TEXAS A&M UNIVERSITY
School of Law

"TAMU Law Answers" CARES Act Webinar Series

Webinar 2: Small Business Incentives under the CARES Act: Will it Help my Business?

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Presenters:

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- William Byrnes, Texas A&M Executive Professor of Law
- William Henning, Texas A&M Executive Professor of Law (Moderator)

While the panelists are all attorneys, they will be discussing the law generally, and nothing in the webinar should be considered as legal advice. Attendees should consult their own legal advisor to address their own unique circumstances.

TRANSCRIPT:

- Howdy. And welcome to the second of three Texas A&M Law School CARES Act webinars. The first in the series was held yesterday and was entitled "Individual Incentives Under the CARES Act-- What's In It For Me?" The third webinar will be held ~~next Tuesday, a week from today~~, *Monday, April 13*, and will cover health care implications under the CARES Act.

Today's topic is "Small Business Incentives Under the CARES Act-- Will It Help My Business?" While our panelists are both attorneys and law professors here at Texas A&M, they're going to be discussing the new law generally. And nothing in the webinar should be considered as legal advice. Attendees should consult their own legal advisors to address their unique circumstances.

I'm Bill Henning. And I'm going to be the moderator today. Our panelists are professors Neal Newman and William Byrnes. Both are outstanding teachers and scholars. Professor Newman's expertise is in the area of securities law, corporate law, financial accounting, and transactional law. Professor Byrnes' expertise lies in the areas of anti-money laundering and risk management, financial planning and wealth management, taxation, and international taxation. I could spend our entire hour recounting the accomplishment of these two terrific colleagues. But instead, let's jump into our first presentation. Each presentation will last 10 minutes. And then we'll start asking questions. Neal, it's all yours.

- Thank you, Bill. I appreciate the introduction. Let me see if I can manage this technology and [AUDIO OUT] up and running. Awesome.

So welcome to everybody out there in virtual world. I'm still getting used to talking to people that I can't necessarily see. But that's our reality. So let me get right to it. And let me get to the-- actually, let me get to the first slide.

So what I'm going to talk about in these 10 minutes-- here's the overview. First, I'm going to talk about the Paycheck Protection Plan from an overall perspective. Then I'm going to talk about the structure of the Paycheck Protection Plan and then how the payment to small businesses is calculated and then talk about whether or not the money has to be repaid. And then I'm going to talk about the timeline for the program's launch. And then probably what's most helpful is what small businesses can and should do right now.

So getting right into it, this Paycheck Protection Program is Division A, Title I of the CARES Act. So essentially, how this program works is the federal government has allocated some $349 billion to be allocated and go to small businesses. They've guaranteed up to $10 million per business. And they're calling them loans. We'll talk more about that.

Who qualifies? Generally, small businesses, as defined as 500 employees or less. And the intent and goal of the Paycheck Protection Program was to cover payroll and payroll-related expenses. So the bulk and the gist and the focus of this program is that this money be used to cover a small business payroll.

The coverage period for this is contemplated that this is to cover costs incurred from February 15, 2020, to June 30, 2020. And here's the part that is most significant. These loans are forgiven if the business uses the money to cover payroll and payroll-related expenses. So that's the key provision in here. And we'll talk about what that is exactly.

So that's the program from an-- 30,000-foot perspective. Let's drill down on a little bit of some of the specific aspects. So in terms of how the program is structured, as I said, this is federally backed and federally guaranteed money, which reduces a lot of risk for the lenders involved.

The program is being administered through the Small Business Administration. But the actual lending is coming from just any number of financial institutions. Typically, it's going to be our current SBA lenders. There are about 800. And there are more coming on board as we speak in order to keep up with the demand. So the actual loans are being facilitated through these financial institutions. And again, the loans are going to businesses that are-- have 500 or fewer employees. That's generally how the program is structured.

Another key piece of information is how the loan amount is calculated. And this is how it works. So what happens is-- so the borrower needs to take 2.5 times the company's average monthly payroll costs during the 12 months prior to applying for the loan. What is that average monthly cost? And then you add to that-- if any of you have applied or received money under the Economic Injury Disaster Loan, you can roll that loan into this, kind of refinance and consolidate it, just to simplify things.

But again, the amount is capped at $10 million-- so 2.5 times your average monthly payroll costs. Add in whatever amount you have received in the loan from the Economic Injury Disaster Loan. And that's the amount to which you'd be entitled to receive as a "loan."

Now, here's the part that is most significant. Does the money have to be paid back? Well, in the event that it's not to be paid back in terms of how you use the money, it's deferred for six months. So you don't have to pay anything for six months under any circumstances.

The loan term is for two years at a 1% interest rate-- so very favorable interest rates on these loans. But here's the part we like-- loans forgiven if used for payroll and payroll-related expenses. Also, small business does not have to report the forgiven loan as income as long as used for these qualifying expenses.

So those two provisions are key. But one caveat there-- the amount forgiven will be reduced for any employee cuts or any reduction in wages. And there's some specifics to that. We'll get into that in the question and answer. And as far as the timeline, the employer has until 6/30/2020 to hire back any employee that they may have laid off or cut.

So there's a lot of questions about what are those specific costs. So I've put them in a-- I've encapsulated them in a nice, neat format. So here are the costs that are included in payroll costs-- salaries/wages, paid leave, severance payments, group health benefits, retirement benefits, state and local payroll taxes.

Costs-- and I don't want to get too difficult about it. But the program also contemplates that you would use money for mortgage interest, rent, lease payments, and utilities. But what ideally-- how they want the costs ratio to be is 75% for payroll costs and no more than 25% for these other expenses. Again, this is the Paycheck Protection Program. So the whole idea is that this money used to keep your employees employed.

Excluded costs are individual compensation that's over $100,000. Certain federal taxes and compensation for non-US residents are excluded. Sick and family wages for which credit is allowed under the Families First Act-- those are going to be excluded expenses.

What is the timeline for the program's launch? Well, if you're a small business, I'm sure you're aware of this. Well, the CARES Act was signed into law on March the 27th, 2020. And the final rules were released on April the 2nd, 2020. So this thing has been moving at lightning speed. And the program was launched last Friday, actually. So we're just a few days into the program.

So those out there who are watching, if you-- if nothing else, this is probably most important slide to-- all this information I'm talking about, you can go to [sba.gov](sba.gov). And it's got information on all the different loan programs that are available-- the Paycheck Protection Program, the EIDL loan advance, SBA Express Bridge Loans, and SBA debt relief. So if nothing else, go to [sba.gov](sba.gov). And they have a wealth of information. And drill down on all the things that I'm talking about.

So my last slide before I pass it over to my colleague is what businesses can do and should do right now. Well, the first thing I recommend, if you haven't done so, is I would go to sba.gov. And I would apply for the Economic Injury Disaster Loan.

And just to be clear, the first $10,000 of that EIDL goes as a grant, which you do not have to pay back. So that's a way to get quick cash on hand as quickly as possible. If it goes smoothly, it's going to be about a three-day period before you get the money.

And as far as the Paycheck Protection Loan, what should I do? Contact your bank. See and hope that they are a participant in this program. That would be the best and most efficient way to do it.

And then after that-- and this is the part that can be overwhelming. There's so much out there. And there's so much information. And there's no one size fits all. There's going to be what's the right approach for you and the right number of options. That's just going to be a personal-- you all are just going to have to make a personal assessment, which I'm assuming and I'm confident most of you are doing that as we speak.

And then last, I just want to say this is a challenging time for all of us. So I'm just-- encourage you all to just stay in the fight. And we'll get through this. So with that, I'll conclude. And I'll pass it on to my colleague, Professor Byrnes.

- William, before you get started, let me make a couple of quick announcements here. First of all, we have a Q&A box down at the bottom of your screens. And we're going to have a lot of time after the presentations for questions and answers. And I hope you'll put your questions in there. We're going to-- we're, obviously, with a crowd this large, not going to be able to take all the questions. But we hope to take a number of questions live.

Secondly, in the setup, I stated the wrong date for the third webinar. I told you that it was next Tuesday. In fact, it is Monday, April 13, at noon, not Tuesday. So with that, let me turn it over to William.

- Well, howdy. I want to spend 10 minutes going over two of the confusing tax issues of the CARES Act. The first I'm going to discuss, the provision that allows employers or independent contractors to delay paying part of the Social Security payroll tax-- and then second, I'm going to turn to the employee retention tax credit that is worth $5,000 per employee.

Of these two provisions, I'm going to start with the delay of payment of the employer's payroll taxes. The CARES Act allows employees of any size-- that's by number of employees or by amount of income-- and also allows independent contractors to defer payment of an employer's Social Security payroll tax without suffering the late payment penalty.

This is a little bit different than the SBA then, which is specifically for small business. This applies to all employers. To be clear, the delay of payroll tax payment, though, only refers to the employer's share of the Social Security tax, which represents 6.2% of an employee's wages.

Well, Social Security only applies to the first $137,000 approximate of wages. So on a per-employee basis, the maximum savings, if you will, for the coming two years of not paying over the payroll tax will be approximately $8,500 per employee. Now, for those of you who are independent contractors, you call this the self-employment tax instead of the employer's Social Security tax.

Now, let's say, said simply, the CARES Act allows an employer and an independent contractor to defer payment of approximately $8,500 of Social Security taxes collected for this year minus any amounts that have already been paid over for January, February, or March. What the CARES Act does not do-- it does not allow the employer or an independent contractor to not pay over the employee's portion of the Social Security tax, the Medicare tax, which is both employer and employee's portion, and, finally, the withholding tax for the prepayment of the employee's federal income tax obligations.

Just to mention, there's also a quarterly payment from every employer to the federal government for unemployment insurance. And we call that by the acronym FUTA, or "foota," as you see on the slide, which is 6% of the first $7,000 of wages.

In general, you're-- as an employer, you're paying either quarterly, monthly, or twice each week. An employer must deposit to the US Treasury the employer and employee share of Social Security, of Medicare, of the federal income tax withheld. Failure to pay on time based on a day-by-day basis, subject to a higher and higher penalty until we reach 15% for late payment after 10 days--

The deferred employment tax is like a loan. It's a loan from the US Treasury to the employer. And thus, it must be repaid like a loan. But the repayment is over the coming two years, with half the amount due December 31, 2021, and the other half due December 31, 2022.

Importantly, the CARES Act does not relieve the employer or the independent contractor of liability for paying over that employer's portion of the Social Security tax to the Social Security Trust Fund. I bring up that point because many employers use third parties, such as a payroll administrator. And thus, if you want to take advantage of the not paying over the employer's portion of the Social Security tax, you're going to need to inform your payroll administrator.

However, the liability remains with the employer. So you're going to need to calendar the repayment over the next two years. You cannot use a defense that you should have been reminded by the payroll administrator, by your third-party professional organization, by example.

I want to point out three special considerations for employers who are considering to defer the Social Security payroll tax. First, the CARES Act requires economic hardship be established because of COVID-19. However, the IRS has published-- stated that it will simply, by default, presume a business that claims COVID-19 has been impacted by COVID-19. It's not going to go through audit and claim on that so long as the deferred taxes are repaid over two years.

Secondly, this payroll tax deferral is not applicable to any business that receives the Small Business Administration, the SBA, forgiveness for the Paycheck Protection Program that Professor Neal Newman just spoke about. So basically, a double-dip between the two programs, SBA or this loan from the government based on your Social Security taxes-- you can't double-dip, take advantage of both. The business must choose loan forgiveness or defer the payment.

Third and finally, the Families First Act for small and midsize employers created a refundable dollar-for-dollar tax credit to reimburse the employers for extended sick leave or family leave because of COVID-19, which, as I mentioned, the IRS is going to be very lenient and presume that businesses who claim it have suffered COVID-19. The entire country has.

How do you get the credit? You can take the credit against the collected Social Security taxes. We'll talk about that at the end of the webinar if you have questions because if you've taken your credit against the taxes, then how do you defer taxes that you no longer have to pay?

According to initial IRS guidance, though, you just simply retain the amount from the Social Security taxes we've collected. And self-employed taxpayers do the same, except just for your quarterly prepayment, your estimated tax payments, that you file April, June, September, and then, finally, January 15 of each year.

Now let's turn to the employee retention credit. This new refundable tax credit, which is different than the Families First Act tax credits, is designed to incentivize employers to retain employees during this COVID-19 crisis. Like for the paid sick and family leave, this credit may be immediately realized, put cash into your pocket, cash flow for the business, by offsetting the credit amount against the quarterly, monthly, or semiweekly Social Security tax obligation that you would normally be paying over to the US Treasury.

But to clear up any misunderstanding, again, this does not apply to the Medicare tax. It does not apply to the employee's portion of the Social Security tax and certainly does not apply to the withholding from the federal income tax liability of the employee. Because the credit is refundable, though, cash refundable, employers are eligible for a cash refund from the US Treasury upon filing the tax return for 2020, which is filed, of course, in 2021, in April.

The employee retention credit is worth, as I already mentioned, $5,000 per employee. But how do we get there? The credit is calculated at 50% of an employee's qualified wages paid by the employer up to a maximum of $10,000 of wages. Wages is not just an hourly or salary rate. It also includes the employer's health plan expenses.

I want to point out that an employer cannot inflate the amount of wages that should be taken into account for purposes of this credit because the rules state that you look back 30 days before the crisis. The COVID-19 began in March. Look back 30 days to see what the comparable wages would have been.

Which employers qualify for the tax credit? All employers are potentially eligible for this tax credit, again, unlike the SBA loan. However, when the credit may be taken or not depends on how the COVID impacted the business. So the first rule is it's available in a quarter when a business operations were either fully or partially suspended because of a government order relating to COVID-19. That's just about everybody in the country.

But secondly, if, for whatever reason, an order does not apply to your business, the business's gross receipts-- if they have declined more than 50% from the same quarter last year, then you can start taking the employee retention tax credit from that quarter. The business stops taking it in either the first quarter of 2021-- it no longer applies from 2021-- or if, in the third or fourth quarter of this year, the business has sudden growth and it reaches 80% of last year's gross receipts for the same quarter. So if there is a sudden rebound, that's when the credit no longer applies.

If an employer has no more than 100 employees-- that, for this purpose, is a small employer-- the amount of the qualified wages is all wages paid regardless if the employees are working or not working during this COVID crisis. But if, for this purpose, a large employer-- that's one with more than 100 employees-- wants the employee retention tax credit, the credit only applies for the wages paid when the workers are not working.

So for small employers, it's all wages during the time of crisis. For large employers, it's only for the wages paid for employees who are actually not working as a result of the crisis.

Now, with that, employers who received the payroll protection limit, because Neal was speaking about the Small Business Administration loan-- again, you can't double-dip. You have to make a choice. You either get these credits or you're going to get the forgivable loan. However, the forgivable loan only qualifies-- is only qualified for small employers. So all the medium and large employers above 500 employees-- this credit system and the deferral of Social Security taxes is probably the way to go.

And with that, let me conclude, saying the mechanics of these tax credits are complicated, same as the SBA loan application that we'll be discussing in a moment and the potential forgiveness after the SBA loan application. But even though they're complicated, what is certain is that Congress has given eligible employers a significant benefit to continue to pay employees until the end of the year.

Some employers are going to be better off with the SBA loans we'll discuss now. And others won't be able to take advantage of the SBA loan and are going to have to use the refundable credits and the deferral of Social Security for the employer's part. But regardless of which funding that the business chooses to stay afloat, the economy will recover in quarters 3 and 4 of this year. So I'll leave it on that upswing note. Thank you kindly.

- Thank you, William. We're going to start the Q&A now. We're getting a lot of questions in the question box. Thank you to the audience. We've gotten a lot of questions about loan documentation. Neal, I think this is for you-- questions about what document you use for this program or that program. Do you have sort of a generic answer to that?

- Yeah. So a lot of these loan documents or these loan applications are going to be on sba.gov. But in terms of documentation for your payroll and so forth, that wasn't spelled out in the rules.

So what's going to happen is each individual lender is going to have to make an assessment of what they think they need. And so they're going to pass it on to you.

But more than likely, some type of documentation or proof that your payroll is what it is-- that probably wasn't spelled out in the rules. So it's going to be on a case-by-case basis. So your lender will tell you what they want and what they need to approve your loan.

- Thank you. Can the loan still be forgiven if an employer cuts employer-- employees or cuts wages? I think you indicated that there were some limitations in that regard. Can you give us a little more detail?

- Yeah. So the way that works-- and again, every business is not structured the same. But let me take a typical example. So one way you do this is you take the number of employees that you had February 15 through June 30 of 2019, last year. Let's say you had 100 employees. And then you take the same comparable period in 2020, February 15 to June 30, 2020. And let's say you had 90 employees.

So if you cut your employees by 10, then 90% of your forgiveness, your reduction is-- well, let me just-- so if you get $500,000, then you would get 90% of that. So instead of $500,000 being forgiven, it'd be $450,000 because you only had 90% of the employees that you had this time last year. Is that clear, Bill, what I'm saying?

- Yeah. I think so. Thank you. Thank you.

- OK.

- Let's try one for William. William, what's the time period for which wages may be counted toward the CARES employee retention tax credit?

- So this goes back to March 12 for the Families First Act enactment-- so the wages from March 12 onward to December 31, 2020.

- Here's another one. And I think you've alluded to this, maybe hit it directly, but maybe if we could hit it again-- "I work for a large corporation with over 10,000 employees. Is my corporation eligible for the payroll tax deferral?"

- Indeed. I think that the Congress has the payroll tax deferral, which I said is just another way of saying a loan. It's a loan from Congress, US Treasury, to the employer. They cannot take advantage of the SBA loan. They're going to be too large an employer. So this is another way to give them an interest-free loan, mind you, interest-free loan, albeit it has to be paid back.

Here's one other small advantage to think about. Because businesses of that size are always on an accrual basis, the deduction may be taken immediately at 2020 even though the payment is made in 2021 and 2022.

- Great. Thank you. Here's one more, if I may. "What if my employer elects both the payment deferral and the retention tax credit? Can you do that? How will that work?"

- That's a good question. And the complexity is the purpose of both of these is to put cash in the hands of the employer to both pay employees and to meet excess expenses-- mortgages, as Neal brought it out, and other operating expenses. A company is incentivized to get the cash back either to have estimated tax payments from which it can withhold the equivalent of what would be the credit or, alternatively, to, and I'm going to say with estimated tax payments because a lot of companies are going to be at net operating losses this year-- I don't expect companies are going to be making net estimated tax payments for this year.

You're going to be incentivized to file your 2020 return as soon as the tax season opens in 2021 because all those credits are going to be cash back in hand. And what's going to happen practically is that banks and businesses are going to loan against those credits securitized by the credits so that, when paid in cash by US Treasury, they'll go to pay off your loan.

- Thank you. Let me look down here and see if we can select a good question. We've got some questions on how independent contractors are treated. I think that would probably be under the payroll protection plan. Neal, can you field that one?

- Yeah. What exactly is the question--

- How are independent contractors, as opposed to employees, going to be treated?

- Right. And that's been the one that has everybody scratching their heads as to how that works. And the honest answer is it's probably still developing. But from what I've seen, this is how it would work.

If you're a small business, you've got full-time employees. They're the ones who should be included in your payroll calculation. If you've got-- if there are people you've paid as independent contractors and so forth, they aren't going to be considered employees of your business. And they have the right and the opportunity to apply for either an EIDL grant or Paycheck Protection Program on their own. So otherwise, as Professor Byrnes mentioned, it'd be double-dipping.

So if you're a sole proprietor or independent contractor, you may have been paid by a small business. But the small business does not [? have to ?] include that payment to you because they can apply on their own in that regard.

- Great. Great. Let me see here. Did you have something you wanted to add there, Neal?

- Well, I'll just say this. There's so many questions on the-- that are coming in. And Bill will answer some live. And I'm doing my best to answer some by typing them in so we can get as many answered as we can. It's great that there's all these inquiries. We'll do the best we can. So I'm answering some, typing them in. But Bill, you can give us some live as well.

- Yeah. And we're getting groupings of questions. And I'm going to try to hit some of the ones, some of the questions, that are being asked by several people. And again, this one's for you, Neal. And then I'm going to find one for William right after this.

This is in the same vein, I think, as the independent contractor question. But it's a variant of it. And it's generally who qualifies for the payroll protection plan. And here are some of the variants that you might think about. Do you know if apartment managers, property managers, are excluded or disallowed? What about churches or 501c3s, small incorporated businesses? I'll stop there. Just do you have general advice along those lines?

- So with the apartment manager, in my mind-- well, in my mind, I'm assuming they're an employee of the apartment complex. So if that's the-- assuming that's the case, then their employer would be the one applying for the Paycheck Protection Program.

Nonprofits-- as long as they're 500 employees or less, they qualify for the Paycheck Protection Program. And what was the last one, Bill?

- Oh, gosh. I'm sorry you asked me that. I was looking at other questions. I don't recall.

- Yeah. It's nonprofits. So any small business with 500 employees or less qualifies. And there are very few exceptions. So if you fall into that category-- and independent contractors, sole proprietors-- they qualify as well. And I guess the biggest thing is what do they report since they don't have employees, most of them. And that's still kind of in flux. It's not crystal clear. But from what I've gathered, it would probably be your net earnings or your net compensation. It would probably be your net average compensation, average net monthly compensation, multiplied by 2.5-- makes any sense?

And I know with sole proprietors, it's very bumpy. But in terms of-- one month may be very different. But I would say you take your average 12 months, what's your average for that, multiply that by 2.5. And that's probably going to be qualifying for the Paycheck Protection Program loan.

- I'll throw in a caveat, which is I agree. I think that's where it will come out, especially for entrepreneurs who are using an LLC or an S corporation. I think it's also important to look at what part did the employer pay.

[INTERPOSING VOICES]

- At what point do they pay a distribution without the self-employment tax attached to it? The wages, for purposes of this, SBA or the credit, are going to apply to the part of that distribution that you paid self-employment tax on. The other part is going to be excluded.

- Thank you. William, this is for you. It's kind of an overlap question, I think. But it's really addressed to the tax consequences. If the small business loans are either pardoned or interest-free, are there going to be tax consequences? In other words, is there going to be a tax hit because of the forgiveness of one of the PPP loans?

- No. It's a good question. So specific-- the specific answer is the provisions allow this to be an exception. So what you're thinking about is discharge of debt equals income. There is an exception specifically for this protection loan from the SBA that that discharge of debt, that forgiveness, will not be gross income.

Consequentially, in essence, this is the government paying your employees. It's not the business paying the employees. The question you should ask is, do I also get a deduction for the payroll for the employees? Did I get money from the government to pay for the employees and, correspondingly, the payroll deduction? And there's no regulation on it. And then it's new.

So the treasury has not had time to address this yet. But as it stands now, without guidance provided, we can't really answer it. But the way it's written, I think you do. But we'll have to wait for guidance from the IRS.

- Great. William, I've got a longer question. And it's going to take me a minute to read it. But I think it's a good question. The question says, "We're a company of 130 employees that does not qualify for the PPP program because our parent company had more than 500 employees." First of all, is that actually correct? Is a subsidiary treated differently for this purpose? And then I have a follow-on to that, depending on your answer.

- So it is the group. You're correct. You wouldn't qualify because you're looking at the consolidated statement in this circumstance.

- Got it. And then going on with the question, "We've had a reduction in revenue, but not yet the 50% that would qualify for the ERC, the Employee Retention Credit. And even if we did, it doesn't sound like it's very beneficial as the company continues to play an employee when they are not working and then takes a tax credit in the future-- doesn't seem like it's very helpful." Is this one of those areas where things sort of fall between the cracks a little bit or is there a better-- is there a helpful response here?

- So the word is "netting." But I'd call it "offset." The company, remember, can offset that-- these particular credits against the employer's portion, which is about $8,000, as you saw on the slide, the employer's portion of the Social Security tax. So there is a way to monetize, and Congress wants companies to monetize, these credits now to help pay the, if you will, operating expenses. They expect that these companies of this size can still pay the employees. But the companies need help with their operating expenses because they just don't have the revenue coming in. So that's the reason.

I want to add in this. There's actually extensive regulations because of the 199A, this new Tax Cuts and Jobs Act, 20% deemed deduction from business income. It's the new provision. It only lasts during the Tax Cuts and Job Act years. But there's extensive regulations of businesses dividing themselves into small businesses so that they could take advantage of the 20% deduction.

So if you make over a certain amount of income-- $357,000 for a married couple filing-- they can't take advantage of it unless they fulfill these other rules. So they divide their business up to have the businesses be smaller and trying to-- anyway, the IRS has issued really extensive final regulations that you amalgamate those businesses. Generally, they're broken up through trusts and partnerships. I believe there's a lot of regulation on it. So if people are thinking, well, I'm just going to break my business into three or four businesses to qualify for the SBA loan, I'm telling you the IRS already thought of it.

- Thank you. I suspect this may be a hard one to answer. But I'm going to throw it at Neal because a number of people in the-- in our audience have asked it. “Apparently, for the EIDL program, the program states the $10,000 will be sent within three business days of a "successful" application whether or not the loan is approved. And I've got several questions as to-- about whether we know what constitutes a successful application and folks saying they've put in their applications and more than three days have gone by and the money has not been deposited.” Neal, is there any way to shed some light on this area?

- Can you all hear me?

- I can hear you well. Yes.

- OK. I've got a shaky connection. So the one thing that I hope everybody can appreciate, the-- the SBA and these banks are just being flooded with applications. And so what's been putting-- what's been put down in terms of what they're trying to and inspiring to do-- actual results are going to vary. So if it says three days, it could be anywhere from three days to-- I don't want to say three weeks. But they're going to get to them. It's going to be a case-by-case basis.

Some of you all will have very favorable experiences. Some of you all will, quite frankly, have very frustrating experiences with both these programs. It just depends on who your lender is, how well equipped they are to process these things, and how soon you got your application in, whether you got the documentation they needed. Everything is fluid. And things are happening on the fly.

Right now, for this-- probably this next week and a half to two weeks, it's going to be very chaotic until things smooth out and the banks catch up, quite frankly. And a lot of them are behind. They're trying to get up and running. So hang in there. Be persistent is the best I can tell you.

- Here's one that a couple of people have asked. And I think I'm going to take a shot at the answer to this one. And Neal or William, catch me if I'm wrong about this. But the questions coming in are for the-- for sba.gov, the site that you referenced earlier, Neal, the-- it's-- you don't have to apply for the payroll protection loan through them, only through your bank.

And I'm pretty confident the answer to that is yes. It's an SBA guaranteed loan. You can get information from the sba.gov website. But the actual application goes to the bank. Can you confirm that I've got that right, Neal?

- You got that absolutely right [AUDIO OUT].

- Here's a question, really, either of you--

- And [AUDIO OUT].

- I'm sorry. Neal, you broke up a little bit on that one. Let me try another question here. I think we got that last one done. “Regarding the PPP, who is going to verify whether the companies use the funds for the specific purposes in the act to obtain the loan forgiveness? Is it going to be the lenders, the federal government, self-report by the businesses, some other mechanism?” Do we have any response for that?

- Is Neal unfrozen? I'm not an SBA expert. But I can guarantee you it's not the lenders. They're not set up for that. So generally speaking, when things have to be verified, it falls on the IRS because the IRS has, obviously, the capacity because they have the agents and they're actually looking at tax returns. And then secondly, of course, every year, one has to file their tax return. So they actually see the documentation. They have expertise in the auditing.

With other areas, where they've been-- the Obamacare Act, anti-money laundering investigations and audits in the United States-- that's all done by the IRS. And it's charged to them. So I'm going to suspect the answer is when they look at your tax return. But-- OK, Neal's back with us. Maybe the SBA has a bunch of auditors that I don't know about on staff.

- Neal, did you hear that last question?

- No. I'm just-- maybe just because we have so many--

- So Neal, the question is, if you've turned in your loan documents, you've been approved, it's the end of the year, how does the government know you really paid employees and you're not just saying it? Who's going to audit that?

- So it's the same idea when you submit your tax returns. They're presumed to be accurate and true. And it's only going to be an issue if it calls into question and someone looks into it and it turns out you submitted things that weren't accurate.

So the best thing to do is to be as accurate as you can and be as truthful as you can. And more than likely, nothing will happen. It's the same idea when you submit your tax return. So more than likely, nothing will happen. But it's best to just put it in accurately. And if it gets called into question and you didn't submit accurately, that's when problems can happen.

- I'm going to walk you through what I think the answer is going to be. There is no guidance on this yet, obviously. The treasury hasn't released guidance whether it's SBA or for the IRS. But this is what's probably going to happen. You're going to receive a document that says you've had loan forgiveness. And it's going to be a discharge of debt.

And there's going to be-- that document already exists. But there's going to be a new box on it. And the new box is going to say the SBA loan so that when you file your tax return, you're going to have reported this amount of money. But you're going to say it's not part of income.

So now the IRS or US Treasury-- it's going to know that you had some kind of discharge of indebtedness from the SBA loan. They can look very easily at the tax return. What are they going to see if you're claiming wages? They're going to see your periodic, whether it's, again, twice a week or monthly. They're going to see your Social Security withholding, your Medicare withholding, and, of course, the federal income tax withholding on the employees.

And if they don't see those things, but they see the forgiveness on labor, there is going to be-- that's when you're in trouble. That's getting a little bit fraudulent. Somebody's going to get in trouble. I think that's what's going to happen.

- Makes a lot of sense. Neal, I think this one is going to be for you. It's a little bit longer question, but a good one. "I have a client that downsized in 2019, reducing its rent, reducing its number of employees. And that was all done before COVID-19. The PPP is based on maintaining a percentage of employment for the previous 12 months, which is going to include a time period, in this case, with a significantly higher employment percentage. Does the act have any guidance for a situation like that?"

- So if I'm understanding the question correctly-- well, so one way in which we would-- that's calculated is we take your number of employees, who did you have on your-- who did you have as pay-- or who did you have employees from February 15, 2019, to June 30, 2019? It may have fluctuated. So maybe your average number of employees during that period-- and that's-- that would be your employment number, what it would be based off of.

And then we compare that to the covered period this period, which would be 2/15/2020 to June 30. So you would be subject to the fraction of a difference. Like if you had 90 employees in that period of 2019 versus 100 employees during this period, 10% of that then would not qualify for being forgiven. That's the broad strokes--

- So what we're really saying is that the act doesn't provide any forgiveness or flexibility in situations where you went through a deliberate downsizing between last year and this year having nothing to do with COVID?

- Right. It's going to look at who'd you have, who did you employ, who did you have employed this time last year versus who you have employed this time. The goal was to keep everybody who you had-- to keep them on the payroll. And there may be different permutations. And frankly, there are going to be some situations that weren't contemplated in the rule. And some special considerations may be taken. But that would be worked out on a case-by-case basis, I would imagine.

- Got it. Here's a question. And we've got a few along this line, variations of this. "If I've already applied for the Paycheck Protection Plan, can I still apply for the EIDL, the Economic Injury Disaster Loan?" I don't know who that one's for. Either of you jump in here.

- I'll take that. You can apply for both. What was contemplated is you would-- the EIDL was rolled out before the Paycheck Protection Program. But I didn't see anything that said you can't apply for both. So get whatever makes sense for your business. I would say try and avail yourselves to everything that's necessary as long as it fits into your scheme and what you're trying to do business-wise and so forth. So yeah, you can apply for both.

- Here's one. “For individuals with multiple businesses but no employees, is it a good idea to apply for each of those businesses separately?” And it says, "My client is concerned that he may be barred from obtaining multiple loans of the same kind"-- any thoughts on that one?

- I would say operate in good faith. And it's always going to be a substance over form. In substance, what are you really? Are you actually two separate businesses or are you really one aggregate business doing a couple things? I think it's a substance over form argument. And I would say just operate in good faith. And don't get on anyone's radar as trying to work the system. Will, you may have other thoughts on that. That's my short answer.

- I just bring up that there are extensive final regulations for Section 199A down to 20% deemed deduction for business income that deal with the one owner or two related owners and many multiple businesses underneath. And they should be looked at. They are written for a specific code provision. However, it makes sense that one would look at them. The SBA, by example, has guidance of what Treasury has thought in other areas.

- Here's a good question. "All my employees have been furloughed and have applied for unemployment. We would like to use the PPP funds to bring back all our employees when we reopen even if we don't have the business to support that level of staffing. What if I'm not allowed to reopen during the eight-week period after the loan is received due to local ordinance? Will I still have to bring back all the employees so the funds can be expended on payroll to be forgiven?"

I'm reluctant to jump in too much here. I'm going to guess that the answer is yes. But Neal, would you take that one?

- So again, this goes to each business. You are going to-- as I'm sure you are doing, you can just look at these programs as options. And you have to always factor them in. What makes the most sense for what's going on with your business?

And you do have to look beyond because this-- what was contemplated here is that this is a stopgap measure to keep everyone afloat for February 15 to June 30, 2020. And the Paycheck Protection Program doesn't look much beyond that right now. So each individual business is going to have to factor that in as to what's life is going to look back-- look like beyond June 30, 2020. And none of us knows that for sure. And that's what’s unsettling and uncertain about it.

So I know I didn't answer the question. I'm saying you've got to just-- you've got to do the analysis as to what makes the most sense for your business. But as far as-- it's who is on your payroll for that period-- is what qualifies for the forgiveness. And what new acts may be coming down the pike to address beyond that-- it's going to be very fluid. And it's going to see where are we with COVID-19 and getting that under control. So it's a very dynamic situation. That's my non-answer answer.

- I'm going to add I think that-- most people think that this-- in third and fourth quarter we have our recovery. And so Congress intends as a stopgap-- they want you to bring the employees back they're trying to make it enticing enough for small business-- remember, this doesn't work for large-- but for small business to bring them back because with the employment comes the medical care.

And so right now, there's three, four million Americans-- there'll be a lot more when they report unemployment this week-- who are going to have to go into COBRA, which is-- you keep your medical care. But you have to pay for it out of pocket. And this is a really bad and hard system. And COBRA is not very fast. And so it's going to leave a lot of Americans in what we call a tax-- a donut hole, like you fall into the hole, where people might not have coverage at the immediate time. And that's not what Congress wants for COVID-19 crisis.

So I think because of this, not only are you going to get the grant if you-- the forgiveness if you keep them on, but you're going to get the deduction as well. You're going to get a double-- in this case, you're going get a double-dip-- the tax-free income, government's paying your employees. And I think you're going to get the deduction not because Congress wants to give you a gift, because Congress needs you to keep them on staff even though it takes the economy four or five months to get back rolling that you actually need the employees. I think that's what's going on here.

- We are down to our last three or four minutes. And I've got a couple more questions here. But maybe before I ask another question from our audience, I'd throw it to each of you. Is there a question or a topic that you think we haven't hit today that would be important for our audience to hear about, just something real quick that you may have discovered about the act that you'd like to throw out there? If there's no takers, I've got more questions.

- Well, let's see. We've got three minutes.

- Yeah.

- I would say just-- you just got to be persistent. And you got to be patient. And that's the two things I would say at this point. And just hang in there. Be persistent. Be patient. If you're applying for a loan and you're trying to get one, just keep working away at it. And I know there's a whole lot of questions that we didn't answer. I tried to get to as many as I could. But we just couldn't get to them all. But just hang in there.

- Yeah. And I want to reiterate that as well. The terrific questions, and we've gotten a ton of them-- and we've been answering them as we've gone along, some with typed answers rather than addressing in the actual program. But we apologize to those whose questions we didn't get to. It's just time and capacity to get to them.

I think we hit this, Neal, previously in one of the recent questions. But maybe this question sharpens the focus a little bit. “A business where the employees have been laid off, already filed for unemployment-- and the question is, can you hire back all those employees and use PPP to do that?” And I'm confident the answers-- to that is yes. But I'd like you to confirm that for our audience.

- As long as there-- anyone who was on your payroll between February 15, 2020, and June 30, 2020, you can count those employees as on your payroll. And you can count the compensation as amount that should be included in forgiveness. Yes. Get them on there by June 30, 2020. That's the key date. That's the key date as of now.

- Good. That's extremely helpful. Thank you.

- We got a minute left, Bill.

- Got a minute left? All right. Then I'm going to throw one that I'm going to guess is going to stump you, but a couple of people have asked. “Could you please provide the exact website where we may apply for the loan up to $10 million, not the PPP, but the main SBA loan.” Is that something you happen to have the full website for or is that something you're going to have to just send folks to sba.gov to figure it out?

- That may be also-- may also be administered through your individual lender. But I would start at sba.gov. But that may be something that's also facilitated through your individual banks. I don't know for certain.

- Thank you, Neal. I think we're going to make that the last question. We're just about out of time. I do want to give everyone a quick reminder about the upcoming webinar on the health care-related issues next Monday. If you were here when we started, I inadvertently said Tuesday. But it's next Monday at noon.

We appreciate your attendance today. Thank you very much. I hope this has been helpful. Thank you, Neal and William, very much.

- Yeah. And Bill, if-- I don't know if we can leave it open to try and answer as many questions online, just typing them out. I don't know if we've got that capability. But I'm trying to answer as many as I can through the box.

- I don't know. I'm going to leave. But I honestly don't know the answer to that, Neal.

- OK.

- Take a shot at it.

- We can leave--

- Hopefully, some of the answers will go back.

- We can leave this on for another 10 minutes. Yes.

- OK. We're going to answer-- I'm going to answer-- we're going to answer as many as we can, just typing them up, for the next 10 minutes. And we'll do the best we can.

- That's terrific. Thank you.

- You can either type--

- And thank you to the audience and to our presenters.

- So I think Gabriel was about to say we can either type them or answer them live. I think I'll just try and answer them live.

- Correct. Yes.

- So let's see. It says, “For living expenses and to reinvest, will you please explain if we are eligible for the $10,000 and possibly a loan? We have a CPA doing our taxes and have been in business for three years.” OK. Hold up.

"So I haven't seen or heard my question answered yet. So if I may, I would like to ask again. My wife and I have an LLC. We are real estate investors, no W-2 income. We use the profit for living expenses and we-- and to reinvest. Will you please explain if we are eligible for the $10,000 and possibly a loan? We have a CPA doing"-- yes, you-- as an LLC, you're-- you qualify as a small business. The fact you don't have W-2s is not a problem.

Again, as far as-- I believe, based on what I've read, it's going to be your average net earnings, your average monthly net earnings, multiplied by 2.5-- is what I believe you'd be eligible for under the Paycheck Protection Program. And you should be eligible for a $10,000 grant under the EIDL program is what I believe.

Next question—“Will voluntary employee exit-- exists-- be treated as a cut in numbers for the voluntary employee exit?” Yeah. A voluntary employee exit will still be a cut because the idea-- if they're not on your payroll, then we don't need to be concerned with compensating them.

“What will the financial statement disclosure requirement be for participants in these programs?” Again, that's going to be how you-- what each individual lender is going to request. That's the one thing that wasn't specified in the rule, which you can understand. So your lender is probably trying to figure out what they probably need to get comfortable. So that's going to be on a case-by-case basis and whatever your lender says.

"I'm sorry," it says. "My question has been answered live. But I didn't hear Bill read it. And I haven't heard either addressed." Let's see what your question is. “So does employee wages come into play with calculating the forgiveness of the-- with the PPP or just the amount of employees we've retained? “

Maybe I wasn't crystal clear. So in terms of how much you receive, it's your average payroll, monthly payroll, this time last year multiplied by 2.5. And that's how much you're entitled to receive because understand this is to cover the period that hasn't happened yet up through June 30, 2020. So that's the amount you're eligible to receive.

And then the amount that's eligible to be forgiven depends on what your payroll looks like now in terms of dollars that you're paying your employee as compared to a prior period and how many employees you have on your payroll. So if you only have a fraction of the employees on your payroll now through June 30 compared to this time last year, then that there will be a corresponding fraction available for forgiveness.

Likewise, if you reduce wages, and I won't go into the specific calculation, but if you reduce wages by more than 25% during this period as compared to how much you were paying, let's say-- the quarter prior, I think, is what they say-- then the amount greater than 25% in payroll reduction is not eligible for forgiveness.

The employee wages—“I'm a realtor. I work for”— let's see. “My wife and I have an LLC” -- I think we answered that question. I think that question's been answered.

“Does employee wages come into play with calculating the forgiveness of the PPP?” Yes. Both. So both-- what you're paying comes into play. In other words, if you're paying folks less than before, then it's like a dollar-for-dollar reduction in the amount over 25% in the cut. And if you're-- you have less employees in terms of number, then the amount that's eligible for forgiveness will be cut by a corresponding fraction. I know I'm not getting specific into how that's calculated. There's just a lot of questions coming in.

So let's see. We still got some participants. As long as I see participants, I'm going to keep doing my best to answer questions until Gabriel says we need to cut it off. Let's see.

“As a 1099, I have a monthly stipend that I take out of my receipts, then health insurance premiums and SEP contributions. Is this what I use to calculate the average payroll?” I would say yes. That's what I would include.

Again, 1099 sole proprietors-- that part was not specifically drilled down. So they're probably going to be figuring that out as they go. But a good faith estimate that makes sense, I think, would pass muster. And what you propose, R. Wagner, I think would work.

Let's see. If I'm a-- let's see.

[MUMBLING]

“Will Quicken have a TurboTax type of Q&A interface to help with these decisions?” That's a great question. My guess is, knowing TurboTax-- I use TurboTax. My guess is they are all over this and they will have it. But I can't say for certain. But my guess is they will be all over this. And they are probably working with coding now to adapt it to fit with some of these issues going on with the CARES Act.

“Will we be able to get a copy of the slides used in this presentation?” Yes, you will. *[Slides available at TAMULawAnswers.info*.] And by the way, my presentation is 30 slides, 30 pages-- or 30 slides. It has all different kinds of information. But for time purposes, I only gave you the first few slides. So this will be posted. And you can see all the permutations and nuances of the PPP act. And hopefully, your question will be answered just by reviewing that.

“If you own multiple LLCs and are the sole employee, can you apply for the PPP loan or would it be better to apply for the—“

You are eligible to apply for both an EIDL loan and a PPP loan. And what you should do just depends on what makes sense for your own individual situation. That was Ben Aguirre asking that. What makes sense financially, both short-term, long-term-- you've got to do that analysis. But you can do both. What's your cost structure looking like? All that comes into play.

I understand you [?can ? can’t?] double-dip. But from July to December, you still can't use the retention credit or the deferral option if you receive the forgiveness of the PPP. I think that would have been a William question. I understand you can't double-dip. But from July to December, you still can't use the retention credit or the deferral option if you receive the forgiveness of the PPP. I do not know the answer to that one.

“If you have contract labor, would that qualify for the SBA loan?” Again, contract labor, from what we've seen-- they are not considered employees, necessarily. And those people are likely independent contractors working for themselves. So assuming they are-- what it seems to be, they need to go ahead and apply for the PPP or the EIDL loan on their own.

- Neal, we need to wrap up.

- OK. All right. So everybody, hang in there and just persevere.