



The Entrepreneur's COVID-19 Playbook

A guide to stimulus money, tax breaks and legal tips to survive and thrive during the pandemic.

Hi! I'm Kyle.

When I launched my law firm in January of 2008, I had no idea that there was going to be a financial collapse 10 months later.

It was a gut-wrenching time for a lot of entrepreneurs. I was a young lawyer and didn't know much, but jumped in to help the best I could. I saw entrepreneurs innovating and adapting to emerge from the financial crisis stronger than ever. It was in that moment when I put pen to paper to draft our manifesto:

We see the world as it could be. We resolve to make change happen. Not content to wait for better times, we strive to lay foundations now. We know that a brighter future is built by the adventurers, people like you and me, who are on the ground charting new territory, motivated by passion and committed to execution.

We believe in the power of the marketplace to generate positive social and environmental change. We believe that the best solutions to complex challenges create long-term prosperity, not only financial but also social and environmental.

We are in this together.

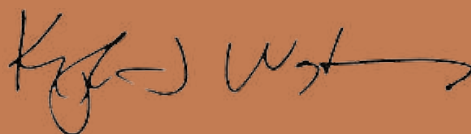
Twelve years later we are confronted with a new crisis. Yet, this manifesto still rings true. I believe that entrepreneurs are the heroes that will rise to the occasion to solve the complex and interconnected problems we're facing.

We're simply here to be a guide for those heroes in this critical moment.

For the last twelve years I've worked with early and growth stage entrepreneurs - both nonprofit and for profit. I teach entrepreneurship at both Harvard Law and Cornell Tech. And more importantly, I've been an entrepreneur myself. So I'm bringing all of that experience to this guide.

Since I know next to nothing about tax, I was lucky enough to convince my friend [Danelle](#) to work on this with me. She's the only person I've ever met that lights up when she talks about the tax code. After doing her time at a big four accounting firm, she's built her own practice working with entrepreneurs.

We hope you'll find this useful.

A handwritten signature in black ink, appearing to read "Kyle West", is positioned at the bottom right of the page.

One of the greatest discoveries a man makes, one of his great surprises, is to find he can do what he was afraid he couldn't do.

HENRY FORD

INTRODUCTION

Running a startup in these tumultuous times will require fortitude, vision and skill. It's these make-or-break moments that truly reveal who we are.

You can survive this moment of crisis and come through the other side, perhaps buried, but certainly smarter and stronger. We're here to help you do that.

Built with the entrepreneur in mind, this guide is designed to help you navigate the changing landscape brought about by the coronavirus pandemic. More specifically, it answers the questions:

1. **Congress just passed a \$2 trillion stimulus package. Is there money in it for me?**
2. **Are there tax breaks I should be taking advantage of?**
3. **How do I take care of my people and my bottom line?**

So how does this guide work?

We've broken the content down into three main chapters—**loans, taxes** and **legal**.

The intent is to call your attention to the relevant sections of the new law that will impact startups and small businesses. The goal is not to be comprehensive, but rather to highlight the most important information in a readable and actionable manner.

We are explicitly not issuing legal, tax or financial advice. Reading this should be the start of a conversation with your advisors, not the end point. We just want to get you up to speed quickly so you can make smart decisions for your business.

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Loans

PAYCHECK PROTECTION PROGRAM (PPP)

The Paycheck Protection Program (PPP) is Section 1102 of the Keeping American Workers Paid and Employed Act, which is Title I of the CARES Act. **The point of the program is to keep workers employed for the next two months—even if your business shuts down.**

This \$349 billion package expands the Small Business Administration's (SBA) existing Section 7(a) loan program to provide loans 100 percent guaranteed by the federal government of up to \$10 million for small businesses, nonprofit organizations, sole proprietors, independent contractors and self-employed individuals, along with loan forgiveness for proceeds used for certain payroll and fixed costs.

The PPP is intended to prioritize companies in underserved and rural markets, including veterans, small businesses owned by socially and economically disadvantaged individuals, women, and businesses that have been in operation for less than two years.

Although the program is open until June 30, 2020, the SBA encourages you to apply as quickly as you can because there is a funding cap and lenders need time to process your loan.

Is my company eligible for PPP?

Your company is eligible if you:

- Are qualified small businesses under current SBA regulations for North American Industry Classification System codes (including independent contractors, sole proprietors and nonprofits); or
- Employ up to 500 employees; or
- Operate in the hotel or food services industries and employs not more 500 employees per physical location requiring assistance;

And you

- Were in operation on February 15, 2020; and
- Had salaried employees or paid independent contractors as of February 15, 2020.

What if my company has an investment from a venture capital firm?

There is some concern that being a venture-backed startup could remove you from the category of a small business. This likely won't be the case for most early stage venture-backed companies.

When calculating both average revenue and number of employees, the SBA includes the revenues and employees of any "affiliates." As defined under the SBA regulations, affiliates include companies under common ownership, companies owned and managed by investors, and the holdings of venture capital investors. Generally companies are considered to be affiliates when one controls or has the power to control the other, or a third party (such as a venture capital firm) has the power to control both.

As a rule of thumb If non-investors still have over 50 percent of the voting power in your company, this likely won't be a concern for you.

If your investors control over 50 percent of the voting power in your company, you may be affiliated with them, which in turn may mean that you don't qualify. You should speak with your investors and your counsel about this.

What are the terms of the loan?

PPP loans are, purposely, on favorable terms to ensure that companies who need the money can get it.

Principal

The maximum amount you can borrow is the lesser of:

- Two months of your average payroll expense (capped at \$100,000 per year per employee) plus 25 percent, or
- \$10,000,000

To calculate, follow these steps:

- Step 1: Aggregate payroll costs (defined in detail below in f.) from the last twelve months for employees whose principal place of residence is the United States.
- Step 2: Subtract any compensation paid to an employee in excess of an annual salary of \$100,000 and/or any amounts paid to an independent contractor or sole proprietor in excess of \$100,000 per year.
- Step 3: Calculate average monthly payroll costs (divide the amount from Step 2 by 12).
- Step 4: Multiply the average monthly payroll costs from Step 3 by 2.5.

Note that independent contractors do not count as employees for the purposes of PPP calculations.

Interest

The interest rate is 1 percent per annum.

Term

The term of the loan is two years. You can pay the loan off earlier than two years with no penalty. Lenders must defer all payments (including principal, interest and fees) for a period of six months.

Personal Liability

You are not personally liable for these loans. The PPP requires no personal guarantees or collateral for founders, individual shareholders, members or partners of your company. However, if the loan proceeds are used for fraudulent purposes, you will be held personally liable. So, be meticulous about how this money is spent.

How am I allowed to spend this money?

You can use the loan in the following ways, most of which qualify for loan forgiveness if such costs are incurred within eight weeks of origination of the PPP loan:

- Salary, wages, commissions, or tips (capped at \$100,000 on an annualized basis for each employee);
- For a sole proprietor or independent contractor: wages, commissions, income, or net earnings from self-employment, capped at \$100,000 on an annualized basis for each employee.
- State and local taxes assessed on compensation;
- Costs related to the continuation of group health care benefits during periods of paid sick, medical or family leave, and insurance premiums;
- Payments of interest (but not payments of principal) on any mortgage obligation;
- Rent (including rent under a lease agreement);
- Utilities; or
- Interest on any other debt incurred before February 15, 2020.

Will this loan be forgiven?

The principal can be forgiven if you comply with PPP.

You will owe money when your loan is due if you use the loan amount for anything other than payroll costs, mortgage interest, rent, and utilities payments over the 8 weeks after getting the loan.

However, you can receive forgiveness of the principal of the PPP loan if it is spent on payroll costs, mortgage interest (if mortgage originated before February 15, 2020), rent (if lease originated before February 15, 2020), or utilities owed during the eight-week period after the loan originated. In order for the principal to be forgiven, no more than 25% of the principal can be used for non-payroll costs.

In order to process the forgiveness, you must submit a request to your bank including documents that verify the number of full-time equivalent employees and pay rates, as well as the payments on eligible mortgage, lease, and utility obligations. You must certify that the documents are true and that you used the forgiveness amount to keep employees and make eligible mortgage interest, rent, and utility payments. The bank must make a decision on the forgiveness within 60 days.

However, that forgiveness will be reduced if you do not comply with PPP.

The amount of principal forgiven will be reduced if you reduce the size of your workforce. The formula for reduction works like this:

- If you do not maintain an average number of full-time equivalent employee positions during the eight weeks following the origination of the loan, then the amount of principal forgiven will be reduced based on how many people you let go. Note that you can choose to compare the eight-week period to your average number of full-time equivalent employees during EITHER: February 15, 2019–July 30, 2019 OR January 1, 2020–February 29,

2020. (§ 1106, p. 46)

- For employees making less than \$100,000 / year, if you reduce any full-time employee's salary by more than 25 percent (compared to the most recent quarter), then your loan forgiveness will be reduced in proportion unless you reinstate those pay levels by July 30, 2020. (§ 1106, p. 48)

You can increase the amount forgiven if you increase wages.

If you increase the wages of a tipped employee, then the amount of forgiven principal will be increased proportionally.

Forgiveness doesn't increase your tax exposure.

Importantly, forgiveness of PPP loans is not considered cancellation of indebtedness income for the purposes of the Internal Revenue Code, and is therefore excluded from gross income for tax purposes. So, you are not taxed on the forgiven principal.

What documents do I need to prepare?

Frankly, it's not exactly clear yet what the loan application packet will look like, and documentation will vary depending on the company.

Guidance released by the Treasury Department indicates that the only documents you need to prepare are:

- [Payroll Protection Program Application Form](#)
- Documentation proving your payroll

As part of your application, you need to certify in good faith that:

- Current economic uncertainty makes the loan necessary to support your ongoing operations.

- The funds will be used to retain workers and maintain payroll or to make mortgage, lease, and utility payments.
- You have not and will not receive another loan under this program.
- You will provide the lender documentation that verifies the number of full-time equivalent employees on payroll and the dollar amounts of payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities for the eight weeks after getting this loan.
- Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities. Due to likely high subscription, it is anticipated that not more than 25% of the forgiven amount may be for non-payroll costs.
- All the information you provided in your application and in all supporting documents and forms is true and accurate. Knowingly making a false statement to get a loan under this program is punishable by law.
- You acknowledge that the lender will calculate the eligible loan amount using the tax documents you submitted. You affirm that the tax documents are identical to those you submitted to the IRS. And you also understand, acknowledge, and agree that the lender can share the tax information with the 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.

How do I apply?

The PPP program is administered through banks, not the SBA directly. Your current bank is likely an SBA lender. If you already have a relationship there that you like, it may be easiest to work with them. However, if you're looking for a bank, check out this list of the [100 most active SBA lenders](#).

Starting April 3, 2020, small businesses and sole proprietorships can apply for and receive loans to cover their payroll and other certain expenses through existing SBA lenders.

Starting April 10, 2020, independent contractors and self-employed individuals can apply for and receive loans to cover their payroll and other certain expenses through existing SBA lenders.

ECONOMIC INJURY DISASTER LOANS (EIDL)

It's worth noting that the SBA has always had a loan program to respond to disasters called [Economic Injury Disaster Loans](#) (EIDL). However, this is the first time it is being applied to a pandemic. In this case, the EIDL has been modified to make it more accessible and to allow for rapid deployment.

Is my company eligible?

If you are eligible under PPP, you're likely eligible for EIDL. In addition, the CARES Act expands eligibility to sole proprietorships, independent contractors, cooperatives under 500 employees, Employee Stock Ownership Plans under 500 employees and tribal small business concerns under 500 employees

In addition, typically, under EIDL, you would need to demonstrate:

- an acceptable credit history;
- an ability to repay the loan;
- location within a state or county that has received an economic injury disaster declaration;
- substantial economic injury as a result of the disaster;
- inability to obtain credit elsewhere;
- collateral for loans of more than \$25,000 (although the SBA often does not decline loans for such lack of collateral);
- a personal guarantee for loans of more than \$200,000; and
- Documentation (including an SBA Loan Application, IRS Form 4506T, complete copies of recent federal income tax returns,

schedule of liabilities, and personal financial statements for all owners).

However, the CARES Act waives the following requirements.

- requests for personal guarantees on loans of under \$200,000
- that the applicant has been in business for the one-year period before the disaster; However, the CARES Act still requires that the business has been in operation as of January 31, 2020;
- that the applicant be unable to obtain credit elsewhere;
- that the applicant provide the lender with tax returns—the lender may approve based solely on the applicant’s credit score or other appropriate methods; and
- that the business must be located in a state or county that received an economic injury disaster declaration from the SBA.

What are the terms of the loan?

EIDL loans can go up to \$2 million and are designed to provide vital economic support to small business deals with a temporary loss of revenue. The interest rate is 3.75 percent for small businesses. The interest rate for non-profits is 2.75 percent. The SBA offers loans with long-term repayments in order to keep payments affordable, up to a maximum of 30 years. Terms are determined on a case-by-case basis, based upon each borrower’s ability to repay. Repayment on loans can be deferred for up to one year, meaning the first repayment doesn’t have to be made until one year after the official date of the loan. However, interest begins accruing from the date the loan was made.

Most significantly for borrowers seeking an immediate influx of funds, borrowers may receive a \$10,000 emergency advance within three

days after applying for an EIDL grant. If the application is denied, the applicant is not required to repay the \$10,000 advance.

How am I allowed to spend this money?

These loans are a working capital loan. They may be used to pay fixed debts, payroll, accounts payable and other bills that can't be paid because of the disaster's impact.

The CARES Act seems to indicate that you may apply for an EIDL grant in addition to a loan under the PPP, so long as the loans are not used for the same purpose.

Will this loan be forgiven?

No. This is a key difference between PPP and EIDL. This is just a straightforward loan to help you get through. There are no forgiveness provisions.

What documents do I need to prepare?

Sole Proprietor Loan Application Documents

- [SBA Form 5C](#)
- [IRS Form 4506-T](#)

Business Loan Application Documents

- [SBA Form 5](#)
- [SBA 159D](#)

- SBA Form 1368
- SBA Form 413D Personal Financial Statement
- IRS Form 4506-T
- SBA Form 2202 Schedule of Liabilities.
- EIDL Supporting Information (P-019)

How do I apply?

Unlike the PPP, which must be applied for through an SBA-approved credit union or bank, the EIDL application process is completed online at the [SBA website](#). Business owners can call the SBA at 800-659-2955 for help with their application. At the time of this writing, we're hearing about sporadic crashes and delays on the website due to the surge in demand.

Currently, it can take up to three weeks for the SBA to approve a loan once an application is received. Once approved, funds can be disbursed within five days of receiving the loan closing documents.

Taxes

INDIVIDUALS AND FAMILIES TAX

Recovery Rebates

The Recovery Rebate is money in the hands of individual taxpayers.

All individuals who are not dependents are eligible to receive a refundable credit of up to \$1,200 (\$2,400 for married filing joint taxpayers). The credit amount is then increased by up to \$500 for each child a taxpayer has under the age of 17. As a taxpayer's income begins to exceed a certain threshold, their potential rebate tax credit begins to phase out. Specifically, the credit is reduced by 5 percent of the adjusted gross income (AGI) that exceeds \$75,000 (\$150,000 for married filing joint and \$112,500 head of household filers).

The recovery rebate payments will be based on 2018 or 2019 income, and are mandated to be made "as soon as possible." The rebate will be reconciled based on 2020 income. If individuals are entitled to a higher rebate payment, they will receive credit upon 2020 tax filing. If an individual received too much in advanced rebate payment, it is not repaid.

It appears that the earliest these payments will be made is during May 2020. It is not yet clear where these payments will be made. Some solutions, which pose many questions, include depositing payments to accounts that were indicated as direct deposit accounts for prior tax refunds, or sending checks to the taxpayer's address on file.

Retirement Account Changes

A taxpayer may withdraw up to \$100,000 for coronavirus-related purposes from individual retirement accounts (IRAs), employer-sponsored retirement plans, or a combination of both, in 2020 under special provisions below. Coronavirus-related purposes are broadly defined, and it seems clear that the Congressional intention is to make this provision widely available.

The withdrawal amount will not be subject to 10 percent early withdrawal penalty after January 1, 2020. The early withdrawal penalty otherwise typically applies to individuals under age 59-½. The amount withdrawn will also not be subject to mandatory withholding requirements, which is otherwise typically 20 percent.

The coronavirus-related withdrawal will be taxed over a three-year period. The income from this withdrawal is split evenly over 2020, 2021 and 2022. A taxpayer can, however, elect to include all of the income from a coronavirus-related distribution in their 2020 income.

Enhanced Charitable Deductions

Taxpayers who take the standard deduction are eligible to deduct up to \$300 of eligible cash contributions as an above-the-line deduction. This deduction is not available for taxpayers who itemize their deductions. This is a permanent change starting in tax year 2020. Qualified charitable contributions must be made in cash, and cannot be used to fund either donor-advised funds (DAFs) or 509(a)(3) “supporting organizations.”

In addition, a taxpayer’s below-the-line qualified charitable contribution deduction is not limited to the typical cap—50% of their AGI—in 2020. Taxpayers can deduct 100 percent of qualified charitable contributions below-the-line.

Student Loan Payments

Required payments on federal (not private) student loans are suspended through September 30, 2020. During this time, no interest will accrue on this debt. Payments will continue unless individuals take proactive measures to contact their loan provider and pause payments.

This period of time will continue to count toward any loan forgiveness programs, such as the Public Service Loan Forgiveness program. If you intend to qualify for a loan forgiveness program, you should

immediately pause any payments, so that you are not paying down debt that will ultimately be forgiven.

All involuntary debt collections are suspended through September 30, 2020, including reduction of a tax refund due to delinquent student loan payments. Taxpayers who have student debt, are delinquent on payments and would normally be subject to a reduction of their tax refund have an incentive to file their tax returns early, so that the refund is processed before this relief expires.

Individual Healthcare Provisions

The definition of qualified medical expenses for tax purposes has been expanded to include over-the-counter medications and menstrual care products. Tax-free funds from qualified medical vehicles such as health savings accounts (HSAs), medical savings accounts (MSAs) and flexible spending accounts (FSAs) may be used to pay for these expenses.

Unemployment Compensation Benefits

Unemployment compensation benefits have been significantly expanded by the CARES Act. Covered individuals now include those who are otherwise ineligible for regular unemployment compensation or have exhausted regular unemployment compensation. Covered individuals also include self-employed individuals, those seeking part-time employment or without sufficient work history.

Covered individuals do not include those who have the ability to telework with pay, or those who receive paid sick leave or other paid leave benefits, regardless of whether the individual otherwise meets the qualifications to receive pandemic unemployment assistance. Covered individuals are eligible to receive the amount that would have been payable under the unemployment compensation law of their state of employment.

Unemployment benefits have a duration limit of up to 39 weeks for new assistance. Regular unemployment assistance is extended by 13 weeks through December 31, 2020 for individuals who are nearing the

deadline of their unemployment benefits. The one-week elimination (waiting) period may be reduced depending on the state, and individuals may be eligible to begin receiving unemployment benefits immediately.

Covered individuals are entitled to receive an additional \$600 payment per week, above what state unemployment compensation law already provides. The additional \$600 weekly payment is available from the date that the applicable state enters into an agreement with the federal government until July 31, 2020 (i.e. four months maximum).

BUSINESS TAX

Employee Retention Tax Credit

Up to 50 percent of qualified wages paid between March 13, 2020 and December 31, 2020 are eligible for the employee retention tax credit related to COVID-19. The credit is limited to \$10,000 of wages per employee per quarter.

The business will need to prove that it has been economically harmed due to the coronavirus. In order to qualify, the business must have been fully or partially shut down due to COVID-19 or have gross income that is 50 percent less than the same quarter in the prior year. Businesses who use the SBA loan assistance under 7(a) / PPP will be ineligible for the credit.

The business will continue to qualify for the credit until the earlier of:

- December 31, 2020;

or

- The sooner of:
 - a quarter without a government-required suspension of operations; or
 - gross revenue from the current quarter exceeds 80 percent gross revenue from the same calendar quarter in 2019.

Deferment of Employer Payroll Taxes

Employers and self-employed taxpayers can defer the employer's portion of the social security tax (6.2 percent).

Payroll tax deferral period begins on March 27, 2020 and ends on December 31, 2020. Deferred payroll taxes are to be repaid in equal payments by December 31, 2021 and December 31, 2022, with the exception of employers who have debt forgiven under the Section 7(a) of the Small Business Act / PPP.

Getting a PPP loan may prevent an employer from qualifying for these delayed payroll tax provisions. For self-employed individuals, getting a PPP loan does not appear to preclude them from deferring the employer portion of the social security tax.

Note that this is a deferment, not a forgiveness. Companies will still have to pay them, just later.

Employee Education Assistance and Student Loans

Student loan payments made by employers on behalf of their employees are typically included in taxable compensation to employees. Under the CARES Act, such payments are deductible to the business and exempt from tax to the employee, up to \$5,250 from the date of the enactment of the CARES Act until December 31, 2020.

Expanded Net Operating Loss Deduction

Net Operating Loss (NOL) rules have been amended for most businesses. Historically, NOLs were allowed to be carried back for two years and carried forward for 20 years. Now, NOLs are to be carried forward indefinitely, beginning in 2018, and offset up to 80 percent of taxable income.

The CARES Act amended the rules, allowing NOLs arising in taxable years 2018, 2019 and 2020 to be carried back 5 years. NOLs can now offset 100 percent of taxable income for tax years 2018, 2019 and 2020. The effective date of the “80% NOL limitation” rule enacted in December 2017 is changed to be effective for tax years beginning in 2021.

Repeal of Excess Business Loss Rules

The excess business loss limitation has been repealed for self-employed individuals and owners of pass-through businesses for tax years 2018–2020. In addition, a TCJA technical correction excluded income and expenses from being in the trade or business of an employee from the excess business loss calculation.

Qualified Tenant Improvement Bonus Depreciation

A 15-year MACRS life and 100 percent bonus depreciation now apply to qualified improvement property (QIP). QIP is any improvement to the interior of a non-residential building after the building was placed in service, other than elevators, escalators, building enlargements or changes to the building's internal structural framework. If the alternative depreciation system (ADS) is used, because the real property business elected out of §163(j), for example, then QIP has a 20-year recovery period and is not eligible for bonus depreciation. The bill would fix this retroactively so that businesses, especially in the hospitality industry, will be able to utilize bonus depreciation and write off immediate costs associated with improving facilities instead of having to depreciate them over a 39-year period.

AMT Credit Refunds

Historically, corporate alternative minimum tax (AMT) credits were refundable over several years with any remaining credits fully deductible in 2021. The corporate AMT credit is now 50 percent refundable in 2018 with any remaining balance fully refundable in 2019. Additionally, an election can be made applying 100 percent of the AMT credit to 2018 taxes.

Net Interest Deduction Limitation

The net interest deduction limitation, which currently limits businesses' ability to deduct interest paid on their tax returns to 30 percent of

earnings before interest, tax, depreciation and amortization (EBITDA), has been expanded to 50 percent of EBITDA for 2019 and 2020. This will help businesses increase liquidity if they have debt or must take on more debt during the crisis.

Excise Taxes Temporarily Suspended

The excise tax applied on alcohol used to produce hand sanitizer is temporarily suspended for tax year 2020. Aviation excise taxes are suspended until January 1, 2021.

Charitable Contributions

Historically, a C corporation's charitable contribution deduction generally was limited to 10 percent of its taxable income. Now, a C corporation is entitled to deduct qualified contributions of up to 25 percent of its taxable income.

The contribution must be made during the 2020 calendar year. If a taxpayer makes qualified contributions in excess of the amount that the taxpayer is entitled to deduct, the taxpayer may carry over the excess contributions to succeeding taxable years, subject to generally applicable charitable contribution carryforward limitations.

Legal

EMPLOYMENT

Federal Sick Leave Updates

Emergency Family Medical Leave Expansion Act (E-FMLA) amends the FMLA to require employers with 500 or fewer employees to provide paid leave to employees with a “qualifying need related to a public health emergency.” The Act specifically limits the “public health emergency” to an emergency based on COVID-19 declared by federal, state or local authority. A qualifying need for leave is limited under the E-FMLA to an employee’s inability to work or telework due to the need to care for a son or daughter under the age of 18 because the school or place of care has been closed, or the childcare provider of the employee’s son or daughter is unavailable due to a public health emergency.

Employers are not required to pay employees for the first 10 days of leave; however, employees may elect to substitute any accrued vacation leave, personal leave, or medical or sick leave already provided by the employer or required by state law for the first 10 days. Beginning on day 11, employees must receive no less than two-thirds of their regular rate of pay for the number of hours they are normally scheduled to work, for up to 20 additional days. E-FMLA paid leave is capped at \$200 per day and \$10,000 in the aggregate. The formula for calculating the E-FMLA rate varies for employees who work part-time or have fluctuating schedules.

Employees taking E-FMLA leave are generally entitled to the same restoration rights provided by the FMLA. They must be restored to the same position they held when the leave began, or to an equivalent position with equivalent employment benefits, pay, and other terms and conditions of employment. Employers with less than 25 employees may be excluded from the E-FMLA restoration requirements by meeting strict conditions.

Emergency Paid Sick Leave Act (EPSLA) provides paid sick leave to employees unable to work or telework for any of the following six qualifying reasons:

1. The employee is subject to a federal, state or local quarantine isolation order related to COVID-19;
2. A healthcare provider advised the employee to self-quarantine due to COVID-19 related concerns;
3. The employee is experiencing symptoms of COVID-19 and seeks a medical diagnosis;
4. The employee is caring for an individual who is subject to an order described in subparagraph (1) or has been advised as described in subparagraph (2);
5. The employee is caring for a son or daughter of such employee if the school or place of care of the son or daughter has been closed, or the childcare provider of such son or daughter is unavailable, due to COVID-19 precautions; and
6. The employee is experiencing any other substantially similar conditions specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Full-time employees are entitled to 80 hours of paid sick leave, while part-time employees are entitled to the equivalent of an average of hours worked over two weeks. Leave under EPSLA is paid, and employees cannot be required to use any other paid leave provided by the employer before using their paid sick leave under the Act. Employees are entitled to their regular rate of pay. However, the recovery is capped at \$511 per day and \$5,110 in the aggregate for leave related to the employee being subject to a quarantine or isolation order, the employee being advised by a healthcare provider to self-

quarantine, and the employee experiencing symptoms of COVID-19 and seeking a medical diagnosis.

While still entitled to their regular rate of pay, the employee's recovery is capped at \$200 per day and \$2,000 in the aggregate when:

1. Employees use their paid sick leave to care for an individual subject to a quarantine or isolation order; or
2. Has been advised by a healthcare provider to self-quarantine to care for a son or daughter due to COVID-19 precautions by the school, or place of childcare is closed; or
3. The childcare provider is unavailable due to COVID-19 precautions; or
4. The employee's experiencing any other substantially similar conditions specified by the Secretary of Health and Human Services, in consultation with the Secretary of the Treasury and the Secretary of Labor.

CONTRACTS

Force Majeure

Do you remember that clause buried in your contract that you haven't looked at in a while? Well, now may be the time.

Force Majeure is an unforeseeable circumstance that prevents one party or both from performing the contract. COVID-19 blindsided most companies and will likely have a significant impact on your ability to perform your obligations under many contracts. But does force majeure apply?

Courts apply the doctrine differently in different jurisdictions, but in general, your obligations will only be waived under force majeure when all three of the elements below

1. The language of the contract covers the event in question. It's essential that the event—in this case a global pandemic or governmental orders—is covered in the force majeure clause.
2. The risk could not have been foreseen and mitigated. If the event in question was foreseeable, then the force majeure clause will not prevail. If timing is important for you on this clause, when did you enter into the contract? Was it September of 2019 or March of 2020? The earlier the date, the more likely you can make a convincing argument that COVID-19 was not foreseeable. If you were entering into the contract in February or March, it's highly unlikely that the claim would prevail.
3. Performance is truly impossible. Does the pandemic make the performance under the contract truly impossible, or is it just inconvenient / not profitable?

COVID-19's classification as a "pandemic" by the WHO will trigger a force majeure clause that expressly accounts for "pandemics." Clauses that are silent on pandemics, epidemics or other viral outbreaks are likely to be insufficient for a force majeure defense due to COVID-19. In addition to the pandemic itself, governmental actions taken in response to the pandemic may similarly make it easier to invoke a force majeure clause not previously triggered by the virus.

If you are hoping to rely on that force majeure clause over the next few months, it's worth remembering point 2 above. Now that you are aware of the impact COVID-19 can have on your business, are you taking steps to mitigate the damage?

What about if you are entering into a contract now, what type of force majeure language should you consider? Of course, as we lawyers say, it depends. You should talk to your lawyer about what's right for you, but here's one example of a clause we drafted for one of our clients in the events industry:

Force Majeure. Notwithstanding anything to the contrary contained herein, neither party shall be liable for any delays or failures in performance resulting, directly or indirectly, from acts beyond its reasonable control including, without limitation, acts of God; earthquakes; fires; floods; wars; civil or military disturbances; acts of terrorism; sabotage; strikes; significant curtailment in transportation; pandemics; epidemics; health emergencies; riots; accidents; labor disputes; acts of civil or military authority; international, federal, state, or local governmental actions, guidance, recommendations, change of law, any event that makes it illegal or impossible to fulfill the terms of this agreement, or any event that results in the cancellation of at least 30 percent of event attendees. Either party shall provide the other party with prompt written notice of any delay or failure to perform that occurs by reason of force majeure. The parties shall mutually seek a resolution of the delay or the failure to perform as noted above.

Doctrine of Impracticability

Even if force majeure does not apply—say for instance if you don't have a force majeure clause in the contract—you may be excused from performing under other legal doctrines, depending on the governing law of the contract. These include frustration of purpose or commercial impracticability, and in civil law jurisdictions, doctrines like hardship and changed circumstances.

Courts in general do not like to apply this doctrine. In most courts, proving that performance is impracticable is a high bar.

Section 261 of the Restatement (Second) of Contracts explains:

Where, after a contract is made, a party's performance is made impracticable without his fault by the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made, his duty to render that performance is discharged, unless the language or the circumstances indicate the contrary.

Broadly speaking, the doctrine of Impossibility / Impracticability / Frustration of Purpose will excuse the parties to the contract from performance if:

1. a contingency has occurred;
2. the contingency made performance impracticable; and
3. the parties did not foresee the contingency when the contract was made.

Depending on the circumstances, the virus itself or the unanticipated government decrees arising from the coronavirus outbreak—such as prohibiting public gatherings and border closures—may give rise to a valid impossibility defense. However, parties typically cannot rely upon

an impossibility defense where an inability to perform is due to subjective impossibility or inconvenience.

For performance to be truly impracticable, the event must be unforeseeable and not caused by the party expected to perform. However, circumstances that make performance merely unprofitable or inconvenient usually are insufficient. Again, timing matters. If the contract was entered into prior to the outbreak, then you have a stronger claim.

CONCLUSION

That was a lot of information. We hope it was both useful and actionable. By now you should have some clarity on the key questions proposed in this guide:

- 1. Congress just passed a \$2 trillion stimulus package. Is there money in it for me?**
- 2. Are there tax breaks I should be taking advantage of?**
- 3. How do I take care of my people and my bottom line?**

There are a lot of nuances that are not discussed in this guide (the bill was 880 pages long). But now that you have the basics, you should discuss them with your legal and tax advisors. And of course, if you are looking to engage new advisors, we'd be happy to chat. Our contact info is on the next page.

Lastly, remember that challenging times force us as businesses and as people to grow. This will likely be the biggest economic challenge in our generation. It will require more of us than we think we have to offer. We will stumble along the way, but now is our time to step into the arena.

It is not the critic who counts; not the man who points out how the strong man stumbles, or where the doer of deeds could have done them better. The credit belongs to the man who is actually in the arena, whose face is marred by dust and sweat and blood; who strives valiantly; who errs, who comes up short again and again, because there is no effort without error and shortcoming; but who does actually strive to do the deeds; who knows great enthusiasms, the great devotions; who spends himself in a worthy cause; who at the best knows in the end the triumph of high achievement, and who at the worst, if he fails, at least fails while daring greatly, so that his place shall never be with those cold and timid souls who neither know victory nor defeat.

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RESOURCES

The authors are indebted to many experts while writing this. Kyle specifically wants to say a special thanks to [Mark Newberg](#) for pointing me to some great resources. While there are a lot of good content out there, the authors relied heavily upon the following and would highly recommend them for deeper learning on the relevant topics.

SBA Loans

- [Paycheck Protection Program Information Sheet: Borrowers - US Treasury Dept.](#)
- [Dear Non-Profits, Small Businesses, Artists, Freelancers, Gig Workers, Self-Employers, Part-Timers, and Solo Shop Warriors Wondering What's Next: This Money is For You. Please Take It. — Amanda Kool](#)
- [Small Business Lending Facility for Venture-Backed Companies — Neil Dugal](#)
- [COVID-19 Financial Assistance Guide for Startups—Almanac](#)
- [Frequently Asked Questions about the Coronavirus Economic Stabilization Act of 2020 \(CESA\) —Morrison Foerester](#)
- [CARES Loan Eligibility and Process — Morrison Foerester](#)
- [Small Business Loan Relief From CARES Act — Arnold & Porter](#)

Employment

- [NYC Paid Safe and Sick Leave Law FAQs](#)

Contracts

- [UPDATE: Force Majeure Under the Coronavirus \(COVID-19\) Pandemic — Paul Weiss](#)
- [Applicability of Force Majeure and Related Doctrines in Response to COVID-19 — Cooley](#)

Tax

- [American Institute of Certified Tax Planners](#)

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A smooth sea never made a skillful sailor.

FRANKLIN D. ROOSEVELT