FAQ's: STAFFING FIRMS ELIGIBILITY FOR PPP LOANS

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ELIGIBILITY

Are staffing firms eligible to participate in the CARES Act SBA PPP program?

Yes, provided they meet one of the two eligibility tests.

The first test focuses on the number of employees that the potential borrower has – *i.e.* a staffing firm with 500 or fewer employees is eligible to participate in the PPP program. The definition of employee includes a staffing firm's part time employees and temporary employees. SBA has not defined part time employee and thus, the presumption is that all part time employees regardless of the duration of their part time employment count in determining eligibility.

The second test applies if a staffing firm has more than 500 employees. That staffing firm will be eligible to participate if satisfies the existing statutory and regulatory definition of a small business concern under Section 3 of the Small Business Act. A business can qualify if it meets the SBA employee-based or revenue-based size standard corresponding to its primary industry. To make this determination the staffing must know its NAICS code and apply the SBA's corresponding requirements.

How do I count my total number of employees if I have multiple operating entities and the employees are spread across those entities?

Under the FAQs, it states that the SBA affiliation rules apply in determining whether a business meets the SBA employee based or revenue based size standards. Specifically, according to guidance issued by the Treasury, there are four tests for affiliation based on control apply to participants in the Paycheck Protection Program. Essentially, concerns and entities are affiliates of each other when one controls or has the power to control the other, or a third party or parties controls or has the power to control both. It does not matter whether control is exercised, so long as the power to control exists.

Note, it is not the lender's responsibility to determine the affiliations of a small business. It is the responsibility of the borrower to determine which entities (if any) are its affiliates and determine the employee headcount of the borrower and its affiliates. Lenders are permitted to rely on borrowers' certifications.

If I have placed my internal or contingent workforce with a PEO or Employer of Record do those employees count toward my eligibility?

Payroll documentation provided by a PEO that indicates the amount of wages and payroll taxes reported to the IRS by the payroll provider for the borrower's employees will be considered acceptable PPP loan documentation. Those employees, however, will not be considered employees of the payroll provider or PEO should the PEO apply under the PPP.

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How do I apply for a loan under the PPP program?
You should call your bank immediately and speak with your contact person about that process. Many banks are only taking applications from their customers and not from potential new customers.

CALCULATING AMOUNT ELIGIBLE TO BORROW

How much will I be able to borrow?

The maximum loan amount is, generally, the average total monthly payments made by the business for payroll costs incurred during the one (1) year period before the date on which the loan closes, or for calendar year 2019, times 2.5. Payroll Costs include the following:

- Salary, wages, commissions or similar compensation.
- Vacation, parental, family, medical and sick leave.
- Allowances for dismissal or separation.
- Payments for group health care benefits, including insurance premiums and retirement benefits.
- Payments for state and local taxes assessed on compensation of employees.

Excluded payroll costs are:

- Compensation of an individual employee in excess of an annual salary of $100,000.
- Compensation for an employee whose principal place of residence is outside the US.
- Federal employment taxes withheld or imposed between February 15, 2020 and June 30, 2020 including the employee's and employer's share of FICA.
- Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act.

Can I count the amount the amount I pay to independent contractors in my borrowing base?

No. Independent contractors have the ability to apply for a PPP loan on their own so they do not count for purposes of a borrower's PPP loan calculation.

Can I count the payroll costs associated with HB-1 and other visa employees in my borrowing base?

Yes, provided the employee has his or her principal place of residence in the United States. I.R.C. § 7701(b).

LOAN TERMS

What are the terms of a PPP loan?

The Interest rate will be 1%, with a maturity date of two (2) years, and no collateral required. You will not have to make any payments for six months following the date of disbursement of the loan. However, interest will continue to accrue on PPP loans during this six-month deferment.

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RESTRICTIONS ON USE OF THE FUNDS

Are there restrictions on how I may use the loan proceeds?

Not more than 25 percent of the loan forgiveness amount may be attributable to non-payroll costs if you wish to obtain loan forgiveness (see below).

Are there repercussions if I don't use the funds as required?

If you use PPP funds for unauthorized purposes, SBA will direct you to repay those amounts. If you knowingly use the funds for unauthorized purposes, you will be subject to additional liability such as charges for fraud. If one of your shareholders, members, or partners uses PPP funds for unauthorized purposes, SBA will have recourse against the shareholder, member, or partner for the unauthorized use.

LOAN FORGIVENESS

Is the loan forgivable and under what conditions?

The actual amount of loan forgiveness will depend, in part, on the total amount of payroll costs, payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments under service agreements dated before February 15, 2020, over the eight-week period following the date of the loan. However, not more than 25 percent of the loan forgiveness amount may be attributable to non-payroll costs. The amount of loan forgiveness can be up to the full amount of the loan and any accrued interest. If the loan funds are used for unauthorized purposes, the SBA will direct the borrower to repay those funds and may subject the borrowers or its principals to additional liability for fraud.

MEETING THE REQUIREMENTS AS TO EMPLOYEE COUNT AND WAGES FOR FORGIVENESS

What are the conditions for loan forgiveness?

The amount forgiven will be reduced if there is a reduction in either (a) the number of employees retained compared to the prior year; or (b) in the pay of any employee beyond 25% of prior year compensation.

- To calculate the amount of the loan available to be forgiven based on employee count reductions, the amount forgiven will be reduced in direct proportion to the number of layoffs. Businesses can choose to compare their reduced workforce numbers to either their average full-time employees from February 15 – June 30, 2019, or their average full-time employees from January 1 – February 29, 2020. Note the reduction does not apply if, by June 30, 2020, a borrower rehires the same number of employees who were laid off between February 15, 2020 and 30 days after enactment of the CARES Act (or April 27, 2020).

For employee salary/wage reductions, the amount of loan forgiven will be reduced dollar-for-dollar for the amounts of any salary or wage reductions in excess of 25% as compared to the employee's most recent full quarter. However, this applies only to such salary/wage reductions for employees who did not receive, during any single pay period during 2019, wages or salary at an annualized rate of more than $100,000. Salary/wage reductions for employees above that pay range do not impact eligibility for loan forgiveness. The reduction does not apply if, by June 30, 2020, a borrower restores any salaries/wages reduced between February 15, 2020, and 30 days after enactment of the CARES Act.

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About the Author:

About Martin Borosko: Martin L. Borosko has been the Managing Member of the firm since 2006. Under his leadership, the firm has grown into one of the premier boutique firms with offices in New York, California, New Jersey and Pennsylvania.

Marty leads the Staffing team within the firm dedicated to studying the best legal practices within the staffing and healthcare industries. His philosophy is to direct clients toward legal strategies that facilitate growth and increase enterprise value in the long term. He often works as part of a team with leading investment bankers, accountants and risk managers to implement comprehensive growth strategies for clients.

Marty is a frequent contributor to legal and business publications and lectures across the country on emerging issues impacting the Staffing Industry.

About Becker

Becker LLC is a premier mid-market firm with offices in New York, New Jersey, Philadelphia and California. The firm provides the complete spectrum of legal services from litigation, transactional, labor and employment, and bankruptcy law counseling, to intellectual property, real estate and construction law related advice. Our size and regional footprint allows us to provide sophisticated services in a manner not only focused on results, but also on our client's return on their investment.

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