

The Small Business Landscape: Resources to Navigate COVID-19

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Speakers



Brandon Román

Senior Associate, Washington DC

T +1 202 457 5330

E brandon.roman@squirepb.com



Keith Bradley

Partner, Denver

T +1 303 894 6156

E keith.bradley@squirepb.com



Susan Stead

Of Counsel, Columbus

T +1 614 365 2708

E sue.stead@squirepb.com



Matthew Cooper

Principal, Denver

T +1 303 894 6117

E matthew.cooper@squirepb.com

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Overview of Recently Passed Legislation and Status of Legislation in Congress Now

Brandon Román

Senior Associate, Washington DC

T +1 202 457 5330

E brandon.roman@squirepb.com



To date, Congress has enacted three separate pieces of legislation to address the COVID-19 pandemic, with more legislation on the way:

- Phase 1: \$8.3 Emergency Supplemental Appropriations (March 6)
- Phase 2: *Families First Coronavirus Response Act* (March 18)
 - Enhanced unemployment insurance benefits
 - New federal emergency paid leave benefits and refundable tax credits for small businesses to defray the cost of the paid leave
 - Increase in Medicaid matching funds to support healthcare providers
 - Policies to ensure that COVID-19 testing is significantly expanded and free to everyone in the US
 - Food safety support needed in the wake of school and business closures
- Phase 3: Coronavirus Aid, Relief, and Economic Security (CARES) Act (March 27)

Provides more than \$2 trillion in relief for both companies and families affected by COVID-19 pandemic. It includes a number of provisions designed to help employers and employees contend with a scaled-back workforce and other economic fallout:

- \$250 billion in unemployment insurance benefits
- \$301 billion in direct payments to households (\$1,200 to taxpayers with adjusted gross income of \$75,000 or less and couples with US\$150,000 or less, plus additional money for children in their households)
- \$150 billion in direct aid to states and territories
- \$221 billion in tax deferrals with extended filing deadlines
- \$300 billion for small business loans
- \$500 billion for loans, loan guarantees or other forms of assistance to businesses, states and municipalities
- \$340 billion in further emergency supplemental appropriations

CARES Act Tax Provisions and Its Benefits

Brandon Román

Senior Associate, Washington DC

T +1 202 457 5330

E brandon.roman@squirepb.com



CARES Act Tax Provisions and Its Benefits



- A refundable payroll tax credit
- Delay of employer payroll taxes
- Expanded usage of net operating losses
- Reduced restrictions on AMT provisions
- Increased ability to deduct business interest expense

Federal Financial Assistance Programs for the COVID-19 Crisis

Keith Bradley
Partner, Denver
T +1 303 894 6156
E keith.bradley@squirepb.com



Fully forgivable loans, at a low rate, to cover payroll and critical fixed costs

- Eligibility:
 - **(A), (B), or (C)**
 - (A) **Small** businesses, using the ordinary SBA size standards
 - For businesses in the insurance sector, typically a revenue measure, ranging from \$8 million to \$41.5 million
 - **(B) 500 or fewer** employees (full-time, part-time or any other status)
 - Averaged over the last 12 months
 - (C) A 501(c)(3) nonprofit, faith-based organization, 501(c)(19) veterans organization, or other business falling below the size standard for the same industry if it is based on employee count, or below 500 employees
 - And you were **in business on Feb 15, 2020, and** had employees for whom you paid salaries and payroll taxes
 - Restrictions barring certain types of business, such as lenders and gambling businesses
 - Restrictions if control persons have serious convictions

Fully forgivable loans, at a low rate, to cover payroll and critical fixed costs

- Uses:
 - Payroll (including benefits, commissions, etc.)
 - Mortgage interest (not principal) and rent payments
 - Utilities
 - Interest on pre-existing debts
 - Other proper uses of a section 7(a) loan—which excludes refinancing prior debts (with one exception for a previous EIDL)
- Forgiveness—up to sum you spend on payroll, mortgage/rent, and utilities during the 8 weeks after you receive the loan, with two caveats
 - The non-payroll costs cannot be more than 25% of the forgiveness amount
 - If you have fewer employees over the 8-week period than the average of the prior year, the forgiveness is reduced proportionally

Fully forgivable loans, at a low rate, to cover payroll and critical fixed costs

- **Terms:**
 - No collateral or personal guarantee
 - Term up to 10 years
 - Interest = 1%
 - Option to defer payments for six months to a year
 - Maximum amount = 2.5 times your average payroll over the prior year
 - Your choice whether to use the prior 12 months or calendar year 2019
 - Special rule for seasonal businesses
- **How to apply:**
 - Sample application at <https://www.sba.gov/document/sba-form--paycheck-protection-program-borrower-application-form>; and you will need 2019 payroll tax records
 - Apply through your existing bank
 - Certifications are critical; the bank relies mainly on your assertions to show eligibility

- Eligibility:
 - **Size requirement similar to the PPP**
 - **Business type requirement similar to the PPP, with additional eligibility:**
 - ESOPs
 - 501(c), (d), or (e) nonprofits in general; and nonprofits without federal status that have authentication from a state
 - **Restrictions similar to the PPP**
 - No requirement that you were in business on February 15 or had employees at that time

- Uses:
 - **Must be used for working capital to carry the business until normal conditions return**
 - Can include maintaining payroll
 - Paying sick leave to employees unable to work because of COVID-19
 - Increased cost because of disruptions to normal supply
 - Rent and mortgage payments
 - Repaying obligations that you can't meet because of revenue loss
 - **Can't be used to repair physical damage**
 - **Can't be used to refinance prior debts**
 - **Can't be used to pay dividends or disbursements to owners (other than reasonable compensation for services)**
 - **Can't be used to pay fines or penalties for regulatory or tax violations**

- Terms:
 - **Interest up to 4%**
 - Not forgivable
 - But the CARES Act authorized \$10,000 grants to EIDL applicants to cover the time while an application is pending
- How to apply:
 - <https://covid19relief.sba.gov/#/>

Affiliation Limits Eligibility for SBA Programs



- All affiliates must be aggregated to count revenues or employees for the SBA size standards
 - For a newly acquired affiliate, include the revenues over the past year even if the acquisition was mid-year
- Affiliation is based on control, which can be complicated
 - Majority ownership
 - Minority ownership plus ability to block important actions
 - “Identity of interest”
 - Shared management
 - “Economic dependence”
 - “Totality of the circumstances”

- Eligibility:
 - Up to 10,000 employees or \$2.5 billion in revenue
 - Significant operations in the United States
 - Majority of employees in the United States
 - No 20% owner who is the President, the Vice President, a Member of Congress, or a cabinet official, or a spouse, child, or son- or daughter-in-law of such a person
 - (Aggregate shares held by the politician and the family members)
 - No restriction on uses, except you cannot use it to repay previous debt

- **Terms**
 - **Interest from 2.5% to 4% (variable rate based on SOFR)**
 - **Minimum of \$1 million, maximum of:**
 - Your total debt to EBITDA ratio must be less than 4
 - Up to a maximum loan size of \$25 million
 - Up to 10,000 employees or \$2.5 billion in revenue
 - **Unsecured**
 - **Loan term of 4 years, payments deferred for the first year (prepayments allowed)**
 - **Operations in the United States**
 - **Origination fee of 100 bp plus possibly another 100 bp passed through from the bank**

- **Restrictions**
 - **You must not repay any other debt of equal or lower seniority before repaying the Main Street loan**
 - **Must not cancel or reduce any existing lines of credit**
 - **Must make reasonable efforts to maintain payroll**
 - **Must not repurchase shares of your business or its parent listed on a stock exchange, while the loan is outstanding and for 12 months after**
 - **Must not pay dividends on common stock, while the loan is outstanding and for 12 months after**
 - **Must adhere to compensation restrictions, while the loan is outstanding and for 12 months after**
 - For employees above \$425,000 last year, no increase above last year
 - For employees above \$3 million, a cap of \$3 million plus 50% of the prior excess above \$3 million; for example, \$4 million last year means \$3.5 million during the covered period

State Insurance Regulatory Landscape During COVID-19

Susan Stead
Of Counsel, Columbus
T +1 614 365 2708
E sue.stead@squirepb.com



Agenda

- Regulatory Activity
 - Premium Relief
 - Moratoriums on Cancellations/Nonrenewals
 - Property and Casualty
 - Health Insurance
 - Relaxation of Regulatory Requirements
 - Producer Licensing and CE
 - Company Filings
- Business Interruption
 - Developments and Proposals

Premium Relief

- Guidance, generally, comes in all forms: requests, expectations, “order” via bulletin, emergency rules
 - ***Check each state!***
- Premium Relief (discounts, refunds, reduced rates)
 - Requested by several states
 - Filings will be expedited
 - California’s “order” of April 13, 2020
 - Broad application:
 - Private passenger auto
 - Commercial auto
 - Workers’ compensation
 - Commercial multi-peril
 - Commercial liability
 - Medical malpractice
 - Any other line where measure of risk is substantially overstated as a result of the pandemic

Moratoriums on Cancellation/Nonrenewal

- Moratoriums on cancellations and nonrenewals for nonpayment of premiums
 - Insurers advised to take all possible actions to avoid lapse, such as extended grace periods, payment plans, waiver of late fees
 - Generally applicable to all lines of business
 - Some states – insured must request accommodations, or only insureds impacted by COVID-19 are eligible
 - Premium finance companies expressly included in some guidance
- Louisiana emergency rule
 - Applies to authorized and unauthorized insurers and all lines
 - Notices in effect on March 12 are void; may not be reissued until expiration of emergency rule; other notices may be issued while rule in effect but no cancellation until after expiration of rule
 - Does not apply to policies issued on or after March 12, 2020

Moratoriums on Cancellation/Nonrenewal

- New York emergency rule
 - Life – 90 day grace period for payment and to exercise other rights
 - P&C – Moratorium on cancellations/nonrenewals for 60 days; may not be limited to nonpayment situations
 - Policyholder must attest to financial impact from COVID-19
 - For nonpayment situations, must offer 12-month payment plan and waive late fees
 - Appears to apply to surplus lines but DFS provided oral guidance that it does not
 - Applies to premium finance companies

Property and Casualty

- Personal Auto
 - Waive exclusions for deliveries and commercial use
- Medical Professional Liability
 - Cover telemedicine services
 - Cover out of state doctors rendering COVID-19 services and those providing services outside their normal practice specialties
 - Indiana – special provision for participation in Patient Compensation Fund
- Workers Compensation
 - Benefits for COVID-19 related illness to be provided for Florida healthcare workers
 - Illinois – emergency rule creates rebuttable presumption that employee of an essential business was infected at the workplace
- Surplus lines
 - Not always excluded from regulatory directives – need to check

Health and Administrative

- Health insurance – key issues
 - Coverage for telemedicine and out of network services
 - Waiver of cost-sharing obligations
 - Elimination of legal, contractual, and procedural impediments to coverage and claim processing, such as provider audits and credentialing
- Producers
 - Many (not all) states extended time for March and April renewals
 - Some are issuing temporary licenses without exams
 - CE requirements and deadlines generally not relaxed, but classroom instruction may be provided via webinar and proctor requirements waived for online courses
- Company filings
 - Temporary relaxation of notarization, wet signatures, and hard copy filings
 - Extensions of time to file annual statements, Forms B,C and F
 - Many states have not formally addressed these issues

State Action

Legislation

Bills pending in Louisiana, Massachusetts, New Jersey, New York, Ohio, Pennsylvania, South Carolina

- All require payment of business interruption claims made under policies in effect on date of state of emergency
- Except Louisiana and South Carolina, assessments against the industry to create fund to reimburse insurers that pay covered claims
- Some would assess only P&C industry; some would assess life and health industries as well
- Except in Louisiana and South Carolina, only claims of small businesses must be paid (less than 100 or 150 employees)

California Notice (April 14, 2020)

- No licensee may dissuade policyholder from making claim; agents must forward all claims to insurer
- Insurers must provide necessary forms and information, conduct “thorough, fair, objective investigation,” and document files
- For first-party claim denials, in whole or part, insurers must provide written explanation of all legal and factual basis for such denial, policy provisions, and any legal authority
- Focus is on business interruption and event cancellation claims but is not limited to those claims

Business Interruption Insurance Coverage Act of 2020

- Introduced in the House by Rep. Mike Thomson (D. Ca.) on April 14, 2020
- Policies in effect on date of enactment
 - Voids policy exclusions in *existing* policies that would prevent coverage for business interruption losses resulting from:
 - Viral pandemic
 - Forced closures or mandatory evacuations
 - Power shut-off for public safety purposes (*think California wildfires*)
 - Voids state regulatory approval of such *exclusions* in policies in force on date of enactment
 - Bill does *not* mention physical damage issue
 - Exclusions may be reinstated with (1) agreement of policyholder or (2) if, after 30 days notice of associated premium and effective date of reinstatement, policyholder fails to pay
 - Possible coverage for claims incurred during the 30 days unless the reinstatement is retroactive; unclear whether exclusion may be reinstated back to effective date of Act
 - No restrictions on premiums that may be charged
- New business after effective date of enactment
 - Insurers “shall make available” business interruption coverage for the stated causes of loss that is not materially different than coverage for losses from other causes
 - Does not address or restrict premiums for such mandatory offering

Pandemic Risk Insurance Act of 2020

- Federal backstop – similar in structure to TRIA
 - Declaration of Public Health Emergency required
 - Program covers 95% of insurance losses after deductible

- Different from TRIA
 - Retroactive application to policies in force on date of enactment
 - Voids all exclusions that would bar coverage and voids state approval of exclusions
 - Rates and forms for BI coverage will not be subject to prior approval by states
 - New “federal cause of action” for property losses, personal injury, and death from a covered Public Health Emergency

Industry Proposal

- Joint Trades (insurance, retail, professional, real estate, travel, etc.)
 - COVID-19 Business and Employee Continuity and Recovery Fund
 - Funded by federal government
 - Special federal administrator to enter into contracts with businesses and to facilitate distribution of funds to businesses and employees
 - Goal: help businesses retain and rehire employees, keep workers' benefits, meet operating expenses
- NCOIL
 - COVID-19 Business Interruption and Cancellation Claims Fund
 - Cover uninsured losses, i.e., those that would normally be excluded by communicable disease exclusion in BI and event cancellation policies
 - Industry to process claims
 - Preempt state legislating requiring BI coverage for COVID-19

Of Interest

- Some emergency orders, like in Colorado, state that COVID-19 “physically contributes to property loss, contamination, and damage due to its propensity to attach to surfaces for prolonged periods of time”
- Vallejo City Council, CA, asked to ratify emergency order declaring that local businesses suffered physical property damage
- Significant number of lawsuits already filed
- Regulators generally agree with industry and warn of potential insolvencies
- Rep. Pramila Jayapal (D. Wash.) asked industry CEOs to justify denials, provide samples of policy language, and provide means to resolve coverage disputes short of litigation

Employment Law Implications of the COVID-19 Crisis

Matthew Cooper

Principal, Denver

T +1 303 894 6117

E matthew.cooper@squirepb.com





Families First Coronavirus Response Act Regulations

- **What:** Provides two separate methods of protection for COVID-19 related reasons as of **April 1, 2020**
 - Emergency paid sick leave (EPSL) (all employees)
 - Extended paid emergency Family and Medical Leave Act (EFMLA) (all employees employed for >30 days)
- **Who:**
 - Most public employers (state and nearly all federal)
 - Private employees with 1-499 employees (no health/emergency)
 - Joint employer test (FLSA)
 - Integrated employer test (FMLA)
 - U.S. only, full and part-time, leave, no ICs or furloughs
 - Headcount at time requested leave is taken → dynamic

- Up to 80 hours for a qualifying reason if employee cannot work **or telework**
- Cannot require employee to first exhaust other paid leave/sick leave
- 100% tax credit for paid sick leave expenditures

Regular Rate of Pay (up to \$511/day)	Two-Thirds Regular Rate (up to \$200/day)
Employee subject to quarantine or isolation order	Employee caring for individual subject to quarantine or isolation order, or advised to self-quarantine
Employee advised by healthcare provider to self-quarantine	Employee caring for minor child affected by school/daycare closure
Employee experiencing symptoms, awaiting medical diagnosis	“Substantially similar condition” as declared by DHHS

- Eligibility:
 - 30 days of employment and satisfy reason five for EPSLA, i.e., employee caring for child affected by school/daycare closure
- First two weeks:
 - Unpaid
 - Can substitute available paid time off
- Next ten weeks:
 - Paid at two-thirds regular rate of pay (up to \$200/day)
 - Dollar-for-dollar payroll tax credit (up to \$200/day)
 - Can supplement with other available paid leave
 - Can take intermittent leave *at employer's discretion*

Small Business (Under 50-Employee) Childcare Coverage Exemption Analysis ...

...“when the imposition of such requirements would jeopardize the viability of the business as a going concern”

1. Leave requested would result in business’s expenses/financial obligations exceeding available business revenue and cause it to cease operating at a minimal capacity
2. Employee’s absence would entail a substantial risk to financial health or operational capabilities of business because of their specialized skills, knowledge, or responsibilities
3. Not sufficient workers able, willing, qualified, and available at time and place needed to provide employee’s labor or services needed to operate at minimal capacity

*performed each time leave is requested, by authorized officer

- Non-Discrimination, Non-Retaliation, Remedies
- Must return employee to same or substantially similar position
- Businesses with fewer than 25 employees may be excused from job restoration requirement if:
 - Position no longer exists due to economic conditions or other changes in operations conditions of the employer that affect employment, AND
 - Change in conditions is caused by COVID-19 during the period of leave, provided that:
 - Employer makes reasonable efforts to restore employee to equivalent position and, if that effort fails,
 - Employer makes reasonable effort to offer employee an equivalent position if one becomes available within a year

The background features a collage of financial data visualizations. In the top left, there is a bar chart with blue bars of varying heights. Below it is a donut chart divided into four segments labeled 18%, 6%, 7%, and 14%. To the right of the donut chart is a line graph with two lines, one blue and one green, plotted against a grid. In the top right, a portion of a spreadsheet is visible, showing numerical data in a grid. A silver pen is resting on the spreadsheet. In the bottom right, another donut chart is partially visible, with segments labeled 14%, 15%, 18%, 6%, and 7%. A large green rectangle is overlaid on the right side of the image, containing the title text.

CARES Act Employment Provisions

CARES Act

- Similar qualifying reasons as FFCRA
- Expanded Qualifying Participants:

**Self-employed
individuals**

**Independent
contractors**

Part-time workers
(who are not covered by
all states in normal
circumstances)

CARES Act; COVID-19 Qualifying Reasons:

- Diagnosed with COVID-19
- Experiencing symptoms and seeking a diagnosis or testing
- Member of household diagnosed with COVID-19
- Caring for a family member or household member with COVID-19
- Caring for a child or other household member whose facility has been shut down due to coronavirus
- Unable to reach place of work due to quarantine imposed as a direct result of the COVID-19 public health emergency or HCP
- Unemployment – **full or partial**

Benefits Under PUA

Any type of reduction in force or hours may result in employee eligibility for state unemployment benefits (which are subject to their own distinct rules by state) for up to a **maximum of 39 weeks**

Additionally, the CARES Act provides employees who are receiving unemployment payments with an additional weekly payment of **\$600, for 13 weeks through July 31**, paid for by the federal government



Reductions Strategies

While strategy will depend on state law, there are several different:

- Layoffs
- Furloughs (keep benefits)
- Reduced work and/or pay
- Workshare programs
- PPP loan and tax credits





OSHA Guidance on COVID-19 Planning

- The General Duty Clause and OSHA Regulations
 - OSHA Guidance, including industry specific:
 - <https://www.osha.gov/Publications/OSHA3990.pdf>
 - <https://www.osha.gov/memos/2020-04-13/interim-enforcement-response-plan-coronavirus-disease-2019-covid-19>
- Recommends engineering, administrative and PPE controls tailored to each risk level from low, medium, high, to very high
- Hazard assessments, training, and good-faith compliance
- Post-pandemic measures when returning to in-person work
- Recordkeeping and Whistleblower protection



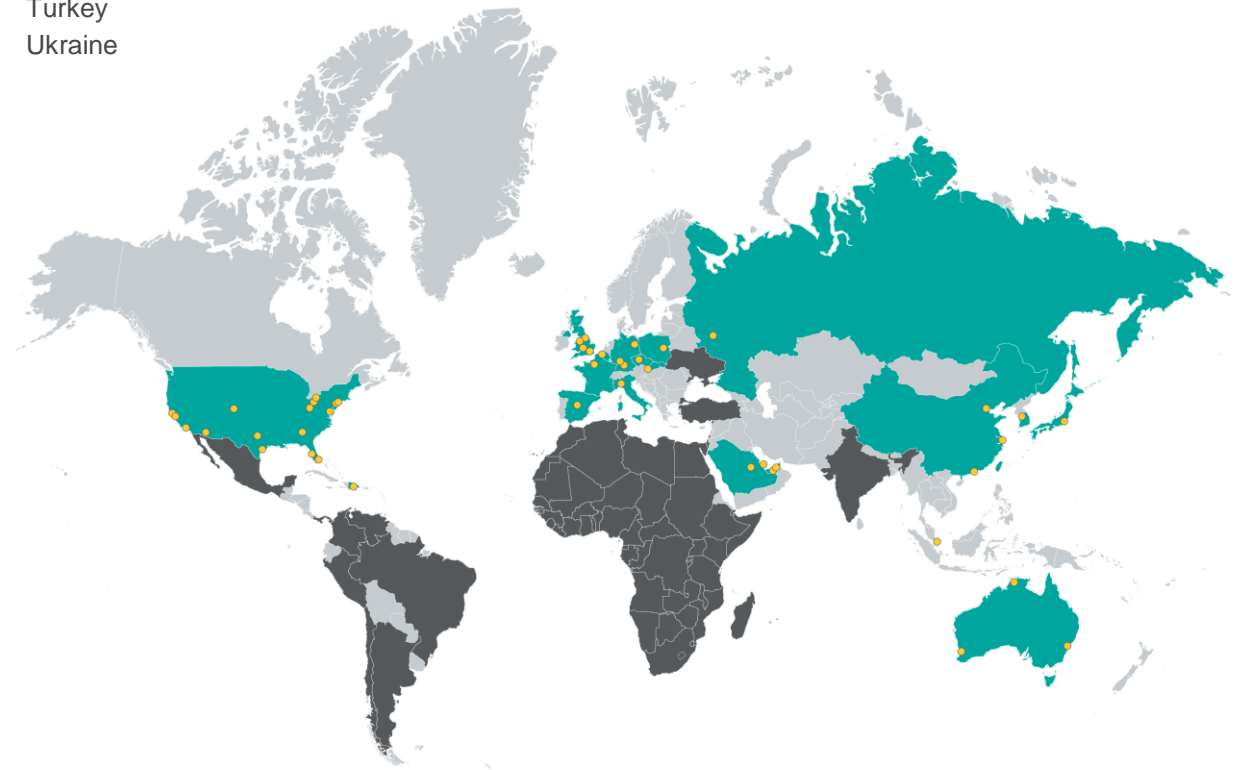
Global Coverage



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Africa
Brazil
Caribbean/Central America
India
Israel
Mexico
Turkey
Ukraine

■ Office locations
■ Regional desks and strategic alliances



Q & A

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