that would amount to 10% of the total $349 billion. That being said, both President Trump and leaders in Congress have expressed a willingness to increase funds for PPP, and Treasury Secretary Steven Mnuchin has requested an additional $250 billion for the program. In any event, the program is first-come, first-served; so applying sooner rather than later is important. Note: if you are an independent contractor or self-employed individual, the Treasury Department has stated you can start applying April 10, 2020.

What documentation will I need to apply?

While some banks may require different records, below is a list of some of the documents you may need. If you cannot locate some of these documents, do not let that stop you from applying; this is a fluid process, and not all of these records are required. The more documentation you can provide, though, the better chance you have that the bank will process your loan without any delays.

- Payroll documentation.
- A copy of W2 forms for all employees. This should be submitted as part of your payroll information.
- Documentation on any owners' compensation.
- Tax return(s) for 2019, if already filed.
- Documentation verifying costs of mortgage interest, rent, and utilities.
- Any applicable bank records, which, if applying with your bank, it should already have.
- Year-end profit and loss statements, as well as current balance sheets.

Do I need to give a personal guaranty or provide collateral?

No.

What are some of the requirements/restrictions?

The PPP is generous, but it comes with some requirements and restrictions:

- The business must retain all of its employees and must not reduce the employees' pay. If your business has had to lay off its employees, you can rehire them as a condition to receiving the PPP loan.
- 75% of the loan must be used for payroll costs, and the remaining 25% can be used only on interest on mortgage obligations, rent (under a lease agreement), and utilities, all of which must have been in effect before February 15, 2020. Note: you can use 100% of the loan on payrolls costs, but if any amounts are spent on mortgage interest, rent, or utilities, then at least 75% must also be used on payroll.
- The business is ineligible if one of the owners (who owns at least 20% of the business) is currently charged with a crime or was convicted of a felony within the past 5 years.
- A couple of other restrictions may apply, but discuss with your lender.

How do I calculate the maximum amount of loan that my business can receive?

First, the PPP loan is capped at $10 million, so you cannot receive more than that. Next, you must calculate your payroll costs prorated for eight weeks (see next two questions on how to calculate). You should use your numbers from the full calendar-year of 2019, although some banks are using only the preceding 12 months (*i.e.*, April 2019 – March 2020). Since at least 75% of the loan must be used on payroll costs, here is the formula for determining the maximum amount of funds available: [insert your total payroll costs for eight weeks] multiplied by 100 and then divided by 75. For example, if your total payroll costs for the eight weeks were $300,000, then you would use the following formula: $300,000 x 100 = $30,000,000. Then $30,000,000 / 75 = $400,000. Therefore, the maximum amount you could receive is $400,000, and you would be able to spend up to $100,000 (or 25%) on mortgage interest, rent, or utilities.

What qualifies as payroll costs?

This question has caused a lot of debate, and because the PPP is in its nascent stages, banks are applying different criteria. It is important that you discuss with you banker all of the costs that qualify. Several banks are giving different answers, so you can also check with multiple banks to find out how they are determining what qualifies.

According to the Interim Final Rule and guidance from the Treasury Department, the following qualifies as "payroll costs":

> Payroll costs consist of compensation to employees (whose principal place of residence is the United States) in the form of salary, wages, commissions, or similar compensation; cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); payment for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; payment of state and local taxes assessed on compensation of employees; and for an independent contractor or sole proprietor, wage, commissions, income, or net earnings from self-employment or similar compensation.

If you are the owner of a small business that has been organized into a legal entity (*e.g.*, an S Corporation), compensation to you as an employee of the business should qualify. For example, the regulation states that "salary, wages, commissions, or similar compensation" qualifies as "payroll costs." "Similar compensation" can be read to include compensation such as s-corp distributions and partnership guaranteed payments. Additional guidance should be forthcoming from the SBA and Treasury Department, but until then, you should check with your bank to determine what qualifies for their purposes.

How do I calculate payroll costs for the loan amount?

This part can get a little tricky. First, payroll costs above $100,000 annually for an individual employee and/or owner cannot be counted. There is some debate about whether the cap applies only to the salary or to the entire compensation (*i.e.*, salary, sick leave, *etc.*) of the employee and/or owner. Most commentators suggest that the entire compensation is capped at $100,000. So what does this mean? An employee who makes more than $100,000 is still counted towards payroll costs. But any amounts over $100,000 are not counted. For example, if you have an employee who makes $120,000 a year (including salary, sick leave, *etc.*), then you need to treat that employee's compensation as though s/he makes only $100,000 a year (this would include yourself).

Once you have all of the employees' compensations laid out (with no one employee making more than $100,000), then you add up all of the *annual* compensation. The Interim Final Rule states the independent contractors are not included in this calculation, because they can "apply for a PPP loan on their own[.]" Once you have calculated the *annual* amount of payroll costs, then you divide that number by 12 (which will equal your monthly payroll costs). Then you multiply that number by 2.5. That final number will be the total amount of payroll costs that you can receive under the PPP loan.

Can I get someone to help me with this application?

Yes. The CARES act allows an "agent" to assist a business with the application. The Treasury Department has issued guidance to lenders that an agent can be an attorney, an accountant, a loan broker, an employee of the business, *etc*. Importantly, the "agent" cannot receive compensation directly from the business (so make sure that anybody who helps you does not charge for the service). The "agent" can receive a fee from the SBA (paid out through the bank) based on a percentage of the loan amount. But the fee is not taken out of the loan.

Are there any fees for applying for a PPP Loan?

No. There is no fee, and the bank that issues your loan receives its fee directly from the SBA, so you are not charged anything for applying, nor are any fees taken out of the loan amount.

What if I have already gotten an EIDL to cover payroll costs?

You cannot use both an EIDL and a PPP loan to pay for the same things (*i.e.*, no double dipping). But, you can roll your EIDL (only those amounts used for payroll costs, *etc.*)

into your PPP loan so that it can qualify for forgiveness. Talk to your lender about this if you have already received funds through an EIDL.

When will I receive my PPP loan?

Banks and the SBA are still working out many of the logistics related to the PPP, so there is no set date by which the banks will distribute funds. However, the loans are set to be distributed as soon as possible. Some banks have already issued a few loans. Hopefully most of the funds will start being distributed this week for those who have already applied. If delays persist, do not let this deter you. The funds have been allocated by Congress, so they will eventually be available.

Is all of my loan eligible for forgiveness?

As long as 75% of your loan is used for "payroll costs," and the remaining 25% is used for mortgage interest, rent, and utilities, then those amounts under the loan can be forgiven.

When and how do I apply for forgiveness?

The CARES Act does not set a specific date for applying for forgiveness. It does, however, state that lenders will have sixty (60) days to make a determination on your application for forgiveness (once the application is received). More guidance will likely be issued from the SBA or Treasury Department regarding the timetable for forgiveness. You should check with your lender to make sure you are aware of any applicable deadlines.

You likely will need to apply for forgiveness from the institution that issued your loan, and that institution will probably provide you the application materials for forgiveness. If you hired an "agent" to assist with your initial PPP application, that agent should help you with your forgiveness application as well.

Importantly, you must provide your lender with specific documentation in order to qualify for forgiveness. According to the CARES Act, those documents are:

- "documentation verifying the number of full-time equivalent employees on payroll and [their] pay rates";
- "documentation . . . verifying payments on" mortgage interest, rent, and utilities;
- a certification by a representative of the business that the above documents are true and correct, and that they were used for the purposes allowed under the loan; and

- any other documentation that the SBA may require.

In other words, it is highly important that you maintain all documentation related to this loan, where the funds go, who receives funds, *etc.* You will *not* be eligible for forgiveness if you do not keep up with all of the necessary documentation during your loan period.

What if some of my loan amounts are not forgiven?

As long as you follow the above requirements, your loan amounts should be forgiven. But even if your lender ultimately determines that some of your loan amounts are not eligible for forgiveness, the terms of the loan are still very generous. The interest on the loan is 100 points (or 1%). The full loan amount does not mature for two years. And all payments on the loan are deferred for 6 months, so whether you receive forgiveness or not, you will not have to pay anything for at least 6 months.

For all of these reasons, the PPP is a great deal for Mississippi small businesses and their employees. If you own a small business, you should apply as soon as possible.

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