Commercial Landlords And Tenants Unite! CARES Act Forgivable Paycheck Protection Program Loans, EIDL Grants and More

Related Attorneys

Tiffany Strelow Cobb

Jacinto A. Núñez

Jill S. Tangeman

Related Services

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COVID-19 has created an economic crisis. In response, Ohio's Governor has issued an order recommending a rent suspension of 90 days for small business commercial tenants. At first blush, this sounds like the perfect pill for commercial tenants. But is it? Forbearance for 90 days is just that; the full payment obligation of commercial tenants remains, with forbearance simply kicking the proverbial can down the road for future. By contrast, federally available, potentially **fully forgivable loans** are available to eligible commercial tenants and landlords (among other things, typically those with 500 or fewer employees)—up to 25% of which may be used to pay rent (and other non-payroll related costs) and still be eligible to be forgiven. Yet, these loans are for the covered period of February 15, 2020 through June 30, 2020, with loan forgiveness in an amount equal to the costs incurred and payments made during the eight week period following loan origination—overlapping the precise period otherwise contemplated by Ohio's recommended forbearance period. A unique opportunity exists for commercial landlords and tenants to collaboratively communicate to maximize access to—and use of—available forgivable and other attractive, federal loans. This would *reduce* a commercial tenant's rent obligations payable from the tenant's own funds and, in turn, best ensure that commercial landlords can similarly meet their mortgage obligations, thereby benefiting both.

The nuts and bolts regarding both the Ohio Executive Order and small business loans (including forgivable loans) available under the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) are detailed below. In short: if you are a commercial landlord, consider communications with your commercial tenants who may be eligible for forgivable loans through this program. Many do not know of this program or its expanded eligibility to include (among others) sole proprietors and self-employed individuals. (Of course, if you are an eligible landlord with 500 or fewer employees, also consider availing yourselves of these loans.) If you are a commercial tenant, consider accessing a fully forgivable loan to make payroll and pay down your rent obligation to the allowable amount within those 90 days. As we weather this storm, commercial landlords and tenants can work together to utilize these resources, helping each other stay afloat and rebound as quickly as possible.

Ohio Executive Order 2020-08D – Recommended Rent Suspension

Ohio Executive Order 2020-08D, (the Order), signed by Ohio Governor Mike DeWine on April 1, 2020, explicitly **requests**—but does not require—that landlords suspend rent payments for 90 days for small business commercial tenant in Ohio that are facing financial hardship due to the COVID-19 pandemic and further that landlord provide for a moratorium of evictions of small business commercial tenants for a term of 90 days. As of today, the Order is a request and does not change the law or private contracts. The Order's final provision, paragraph 8, states: "[n]othing in this Order shall be construed to suspend any federal or state law." The Order does not provide for enforcement mechanisms for failure to comply with the requests. Clearly, one of the intended impacts of the Order is to encourage dialogue between tenants and landlords and between landlords and tenants. While legal recourse is still available despite the Order, as a practical matter, the Ohio courts are not hearing foreclosure and eviction proceedings at this time. On March 20, 2020, the Ohio Supreme Court provided "Guidance to Local Courts" which identifies efforts to minimize physical appearances at court, specifically including to "[t]emporarily continue [postpone] eviction filings, pending eviction proceedings, scheduled move-outs, and the execution of foreclosure judgments (except in the instances where allegations of domestic violence are involved)." In light of the Order and the Ohio Supreme Court Guidance, it may be to the benefit of both landlords and tenants to find workable solutions rather than reverting to a default of obligations and corresponding litigation.

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

On March 27, 2020, President Trump signed into law the Coronavirus Aid, Relief, and Economic Security Act (the CARES Act)—summarized in a previous alert—which amends and expands the U.S. Small Business Administration's (SBA) flagship 7(a) Loan Program to create the Paycheck Protection Program (PPP). Coupled with the SBA's pre-existing Economic Injury Disaster Loans (EIDL) program, these programs are offering small business loans with very attractive interest rates.

Who Is Eligible For A PPP Loan?

The PPP expands the typical definition of who is eligible for these SBA loans to any business concern, nonprofit organization, veterans' organization or Tribal business concern if they employ not more than the greater of (a) 500 employees; or (b) if applicable, the size standard for the business's industry. The PPP specifically provides that individuals who operate under a sole proprietorship or as an independent contractor and eligible self-employed individuals may be eligible under the PPP, even though they are not eligible for a traditional SBA loan.

The PPP further relaxes other typical eligibility requirements for any business concern that is assigned a NAICS code beginning with 72, which generally applies to the hospitality and food service industry. The PPP makes these businesses eligible for a PPP loan if they employ not more than 500 employees ***per physical location***. Further, the PPP waives affiliation rules for these restaurant and hospitality businesses, and also for any business concern operating as a franchise that is assigned a franchise identifier code by the Administration and any business concern that receives financial assistance from a SBIC.

How Does The Loan Forgiveness Aspect Work?

The CARES Act implements a loan forgiveness program for loans received under the PPP. A tenant is eligible for loan forgiveness in an amount equal to the costs incurred and payments made ***during the eight week period following loan origination*** in the following categories:

- Payroll costs;
- Any payment of interest on any covered mortgage (which does not include any prepayment of or payment of principal on a mortgage obligation);
- Any payment on any covered rent obligation; and
- Any covered utility payment.

The forgiveness amount cannot exceed the principal amount of the loan. Additionally, recent guidance provided by the SBA notes that the forgiveness calculation echoes the allowable uses, and that 75% of PPP funds forgiven must have been used for payroll costs, while the remaining 25% may have been used for other allowable costs and expenses.

Tenants seeking loan forgiveness must provide sufficient documentation verifying all employee and salary information. Lenders will be required to make a decision on forgiveness within 60 days of receiving a loan forgiveness application. Amounts forgiven under this section are considered canceled indebtedness by a lender authorized under 7(a) of the Small Business Act. For IRS purposes, any amount which would be includible in gross income of the eligible recipient by reason of loan forgiveness shall be excluded from gross income.

What is The "Covered Period" For The PPP Loans?

These PPP provisions cover loans that are made between February 15, 2020 and June 30, 2020.

How Large Are the PPP Loans?

The loan size will generally be 2.5x the applicant's average monthly payroll costs, with a maximum loan amount of $10 million. The formula is set out in greater detail in Section 1102(a)(1)(E) of the CARES Act.

Can A Tenant Pay Rent With The PPP Loan Funds?

Yes, as long as your lease was in place as of February 15, 2020. A tenant can generally use the PPP funds for: (a) Payroll costs; (b) Costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums; (c) Employee salaries, commissions, or similar compensations; (d) Payments of interest on any mortgage obligation (which does not include any prepayment of or payment of principal on a mortgage obligation); (e) Rent; (f) Utilities; and (g) Interest on any other debt obligations that were incurred before the covered period.

Recent guidance provided by the SBA notes that to further the goal of maintaining payroll, the forgivable amount of non-payroll, allowable costs and expenses is capped at 25% of the loan. The funds may be used for any allowable costs but exceeding this percentage will affect the calculation of loan forgiveness.

Accordingly, the commercial tenant using these funds to pay at least 75% for payroll costs may allocate up to 25% of the PPP funds to pay rent while still maintaining the benefit of loan forgiveness.

Will The Tenant's Loan Forgiveness Amount Be Affected If Its Business Experiences Layoffs?

The loan forgiveness amount will be reduced based on employee and salary reductions, but the PPP makes exemptions for that reduction if a tenant re-hires its employees or eliminates the salary reductions by June 30, 2020.

To calculate the amount to be forgiven as reduced based on employee reduction, the PPP uses the following formulas:

- ***Non-seasonal employers*** - Forgiveness amount x (the average number of FTE employees per month between February 15, 2020 and June 30, 2020 ÷ the average number of FTE employees per month between [February 15, 2019 and June 30, 2019 **or** January 1, 2020 and February 29, 2020 at the election of the borrower]).
- ***Seasonal employers*** - Forgiveness amount x (the average number of FTE employees per month between February 15, 2020 and June 30, 2020 ÷ the average number of FTE employees per month between February 15, 2019 and June 30, 2019).

The loan forgiveness amount will also be reduced by the amount of any reduction in total salary or wages of any employee that is in excess of 25% of the total salary or wages of the employee during the most recent full quarter before the covered period. This does not apply for individuals who, in any single pay period, received wages at an annualized rate of pay over $100,000.

What Happens To Loan Amounts That Are Not Forgiven?

For covered loans that have a remaining balance after the loan forgiveness reduction, the remaining balance is guaranteed by the SBA, the loan will have a two-year maturity date, and the interest rate will be 1%. There is no prepayment penalty for covered loans. The PPP also provides for no debt service payments for six months.

What Is The Process For Obtaining A PPP Loan?

Some lenders have accepted applications for PPP loans as early as April 3 for businesses and will be accepted beginning April 10 for independent contractors and sole proprietorships. Applicants should contact a participating lender to determine the details of the application process. The PPP permits the government to expand the number of lenders under this program, and allows those lenders to make and approve loans, including determining borrower eligibility. In evaluating eligibility, the lender is required to consider, among other factors, whether the borrower was in operation on February 15, 2020.

As part of the application, an applicant must make a good faith certification:

- That current economic conditions makes the loan necessary to support ongoing operations;

- Acknowledging that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments;
- That the recipient does not have an application pending for a loan under this subsection **for the same purpose** and duplicative of amounts applied for or received under a covered loan; and
- Between February 15, 2020 and December 31, 2020, the recipient has not received amounts under this subsection for the same purpose.

The PPP waives several typical SBA loan requirements, including the requirement that a small business concern is unable to obtain credit elsewhere (the "credit elsewhere" requirement) and the personal guarantee requirement.

CARES Act's Expanded Access To EIDL Loans (With Up To $10,000 Grant)

Additionally, both commercial landlords and their tenants may be eligible for small business Economic Injury Disaster (EIDL) loans for longer-term loans with attractive loan terms. Although EIDL loans do not have the forgivable loan aspect that exists for a PPP loan, entities eligible for an EIDL may request an advance of up to $10,000 (a grant) anticipated to be paid within 3 days of application to cover allowable working capital needs, which *does not have to be repaid* (but is deducted from any loan forgiveness amounts under a PPP loan to avoid a double dip).

Under the CARES Act, EIDL loans cover a longer period than the PPP forgivable loans: the period between and including January 31, 2020 and December 31, 2020. Similar to the PPP loans, eligibility is expanded under CARES; in addition to a entities previously eligible (businesses with not more than 500 employees, private nonprofit organizations and small agricultural cooperatives), sole proprietorships, independent contractors, and ESOPs, cooperatives and tribal small business concerns with not more than 500 employees are eligible.

To qualify for an EIDL loan under the CARES Act, the covered entity must have suffered "substantial economic injury" tied to COVID-19. EIDL loans are up to $2,000,000, with the calculation is premised on actual economic injury as determined by the SBA, minus recoveries such as insurance proceeds.

As noted above, the CARES Act contemplates that both the PPP and EIDL loans may be issued to the same borrower provided that they are not used **for the same purpose** and **duplicative of amounts** applied for or received under the other covered loan. So, for example, although an EIDL loan can also be used for payroll costs (including rent), if the borrower also has a PPP loan, it would be advisable to use the EIDL for other, non-PPP eligible purposes, such as to cover increased costs due to supply chain interruption or to pay obligations that cannot otherwise be met due to revenue loss. Alternatively, depending upon the borrower's needs, given the longer period covered by an EIDL, there may well be instances in which a commercial landlord or its tenant chose to solely apply for an EIDL loan (with grant that is not repaid) rather than apply for a PPP loan at all.

EIDL loans have up to a 30-year term, and the interest rate on EIDL loans is 3.75% fixed for small businesses and 2.75% for nonprofits. Unlike a PPP loan, a credit check is required on owners of 20% or more, and for an EIDL loan over $25,000, collateral may be required. Applications for EIDL loans should be submitted directly to the SBA, as distinguished from the PPP loan application through an SBA-approved lender or other lenders as discussed above.

Unite!

In sum, commercial landlords and tenants share the common goal of infusing funds available from federally available, and potentially forgivable, loans into their business chains to help keep everyone afloat.

Vorys is actively monitoring the lending aspects and ongoing development of the CARES Act and other coronavirus relief efforts. Please contact Tiffany Strelow Cobb (PPP/EIDL specifics), Barbara Jordan, Jacinto Núñez, Jill Tangeman or your regular Vorys attorney with questions or for assistance.

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Vorys COVID-19 Task Force

Vorys attorneys and professionals are counseling our clients in the myriad issues related to the coronavirus (COVID-19) outbreak. We are taking significant steps to ensure we remain proactive in this extremely fluid environment. We have also established a comprehensive Coronavirus Task Force, which includes attorneys with deep experience in the niche disciplines that we have been and expect to continue receiving questions regarding coronavirus. Learn more and see the latest updates from the task force at vorys.com/coronavirus.