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## **FAQs ON PANDEMIC-RELATED ISSUES FOR SMALL BUSINESSES AND NONPROFITS**

### **IN NEW JERSEY AND NEW YORK**

**Last Updated on July 6, 2020**

#### **I. PAYCHECK PROTECTION PROGRAM**

The federal government has created several forms of financial relief for small businesses and nonprofits. One important federal program that your business may want to consider is the Paycheck Protection Program (the “PPP”), established by Section 1102 of the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”). Volunteer lawyers from Lowenstein Sandler are helping under-resourced entrepreneurs and nonprofits apply for PPP loans.

The first wave of PPP funding was exhausted on April 16, 2020. The government approved \$310 billion of new funding for the PPP on April 24, 2020. On April 27, 2020, the SBA resumed accepting PPP applications from participating lenders. About one fifth of the second round of PPP funding is earmarked for smaller banks, smaller credit unions, and community financial institutions that provide financing to underserved and economically disadvantaged communities.

The terms and conditions of a PPP loan are very attractive to most small business owners. If used properly, all or most of the loan is forgiven and will not need to be repaid. If you are concerned about the financial wellbeing of your business, you should consider applying for a PPP loan. The [newly enacted PPP Extension Act](#) extends the application deadline from June 30 to August 8, 2020, or until program funds are exhausted, whichever is earlier. [According to the SBA, as of June 30 2020, about \\$137.5 billion of PPP funding remained. This funding may go quickly.](#)

UPDATE: The CARES Act was substantially amended on June 5, 2020, with the enactment of the Paycheck Protection Program Flexibility Act of 2020 (the “Flexibility Act”). The [Flexibility Act](#) updates many aspects of the PPP. As suggested by its name, the new law is intended to give PPP borrowers more flexibility in when and how they spend their PPP funds.

Some small businesses and nonprofits have reported difficulty finding a bank to accept their PPP applications, and others did not hear from their bank after they applied. An existing relationship with a bank typically helps facilitate the loan process as many banks are taking applications only from those clients who already have an existing relationship. Note, however, that earlier in the program, some banks had extremely long backlogs for PPP applications and failed to timely process borrowers’ applications. Now, at the end of the program, some lenders may have closed their application portals. Check the lender’s website to determine if it is still accepting applications. To increase the likelihood that your loan application will be processed, you may wish to apply with a community bank or FinTech company like [PayPal](#). While Lowenstein Sandler does not endorse any particular bank or lender, as of the date of this

writing, we have heard that the following institutions have relatively light or no backlogs and may accept applications from new customers: [Northeast Bank](#), [Kabbage](#), and [Old Dominion Bank](#). Contact a lender as soon as possible to begin the application process.

Full FAQs about the Paycheck Protection Program are available on [Lowenstein Sandler's website](#).

In addition to applying for a PPP loan, you may wish to consider which other federal, state and private financial support programs your business may be eligible for and applying for those that match your business needs. The [NJ COVID-19 Business Emergency Assistance Eligibility Wizard](#) is a helpful resource for companies and nonprofits in New Jersey. The New York City Department of Small Business Services offers [weekly webinars](#) on financial assistance for organizations financially impacted by COVID-19 that may be helpful for companies and nonprofits in the New York City area.

## II. [COVID-19 ENTREPRENEUR QUESTIONS AND ANSWERS](#)

Lowenstein Sandler received a list of legal questions that entrepreneurs have posed. Many of these questions are also applicable to nonprofits. Please find below general information to assist entrepreneurs and nonprofit organizations in navigating COVID-19 relief programs and complying with applicable laws. As noted above, information should not be relied upon for legal advice in any particular circumstance or fact situation.

### [Question 1:](#)

*My business had to suspend operations due to COVID-19. What benefits might I qualify for?*

#### Answer:

**General:** You may wish to consider applying for a Paycheck Protection Program loan to pay your own salary and/or your payroll costs for other employees. The program covers sole proprietors, self-employed people, and independent contractors, among other small businesses.

If you are a self-employed sole proprietor or single member LLC, you also have another alternative. Federal Pandemic Unemployment Assistance expands eligibility for individuals who are typically ineligible for unemployment benefits, and federal Pandemic Unemployment Compensation provides an additional \$600 per week, on top of regular benefits, to all recipients of unemployment insurance. The program is set to expire at the end of July. You should submit your application on the website of your state unemployment authority. Note that you cannot apply for Unemployment Assistance and use a Paycheck Protection Loan or SBA Economic Injury Disaster Loan (EIDL) to pay your own salary (though if you collect unemployment you could use the PPP loan or EIDL to pay other expenses). You can only apply to one of these programs to cover your salary.

**New Jersey:** Guidance on which New Jersey businesses and nonprofits may stay open during the public health emergency, and which must close, is available on the [NJ COVID-19 Business Information Hub](#), which includes comprehensive information on federal, state, and private emergency support programs for your business. Check the FAQ: "[Does My Business Need to Close](#)." Guidance on applying for state and federal unemployment benefits is available on the [New Jersey Department of Labor website](#).

**New York:** Guidance on what constitutes an essential business in New York can be found on the [Empire State Development website](#). Check the FAQ: “[Determining Whether A Business Is Subject To A Workforce Reduction Under Recent Executive Order Enacted To Address Covid-19 Outbreak.](#)” Guidance on applying for state and federal unemployment benefits is available on the [New York State Department of Labor website](#).

Question 2:

*I own a company and do not receive a W2 form or paycheck. I compensate myself and my business partner from petty cash after business expenses are paid. How do I apply for PPP assistance?*

Answer: To apply for a PPP loan, your business would need to provide records documenting the amount of compensation paid and establishing (i) that the particular method of compensation is in the ordinary course of the business, and (ii) that you have paid applicable federal, state, and local taxes. If your business cannot document any payroll expenses, the PPP is not the best option for you.

Assuming that a business can satisfy these two criteria, it may apply for a PPP loan. Different types of entities should follow different steps to calculate the loan amount. SBA Guidance, [Paycheck Protection Program: How to Calculate Maximum Loan Amounts – By Business Type](#), provides complete instructions for general partnerships, sole proprietors, and independent contractors, among others.

Question 3:

*My compensation is project-based and inconsistent throughout the year. I do not receive the same amount of compensation each month. How do I demonstrate my average pay in order to obtain the largest possible PPP loan?*

Answer: See Question 2 above and SBA Guidance, [Paycheck Protection Program: How to Calculate Maximum Loan Amounts – By Business Type](#). You should base your payroll calculations on net earnings for self-employment (if a partnership) or net profit amount (if a sole proprietor, single member LLC, or independent contractor) during the 2019 calendar year.

Question 4:

*Should an hourly employee who is too scared to come to work still be paid?*

Answer: For purposes of obtaining maximum forgiveness of a PPP loan, you may want to keep them on payroll. Before the enactment of the Flexibility Act, for a PPP loan to be fully forgiven, the employee headcount had to remain the same in the eight weeks following disbursement of the PPP loan. The Flexibility Act extended this period: For 24 weeks after receiving their loans, or until December 31, 2020, whichever is earlier, employers must maintain their workforce at pre-pandemic levels if they want to secure maximum loan forgiveness.

Note, though, that some reductions in workforce will not count against you for the purpose of loan forgiveness. Loan forgiveness will not be impacted if:

- you laid off workers between February 15, 2020 and April 26, 2020 and then rehire them by December 31. (Before the enactment of the Flexibility Act, employers only had until June 30, 2020 to rehire employees laid off between February 15 and April 26.)

- you fire an employee for cause; an employee voluntarily resigns; or an employee voluntarily requests and receives a reduction in hours.
- you have laid off employees, and then:
  - made a good faith, written offer to rehire,
  - documented the employee’s rejection of that offer,
  - informed the state unemployment insurance office within 30 days of the employee’s rejection of the offer (employees who reject offers of reemployment may forfeit eligibility for continued unemployment compensation), and
  - documented your inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020.
- Rehiring – Flexibility Act Update: In addition to the above, forgiveness will not be reduced if the employer can document in good faith that it is unable to return to the same level of business activity such business was operating at before February 15, 2020, due to compliance with operating restrictions related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.

Distinct from PPP loan forgiveness considerations are protections for certain kinds of time off from work under state and federal laws.

**New Jersey:** In New Jersey, [guidance](#) issued by the New Jersey Department of Labor specifically indicates that workers who are afraid of gathering in a group and stay home from work because they are self-distancing are entitled to take New Jersey Earned Sick Leave, even if their employer is permitted to remain open. Under [New Jersey’s Earned Sick Leave law](#), most employers must provide full-time, part-time, and temporary employees with up to 40 hours of earned sick leave per year so they can care for themselves or a loved one. The employer is responsible for paying this benefit.

**New York:** No New York State law requires an employer to pay an hourly employee who is too scared to come to work. On March 18, 2020, New York State enacted an emergency COVID-19 sick leave law, but it applies only in limited circumstances. On April 3, 2020, the state enacted a general sick leave law, but it does not go into effect until September 30, 2020. On the other hand, New York City’s [Paid Sick and Safe Leave Law](#) would arguably protect the cautious worker. [Guidance](#) released by the NYC Department of Consumer Affairs states that an employee may take paid leave to “self-isolat[e] for preventative purposes.” Additional information about New York State’s and New York City’s sick leave laws can be found in response to Question 5 below.

**General:** After state and federal leave obligations are satisfied, an employer would generally be free to cease paying an employee who is not working. Under the federal Fair Labor Standards Act (FLSA), which covers many but not all employers, a business is not required to keep paying employees who are not working. FLSA minimum wage and overtime requirements attach to hours worked in a workweek, so employees who are not working are typically not entitled to the wages the FLSA requires. Of course, an employer might have an obligation to keep paying employees because of, for example, an employment contract, a collective bargaining agreement, or some policy or practice that is enforceable as a contract or under a state wage law. Consult an attorney for specific advice.

[Question 5:](#)

*If an hourly employee is unable to work for reasons related to COVID-19, should they be paid?*

Answer: If your business is able to obtain a PPP loan, then the amount of forgiveness will depend on your business's keeping as many employees on payroll as possible. So, it is to your business's advantage to keep these individuals on payroll and maintain their regular level of compensation.

**Federal Law:** In addition, the federal Families First Coronavirus Response Act ("FFCRA") requires private employers with fewer than 500 employees to provide income and job protection for employees who are unable to work or telework because they are:

- following [quarantine orders](#) (including shelter-in-place or stay-at-home orders issued by any government authority or are quarantined by a health care provider),
- experiencing symptoms of COVID-19,
- caring for an individual under quarantine orders, or
- caring for a child whose school is closed or for whom childcare is unavailable for reasons related to COVID-19.

Exemption: Small businesses with fewer than 50 employees may request an exemption if providing FFCRA leave would jeopardize the viability of their business as a going concern. The U.S. Department of Labor has indicated that it will release additional guidance on the [criteria](#) for meeting the exemption.

Duration of leave and pay depends on [the reason the leave is taken](#):

- The employer must pay an employee's regular rate of pay (up to \$511 a day) for two weeks, up to a maximum of \$5,110, if the employee is unable to work because of the employee's own illness, quarantine order, or self-isolation.
- The employer must pay two-thirds of the employee's regular rate of pay, up to a maximum of \$200 a day and a total of \$2,000, if the employee is unable to work because they must care for someone else.
- The employer must pay employees who take childcare leave at the employee's regular rate of pay (up to \$511 a day) for two weeks, up to a maximum of \$5,110. An employee may take up to ten additional weeks of childcare leave, paid for by the employer at two-thirds of the employee's regular rate of pay. Mandatory compensation for childcare leave is capped at \$12,000 for the twelve weeks.
- Employers are free to pay more, but not less, than these mandatory amounts, and tax credits are available only for the mandatory amounts (see below).

Documentation: According to [U.S. Department of Labor guidance](#), employers must document the following:

- the name of employee requesting leave;
- the date(s) for which leave requested;
- the reason for leave:
  - if due to quarantine or stay-at-home order, document the name of government entity or health care provider that gave the order;

- if to care for a child whose school or place of care is closed, document the name of the child and the name of the school or place of care, and obtain a statement from the employee that no other suitable childcare is available;
- a statement from the employee that he or she is unable to work because of qualifying circumstances.

**Reimbursement:** Employers may apply for a tax credit for the amount of COVID-related emergency sick leave and emergency family leave benefits paid to their employees. Employers may fund the leave by accessing federal employment taxes (including withheld taxes that are required to be deposited with the IRS) or by requesting an advance from the IRS. Detailed guidance is available on the [IRS's website](#).

**New Jersey:** Under New Jersey's Earned Sick Leave law, employers must pay employees sick leave benefits while the workplace is ordered closed, when a public health authority or health care provider orders a worker to quarantine, or (as noted above) when an employee is afraid of gathering in a group and – even though their place of work is open – stays home from work because they are self-distancing. See [New Jersey Department of Labor website](#) for a summary of state leave benefits and [detailed guidance](#) on the interplay of federal and state leave laws.

**New York:** As noted above, New York's sick leave law, enacted on April 3, 2020, has not yet gone into effect. Under the new law, which will apply to all private employers, the amount of leave, and whether it is paid or unpaid, will depend on an employer's size and net income.

On March 18, 2020, New York State enacted an emergency COVID-19 sick leave law that applies to employers of all sizes and covers employees who are unable to work for reasons related to COVID-19. The rate of pay is based on an employer's size and business earnings. Employees are eligible for [COVID-19 Paid Sick Leave](#) if a public health authority directs them personally to [quarantine or self-isolate](#) (a general stay-at-home order does not meet this standard). The local health department provides the order of quarantine or isolation, and the employee must submit the order to the employer's disability and Paid Family Leave insurance carrier as part of its COVID-19 paid sick leave application package. Employees who are not showing symptoms and are physically able to work through remote access do not qualify for this benefit. See [New York COVID-19 Paid Sick Leave: Frequently Asked Questions](#) for additional information.

Under New York City's Earned Sick and Safe Time Act, employers in New York City with five or more employees are required to provide employees with up to 40 hours of paid leave time per year (the time is unpaid if the employer has fewer than five employees). Employees may take sick leave for various COVID-19-related reasons:

- the employee feels ill or shows symptoms of COVID-19,
- the employee needs to get tested for the flu or COVID-19,
- the employee is under quarantine or self-isolating for preventative purposes,
- the employee is caring for a family member under a mandatory or precautionary order of quarantine,
- a public official temporarily closes the employee's place of work due to a public health emergency, or
- a public official closes the employee's child's school or childcare provider due to a public health emergency.

An order of quarantine or isolation is not required. [Detailed guidance](#) is available on the New York City Department of Consumer Affairs website.

Question 6:

*I have no work for my employees. Should I keep them on payroll?*

Answer: For purposes of obtaining maximum loan forgiveness under a PPP loan, you may want to keep them on payroll. See Question (4) above.

Employers should consider whether individual employees are entitled to paid sick leave or family leave benefits provided for under the federal and state laws described above.

Employers should also consider whether an employee can use vacation or other paid or unpaid time off during the period they are not working, and whether their job duties can be completed on a flexible schedule or reduced time basis.

After federal and state law and contractual paid leave obligations have been satisfied, an employer can generally elect to stop paying employees, at which point most employees will be eligible for unemployment assistance.

Question 7:

*Can I ask an employee who shows symptoms to go home?*

Answer: The Centers for Disease Control (“CDC”) states that employees who become ill with symptoms of COVID-19 should leave the workplace. During a pandemic, employers may ask employees who are entering the workplace if they are experiencing symptoms of the pandemic virus and may ask symptomatic employees to leave the workplace. For COVID-19, common symptoms include fever, chills, cough, shortness of breath, and sore throat. As public health authorities learn more about COVID-19, they may expand the list of associated symptoms. Employers should rely on CDC guidance on emerging symptoms associated with the disease.

Applicable anti-discrimination laws do not prevent an employer from asking a sick employee to leave the workplace, but they do prevent adverse employment actions against employees based on their real or perceived illness with COVID-19, among other reasons.

**Federal, New Jersey, and New York Anti-Discrimination Law:** Certain businesses are required to comply with the Americans with Disabilities Act (the “ADA”), and other federal, state and local laws that prohibit discrimination on the basis of disability. The [New Jersey Division on Civil Rights has made clear](#), for instance, that an employer may not fire or otherwise discriminate against an employee because the employee has, or is perceived to have, COVID-19. The [New York State Division of Human Rights](#) and [New York City Commission on Human Rights](#) have made similar pronouncements. Employers must also protect employees from workplace harassment based on perceived or actual COVID-19 symptoms or on national origins that some assume to be connected to the pandemic.

Employers should maintain all medical information about a particular employee in a confidential medical file, separate from the employee’s personnel file, in compliance with the ADA. Medical information includes an employee’s statement that he or she has the disease or suspects he or she has the disease, or the employer’s notes or other documentation from questioning an employee

about symptoms. Employers may store information related to COVID-19 in an employee's existing medical file.

#### Question 8:

*How would sending an employee to collect unemployment affect my business?*

Answer: Employees who are laid off or furloughed for business-related reasons arising from the pandemic may be eligible to collect unemployment. The unemployment charges made to an employer's account can affect the employer's experience rating – i.e., the business's or nonprofit's prospective unemployment insurance tax rate. This can result in significant increased unemployment insurance costs going forward. Some states have introduced legislation to prevent employers from incurring increased unemployment insurance costs as a result of COVID-19-related unemployment benefits, but neither New Jersey nor New York has passed such a law as of this writing (although legislation has been introduced in both states).

#### Question 9:

*What obligations do I have to employees now that I intend to shut down my operations?*

Answer: The termination of employees, including a complete shutdown of business operations, requires careful consideration of multiple legal issues. An employer must determine whether it has any contractual or statutory notice obligations, including advance notice under the federal Worker Adjustment and Retraining Notification ("WARN") Act and analogous state laws, if applicable, and if so, whether any exceptions to those notice requirements apply. An employer should review existing employee agreements and policies that may include employee rights to compensation, severance, or benefits triggered by certain termination events.

**New Jersey and New York:** When letting employees go, employers in both New Jersey and New York are legally obligated to pay all outstanding wages no later than the regular payday for the pay period in which the termination occurred. An employee compensated in full or in part by an incentive system may be paid a reasonable approximation of all wages due until the exact amount is computed. New Jersey and New York employers are not required to pay unused accrued vacation upon termination absent a company policy stating the contrary. An employer should review plan documents to determine the effect of a shutdown on employee benefits, including group health insurance and pensions, notify plan administrators, and prepare and send any required notices relating to continuation of health insurance under the [federal COBRA law](#), [New Jersey's "mini-COBRA" law](#), or [New York's "mini-COBRA" law](#). If employees on a temporary employment visa are affected by the shutdown, the employer should determine whether there are any reporting obligations to the government, obligations to pay the reasonable cost of return transportation abroad, or ways to structure severance payments to address immigration issues. Companies and nonprofits should consider whether they need employees while operations are winding down, and if so, which positions and how many employees are needed. When selecting wind-down employees, an employer should use objective selection criteria to avoid discrimination claims.

#### Question 10:

*How can I avoid discrimination issues that may arise from the COVID-19 crisis?*



Answer: Employers can remind employees that it is against federal law to harass or otherwise discriminate against coworkers based on race, national origin, color, sex, religion, disability, or genetic information. Applicable state laws may prohibit discrimination and harassment based on additional protected characteristics. An employer should remind employees of existing company policies prohibiting discrimination and harassment in the workplace and of its reporting system for lodging and handling discrimination and harassment complaints. Employers should make clear that they will promptly review allegations of discrimination and harassment and take appropriate corrective action when necessary. Further, employers should assure staff that no retaliation will be taken against an employee who makes a good-faith report of unlawful discrimination or harassment.