

# Independent School Compliance with Federal Laws after Taking Federal Loans

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**Holland & Knight**

# SBA Loans Under the CARES Act

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# SBA Loans

- The CARES Act includes three different SBA Loan opportunities:
  - SBA Economic Injury Disaster Loans
  - SBA Express Loans
  - SBA Paycheck Protection Program Forgivable Loans
- Each opportunity has detailed eligibility requirements and limits on the use of the funds received.

# Economic Injury Disaster Loans

- The CARES Act provided \$10 billion for the SBA to provide Economic Injury Disaster Loans (EIDLs) until December 31, 2020.
- Maximum Loan Limit: \$2 million.
- Permissible Uses: Fixed debts, payroll, accounts payable and other bills, where the ability to pay is impacted by the disaster.
- Maximum Interest Rate: 3.75% for small businesses, 2.75% for nonprofits.
- Maximum Loan Term: 30 years, but the terms are set on a case-by-case basis, based upon each borrower's ability to repay.
- Available to nonprofits.
- All funds allocated to program have been spent, and the SBA is not accepting any new applications for EIDLs.

# Express Loans

- The CARES Act increases the maximum loan for an SBA Express loan from \$350,000 to \$1 million through December 31, 2020.
- Not available to not-for-profit businesses.
- Turnaround Time: 36 hours for approval or denial of a completed application by SBA designated lenders.
- Maximum Loan Limit: \$1 million.
- Permissible Uses: Same as the standard 7(a) loan.
- Maximum Loan Term: 7 years with an option to revolve.
- Appears to be no longer available (or limited to \$25,000 if borrower has an existing relationship with a SBA Express Lender).

# SBA Paycheck Protection Program

## Overview

- The CARES Act (and a supplemental Act) created a new \$659 billion forgivable loan program but it is limited to “small businesses” (but includes 501(c)(3) entities).
- Entities consisting of 500 employees or less (including part-time employees and employees of affiliates) are deemed “small businesses.”
- Interest Rate and Term: 1 percent interest payable over 2 years (no payments during first six months).

# SBA Paycheck Protection Program

## Loan Amount & Use of Proceeds

- Maximum Loan Limit: The lesser of average monthly payroll costs multiplied by 2.5 or \$10 million.
- Payroll costs include (1) salary, wages and commission (up to \$100K per U.S. employee), (2) cash tip payment, (3) paid leave time, (4) allowance for dismissal/separation, (5) health insurance premium, (6) retirement benefits and (7) state and local employment taxes (but not federal taxes).
- Loan proceeds may be used only for payroll costs and other permitted uses (75% must be used for payroll costs).

# SBA Payroll Protection Program

## Forgiveness

- If the PPP loan proceeds are (a) spent within the covered period, (b) used for forgivable uses, and (c) certain employment/wage levels are maintained, the loan is converted to a grant and does not need to be repaid.
- Covered Period: The 8-week period beginning from first disbursement.
- Forgivable Uses: (1) payroll costs; (2) mortgage interest; (3) rent; or (4) utilities.
- Forgiveness Reduction: If the average FTE employment or individual salary/wages are reduced during the covered period unless such reduction is eliminated by June 30, 2020.



# SBA Paycheck Protection Program

## “Necessary” Certification

- Required certification by applicant: “Current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”
- FAQs issued by SBA: “Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.”
- FAQs issued by SBA: “unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith.”

# SBA Paycheck Protection Program

## “Necessary” Certification & Schools

- Safe harbor if PPP funds returned by May 14, 2020.
- Currently no bright line test (but more guidance to be issued before May 14).
- All loans in excess of \$2,000,000 will be reviewed by SBA following request for forgiveness.
- Borrowers should prepare an internal memo justifying their certification as of the time made.



It has come to our attention that some private schools with significant endowments have taken #PPP loans. They should return them. @SBAgov #CARESAct #PPPLoans

8:46 AM · May 1, 2020 · Twitter for iPhone

# Compliance Issues

Philip J. Catanzano

# Federal Laws Triggered by Federal Financial Assistance

- Title IX of the Education Amendments Act of 1972
- Section 504 of the Rehabilitation Act of 1973\*
- Title VI of the Civil Rights Act of 1964
- Age Discrimination Act of 1975

(\*While there has been some debate on whether and how Section 504 would apply to schools, the language of the Section 504 regulations indicate that they would apply unless there is an update.)

# Title IX of the Education Amendments Act of 1972

- Regulations found at 34 C.F.R. 106, but currently being revised. Stay tuned!
- Heavily debated because of its focus on sexual misconduct the last few years.
- Many schools have prohibitions on sexual misconduct already, but Title IX's application could change the format of that process.
  - Different forms of notice
  - Different outcome notifications
  - Parity of process is key
- Institutions must appoint a Title IX Coordinator and publish contact information.
- Institutions must publish grievance procedures, but be careful of outdated guidance.

# Title IX of the Education Amendments Act of 1972

- Title IX also concerned with equity in interscholastic athletics. (It is a misnomer that Title IX is focused only on intercollegiate athletics.)
- Very challenging reviews because much more specific than general sentiments of fairness, e.g., not a question of “it’s fair!” but rather a question at looking at resources, facilities, travel modes, etc.
- Thirteen components, but not all will be applicable to K-12+ education.
- Post-graduate athletes may be uniquely considered, depending on facts and circumstances.

# Title IX of the Education Amendments Act of 1972

Three additional areas in which you should exercise caution:

- Single sex classes
- Single sex scholarships/grants/awards
- Significant assistance clause

# Section 504 of the Rehabilitation Act of 1973

- Will generally mirror current requirements under Title III of the ADA, e.g., physical accessibility, digital accessibility, etc.
- Section 504 also extends to admissions and providing educational services.
- Reasonably clear that the Individuals with Disabilities Education Act (IDEA) will not be incorporated because funded differently via formulas.



# Section 504 of the Rehabilitation Act of 1973

- Uncertainty with regard to how the federal government will define “special education.”
  - If defined in a common sense manner, the application of Section 504 should re-affirm the need to provide “minor adjustments.”
  - If defined broadly, could trigger additional processes set forth in 34 C.F.R. 104.34-38, which focus on things like educational setting, evaluation and placement procedures, etc.
  - Language does not perfectly line up because Section 504 not drafted for independent schools, so there will be questions that are outstanding.
- The law also has a significant assistance prohibition, i.e., cannot “significantly assist” an entity that discriminates on the basis of disability.

# Remaining Laws (Title VI and Age Discrimination)

- Less changes in these sections and such discrimination is likely already prohibited under state law or other federal laws.
- Make sure notices of non-discrimination have both prohibitions in place and a process to investigate such claims.
- The key to these laws is that the government reserves the right to review allegations that a school is violating either law and it is imperative to keep information available in case such an audit is conducted.
  - For example, if a school is accused of punishing a certain race/ethnicity more harshly than another, the government often asks for statistical information to be disaggregated by race.
  - Any tracking should be done subtly.

Questions?

# Presenters



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