



CARES ACT UPDATES AND COVID-19 RELATED LEGAL ISSUES

National Sea Grant Law Center
Informational Webinar
May 27, 2020



THE UNIVERSITY of
MISSISSIPPI
SCHOOL OF LAW

Webinar Overview

- Introduction & Background
- General Updates
- Fishery Participants Program
- USDA Programs
- Liability Concerns
- PPP Loan Forgiveness
- Questions and Answers

Who We Are

- One of 34 Sea Grant Programs
- Based at the University of Mississippi School of Law
- Established to provide non-advocacy legal research, outreach, and education services to Sea Grant network.



The screenshot shows the website for The National Sea Grant Law Center. The header features the Sea Grant Law Center logo and the University of Mississippi School of Law logo. Below the header is a navigation menu with buttons for Home, About Us, Our Work, Advisory, Publications, Projects, Funding, Legal Network, Blog, News, and a Search bar. The main content area is titled "COVID-19 Resources" and includes a breadcrumb trail: Home > COVID-19 Resources. A large image of a coronavirus particle is displayed. To the right of the image is a "Contact Us" box with the text: "Have questions or comments about the National Sea Grant Law Center? Feel free to contact us!" and contact information: "Call or fax us at: 662-915-7775, 662-915-5267 (fax)". Below the image, there are two paragraphs of text. The first paragraph states: "The COVID-19 pandemic is disrupting our personal lives and businesses in unprecedented ways. The U.S. Congress responded by passing the CARES Act, a \$2 trillion economic stabilization package, to provide relief to affected individuals and businesses." The second paragraph states: "The National Sea Grant Law Center, in partnership with the Mississippi-Alabama Sea Grant Legal Program, created this webpage to serve as a clearinghouse of reliable information on CARES Act programs and other issues associated with COVID-19 for the fishing, aquaculture, and seafood industries. This page is updated frequently as questions are received and resources come online."

<http://nsglc.olemiss.edu/covid19>

General Updates

- New information on COVID-19 Resources webpage:
 - USDA Food Purchases
 - Coronavirus Food Assistance Program (CFAP)
- COVID-19 Advisory Requests:
 - Impact of stipends on unemployment compensation
 - Liability of nonprofit for resuming activities
 - Review of informational fact sheet for charter boat operators
 - Clarification of PPP loan calculations for sole proprietors.
 - Clarification regarding which species are included in CFAP.

Fishery Participant Program

- CARES Act allocated \$300 million for economic relief to “fishery participants.” To be eligible must have suffered:
 - **Economic revenue losses of 35%** as compared to five year average or
 - **Negative impacts** to subsistence, cultural, or ceremonial fisheries.
- Disbursed through interstate marine fisheries commissions (and PR and USVI). State allocations set by NOAA.
- Eligibility determinations will vary by states as set forth in their spend plans.

USDA SECTION 32 FOOD PURCHASES

What is Section 32?

Section 32 of the Agriculture Act of 1935 authorizes the USDA to purchase a variety of domestically produced and processed agricultural commodities. These commodities are then provided to USDA's Food and Nutrition Service (FNS) assistance programs, such as food banks that operate the Emergency Food Assistance Program (TEFAP).

Is seafood included?

Yes, USDA will be purchasing Alaskan pollock (\$20 million) and Atlantic haddock, pollock, and redfish (\$20 million).

What can eligible producers do now?

Producers of Alaskan pollock or Atlantic haddock, pollock, or redfish should become a USDA approved vendor if they aren't one already so they can submit offers through USDA's Web-Based Supply Chain Management System (WBSCM). The Agricultural Marketing Service (AMS) will start posting solicitations in June.

To learn more, visit: <https://bit.ly/2ZFPxjW>

CORONAVIRUS FOOD ASSISTANCE PROGRAM (CFAP)

What is CFAP?

A \$16 billion dollar USDA direct aid program for farmers impacted by COVID.

Is aquaculture included?

Yes, CFAP regulations explicitly provide for aid to aquaculture operations, but the USDA needs more time to determine which kinds of aquaculture commodities are eligible.

Which kinds of aquaculture businesses will be eligible?

Eligible aquaculture producers must be privately owned and propagate freshwater or saltwater products in a controlled environment. To qualify for CFAP, the business must be producing a commodity that **suffered a loss in value of 5% or greater** between January and April 2020 *or* faced **additional marketing costs** due to COVID-19.

What can aquaculture operators do now?

Respond to the USDA's Notice of Funding Availability (NOFA) by submitting the requested information on prices and inventory. Await further guidance regarding which aquaculture commodities are eligible.

For the NOFA and more information visit: <https://bit.ly/2XcHhVH>

Liability Concerns

- As states lift stay-at-home orders and beaches, parks, schools, and businesses begin to reopen, there may be questions about whether these activities can resume safely.
- What are the legal liabilities for businesses and institutions?
- What are the ways to manage these legal risk?

Liability for Negligence

- Negligence: “conduct which falls below the standard established by law for the protection of others against unreasonable risk of harm.”
 - 1) defendant owed a **duty** to the plaintiff;
 - 2) defendant breached that duty; and
 - 3) breach proximately caused injury to the plaintiff.
- Duty of care: act with **due care** to provide safe environment.
 - **Best practice**: comply with state regulations, University guidelines, federal and state agency guidance (CDC, OSHA, etc.), relevant best practices.
 - CDC guidelines for community events:
<https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/index.html>

Potential Limits on Negligence?

- Sovereign immunity
 - Generally, makes a state **immune** from tort suits under the doctrine.
 - Many states have tort claims acts **waiving immunity**
 - There are **exceptions** to the waiver
 - Discretionary function exception
- Assumption of the risk
 - A person assumes a risk where he or she voluntarily subjects himself or herself to a known peril.
 - Participating in activities during a pandemic=assumption of the risk

Liability Waivers

- Courts have not ruled on Covid-19 waivers...yet.
- Whether waivers are enforceable varies by state.
- If you do have a waiver, the language should be **clear** and **unambiguous**.
- Generally, **unenforceable** if:
 - Gross or extreme negligence
 - Contrary to public policy

Elements of Liability Waivers

- Assumption of Risk
- Waiver
- Indemnification
- Agreement to Comply

PPP REMINDERS

PPP applies to all small businesses.

Independent Contractors:

The main purpose of the Paycheck Protection Program is to **pay employees**. Sole-proprietor businesses that use independent contractors are able to get loans to pay themselves and any W-2 employees that they employ under the PPP.

- Employer can't help an independent contractor through the PPP.
- But independent contractors are themselves eligible to apply and receive PPP loans to pay themselves.

Seasonal Calculation:

The SBA interim rule for seasonal businesses refers to "seasonal employers" and is meant for businesses that would be hiring employees (issued W-2s) in the summer months.

- If the business is not hiring employees (as opposed to independent contractors), they could not be considered a "seasonal employer."
- If a business does not have W-2 employees, its PPP loan amount would not change under the seasonal calculation rule since their payroll costs would remain the same.

PPP LOAN FORGIVENESS - OVERVIEW

What is forgivable?

Payroll costs and certain non-payroll costs. Payroll costs are capped at \$100,000 for each employee, pro-rated over the loan period. Allowable non-payroll costs include:

- Mortgage interest (no pre-payments), lease, and utility (electricity, gas, water, transportation, telephone, or internet access) payments.
 - *Must be connected to the business and in existence before Feb. 15, 2020.*

What is the 75% rule?

75% of the forgivable amount must be for payroll costs.

- Not based in statute, congressional action ***is not*** needed to change.

What is the applicable time period?

The 8-week (56 day) covered loan period.

- Based in the statute, congressional action ***is*** needed to change.

What is the review process?

- Borrower submits a loan application. Lender has 60 days to review.
- SBA will be auditing loans greater than \$2 million.
- All non-forgivable loan amounts must be repaid within 2 years.

PPP LOAN FORGIVENESS

WHAT IMPACTS THE FORGIVENESS AMOUNT?

According to SBA guidance, the amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest.

- To maximize forgiveness, at least 75% must be spent on payroll costs.
 - No more than 25% of the forgivable loan amount can be spent on mortgage interest, rent, and utilities related to the business and entered into before February 15, 2020.
- Proceeds from any advance up to \$10,000 on an EIDL loan will be deducted from the loan forgiveness amount on the PPP loan.
- Forgiveness is based on the employer maintaining or quickly rehiring employees and maintaining salary levels.
 - Forgiveness will be reduced if **full-time** headcount declines.
 - Independent Contractors do not count as employees.
 - Forgiveness will be reduced if salaries decrease by more than 25% for an employee.
 - Does not apply to employees who made more than a pro rata amount equal to \$100,000 in a single pay period

PPP LOAN FORGIVENESS CALCULATIONS - PAYROLL

When must payroll be incurred/paid to be forgivable?

Payroll costs incurred or paid during 8-week period are forgivable. The 8-week period can begin:

- Date of loan disbursement (“covered period”); or
- First day of the first payroll cycle in the covered period (“alternative payroll covered period”).
 - *Second option only available if have bi-weekly or more frequent payroll cycles.*

Example:

A borrower has a bi-weekly payroll schedule (every other week). Its 8-week covered period begins on June 1 and ends on July 26. The first day of its first payroll cycle that starts in the covered period is June 7.

- The borrower may elect an alternative payroll covered period that starts on June 7 and ends 55 days later (for a total of 56 days) on August 1.
- Payroll costs paid during alternative payroll covered period = forgivable.
- Payroll costs incurred during alternative payroll covered period = forgivable if paid on or before the first regular payroll date occurring after August 1.
- *Payroll costs that were both paid and incurred during the covered period (or alternative payroll covered period) may only be counted once.*

PPP LOAN FORGIVENESS CALCULATIONS - NON-PAYROLL

When must non-payroll costs be incurred and/or paid to be eligible for forgiveness?

A non-payroll cost is eligible for forgiveness if it was:

- Paid during the covered period; or
- Incurred during the covered period and paid on or before the next regular billing date, even if the billing date is after the covered period.

Example:

A borrower's covered period begins on June 1 and ends on July 26. It pays its May and June electricity bill during the covered period and pays its July electricity bill on August 10, which is the next regular billing date.

- May and June electricity bills = forgivable
 - Paid during the covered period.
- Portion of July electricity bill through July 26 (the end of the covered period) = forgivable
 - Incurred during covered period and paid on the next regular billing date.

PPP LOAN FORGIVENESS – EMPLOYEE RETENTION

REHIRE EXCEPTIONS

The CARES Act gave the SBA the authority to establish de minimis exceptions to the limits on loan forgiveness under the Act. The SBA using this provision to help businesses who attempt to rehire employees.

- Laid-off employees whom the borrower offered to rehire are excluded from the CARES Act's loan forgiveness reduction calculation.
- Also applicable to employees who had hours reduced.

Exception only available if:

- Borrower made a good faith, written offer to rehire or restore the reduced hours of the employee during the covered period or the alternative payroll covered period;
- Offer was for the same salary or wages and same number of hours as earned by the employee in the last pay period before layoff or reduction in hours;
- Offer was rejected by the employee;
- Borrower has maintained records documenting the offer and its rejection; and
- ***Borrower informed the applicable state unemployment insurance office of such employee's rejected offer of reemployment within 30 days of the employee's rejection of the offer***
 - **Details on this process are forthcoming.**



Questions?

Please type your question into the Chat window.

Answer Poll Before Signing Off!

Contact Us

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