Gallagher
Insurance | Risk Management | Consulting

COZEN O'CONNOR

Frequently Asked Questions: Financial Assistance for Small, Mid-sized and Distressed Sector Businesses

Guidance from Gallagher's Human Resources & Compensation Consulting practice, developed in partnership with Cozen O'Connor

The largest economic aid package in U.S. history became law on Friday, March 27, 2020, when Congress passed, and the president signed, the Coronavirus Aid, Relief, and Economic Security Act of 2020 (the CARES Act). The CARES Act provides approximately $2.2 trillion (more than 10 percent of U.S. Gross Domestic Product (GDP) in economic assistance to various sectors of the economy impacted by COVID-19, with a number of provisions directly promoting the interests of small businesses. The sweeping legislation also contains relief for individual taxpayers, distressed industries, and the healthcare sector, among others. This discussion is current as of April 13, 2020.

Small Business Assistance

The CARES Act established a new Paycheck Protection Program under the Small Business Act and appropriated $349 billion for the program (with more likely to be added), to make forgivable loans to encourage businesses to retain or rehire employees. The CARES Act increases the maximum amount of a loan under the Small Business Administration's (SBA) SBA Express loan program from $350,000 to $1,000,000. Further, it provides for the SBA to make payments on most outstanding SBA-guaranteed loans for six months, alters the SBA Emergency Economic Injury Disaster Loan (EIDL) program and several other federal assistance programs, and provides a variety of tax and other benefits.

Paycheck Protection Program

We begin with a discussion of the Paycheck Protection Program (PPP), an immensely popular feature of the Act.

1. **Who is Eligible to Receive a Payroll Protection Loan?**

   The Act provides eligible loan recipients with access to Payroll Protection Loans through June 30, 2020. During this period, any business concern, 501(c)(3) nonprofit organization, 501(c)(19) veterans organization, or Tribal small business concern may be eligible. Businesses are eligible to receive a loan if they employ not more than the greater of 500 employees or the maximum number of employees established by the Small Business Administration for the industry segment (North American Industry Classification System, or NAICS, code) in which the borrower operates. Many of these limits exceed 500 employees, ranging as high as 1,500 employees.

   Additionally, a business can qualify for the PPP as a small business concern if it met both tests in SBA's "alternative size standard" as of March 27, 2020: (i) maximum tangible net worth of the business is not more than $15 million, and (ii) the average net income after federal income taxes (excluding any carry-over losses) of the business for the two full fiscal years before the date of the application is not more than $5 million.

   Normally, the SBA's affiliation rules count the worldwide employees of the borrower and its affiliates in calculating the number of employees to determine if a borrower qualifies as a small business. However, several exceptions to this rule have been created for the PPP program. First, the number of employees is calculated on a per-location basis, without regard to the affiliation rules, for businesses in Sector 72 — Accommodation and Food Services — under the North American Industry Classification System (NAICS) (for example, hotels, bars,

© 2020 Arthur J. Gallagher & Co.

Gallagher

Insurance | Risk Management | Consulting

and restaurants). Second, the affiliation rules are waived for (1) businesses with not more than 500 employees that are in NAICS Sector 72, (2) SBA-approved franchises, and (3) businesses that have received financial assistance from an SBA-licensed small business investment company. Third, the SBA has said businesses with 500 or fewer employees whose principal place of residence is in the USA are also eligible to participate. Fourth, the SBA has determined that faith-based nonprofit organizations are not bound by the affiliation rules. By relaxing the affiliation rules and method of counting employees, more businesses are able to take advantage of Payroll Protection Loans.

Except as stated in the previous paragraph, the SBA's traditional affiliation rules will apply. This often makes it difficult for private equity- or venture capital-backed businesses to qualify, because they might be considered affiliates of the other companies in which the PE or VC sponsor's funds have invested and, thus, all of their employees are added together for the size calculation. The SBA reaffirmed its traditional view that majority voting control of a company creates an affiliate relationship. SBA rules also identify certain other factors that may lead to control even without majority voting control, including holding "veto" rights over certain major corporate actions. One possible response to the SBA's position is for the investor(s) to waive such rights. The SBA has confirmed that an irrevocable waiver or relinquishment of such rights by a minority shareholder will terminate the affiliation, assuming no other affiliation relationships exist.

Also eligible to participate in the PPP are individuals who operate as a sole proprietorship, an independent contractor or self-employed.

Certain entities are ineligible even if they would otherwise qualify as a small business, including any business engaged in an illegal activity (specifically including cannabis-related businesses, because they are illegal at the federal level), a household employer, an entity with an owner of 20 percent or more with a defined criminal background, a business with an owner that is currently delinquent on or defaulted on a direct or guaranteed loan within the last seven years causing a loss to the government, and certain "passive" businesses.

2. How Do You Determine the Amount of Paycheck Protection Loan for Which a Small Business Is Eligible?

Businesses that were in business during the duration of the prior year may receive the lesser of $10 million or 2.5 times the average monthly payroll cost for the year prior to the loan. The SBA has stated that a borrower may use either 2019 or the twelve months prior to the loan application for purposes of calculating payroll. If the borrower was not in business from February 15, 2019 to June 30, 2019, they are eligible for 2.5 times the average total monthly payments by applicant for payroll from January 1, 2020 to Feb 29, 2020.

"Payroll cost" means the sum of (i) all salary, wage, commission, or similar compensation; (ii) payment of cash tips or their equivalent; (iii) payment for vacation, parental, family, medical, or sick leave; (iv) allowances for dismissal or separation; (v) payment of group health care benefits including premiums; (vi) payment of retirement benefits; and (vii) local and state tax payments on compensation. For an independent contractor or self-employed person, "payroll cost" means the sum of payments of any compensation to or income.

Payroll costs expressly exclude any compensation in excess of $100,000, the employer's (but not employee's) portion of federal payroll taxes (e.g., FICA), any compensation of an employee with a principal residence outside of the United States, and qualified sick leave wages/qualified family leave wages for which credit was already provided under the Families First Coronavirus Response Act. The $100,000 salary cap only applies to compensation, and not to benefits or other elements of payroll cost. Only federal payroll taxes from February 15 – June 30, 2020 are excluded, so applicants using 2019 figures will have no deduction for payroll taxes. Payments to an independent contractor may not be counted in payroll, because an independent contractor is eligible to receive their own PPP Loan.

© 2020 Arthur J. Gallagher & Co.

Gallagher

Insurance | Risk Management | Consulting

The amount of any SBA Economic Injury Disaster Loan (EIDL) received between January 31, 2020 and April 3, 2020 and used to pay payroll costs, less any COVID-19 advance (which may be up to $10,000 and which is not subject to repayment), must be refinanced with the Payroll Protection Loan and is added to the amount for which the borrower would otherwise be eligible. If the EIDL was not used for payroll costs, it is not affected by the PPP loan.

3. Although the Amount of Paycheck Protection Loan for Which an Entity Is Eligible Is Based on Payroll, Does It Have To Be Used for Payroll Only?

No. Paycheck Protection Loans may be used for payroll costs (as described above), rent, utilities, interest on mortgages, and interest on other debt incurred before February 15, 2020. However, 75 percent of the Payroll Protection Loan proceeds must be used for payroll costs. Proceeds from the Payroll Protection Loan cannot be used for compensation of individual employees, independent contractors, or sole proprietors in excess of an annual salary of $100,000; compensation of employees with a principal place of residence outside the United States; or leave wages already covered by the Families First Coronavirus Response Act.

The SBA would have recourse against any borrower that uses Payroll Protection Loan funds for an unauthorized purpose.

4. How Does Forgiveness Work Under Payroll Protection Loans?

A recipient is eligible for forgiveness of indebtedness on a covered loan in an amount up to that amount of payments made for payroll costs (see question 3) and for certain rent, utilities and interest on mortgage debt during the eight-week period beginning upon the loan funding date. This 8-week period is referred to as the “covered period.” Not more than 25% of the forgiveness amount may be attributable to costs other than payroll.

The potential forgiveness amount may be reduced based on a formula that effectively adjusts the forgiveness amount by the number of employees retained/rehired from and any reduction in salary greater than 25 percent for employees making less than $100,000. Generally, the forgiveness amount is multiplied by a fraction, the numerator of which is the average number of FTEs per month during the covered period and the denominator of which is either the average number of FTEs employed per month from February 15, 2019 to June 30, 2019 or the average number of FTEs per month employed from January 1, 2020 until February 29, 2020, at the borrower’s option. Average FTEs is calculated by using the average number of full-time equivalent employees for each pay period falling within a month.

The amount of loan forgiveness calculated under the previous paragraph is further reduced, dollar for dollar, by the amount of any reduction in salary or wages of the employees counted during the covered period that is more than 25% of the salary for those employees during the most recent calendar quarter before the covered period. However, in this calculation, you disregard all salary or wages of any employee with compensation at an annualized rate of more than $100,000 for any single pay period during 2019. For example, if you pay twice a month, anyone who made more than $4,166.66 in any pay period during 2019 would be entirely excluded from the calculation relating to the salary adjustment. The idea is that employers may reduce the compensation of $100,000+ employees without forgiveness penalty.

© 2020 Arthur J. Gallagher & Co.

For example, if the average FTEs during the covered period is 300, and the monthly average of FTEs for the February 15, 2019 to June 30, 2019 period is 380 and the average FTEs during the January 1, 2020 to February 29, 2020 period is 405, and there was no decrease in salaries of more than 25% during the covered period, then the modifier would be 0.7895 (or 300/380) or 0.74074 (or 300/405). So if, for instance, the company was eligible for $1 million in forgiveness, it would be adjusted to $789,500, subject to the adjustment in the following paragraph.

The Act includes an alternative “rehiring” provision. If between February 15, 2020 and April 26, 2020, workers were laid off or salaries were reduced more than 25 percent, they will not be counted for purposes of downward adjusting the forgiveness amount for the period from February 15 to April 26 so long as the number of employees and/or salaries are restored by June 30, 2020.

The SBA intends to issue additional rules for the Program, which may help clarify some of the details and mechanics of the forgiveness process. The challenges facing each small business are unique and there is no simple solution with respect to how best to utilize Paycheck Protection Loans. Entities should consider their outstanding obligations and costs to determine various ways in which they can utilize these loans during this period of economic challenge.

5. What Documentation Is Required To Receive Payroll Protection Loan Forgiveness?

In addition to any other documentation required by the SBA, borrowers must (1) document FTEs on payroll and their rate of pay, covered costs/payments giving rise to forgiveness, and (2) certify that the documentation is true and correct and the forgiveness figure was used to retain employees and make other eligible payments.

6. What Are the Loan Terms for Payroll Protection Loans?

For any portion of a PPP Loan that is not forgiven, the interest rate is set at 1 percent, and the maturity of the loan is two years, with no payments until 6 months after disbursement of the loan. Interest accrues during the deferral period.

Unlike traditional SBA loans, personal guarantees and collateral are not required to receive Payroll Protection Loans. The CARES Act also waives the requirement that a business show that it cannot obtain “credit elsewhere,” a common barrier to qualifying for SBA loans.

PPP Loans are made through participating SBA lenders, and not through the SBA directly. Payroll Protection Loans are “first come, first served,” meaning that applications will be processed until the appropriated funds are exhausted or the Program expires on June 30, 2020.

7. What Must a Potential Borrower Certify to in Order to Obtain a Payroll Protection Loan?

The PPP Borrower Application Form requires the applicant to answer a series of questions about potential disqualifying events, such as bankruptcy, default on federally backed loans, and criminal background. The application also requires the applicant to certify to a number of items, including that (i) it is eligible under the Act and applicable rules, (ii) it meets the size standards, (iii) current economic uncertainty makes the loan request necessary to support its ongoing operations, (iv) funds will be used to retain workers, maintain payroll, or make eligible interest, rent and utility payments, and (v) it has not and will not receive another Paycheck Protection Loan.

8. What Other Small Business Assistance Programs Are Available?

In addition to the loans under the PPP program, the SBA’s existing EIDL program continues to be available for potentially affected small businesses. Every state, territory, and the District of Columbia, have been declared

© 2020 Arthur J. Gallagher & Co.

disaster areas for purposes of COVID-19, allowing small businesses nationwide to access additional emergency funding. The EIDL program provides up to $2 million in loans to cover costs that would have been payable by the applicant had the disaster not occurred. EIDL loans for small businesses have a maximum interest rate of 3.75 percent. There is significant overlap in the costs that can be covered by EIDL loans and PPP loans, but businesses cannot receive assistance for the same economic loss under both programs. The primary changes to the EIDL program enacted in connection with the CARES Act are waivers of the requirement that the applicant was unable to access credit elsewhere, personal guarantees for loans under $200,000, and that the requirement that the business was in operation for one year.

The Act also appropriates an additional $10 billion to expanding emergency grants under the EIDL, known as an "advance." Eligible EIDL recipients may receive an expedited advance of up to $10,000 prior to the issuance of their loan. The advance may be used toward potential eligible costs, including increased costs of materials, payroll, or rent or mortgage payment. The advance does not need to be repaid, even if the EIDL loan is denied. See question 2 for a discussion of the relationship between EIDL and PPP Loans.

The SBA Express Loan program allows for payment of working capital costs that are otherwise not tied to the impact of the COVID-19 emergency, including purchasing real estate, expanding business, or refinancing existing business debt. This program provides for expedited loan processing by SBA participating lenders with which the applicant has an existing relationship. Under the Act, the maximum amount of the Express Loan was increased from $350,000 to $1 million through the end of 2020.

In addition to programs under the SBA, Section 4003 of the CARES Act permits the Federal Reserve to develop a "Main Street Business Lending Program" to support lending by financial institutions to small and medium-sized businesses. The Federal Reserve has not yet announced details on this program.

Some states, cities and other governmental bodies have also established assistance programs for companies affected by COVID-19. The Payroll Protection Loan requirements do not prohibit the utilization of other sources of loans, grants, or other funding such as state or local resources or sources.

In addition to the specific small business financing programs, the Act also provides investment and funding to "eligible businesses," which are defined as a U.S. business that has not otherwise received adequate economic relief in the form of loans or loan guarantees provided under this Act. Therefore, the CARES Act does not preclude a business with fewer than 500 employees from receiving a loan, loan guarantee, or other assistance under Section 4003. Furthermore, it may be possible for an entity receiving a Paycheck Protection Loan or other small business loan to also seek a loan or other assistance under Section 4003. In the event that an entity were to receive a Paycheck Protection Loan (or any other loan under the Act such as an SBA Express Loan), but such relief were inadequate, it may be able to demonstrate to the Department of the Treasury (Treasury) that it should be deemed an eligible business for purposes of Section 4003. These additional programs are discussed in Part II.E below.

Other Provisions Impacting Small Businesses

The CARES Act establishes other mechanisms to help enterprises impacted by COVID-19. The following are some of the most relevant for small business.

1. Subsidy for Certain Loan Payments

In addition to providing relief in the form of additional loans for meeting fixed costs and payroll caused by the current economic slowdown, the Act also provides some relief to borrowers who have received other SBA loans prior to the enactment of the Act. Under the Act, $17 billion was appropriated to provide for six months of payments on all Section 7(a) loans (excluding Paycheck Protection Loans) and certain other small business programs. This payment is made automatically, with no additional action required of borrowers. Additionally, the

© 2020 Arthur J. Gallagher & Co.

Act requires the SBA to work with federal and state bank regulatory authorities to ensure that lenders are not adversely affected by the provision of the loan payments or deferral of the maturity date.

2. Employee Retention Credit for Employers Subject to Closure Due to COVID-19

While small businesses that are able to maintain some extent of operations are able to receive financing and grants under the CARES Act, the Act provides another option for small businesses that need to cease or significantly curtail their operations. Employers of any size, including small businesses, who have either suspended operations to some degree or experienced a loss of at least half of their gross receipts during the first quarter of 2020, are eligible to receive a refundable tax credit equal to 50 percent of the wages paid to their employees, to a maximum of $5,000 per employee. Employers are only eligible for these credits if they have not applied for Paycheck Protection Loans or received credits for wages under the Family First Coronavirus Response Act. Employers are eligible to receive the credit either for the amount of time their operations were suspended or, if the credits were based on a diminution of gross receipts, until the quarter where their gross receipts reach the level of 80 percent of the prior year average.

3. Delay of Payment of Employer Payroll Taxes

The Act allows employers to defer payment of payroll tax or Self-Employed Contribution Act payments owed through the end of calendar year 2020. The deferred taxes would be paid in two tranches, with 50 percent due by the end of 2021 and the remainder due by the end of 2022. Employers who receive loan forgiveness under the other provisions of the Act, such as a PPP Loan, are ineligible for the payroll tax deferral.

Assistance for Other Businesses

In addition to its support for small business, the CARES Act also contains aid for severely distressed sectors of the U.S. economy. Congress has provided up to $500 billion for Treasury to make direct loans, or to guarantee loans made by the Federal Reserve under Section 13(3) of the Federal Reserve Act, to a wide range of businesses (as well as states and municipalities). In the CARES Act, $46 billion is reserved specifically for certain key sectors, including passenger air carriers, cargo air carriers, and other industries critical to U.S. security. Another $454 billion (the Emergency Fund) is available for loans and loan guarantees to a wide range of other sectors impacted by COVID-19.

By leveraging the Federal Reserve's existing lending authorities under Section 13(3), Treasury will augment the Emergency Fund's economic impact. For every dollar of equity that Treasury provides from its Emergency Fund, the Federal Reserve expects to lend up to ten dollars ($10) to U.S. businesses. On Thursday, April 9, the Federal Reserve and Treasury announced the first such combined lending facilities designed for mid-sized businesses (those with up to 10,000 employees or $2.5 billion in 2019 annual revenues). Under the Main Street Lending Programs, the Federal Reserve will loan up to $600 billion to mid-sized businesses. $75 billion of the Emergency Fund (invested by Treasury) will be used to guarantee these loans. These programs are discussed in greater detail below in Part II.E.2.

© 2020 Arthur J. Gallagher & Co.

Gallagher
Insurance | Risk Management | Consulting

1. **Passenger Air Carriers, Cargo Air Carriers, and Businesses Critical to National Security**

Treasury is authorized to provide up to $46 billion in loans, loan guarantees, and other investments to passenger air carriers, cargo air carriers, and businesses of national security, in the following amounts.

Industry Sector	Maximum Allocation of Loans/Guarantees
Passenger air carriers	$25 billion
Cargo air carriers	$4 billion
Businesses critical to national security	$17 billion

Only U.S. businesses are eligible to receive air carrier loans and loan guarantees, and the principal executive and financial officers of applicants must certify that such entity "is created or organized … and has significant operations in and a majority of its employees" in the United States.
The Act provides the Treasury Secretary with broad discretion to determine whether (1) an applicant for a loan is an eligible business and (2) the applicant suffered "covered losses" envisioned by the Act. The latter category is defined broadly as including direct and indirect harm as a result of COVID-19.

Additionally, in making determinations regarding loans and loan guarantees, the Treasury Secretary must determine, in his discretion, the following factors:

1. The business entity is eligible under the Act and credit is not "reasonably available" at the time of the requested transaction;
2. The intended obligation by the business entity is "prudently incurred";
3. The loan is sufficiently secured; and
4. The losses incurred by the applicant jeopardize continued operations.

Recipients under these provisions are also required to maintain employment levels as of March 24, 2020 to the extent practicable until September 30, 2020 and shall not reduce its employment levels by more than 10 percent during such period. Additionally, any loans, loan guarantees, or other investments must be "as short as practicable" and not longer than five years in any event.

2. **Maintaining Air Transportation Services**

Specifically for air carriers, the Act authorizes the Secretary of Transportation to require carriers to maintain certain air transportation services. For air carriers receiving loans and guarantees under the Act, the Transportation Secretary may, as he deems necessary, require such carriers to "maintain scheduled air transportation service" to any point a carrier served before March 1, 2020. The Act requires the Transportation Secretary to consider the "air transportation needs of small and remote communities" when rendering decisions under this provision.

In addition, the Act suspends certain aviation excise taxes for the period from enactment through December 31, 2020.

3. **Government Protection**

To provide the government with certain financial protections, the Act restricts the Treasury Secretary from issuing any loans to air carriers and businesses critical to maintaining national security unless the applicant (i) as issued securities on a national security exchange, and (ii) issues a warrant, equity interest, or senior debt instrument in the eligible business to the Treasury Secretary.

© 2020 Arthur J. Gallagher & Co.

The purpose of these provisions is to provide benefits to taxpayers for this economic assistance. In the event that gains occur due to these instruments, the Treasury Secretary must deposit such monies into federal deposit accounts. Additionally, the Treasury Secretary (for the primary benefit of taxpayers) may sell, exercise, or surrender any received warrant or senior debt instrument. The Treasury Secretary, however, may not exercise voting power with respect to any acquired shares of common stock.

Other Eligible Businesses

The Act provides approximately $454 billion in loans, loan guarantees, and other investments to so-called other eligible businesses, which include states, municipalities, and business entities of all sizes. The Treasury Secretary is authorized to perform a variety of actions if the eligible businesses agree to certain restrictions regarding compensation, equity repurchasing, and dividend issuances, as discussed in greater detail below. These actions may include any of the following:

1. Purchasing obligations or other interests directly from issuers of such obligations;
2. Purchasing obligations or other interests in secondary markets; or
3. Making loans, including loans or other advances secured by collateral.

Any entity seeking loans under this provision must be an eligible business that has suffered a covered loss. Again, the term covered loss is defined so broadly (losses incurred directly or indirectly as a result of COVID-19) that virtually any sector of the U.S. economy could conceivably meet this criteria. However, funds available under this provision may only be loaned or advanced to “businesses that are created or organized in the United States or under the laws of the United States and that have significant operations in and a majority” of employees based in the United States.

Assistance for Mid-Sized Businesses

1. General

The CARES Act tasks the Treasury Secretary with developing programs to provide financing to banks and other lenders to make direct loans to mid-sized businesses (500 – 10,000 employees) at an annualized interest rate that is not higher than 2 percent. Further, the terms of these loans shall provide that there be no principal or interest due or payable for the first six months after a direct loan is made, and the Treasury Secretary has discretion to extend this period.

To receive funds under this program, all eligible borrowers must certify the following:

1. The loan request is necessary to support ongoing operations;
2. The funds received will be used to retain at least 90 percent of the recipient’s workforce until September 30, 2020;
3. The recipient intends to restore not less than 90 percent of its workforce that existed as of February 1, 2020, and restore all compensation and benefits to workers no later than four months after termination of the COVID-19 public health emergency;
4. The recipient is organized and domiciled in the United States and maintains significant operations and a majority of its employees in the United States; and
5. The recipient is not a debtor in a bankruptcy proceeding.

© 2020 Arthur J. Gallagher & Co.

Additionally, recipients are prohibited from taking any of the following actions:

1. Paying dividends with respect to common stock of the eligible business or repurchasing equity securities of the eligible business that is listed on national securities exchanges;
2. Outsourcing or offshoring jobs for the term of the loan and two years after completing repayment of the loan; and
3. Abrogating existing collective bargaining agreements for the term of the loan and two years after completing repayment of the loan.

The Act also requires any recipient to “remain neutral” in any effort related to union organization for the term of the loan.

2. Main Street Lending Programs

On April 9, 2020, the Federal Reserve announced that it, in conjunction with Treasury, will start the Main Street New Loan Facility (MSNLF) and the Main Street Expanded Loan Facility (MSELF) (collectively, the Main Street Lending Programs, or MSLP). Treasury will invest a total of $75 billion of the CARES Act’s $464 billion Emergency Fund in a special purpose vehicle (SPV), and the Fed will leverage that investment to allow the SPV to provide a combined total of up to $600 billion of financing under the two programs. U.S. insured depository institutions and bank and savings and loan holding companies are eligible to participate as lenders in the programs. The Facilities will stop purchasing loans on September 30, 2020, unless the MSLPs are extended.

The programs target borrowers with up to 10,000 employees or up to $2.5 billion in 2019 annual revenues. A borrower that has received funding under the PPP <u>is</u> eligible for a Main Street loan. The borrower must be a U.S. entity with significant operations in and a majority of its employees based in the U.S. A borrower may only participate in one of the two Facilities.

In each case, loans will be originated by an eligible lender. The SPV will purchase 95% of the loan, and the lender will retain 5%. The lender and SPV share the risk on a pro rata basis.

The maximum loan amount for the MSNLF is the lesser of (i) $25 million or (ii) an amount that, when added to the borrower’s existing outstanding and committed but undrawn debt, does not exceed four times the borrower’s 2019 EBITDA. The maximum loan amount of for the MSELF is the lesser of (i) $150 million, (ii) 30% of the borrower’s existing outstanding and committed but undrawn bank debt, or (iii) an amount that, when added to the borrower’s existing outstanding and committed but undrawn debt, does not exceed six times the borrower’s 2019 EBITDA.

The other loan terms are the same for both Facilities: (i) 4-year maturity; (ii) amortization of principal and interest deferred for one year; (iii) adjustable rate of SOFR + 250-400 basis points; (iv) minimum loan size of $1 million; and (v) prepayment permitted without penalty.

The loans will have limitations on using proceeds to repay other debt. In addition, the lender must agree that it will not cancel or reduce any other existing lines of credit outstanding with the borrower, and the borrower must agree that it will not cancel or reduce any existing lines of credit with any lender.

The borrower must attest that it requires financing due to the exigent circumstances presented by the COVID-19 pandemic, and that, using the proceeds of the loan, it will make reasonable efforts to maintain its payroll and retain its employees during the term of the loan. The borrower must also certify that it meets the applicable EBITDA eligibility requirement described above.

The borrower must also agree to follow the limitations on compensation, stock repurchases and dividends described in the following section for one year after the loan is repaid.

© 2020 Arthur J. Gallagher & Co.

3. Limits on Executive Compensation, Stock Buybacks and Dividends

The Act creates several restrictions and requirements for all eligible businesses that receive funds under programs implemented by the Treasury Secretary. To begin, it places compensation limitations for a two-year period (March 1, 2020 – March 1, 2022) for those employees who received more than $425,000 in calendar year 2019 in the following manner:

1. Such officers and employees are not eligible to receive total compensation in excess of calendar 2019 compensation; and
2. No officer or employee may receive severance pay (or similar benefits) upon termination of employment that “exceeds twice the maximum total compensation” received by the employee or officer in calendar year 2019.

The Act includes further restrictions for employees or officers whose total compensation exceeded $3 million in calendar year 2019. Such employees or officers may not receive total compensation in excess of $3 million plus 50 percent of the excess over $3 million received in calendar year 2019. The Act defines “total compensation” to include salary, bonuses, stock awards, and “other financial benefits” provided by the eligible business. Thus, any business receiving loans or guarantees under the Act (of any amount) must implement strict monitoring of highly compensated employees through at least March 1, 2022.

Additionally, all recipients of funds are not permitted for 12 months after the date the loan or guarantee is no longer outstanding to:

1. Purchase equity security, listed on a national exchange, of the eligible business or any parent company of the eligible business; or
2. Pay dividends with respect to the common stock of the eligible business.

The Treasury Secretary is authorized to waive these restrictions for other eligible businesses if such action is “necessary to protect the interests of the Federal Government.” The Treasury Secretary must be available to provide reasons for any waiver to the Senate Committee on Banking, Housing, and Urban Affairs as well as the House Committee on Financial Services.

© 2020 Arthur J. Gallagher & Co.

Gallagher
Insurance | Risk Management | Consulting

About the Authors

Dan Mayfield
Managing Director, Human Resource & Compensation Consulting Practice
Gallagher Benefits & HR Consulting
612.337.1108
Dan_Mayfield@ajg.com

Dan Mayfield has nearly 18 years of experience consulting on executive pay issues in partnership with the board of trustees and management of both large and small health care providers. He works closely on issues related to compensation strategy, incentive plan design, severance benefits, nonqualified retirement plans and perquisites, director compensation, and corporate governance.

Tony DaSilva
Managing Director, Human Resources & Compensation Consulting Practice
Gallagher Benefits & HR Consulting
617.204.6724
Tony_Dasilva@ajg.com

Tony DaSilva works closely with public, private and not-for-profit company and institution compensation committees and management on issues related to executive and board compensation. He is an authority on the assessment of competitive pay levels for managers and directors, and the design, implementation and tax rules that apply to executive, manager and director pay programs. He has also deep experience in working through the unique compensation issue that arise in mergers, acquisitions and spin-offs.

Steve Dickinson
Corporate and M&A Member
Cozen O'Connor
612.260.9051
SDickinson@cozen.com

Steve Dickinson is a corporate and M&A member of Cozen O'Connor and is co-chair of the Firm's international practice. Steve is one of the leaders of Cozen O'Connor's small business task force in response to the COVID-19 pandemic and has advised numerous businesses with regard to the small and mid-sized business aspects of the CARES Act and other government assistance programs.

Jim Argionis
Commercial Litigation Member
Cozen O'Connor
312.474.7904
JArgionis@cozen.com

Jim Argionis is a commercial litigation member of Cozen O'Connor. Jim counsels and represents businesses with respect to a wide range of commercial disputes and liability issues. He is part of Cozen O'Connor's small business task force in response to the COVID-19 pandemic, a team of professionals assembled from across all of the Firm's disciplines and offices focusing on coronavirus-related issues.

Consulting and insurance brokerage services to be provided by Gallagher Benefit Services, Inc. and/or its affiliate Gallagher Benefit Services (Canada) Group Inc. Gallagher Benefit Services, Inc. is a licensed insurance agency that does business in California as "Gallagher Benefit Services of California Insurance Services" and in Massachusetts as "Gallagher Benefit Insurance Services." Neither Arthur J. Gallagher & Co., nor its affiliates provide accounting, legal or tax advice.

© 2020 Arthur J. Gallagher & Co.