

CLIENT ALERT - CORONAVIRUS (COVID 19)
CARES ACT AND OTHER PROGRAMS AND
RELIEF AVAILABLE FOR SMALL BUSINESSES

Dear Clients and Friends:

As the Coronavirus (COVID-19) pandemic has disrupted businesses across the nation, state and local governments have commenced loan and grant programs making funds available to help small businesses stay afloat. In addition, Congress has passed the Coronavirus Aid, Relief, and Economic Security (CARES) Act which provides \$377 billion dollars of federal aid to small businesses to assist them in their time of need.

Many clients have contacted us about the programs and relief available for small businesses and we provide this Client Alert to give you general information about certain programs available to help small businesses during this difficult time. This information is not legal advice and may not be suitable for all client situations. Determining the best steps for a business to take will depend upon the particular facts and circumstances. As always, if you would like specific legal assistance with respect to these programs or any other matters, please do not hesitate to contact your HH&K attorney.

The following is a summary of various programs about which small businesses should be aware:

Coronavirus Aid, Relief, and Economic Security (CARES) Act

The Coronavirus Aid, Relief, and Economic Security (CARES) Act passed by Congress on March 27, 2020 allocates \$377 billion through various programs to provide for relief to small businesses. This relief includes \$10 billion for emergency grants of up to \$10,000 to cover immediate operating costs. The CARES Act also provides relief for small businesses with outstanding SBA loans by allocating \$17 billion to cover 6 months of loan payments.

Paycheck Protection Program

The Paycheck Protection Program (PPP) implemented by the CARES Act provides \$349 billion to the Small Business Administration's 7(a) lending program and broadens eligibility for forgivable loans up to \$10,000,000 through the covered loan period (February 15, 2020 - June 30, 2020). Small businesses, non-profits, tribal businesses, and veterans' organizations with 500 employees or less, as well as sole proprietors, independent contractors, self-employed individuals and other entities that qualify as a "small business concern" under existing SBA rules may be eligible to receive an SBA 7(a) loan under this program if they were in business on February 15, 2020. The interest rate for a PPP loan is fixed at 4% per annum. Payments of principal, interest and fees are deferred for a period ranging from six months to one year. Loans administered by the SBA under the PPP have a maximum term of ten years with no prepayment penalty.

The PPP eliminates the "no credit available elsewhere" requirement that is usually in place for SBA 7(a) loans and also waives guaranty and collateral requirements, but applicants for a PPP loan must make certain good faith certifications regarding the individual applicant's circumstances and the intended use of the loan funds. Allowable uses for the loan proceeds include: certain payroll costs (including costs related to the continuation of group health care benefits), mortgage interest, rent, utilities and interest on any other debt obligations that were incurred before the covered loan period.

Recipients of a PPP loan are eligible for loan forgiveness for an eight-week period after the origination date of the loan in the amount equal to the sum of payroll costs, mortgage interest payments, rent payments and utility payments. The amount forgiven cannot exceed the amount borrowed and may be decreased if there is a reduction in the average number of employees or the total employee salary or wages during the covered period. Such reductions in the amount of the

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loan forgiven may not apply if loan recipients rehire workers and restore salaries by June 30, 2020. The intent is to encourage employers to retain personnel but not to penalize businesses for having a smaller workforce or payroll at the beginning of the covered period.

Loan recipients must submit documentation of payroll and expenses in order to receive loan forgiveness. Borrowers with tipped employees may receive loan forgiveness for the additional wages paid to those employees during the covered period. The CARES Act states that PPP loan amount that is forgiven will be excluded from gross income for tax purposes.

SBA Emergency Economic Injury Disaster Loan (EIDL) Grants

The CARES Act also broadened eligibility for the SBA's Economic Injury Disaster Loans (EIDLs) through the covered period (January 31, 2020 – December 31, 2020). These low-interest disaster loans for working capital are now available to small businesses, private nonprofit organizations, small agricultural cooperatives, cooperatives, and tribal small businesses with no more than 500 employees, any individual who operates a sole proprietorship (with or without employees) and independent contractors that are suffering substantial economic injury as a result of the COVID-19 pandemic.

EIDLs offer up to \$2 million in assistance that may be used to pay fixed debts, payroll, accounts payable, and other bills that cannot be paid due to COVID-19's impact. The interest rate for small businesses is 3.75%, while the interest rate for nonprofits is 2.75%. These loans also have long-term repayment periods (up to 30 years). The term and amount of each loan is determined on a case-by-case basis, based upon each borrower's ability to repay as well as the size and type of business.

All rules related to personal guarantees on advances and loans of \$200,000 or less during the covered period and the "no credit available elsewhere" requirements have been waived. In addition, the CARES Act waives the requirement that a business must be in business for one year before the disaster to qualify for an EIDL, but replaces it with the requirement that the business must have been operational on January 31, 2020.

Economic Injury Disaster Loan Advance

During the covered period, eligible entities may request that the SBA provide an advance in an amount requested by the applicant up to \$10,000. Such advances will be made within three days after the SBA receives the application. Before the SBA will disburse any advance amount, it will verify that the entity is eligible for the EIDL program by accepting a self-certification given under penalty of perjury. An EIDL advance may be used for any allowable purpose, such as: providing paid sick leave to employees unable to work due to the direct effect of COVID-19, maintaining payroll to retain employees during business disruptions or substantial slowdowns, meeting increased costs to obtain materials unavailable from the applicant's original source due to supply chain interruptions, making rent or mortgage payments, and repaying obligations that cannot be met due to revenue losses. Applicants will not be required to repay the advance, even if subsequently denied an EIDL. However, if an applicant is approved for a PPP loan, the PPP loan forgiveness amount, if any, will be reduced by the amount of the EIDL advance.

SBA Express Loan Program

The CARES Act also temporarily increases the maximum amount for an SBA Express loan (an existing SBA 7(a) loan program) from \$350,000 to \$1 million through December 30, 2020. SBA Express loans come in the form of revolving lines of credit for periods up to 7 years with maturity extensions permitted at the outset. These loans have an accelerated turnaround time for SBA review, and applicants will get a response from the SBA within 36 hours. Lenders are not required to take collateral for loans of \$25,000 or less.

In order to be eligible for an SBA Express loan, applicants must qualify as a small business according to the SBA's size standards and operate on a for-profit basis in the United States. The business must have been operational for at least two years before the date of application and it must show both a need for the financing, and that it is unable to obtain desired financing from alternate, non-Federal sources. The business may not be delinquent on any previous debts to the government and the SBA requires that the borrowers both be of "good character" and demonstrate an ability to repay the loan.

Tax Implications for Businesses.

Please note that the decision to take advantage of certain loans or other relief programs may affect a business' ability to claim some of these new tax benefits. You should discuss your various options with your attorney and your accountant or other tax advisor before making any decisions.

Employer Tax Credits - Under the CARES Act's Employee Retention Credit, any employer that was operating in 2020 and that experienced a full or partial suspension of business due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings due to COVID-19, may be eligible for a quarterly employment tax credit for wages paid after March 12, 2020 and before January 1, 2021. Eligible employers are eligible for the credit in any quarter in which it has a reduction of gross receipts greater than 50% as compared to the same quarter in 2019. The employer will continue to be eligible for the credit in subsequent quarters if it has a reduction in gross receipts of more than 80% as compared to the same quarter in 2019. The amount of the credit is equal to 50% of the qualifying wages of the employer with a cap of \$10,000 per employee for all quarters. This credit is not available if the employer is a borrower under PPP. The credit is reduced by any credits received for sick leave and family leave under the Families First Coronavirus Relief Act.

Deferral of Payroll Taxes - The CARES Act also aims to free up cash flow and help businesses retain employees during times of quarantine or shut down by deferring the payment of Social Security payroll taxes. Social Security payroll taxes incurred by employers and 50% of the Social Security payroll taxes incurred by self-employed persons due from the date that the CARES Act was signed until December 31, 2020 are deferred. Half of the deferred Social Security payroll taxes will be due on December 31, 2021 and the remainder will be due on December 31, 2022. This deferral does not apply if a business obtained forgiveness of a PPP loan.

Net Operating Losses - Carryback of net operating losses (NOLs) is also expanded under the CARES Act. The Act provides for a 5-year carryback that can also be taken advantage of by sole proprietors and pass-through entities. Businesses will be permitted to amend or modify their tax returns for tax years 2013 and later to take advantage of this provision, and NOLs arising before January 1, 2021 may fully offset income.

Alternative Minimum Tax Credit - The Tax Cuts and Jobs Act (TCJA) eliminated corporations' ability to claim the alternative minimum tax credit after 2017, but allowed corporations to claim refundable alternative minimum tax credits equal to a portion of any excess minimum tax from 2018-2020 and the full amount beginning in 2021. The CARES Act accelerates the year for which a corporation may claim a fully refundable credit to 2019 and allows corporations to elect to claim the fully refundable minimum tax credits in 2018. The CARES Act mandates the US Treasury to expedite the refunds generated by this change in law to give businesses additional cash flow.

Improvement Property - The CARES Act fixes an oversight in the TCJA by classifying "qualified improvement" property as 15-year property for property acquired and placed in service after September 27, 2017. This allows 100% of improvements to be deducted in the year the improvement was made.

Interest Expense Deduction - The TCJA limited the amount of allowable deductions for business interest for tax years after 2017 to the business interest income that year plus 30% of adjusted taxable income for the year. The CARES Act temporarily increases (to 50%) the amount

of adjusted taxable income for 2019 and 2020. When calculating the limitation for 2020, businesses may elect to use their adjusted taxable income for 2019.

Other Loan Programs

Small businesses may also take advantage of loan programs outside of the CARES Act to help them survive the COVID-19 pandemic. Some of these programs include:

SBA Express Bridge Loans (EBL)

One of the SBA's pilot (non-7(a)) loan programs, Express Bridge, provides funds to for profit small businesses that have an urgent need for cash while waiting for a decision and disbursement on an EIDL. This limited-time program grants SBA Express Bridge Loans (EBLs) of up to \$25,000 to eligible small businesses. Requiring less paperwork and having faster turnaround times than EIDLs, the EBLs are meant to assist small businesses in overcoming the temporary loss of revenue that they are experiencing due to COVID-19, and to help those businesses bridge the gap when applying for an EIDL. The EBL is to be repaid in full or in part by the proceeds from the EIDL. EBLs may only be used to support the survival and/or reopening of the small business and the loan proceeds must be disbursed as working capital.

EBLs are structured as term loans with a maximum term of 7 years. Lenders may charge an interest rate of up to 6.5% over the Prime rate, regardless of the maturity date of the loan. Lenders may also require the borrower to pay back the loan in full or in part if the borrower is approved for long-term disaster financing that allows the loan proceeds to be used for EBL reimbursement.

EBL loans due to COVID-19 can be approved by the SBA through March 13, 2021 and may only be made by certain designated lenders. Further, an SBA Express Lender may only make EBL loans to small businesses with which it had an existing banking relationship on or before March 13, 2020. In order to be eligible, small business applicants must have been operational on March 13, 2020 and adversely impacted by the COVID-19 emergency. The applicant must also be able to demonstrate a need for the desired credit and an inability to obtain the credit on reasonable terms from non-Federal sources.

Binghamton Local Development Corporation (BLDC) COVID-19 Emergency Small Business Loan

The Binghamton Local Development Corporation (BLDC) is now offering COVID-19 Emergency Small Business Loans to assist small companies that have been negatively impacted by the COVID-19 pandemic. The BLDC is providing working capital loans up to \$15,000 at 0% interest for a term of 12 months. In order to qualify for a BLDC COVID-19 Emergency Small Business Loan, the borrower must be a successfully operating business within the Binghamton city limits with 50 employees or less. A personal guaranty is required to secure a BLDC Emergency Loan, and any remaining balance after the initial 12-month term will be subject to the Wall Street Journal Prime Rate. Additional collateral may be required in the event that the loan balance is not repaid in full in the first 12 months.

Pursuit SmartLoan

Pursuit, formerly known as the New York Business Development Corporation, is lending anywhere from \$10,000 to \$100,000 to established businesses at a maximum interest rate of 11.9% through its SmartLoan Program. This program offers loan terms of 5 years with a 10-year amortization. The monthly payment is calculated as if the loan term was ten years. At the end of the 5-year term, the loan reaches its maturity, but still has a remaining balance. At that point, Pursuit will work with the borrower to refinance the balance into a new loan, or the borrower can choose to pay the remaining balance. Each loan has a 5% commitment fee, which will be financed as part of the loan. Once a business submits a complete loan application with all required documentation, a decision is sent within two business days. Funding is received within five business days of the approval. SmartLoans may be used for almost any business purpose, including, but not limited to: working capital, equipment purchases, technology upgrades, debt refinancing, and leasehold improvements.

NYC Employee Retention Grant Program

New York City Small Business Services is offering grants to small businesses with fewer than 5 employees to cover 40% of payroll costs for two months – up to \$27,000 per employer – in order to help the small business retain its employees. In order to be eligible, businesses (including non-profits) must be located within the 5 boroughs of New York City and demonstrate that the COVID-19 pandemic has caused at least a 25% decrease in revenue. The business also must have been in operation for at least 6 months and have no outstanding tax liens or legal judgments. Applicants must submit financial documents for 2 months in 2020 which demonstrate a revenue decrease due to COVID-19 as well as financial documents for the same two months in 2019, unless the business was not operating at that time. Applicants must also submit financial documents showing the business's full revenue for the full 2019 calendar year and payroll records for the two most recent months must be submitted in order to determine the grant amount.

NYC Small Business Continuity Loan Fund

New York City Small Business Services is also offering zero-interest loans up to \$75,000 to businesses with fewer than 100 employees that have experienced sales decreases of 25% or more. In order to be eligible, businesses must have been in business for at least 2 years, be able to demonstrate an ability to repay the loan and have no outstanding tax liens or legal judgments.

Contact Your HH&K Attorney For Legal Guidance

This client alert does not outline all of the programs and relief that may be available to small businesses and the laws and regulations regarding applicable programs are constantly evolving. The summaries above are not full statements of each of the programs described and do not outline all of the important considerations related thereto. We understand there is a lot of information out there coming from a variety of sources. As we have noted above, the particular facts and circumstances of each situation (which may change as businesses adapt to this crisis) need to be considered as a whole in order to determine what programs or relief may be available, appropriate, or most beneficial to a particular business. This client alert is not a substitute for legal guidance regarding the program details and how those may be applicable to your business. As always, if we can be of assistance during this difficult time, please do not hesitate to contact your HH&K attorney.



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