COVID-19: TRIBAL BUSINESS FAQ FOR CARES ACT PAYCHECK PROTECTION PROGRAM

Date: 24 April 2020

By: Bart J. Freedman, Karishma Shah Page, Natalie J. Reid

OVERVIEW

Business concerns owned by Indian Tribes, Alaska Native Corporations (ANCs), Native Hawaiian Organizations (NHOs), and Community Development Corporations (CDCs) meeting certain specified size limitations may be eligible recipients of loans under the Paycheck Protection Program (the "PPP") provided under Sections 1102 and 1106 of the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act").

This Tribal Businesses FAQ sets forth answers to some frequently asked questions concerning the PPP. It is based on the Interim Final Rules ("IFR") promulgated by the Small Business Administration ("SBA") implementing the relevant sections of the CARES Act, which were released on April 2 and 3, 2020 and published in the Federal Register at 13 CFR Part 120, as well as additional guidance in the form of a "frequently asked questions" document regarding the PPP loans, which was released on April 3, 2020 and subsequently updated, and an April 4, 2020 guidance letter from the Associate General Counsel to the Small Business Administration regarding size eligibility and affiliation under the CARES Act. This Tribal Business FAQ also refers to the pre-CARES regulations published by the SBA, which remain in effect unless otherwise noted.

We note that the CARES Act distinguishes between small business concerns owned by a Tribe and "Tribal business concerns." By the Office of General Counsel's April 4, 2020 letter, we understand that the SBA considers both as eligible for getting a PPP loan. Furthermore, it is unclear whether the SBA will publish further additional guidance on this issue before the PPP funds are exhausted. This FAQ assumes that the PPP program is uncertain and time-sensitive, and complete certainty as to SBA policy with respect to PPP loans is not feasible.

FREQUENTLY ASKED QUESTIONS

Should our business apply for a Paycheck Protection Loan from the SBA?

A Tribal business may wish to consider applying for a Paycheck Protection Loan ("PPP Loan") if:

- Current economic uncertainty makes a PPP Loan necessary to support the ongoing operations of the Tribe's business; and
- The Tribe's business would need to consider laying off, terminating, or reducing the hours or the compensation of its employees but for the funds supplied by a PPP Loan.

Note: A Tribal business will still need to qualify as an eligible recipient to receive a PPP Loan and to certify that the PPP Loan will only be used for authorized purposes (as described below).

©2005-2026 K&L Gates LLP. All Rights Reserved.

Is our business an "eligible recipient"?

In general, a Tribal business qualifies as an eligible recipient if:

- It is a small business concern, defined as one which is independently owned and operated, or wholly owned by a Tribe, and which is not dominant in its field of operation or meets both tests in SBA's "alternative size standard" as of March 27, 2020: (1) maximum tangible net worth of the business is not more than $15 million; and (2) 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;
- It was in operation on February 15, 2020;
- It paid salaries and payroll taxes for employees or paid independent contractors before February 15, 2020; and
- It is a business concern and has 500 or fewer employees whose principal place of residence is in the United States; or is a business that operates in a certain industry and meets the applicable SBA employee-based size standards for that industry.

Our business is owned by the Tribe—are we eligible for a PPP loan?

Yes, business concerns owned and controlled by Indian Tribes, or wholly-owned entities of Indian Tribes, and Tribal business concerns are eligible for PPP loans. If your business meets the other eligibility criteria for a PPP loan, the fact that it is owned by a Tribe does not alone affect its eligibility.

Should we count other businesses owned by our Tribe as "affiliates" when calculating the number of our employees?

No, with some exceptions. Generally, small business concerns owned and controlled by Indian Tribes are not considered to be affiliated with other concerns owned by the Tribe.

However, the SBA considers small business concerns to be affiliated with the owning Tribe if the owning Tribe performs contract administration services for the business that encompass actual direct day-to-day oversight and control of a contract/project. If your business affiliated with the owning Tribe under this standard, it will affect how you must calculate the number of your employees and therefore whether your business qualifies as an eligible small business concern.

Could our business be ineligible even if it meets the eligibility requirements?

Yes, a your business could be ineligible if:

- It is engaged in any activity that is illegal under federal, state, or local law; or
- It is engaged in other ineligible SBA business (passive real estate development, certain lending activities, sales or live displays of a prurient sexual nature, private clubs which limit membership for reasons other than capacity).
- It or any business that it owns or controls:
    - has ever obtained a direct or guaranteed loan from SBA or any other Federal agency that is currently delinquent; or

©2005-2026 K&L Gates LLP. All Rights Reserved.

- has defaulted within the last seven years and caused a loss to the government.

Our business receives revenue from legal gaming. Are we eligible for a PPP Loan?

Yes, a business that is otherwise eligible for a PPP Loan is not rendered ineligible due to its receipt of legal gaming revenues.

Businesses that received illegal gaming revenue remain categorically ineligible.

How much can our business borrow?

Under the PPP, the maximum loan amount a business may borrow is the lesser of:

- $10 million, or
- The result of the payroll cost-based formula specified in the CARES Act.

What is the "payroll- based formula" for calculating the maximum loan amount my organization may borrow?

The Payroll-Based Formula:

- Step 1: Calculate aggregate payroll costs (discussed below)
- Step 2: Subtract any compensation paid as wages to an employee in excess of $100,000 in annual salary.
- Step 3: Divided by 12 to calculate average monthly payroll costs.
- Step 4: Multiply the average monthly payroll costs by 2.5.
- Step 5: Add (if applicable) any outstanding amount of an Economic Injury Disaster Loan ("EIDL") made between January 31, 2020, and April 3, 2020, less the amount of any "advance" under an EIDL.

What qualifies as "payroll costs"?

Payroll costs include:

- Employee salaries, wages, commissions, or similar compensation;
- Cash tips or equivalent;
- Payment for vacation, parental, family medical, or sick leave;
- Severance payments;
- Payment for employee health care benefits, including insurance premiums;
- Payment for employee retirement benefits; and
- Payment of state or local taxes assessed on employee compensation.

Payroll costs exclude:

- Compensation of any employee whose principal residence is outside the United States;
- Compensation of any employee in excess of an annualized annual salary of $100,000;

©2005-2026 K&L Gates LLP. All Rights Reserved.

- Federal income tax and payroll tax contributions; and
- Qualified sick and family leave wages already covered by tax credits under the Families First Coronavirus Response Act ("FFCRA").

Do independent contractors count as "employees" for the purpose of calculating payroll costs?

No, independent contractors do not count for the purpose of calculating a business's payroll costs because independent contractors may apply independently for a PPP Loan.

Note 1: The CARES Act defines "employee" as an individual employed on a full-time, part-time, or other basis. We understand "other basis" to include seasonal employees that work periodically for a business, e.g., during a performance run.

Note 2: Businesses should consider advising their independent contractors to apply separately for a PPP Loan.

What is the interest rate on a PPP Loan?

1% per annum.

What is the maturity dated on a PPP Loan?

Two years.

Can our business apply for more than one PPP Loan?

No, businesses and other eligible borrowers may receive only one PPP Loan. Accordingly, SBA recommends that eligible borrowers consider applying for their maximum loan amount when they apply for a PPP Loan.

Can our business use e-signatures or e- consents?

Yes, e-signatures and e-consents can be used in the PPP application materials. Your lender may have different or additional requirements, however.

Is the PPP first-come, first-served?

Yes. Senate has just approved on the terms of a bill that will add an additional $310 billion into the PPP Loan program. Businesses interested in obtaining a PPP Loan should apply as soon as possible, notwithstanding the possibility of the program's extension.

When will our business have to begin paying principal and interest on a PPP Loan?

Payments are deferred for six months following disbursement of a PPP Loan; however, interest will accrue during this six-month deferment period. Interest for forgiven amounts will be paid by the SBA to the SBA lender.

Can a PPP Loan be forgiven in whole or in part?

Yes, a PPP Loan can be forgiven up to the full principal amount and any accrued interest to the extent of the borrower's documented payroll costs (as discussed above), rent, utility payments, and interest payments on mortgages, in each case paid during the eight-week period following the date of the loan (the "Forgiveness Period").

Note: Loan forgiveness may be reduced if more than 25% of the proceeds from a PPP Loan are used for non-payroll costs during the Forgiveness Period, e.g., rent mortgage interest, and utility payments. Additional

©2005-2026 K&L Gates LLP. All Rights Reserved.

guidance on loan forgiveness is expected from SBA, but Treasury regulations indicate that no more than 25% should be used for items other than payroll costs. Using the PPP loan proceeds for purposes other than those specified in the CARES Act can subject owners to liability.

Do independent contractors count as employees for the purpose of PPP loan forgiveness?

No, independent contractors do not count for the purpose of calculating a business's loan forgiveness because independent contractors may apply independently for a PPP Loan. Characterizing independent contractors as employees could lead to additional tax penalties.

Note: As noted above, businesses should consider advising their independent contractors to apply separately for a PPP Loan.

How can our business submit an application for a PPP Loan?

A business must submit an SBA application Form 2483 and payroll documentation to a participating SBA lender. Locate participating lenders by zip code here.

Note 1: Lenders may require additional information beyond the documentation required by the PPP application.

Note 2: Because of the high demand for PPP Loans, many lenders have said that they will initially work only with current customers with whom they have a pre- existing lending relationship. Businesses interested in seeking a PPP Loan should contact their existing banks as soon as possible to determine bank-specific requirements related to application processing. The SBA website contains a link to identify SBA lenders by zip code.

How may funds from a PPP Loan be used by our business?

A business must use at least 75% of the proceeds from a PPP Loan for payroll costs. The borrowing business will have to document that proceeds were used for payroll costs in order to determine loan forgiveness.

Note: SBA has identified the following as permitted uses of PPP Loan funds:

- Payroll costs;
- Costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- Interest payments on mortgages and pre-existing debt (but not prepayments or principal payments);
- Rent payments;
- Utility payments; and
- Refinancing (if applicable) an EIDL made between January 31, 2020 and April 3, 2020.

What happens if funds from a PPP Loan are misused by our business?

SBA will require businesses to repay any amounts from a PPP Loan that are used for unauthorized purposes. Businesses will also be subject to additional liability, including fraud, if they knowingly use funds from a PPP Loan for unauthorized purposes. SBA will have recourse against your business if funds from a PPP Loan are used for unauthorized purposes.

Note: Officers and directors will have fiduciary duties regarding the use of funds from a PPP Loan as well.

©2005-2026 K&L Gates LLP. All Rights Reserved.

Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?

Recent SBA guidance states: “In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.

Lenders may rely on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.”

What certifications does our business need to make as part of PPP Loan application process?

An authorized representative of the business applicant must certify in good faith to all of the below:

- The business was in operation on February 15, 2020 and had employees for whom it paid salaries and payroll taxes, or it paid independent contractors as reported on a Form 1099-MISC.
- The business applying for a PPP Loan because current economic uncertainty makes a loan request necessary to support its ongoing operations. The Secretary of Treasury stated that further advice on this certification will be forthcoming.
- The business will use PPP Loan funds to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments; it understands that if the funds are knowingly used for unauthorized purposes, the federal government may hold it legally liable, such as for charges of fraud.
- The business will provide to the lender documentation verifying the number of full- time equivalent employees on payroll as well as the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight-week period following the date of the loan.
- The business understands loan forgiveness will be limited to the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities.
- The business has not and will not receive another PPP Loan during the period beginning on February 15, 2020 and ending on December 31, 2020.
- The business certifies that (a) the information provided in this application and the information provided in all supporting documents and forms is true and accurate in all material respects; and (b) it understands

©2005-2026 K&L Gates LLP. All Rights Reserved.

that knowingly making a false statement to obtain a guaranteed loan from SBA is punishable under the law, including under 18 USC 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to $250,000, under 15 USC 645 by imprisonment of not more than two years and/or a fine of not more than $5,000, and, if submitted to a federally insured institution, under 18 USC 1014 by imprisonment of not more than 30 years and/or a fine of not more than $1,000,000.

- The business acknowledges that the lender will confirm the eligible loan amount using tax documents it has submitted, and it affirms that these tax documents are identical to those submitted to the Internal Revenue Service. It also understands, acknowledges, and agrees that the lender can share the tax information with SBA's authorized representatives, including authorized representatives of the SBA Office of Inspector General, for the purpose of compliance with SBA Loan Program Requirements and all SBA reviews.

Note: As explained above, if more than 25% of PPP Loan funds are used for non- payroll costs, then that excess amount will not be forgiven.

What are the loan terms and conditions of a PPP Loan?

PPP Loans will be guaranteed under the PPP under the same terms, conditions, and processes as other SBA 7(a) loans, with certain changes, including but not limited to:

- SBA guarantees 100% of the PPP Loan.
- No collateral will be required.
- No personal guarantees will be required.
- All loans will be processed by SBA lenders and SBA lenders will be permitted to rely on certifications of the borrower in order to determine eligibility of the borrower and the use of loan proceeds.

Are there any fee waivers for a PPP Loan?

Yes, fees otherwise payable by borrowers are waived under the PPP.

MORE DETAILED INFORMATION

What documents will our business need for the PPP application process?

Businesses should begin gathering documentation to expedite the PPP application process.

Although requirements will vary by lender, we anticipate lenders will likely require or request the following organizational information:

- Employer Identification Number or EIN;
- Copy of Articles/Certificate of Incorporation (including any amendments);
- Copy of Bylaws (including any amendments) and any contractual agreements between owners;

©2005-2026 K&L Gates LLP. All Rights Reserved.

- Certificates of Good Standing in (a) the jurisdiction of incorporation and (b) the relevant jurisdiction where the business organization is qualified as a foreign entity registered to do business;
- Board of directors' authorizing resolution (if required under organizational documents) for PPP-covered loan debt incurrence;
- Documentation of payroll costs incurred in the one-year period before the anticipated loan date; and
- Documentation relating to any existing SBA loan.

How do I determine whether our business has affiliates that must be counted for purposes of meeting eligibility requirements and calculating payroll costs?

If your business is not wholly owned by an Indian Tribe you may need to determine if you have affiliate businesses that would affect your eligibility.

Under the standard SBA rules for SBA 7(a) loans (of which PPP Loans are a part), affiliates are generally aggregated for purposes of determining eligibility. This means businesses should aggregate employees of affiliates for purposes of meeting the eligibility requirements and calculating payroll costs.

Under the standard SBA rules, affiliation is determined on a case-by-case basis looking at the totality of the circumstances, considering, among other things:

- Common ownership (generally control of 50% of voting equity or board seats);
- Negative control via charter or contractual vetoes, covenants, or protective provisions;
- Common management, either at the officer or board level; and
- Other factors, such as economic dependence, common investments, franchise agreements, or an identity of interest provided, however, for the CARES Act, (a) businesses operated as franchises and (b) businesses with a North American Industry Classification System (“NAICS”) designation beginning with 72 are exempted from affiliation rules)

Although determinations regarding “affiliation” may require examination of a business's articles and bylaws and consideration of state-law requirements as well as detailed factual and legal inquiry, the following general guidelines may be useful:

- A business that has no members, or whose members do not select the members of the board, and whose management is independent of other organizations, does not have affiliates.
- A business with a broad-based membership and one-member, one-vote rules likely need not worry about affiliation unless it has a brother-sister relationship or shares management with another business.
- If a business is owned by another entity, if another entity has the power to appoint the board of directors, or if another entity exercises control over the business's management, the business should consider that other entity an affiliate.

©2005-2026 K&L Gates LLP. All Rights Reserved.

KEY CONTACTS



BART J. FREEDMAN
PARTNER

SEATTLE
+1.206.370.7655
BART.FREEDMAN@KLGATES.COM



NATALIE J. REID
ASSOCIATE

SEATTLE
+1.206.370.6557
NATALIE.REID@KLGATES.COM



KARISHMA SHAH PAGE
PARTNER

WASHINGTON, DC
+1.202.778.9128
KARISHMA.PAGE@KLGATES.COM

This publication/newsletter is for informational purposes and does not contain or convey legal advice. The information herein should not be used or relied upon in regard to any particular facts or circumstances without first consulting a lawyer. Any views expressed herein are those of the author(s) and not necessarily those of the law firm's clients.

©2005-2026 K&L Gates LLP. All Rights Reserved.