

Recommendations for Coronavirus-Affected Businesses Seeking Government Assistance



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Callan G. Stein | steinc@pepperlaw.com

In a very short period of time, the unprecedented coronavirus (COVID-19) pandemic has created extremely difficult economic circumstances for businesses of all shapes and sizes. Federal, state and local governments have moved swiftly to roll out assistance programs to help keep businesses afloat in these trying times. Although there are more programs to come, below is a summary of the existing loan and grant programs of which businesses may consider availing themselves, as well as some practice recommendations for how businesses can enhance their chances of securing funds while simultaneously protecting themselves from future issues.

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Available Programs

U.S. Small Business Administration

The SBA currently has two programs available for businesses impacted by the coronavirus.

The Economic Injury Disaster Loan Program (EIDL)

Overview: The EIDL is a disaster-relief program administered by the SBA that has been used in the past to help businesses affected by natural disasters like hurricanes, droughts and other severe weather.

Loan Amount: The EIDL offers loans up to a maximum of \$2 million.

Eligibility: Loans are available to businesses that (1) have suffered substantial economic injury and (2) are located within a declared disaster area. For coronavirus, the SBA has announced disaster areas in counties in 35 states plus Washington D.C., though the list is subject to constant updating.

Permitted Uses: EIDL loans can be used to pay fixed debts, payroll, accounts payable and other bills that cannot be paid because of the disaster's impact.

Program Terms: Interest rates for SBA EIDL loans are variable but will not exceed 4 percent per year. EIDL loans have long-term repayment periods (up to 30 years) to keep monthly payments affordable, though the SBA determines specific loan terms on a case-by-case basis according to the borrower's repayment abilities.

For additional detail regarding SBA's disaster loan program, see Pepper's Q&A found at <https://www.pepperlaw.com/publications/eligibility-for-sbas-emergency-loan-program-for-businesses-impacted-by-covid-19-2020-03-20/>.

7(a) Loan Program

Overview: The 7(a) loan program is the SBA's primary program for providing financial assistance to businesses. This is the SBA's normal loan program; it is not dependent on the existence of a disaster situation.

Loan Amount: The 7(a) loan program offers loans up to a maximum of \$5 million.

Eligibility: Unlike loans given under the EIDL, the SBA typically delegates authority to determine borrower eligibility to the individual lenders without SBA oversight or approval. Most businesses are eligible for a 7(a) loan. The only eligibility requirements are that the business (1) operate for profit; (2) is engaged in, or proposes to do, business in the United States; (3) has reasonable owner equity to invest; and (4) uses alternative financial resources (e.g., personal assets) before seeking financial assistance.

Permitted Uses: 7(a) loans can be used to acquire land; purchase existing buildings; convert, expand or renovate buildings; construct new buildings; acquire and install fixed assets; acquire inventory; purchase supplies and raw materials; purchase a business, start a business, leasehold improvements, term working capital; and, under certain conditions, refinance certain outstanding debts.

Program Terms: The terms of a 7(a) loan often vary by the type of loan, and lenders and borrowers are permitted to negotiate the interest rate (so long as it does not exceed the SBA maximum rate).

Special Considerations: The 7(a) loan program terms and conditions contain special consideration for certain businesses, including franchises, recreational facilities/clubs, farms and agricultural businesses, hospitals, clinics, laboratories, and other medical facilities, among others.

State and Local Initiatives

Numerous states and some cities across the country have announced loan and funding programs to support local businesses. These programs vary by location but maintain some consistent features, including that the maximum amount offered is significantly smaller than is offered by the SBA programs. Below are two examples of state and local programs that have been announced.

New York City Assistance & Guidance for Businesses Impacted Due to Novel Coronavirus

Overview: On March 8, Mayor Bill de Blasio announced that New York City will provide relief for businesses across the city seeing a reduction in revenue because of the coronavirus.

Eligibility: Businesses that have fewer than 100 employees and can demonstrate a decrease in sales of 25 percent or more are eligible for the NYC Small Business Continuity Fund. Businesses with fewer than five employees are eligible for the NYC Employee Retention Grant Program. To be eligible for either program, a business must be located within the five boroughs of New York City.

Program Terms: The Small Business Continuity Fund will issue 0 percent interest loans of up to \$75,000 to mitigate business losses. The Employer Retention Grant Program will issue grants to cover up to 40 percent of payroll costs for two months in order to help businesses retain employees.

The Massachusetts Small Business Recovery Loan Fund

Overview: The Massachusetts Small Business Recovery Loan Fund is a \$10 million program administered by Massachusetts Growth Capital Corporation, a quasi-public corporation.

Loan Amount: The Small Business Recovery Loan Fund offers loans up to a maximum amount of \$75,000.

Eligibility: All Massachusetts-based businesses that have fewer than 50 employees (full-time plus part-time) and have suffered a verifiable negative impact because of the coronavirus pandemic are eligible to participate.

Program Terms: Loans issued under this program will have no payments due for the first 6 months, followed by 30 months of payments of principal plus interest. There are no prepayment penalties.

Federal Legislation

It is expected that Congress will soon enact legislation that will provide additional resources and funding options for U.S. businesses. On March 18, the first Senate bill responding to the coronavirus pandemic was enacted, but legislators are quickly working to follow up with an additional \$1.3 trillion economic rescue package.

The initial Senate bill provides for paid sick leave, food assistance for vulnerable populations, and financial help for coronavirus testing. However, funding programs and financial assistance to businesses suffering in the wake of the pandemic are expected to be addressed in the forthcoming follow-up bill.

The White House's request to Congress for the additional \$1.3 trillion includes \$150 billion earmarked for "severely distressed sectors" of the economy. What constitutes a "severely distressed sector" remains to be seen, but it will likely include things like the restaurant and service industries and some sectors of the retail industry. (The airline industry will not count toward that \$150 billion, as the request included \$50 billion specifically for the airline industry.) This restriction will likely limit the availability of federal funds, at least initially, to businesses that fall outside the "severely distressed sectors."

Considerations For Business

With so much uncertainty, things are changing on a daily (if not hourly) basis as the pandemic develops. And it is all but certain that there will be more applicants for these assistance programs than there will be resources available to satisfy them. Businesses, even those that are still considering whether and when to apply for assistance, would be wise to consider the following recommendations now.

1. *Be prepared.* Unless you are looking to apply for an SBA loan or for assistance under an existing state program, you likely do not yet know what information you will have to provide and what eligibility requirements you will have to meet. Though this uncertainty may prevent you from actually preparing your application, businesses can begin gathering documents and financial information that are likely to be requested. Although every program will require slightly different information, businesses can get a head start by reviewing one of the SBA program applications and beginning to prepare the information requested therein.
2. *Document your losses.* While it is true that not every assistance program will require businesses to demonstrate their losses due to the coronavirus to be eligible, some almost certainly will (for example, the Massachusetts program requires "verifiable" losses due to the pandemic). Other programs may prioritize businesses that can demonstrate more significant losses. Businesses should ensure they are contemporaneously documenting their losses due to the pandemic. This will include financial

documentation demonstrating significant drops in sales, but also things like out-of-pocket costs incurred by complying with state or local closures or other guidance. The more losses you can document, the stronger a case you will be able to make.

3. *Be careful, be accurate.* Remember, above all else, that when you do apply for a loan or grant funding from the government (including from the SBA), you must be truthful and complete. Government assistance programs can be a hotbed for fraudulent activity. Federal and state prosecutors know that bad actors abound, and, as a result, there is significant attention and scrutiny devoted to ensuring the truthfulness of applications. History tells us that there will be a number of enforcement actions and even criminal prosecutions for fraud and violations of the False Claims Act (state and federal) against individuals who, in their fervor to mitigate their losses, submit inaccurate or exaggerated loan/grant applications. For example, exaggerating the amount of your losses, omitting relevant insurance coverage or history of bankruptcy, or being dishonest about prior convictions or tax delinquency of owners may open you up to False Claims Act liability. The best way to guard against this is to maintain careful records and solicit assistance from outside counsel when necessary.