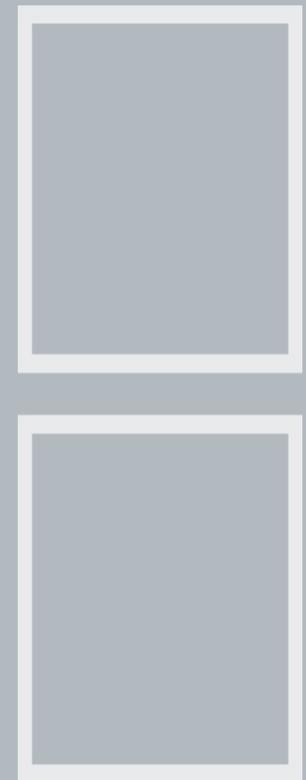




FOLEY & LARDNER LLP

# Coronavirus Financial Relief: Texas Land Title Association

Webinar by Foley & Lardner LLP



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# Topics Covered

## Introduction

- Texas Executive Order
- Employment Law Issues
- SBA Loans
- Tax Credits

# Texas Executive Order

- Governor declined to call it a Stay at Home order
- But generally requires individuals to remain at home except where necessary to provide or obtain “Essential services” and minimize in-person contact
- Essential Services are from the federal Essential Critical Infrastructure Workforce guidance
  - Working from home if possible
  - Unless they are essential services that cannot be performed remotely

# Texas Executive Order

- Religious worship services are exempt IF they cannot be conducted from home or remotely
- Even “Essential Businesses” are subject to restrictions:
  - Remote work where possible
  - Follow CDC Guidelines on good hygiene, environmental cleanliness, sanitation, and social distancing
- Currently in place until April 30, 2020
- Still check local jurisdictions – eg., Dallas County

# Employment, Unemployment, Layoffs and Unions

- Expanded federal unemployment benefits (CARES Act)
  - Additional \$600 per week
  - Extending unemployment to 39 weeks
- Expanded paid leave provisions (Families First Act)
  - Two weeks of full pay for COVID-related leave (five buckets)
  - Additional ten weeks of two-thirds pay for child-care-related leave
  - Applies to employers with fewer than 500 employees only
  - Employers with fewer than 50 employees can seek exemption
- WARN Act
- Union Issues

# Financial Options under “Coronavirus Aid, Relief, and Economic Security” Act CARES Act

Provision	Basic Summary/Generalizations (Caveats to Follow)
Paycheck Protection Program: Small Business Interruption Loan & Forgiveness	<ul style="list-style-type: none"> <li>• Businesses with fewer than 500 employees</li> <li>• Loan for 2.5x of monthly payroll (salary and benefits)</li> <li>• Loan Forgiveness: 8 weeks of payroll costs, rent, mortgage payments, and utilities will be forgiven if business maintains FTEs and employee compensation</li> </ul>
Emergency Economic Injury Disaster Loan	<ul style="list-style-type: none"> <li>• Loan based on “substantial economic injury” up to \$2 million</li> <li>• 3.75%; 30 year term</li> <li>• Cannot have more than 500 employees</li> </ul>
Employee Retention Tax Credit  Not eligible if recipient of a Small Business Interruption Loan	<ul style="list-style-type: none"> <li>• Payroll tax credit of 50% of wages and benefits up to \$5,000 per employee</li> <li>• Must have trade or business</li> <li>• Suspended due to government order</li> <li>• Refundable</li> </ul>
Employee Payroll Tax Deferral  Not eligible if recipient has received loan forgiveness under PPP.	<ul style="list-style-type: none"> <li>• Defer payroll taxes from March 27<sup>th</sup> through December 31, 2020</li> <li>• Half of the deferred amounts paid back in December 2021 and December 2022</li> </ul>

# Paycheck Protection Program: Small Business Interruption Loan

- Things are changing (Interim Rule was out at 8:00 on Thursday)
- Economic stimulus – designed to put short-term money into the economy.
- Designed to get businesses to maintain payroll and pay bills
- Opposite of what would generally be “good financial management” when revenues dry up (furlough employees, cut compensation and cut costs)
- **2 Steps**
  - Obtain unsecured loan:
    - 2.5X Monthly Payroll Costs up to \$10 million limit
    - 2 months of payroll + 25% for overhead (mortgage interest, rent, utilities)
  - Loan Forgiveness:
    - 8 weeks of payroll costs and overhead
    - Loan forgiveness will be reduced if reductions in FTEs or compensation

# Eligibility

- In operation on February 15, 2020
- Not more than 500 Employees
  - Not FTEs – employee includes any part-time or full-time employees (certain exceptions)
  - Unclear what date to use: SBA Regulations say average of last 12 months
- Business probably does not have to meet definition of a “Small Business Concern” under SBA
  - Would impose additional size restrictions
  - Some banks may take this interpretation
- “Current economic conditions make the loan request necessary to support on-going operations”
  - No additional guidance
  - Compare: other CARES Act Provisions included specific requirements, Congress did not include specific provisions here.

# Affiliation Rules

- Two businesses are affiliates when:
  - one entity controls or has the power to control the other; or
  - a third party controls or has the power to control both entities.
- When determining whether one entity controls another, consider:
  - common ownership (for example, control through stock ownership, stock options, and voting trusts);
  - exercise of stock options, convertible securities, and agreements to merge.
  - common management (for example, interlocking management and common facilities);
  - previous relationships with, or ties to, another business, referred to as the “newly organized concern” factor; and
  - ownership between close relatives (when close relatives operate in the same industry).

# Application

- Apply with a SBA Lender
  - Focus on your current bank—there will be a logjam in processing
  - Form 2483: Application Form
  - Need to provide documentation to establish eligibility (payroll processor records, payroll tax filings, or 1099-MISC; or bank records to establish qualifying payroll).
- <https://home.treasury.gov/cares>
- No collateral, no personal guarantee, and no showing that credit is unavailable elsewhere.
- 1% Interest, deferred for 6 months, due in 2 years (if not forgiven)
- Apply once—can't apply again (so consider applying for maximum amount)
- **Applications began Friday, April 3, 2020**
  - **Don't Delay—program availability is capped at \$349 billion**
  - **Guidance; First-Come, First-Serve**
- Program Ends June 30, 2020

# Determining the Amount of the Loan

- 2.5 X average total monthly payments of the applicant for “payroll costs”
  - Wages of employees who are U.S. residents (including commissions and tips), capped at \$100,000 on an annualized basis
  - Benefits (including group health care benefits, insurance premiums and retirement)
  - State and local taxes assessed on compensation
  - Excludes any credits for sick leave wages and family leave wages
  - **Payments to management companies or independent contractors do not count**
- Calculated:
  - Monthly average payrolls for year before loan is made (April 2019-March 2020)
  - Seasonal: 12 weeks beginning February 15, 2019 or March 1, 2019-June 30, 2019
  - Add Economic Injury Loan (if any)
- Concept: 2 months of payroll costs and an extra 25% for overhead (rent, mortgage, and utilities)

# Uses of Loan Proceeds

- Payroll Costs (same calculation as the loan amount)
- Plus Overhead
  - Interest on mortgage loans (not principal or prepayments)
  - Interest payments on any other debt obligations
  - Rent
  - Utilities
  - Must be in force before February 15, 2020
- Knowing use for unauthorized purposes is fraud.

# Loan Forgiveness

- New Guidance: SBA will issue additional guidance on forgiveness later
- Forgiveness to the extent the business paid or incurred:
  - payroll costs (wages and benefits), but not wages in excess of \$100k
  - overhead (mortgage interest, rent, utilities)
- Amounts paid during 8 weeks after the loan is made may be forgiven, but not costs after that.
- Non-Payroll Costs (Overhead) in excess of 25% of the loan will not be forgiven
- Amount not forgiven remains a loan (2 years, 1% interest)
- Maintain documentation

# Reductions in Loan Forgiveness for Reductions in Payroll

- Reduction for Loss of FTEs
  - Maintain Average number of FTEs during 8 week period
  - Compared prior periods:
    - FTEs February 15, 2019 to June 30, 2019 or
    - FTEs January 1, 2020-February 29, 2020
- Salary and Wages Reduction
  - Forgiveness reduced if business decreases salaries and wages by more than 25% for any employee making less than \$100,000 annualized
- If business had a reduction since February 15<sup>th</sup>, can rehire by June 30<sup>th</sup>, 2020 to avoid reduction

## Other Points

- Amount of program is capped—Don't Delay!
- Review current bank covenants to make sure loan doesn't trigger any provisions
- Be careful—the banks have been told to “approve” without delay and may not be reviewing closely.

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# Emergency Economic Injury Disaster Loan

- Apply directly online with SBA
- Can't "double-dip" with PPP—expenses can only be claimed once
- Must have suffered a "substantial economic injury":
  - EIDL loans may be used for payroll and other costs as well as to cover increased costs due to supply chain interruption, to pay obligations that cannot be met due to revenue loss and for other uses.
- Limited to \$2 million; can get advance of \$10,000 for working capital (advance does not have to be repaid)
- Interest 3.75%
- No forgiveness; 30-year term and amortization
- Personal Guarantees if loan in excess of \$200,000
  - Need collateral for a loan over \$25,000
- SBA must make determination that applicant has ability to repay the loan

# Employee Retention Credit

- 50% refundable tax credit for “eligible employer” that pays “qualified wages”
- Business is ineligible if the business borrowed under a Payroll Protection Loan
- An Eligible Employer is one that :
  - Must have been operating a “trade or business” and
  - Either
    - (1) Operation was fully or partially suspended due to governmental orders (e.g, Stay At Home Order) (a “Suspension”) or
    - (2) a 50% reduction in gross revenue from the prior calendar quarter (“Gross Receipts Decline”)

# Eligible Retention Credit

- Qualified Wages:
  - For employers with greater than 100 employees:
    - Wages paid to the extent the employee is not performing services *due to circumstances* of the Suspension or Gross Receipts Decline
  - For employer with 100 or fewer employees:
    - Wages paid during a Suspension or Gross Receipts Decline (whether or not performing services)
  - Employees counted under Section 4980H of the Code

# Eligible Retention Credit

- “Wages”
  - Defined as wages under Section 3121(a) or Section 3231(e)
  - Includes prorated employer health costs (pre-tax contribution towards health benefits and the employer portion)
  - Excludes qualified sick leave and qualified family leave under the Families First Act
  - Limited to \$10,000 per employee
    - Effectively caps the credit at \$5,000 for payments to a particular employee

# Eligible Retention Credit

- The credit is initially applied at the time an employer (or their payroll provider) remits payroll obligation to the government
- The credit may be applied against any tax obligations remitted in connection with payroll
  - Applied against employer and employee FICA taxes, employer and employee Medicare taxes, & federal income tax withholding
  - To the extent the amount of the credit exceeds amount of all payroll tax obligations, excess amount may be applied against future obligations, or the company may request advance refund by filing Form 7200, Advance Payment of Employer Credits Due to COVID-19.

# Employment Tax Payment Delay

- Employer-portion of Social Security Tax (the 6.2%) is subject to a delayed payment:
  - 50% of the delayed payroll taxes will be due by December 31, 2021
  - 50% of the delayed amount due by December 31, 2022
- Applies to wages paid beginning March 27, 2020 and ending on December 31, 2020
- Provision does not apply if employer receives Payroll Protection Loan forgiveness

# Tax Credits – Families First Act

- Families first act requires mandatory payments for Qualified Sick Leave and Qualified Family Leave
  - These are expanded benefits under FMLA related to a specific list of COVID-19 related absences
  - These benefits are payable to April 1, 2020 through December 31, 2020.
- Tax credit is 100% amount of the qualified leave payment
- Tax credit is applied against general payroll tax obligations in the same manner as Eligible Retention Credit

# Other Tax Benefits

- Relaxation of net operation loss rules
  - NOLs from 2018 to 2020 may be carried back 5 years
  - No 80% limitation
- Modification of limitation on losses for non-corporate taxpayers
  - Tax Cuts and Jobs Act limited ability of non-corporate taxpayer to deduct “excess business losses”
  - Removed limitation for 2018 to 2020
  - May provided for immediate refunds

# Other Tax Benefits

- Modification of AMT for Corporations
  - The Tax Cuts and Jobs Act repealed corporate AMT tax and provided for use of credits over time
  - Relaxation of rules to permit credits to be fully used in 2018 and 2019
- Business interest
  - Relaxes business interest restriction from 30% to 50%

# Other Tax Benefits

- Fixes “the Glitch” which limited bonus depreciation for self-created real estate improvement (aka leasehold improvements)
  - Provides for 15 year depreciation life
  - Eligible for bonus depreciation
  - Effective for 2018 and later years
  - Limited to “improvements by the taxpayer” (purchased assets do not get this benefit)

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## Interested in learning more?

The Coronavirus Resource Center offers insights from across Foley's many practice disciplines to offer timely perspective on what companies can do now and how to prepare for the future.

<https://www.foley.com/en/insights/blogs/coronavirus-resource-center>