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The CARES Act and the Self-Employed: A Primer

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The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) offers economic aid, such as small business loans and unemployment assistance, to self-employed individuals who traditionally have not been eligible for such benefits. Businesses that rely on gig-economy workers may classify these individuals as independent contractors instead of employees, leaving such workers with limited options for obtaining benefits. In addition, those who are self-employed or sole proprietors may also be denied some work-related benefits that regular employees enjoy. This GT Alert outlines new and expanded opportunities available via the CARES Act for self-employed individuals, sole proprietorships, gig economy workers, and independent contractors.

Pandemic Unemployment Assistance

The CARES Act creates a temporary Pandemic Unemployment Assistance (PUA) program, which allows self-employed workers, who are otherwise ineligible for unemployment benefits under state and federal law, to qualify for such benefits. Self-employed individuals, such as gig workers, consultants, or independent contractors qualify, as do part-time employees and those who lack sufficient work history.

The PUA program covers any individual who:

1) Is not otherwise eligible for, or has exhausted all rights to, unemployment benefits; and

2) Is unemployed, partially unemployed, or unable to work because of any of the following COVID-19-related

circumstances:

a.	The individual has been diagnosed with COVID-19 or is seeking diagnosis;
b.	A member of the individual’s household has been diagnosed with COVID-19;
c.	The individual is providing care for a family or household member who has been diagnosed with COVID-19;
d.	The individual is the primary caregiver for a child or other household member who is unable to attend school or another facility that has been closed due to COVID-19;
e.	The individual cannot reach their place of employment as a result of a COVID-19-related quarantine;
f.	The individual was scheduled to begin employment and does not have a job or is unable to reach that job as a direct result of COVID-19;
g.	The individual has become the primary support source for a household because the head of the household has died as a direct result of COVID-19;
h.	The individual has been forced to quit a job as a direct result of COVID-19;
i.	The individual’s place of employment is closed as a direct result of COVID-19.

Individuals able to telework or currently receiving paid sick leave or other paid benefits are excluded from the program.

If an individual qualifies for state benefits, in addition to the state unemployment compensation benefit they receive, they also will receive a $600 per week payment, for up to four months, for any weeks ending on or before July 31, 2020.

State unemployment benefit payments under the PUA program are available for the duration of the covered individual's period of unemployment, partial unemployment, or inability to work, beginning retroactively on Jan. 27, 2020, and ending Dec. 31, 2020, up to a maximum of 39 weeks. This represents a 13-week increase of the 26-week maximum allowed under some state unemployment laws. The $600 per week additional federal payment is not payable for any week of unemployment ending after July 31, 2020.

Unlike some state unemployment laws, the PUA program does not require a covered individual to be actively seeking work to receive unemployment benefits. Individuals must first, however, qualify under state law to receive their state's unemployment benefits to be eligible for the extra $600 per week federal payment. Although most states have waived the requirements for an individual to be actively seeking work, it remains to be seen whether all states will do so.
The PUA program also does not require a waiting period before eligibility for benefits. Many states' unemployment laws require applicants to wait one week between filing for benefits and becoming eligible for them. The CARES Act encourages state unemployment offices to waive the one-week waiting period, and all 50 states have since done so.

Issues are surfacing in these early days of the PUA program, however, as certain states, overwhelmed with unemployment claims, have indicated they need more time to develop processing systems for the self-employed and independent contractors. For example, to be eligible for the extra $600 in federal benefits, applicants must file for state unemployment benefits first, and some state unemployment insurance websites have crashed due to the high volume of filers. Other states do not have forms available for those who wish to file based on 1099 compensation. States are attempting to address these issues. Massachusetts is building a new platform for gig worker filers which may not be running until April 30. New York is working with technology companies to increase the capacity of its state unemployment benefits website. Other states are relying on the relaxed hiring standards encompassed in the CARES Act to bring back recently retired employees and add additional employees to address the unprecedented flood of unemployment benefit applications.

On April 5, the U.S. Department of Labor issued guidance that outlines eligibility criteria for gig workers and independent contractors. Some lawmakers argue that the guidance is too narrow and could result in many being denied benefits. The Small Business Administration (SBA) has not yet released guidance on whether individuals can receive both unemployment benefits and a Paycheck Protection Program loan, discussed below, at the same time. SBA has not yet released guidance on if individuals can receive both unemployment benefits and a Paycheck Protection Program loan, discussed below, at the same time.

Paycheck Protection Program

The CARES Act also creates a Paycheck Protection Program (PPP) under the SBA, and certain PPP advantages apply to independent contractors and self-employed individuals. The CARES Act initially provided $349 billion to the program; currently, Congress is working to add to the PPP an additional $251 billion to ensure eligible businesses and individuals have access to the funding. The PPP provides low-interest (1%) loan assistance to small businesses and other qualifying entities and individuals, to provide relief for up to eight weeks for payroll and operating costs and is potentially completely forgiven. The CARES Act sets the maximum loan amount under the PPP at 2.5 times average monthly payroll costs, up to a total of $10 million. For more general information regarding the SBA PPP program, please refer to the April 3 GT Alert, "Congress Passes CARES Act: Overview of the Relief Available to Small and Other Business Concerns."

The SBA issued an Interim Final Rule on April 2, 2020 (and additional guidance several days following) outlining how the program would function and implementing Sections 1102 and 1106 of the CARES Act. The rule confirmed that sole proprietorships, independent contractors, gig economy workers, and self-employed individuals are all eligible for the PPP. Eligibility for the program, however, comes with a caveat: independent contractors and sole proprietorships do not count as employees "for purposes of a borrower's PPP loan calculation," or "PPP loan forgiveness," because "independent contractors have the ability to apply for a PPP loan." With this interim final rule in place, independent contractors and sole proprietorships must apply on their own for the benefits of the PPP.

PPP funding is intended to cover payroll and some non-payroll expenses, including office lease, rent, mortgage interest, and utilities. To be eligible for 100% loan forgiveness (including accrued interest), self-employed individuals and sole proprietors must use the PPP loan to fund: (1) payroll, excluding the pro-rated portion of any compensation (including benefits) above $100,000 per year for any person; (2) health care benefits and insurance premiums; (3) mortgage interest (but not on any prepayment of or payment of principal on a covered mortgage obligation); (4) rent payments and leases in existence prior to Feb. 15, 2020; and (5) certain utility payments incurred in the ordinary course of business prior to Feb. 15, 2020. Additionally, to be eligible for loan forgiveness, salary and wages must be kept consistent during that time. The Interim Final Rule clarifies that "not more than 25 percent of the loan forgiveness amount may be attributable to non-payroll costs." The PPP can be used for other business-related expenses, like inventory, but that portion is non-forgivable. Notably, Tax need not be paid on any portion of the loan that is forgiven.

To determine the size of the loan, self-employed individuals, sole proprietorships, and independent contractors may consider following the below formula:

income for the past twelve months or the year 2019

subtract anything in excess of $100,000

divide that number by 12

multiply that number by 2.5

Borrowers will be required to provide documentation to establish eligibility. Such documents could include payroll processor records, payroll tax filings, or Form 1099-MISC, or for sole proprietors, documents that show income and expenses. For those without such forms, documentation such as bank records that demonstrate the qualifying payroll amount may be used.

The application period for sole proprietorships opened on April 3, but independent contractors and self-employed individuals were eligible to apply on April 10. The application period closes June 30. Applications can be submitted through one of the thousands of SBA-backed lenders. View the PPP borrower application form here.

A business must have been operational as of Feb. 15, 2020, to be eligible for the PPP. If an individual owns several sole proprietorships, applications can be filed for each, provided the entities have separate Employer Identification Numbers (EINs).

Economic Injury Disaster Loans

Small business owners, sole proprietorships, independent contractors and other self-employed individuals are eligible to apply for Economic Injury Disaster Loans (EIDL), a longstanding U.S. assistance program that was enhanced by the CARES Act. The CARES Act allows for an EIDL cash advance of up to $10,000, without repayment. The funds are intended to support temporary loss of revenue businesses and self-employed individuals are experiencing due to COVID-19. The rest of the already-established EIDL loan program caps out at $2 million, and although it is not forgivable, it may provide more flexibility than PPP in the types of expenses it covers, including a range of operating costs. The EIDL loan amount that can be requested is based on the amount of “economic injury” the applicant has sustained as a result of COVID-19. One can determine that “injury” (or loss) by comparing this year’s economic results to those in 2019.

Similar to PPP, the applicant will need to submit necessary documentation to establish eligibility, such as payroll processor records, payroll tax filings, or Form 1099-MISC, or income and expenses from a sole proprietorship. Bank records will suffice if the borrower does not have other forms of documentation.

Eligible entities and self-employed individuals may apply for both PPP and EIDL, to the extent the EIDL is used for purposes other than those permitted for PPP loans. But, if the entity took out an EIDL loan between Jan. 31, 2020, and April 3, 2020, and used that loan funding for payroll costs, the borrower is still eligible for the PPP, but the borrower must then use the PPP to refinance the EIDL loan.

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