Elisabeth Haub School of Law

FOOD LAW INITIATIVE

Prepared by the Food and Beverage Law Clinic at the Elisabeth Haub School of Law at Pace University
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FAQ on Funding Programs Available to Small and Mid-Size Farms in Response to COVID-19

Q: We are a farm financially struggling as a result of the Covid-19 pandemic. I know there are funding programs to help, but there is so much information being shared on this that it's overwhelming. What should I do right now?

A: *First*, we recommend that you consider whether you are eligible for the SBA's Paycheck Protection Program (PPP). If you think you may be eligible for a loan amount that can make a difference for your business, we recommend that you apply ASAP, for two reasons:

> (1) PPP loans are forgivable, meaning that if the conditions are met this can be free money.
>
> (2) PPP loans are available on a first-come first-serve basis. As of the date this FAQ was last updated (April 17, 2020), the initial funding for the program has been exhausted, but it is expected that it will be funded again soon; some banks are still processing applications for this reason. If you think you may benefit from this program once it is re-funded, we suggest getting towards the front of the line by contacting your lender, gathering your records, and starting the application process with your lender if possible.

Given the potential impact of the PPP for farms, and the number of questions that have arisen in how it applies to farms, the bulk of this FAQ addresses these questions below under *Paycheck Protection Program (PPP)*.

Second, there are a number of private as well as state and local programs for grants or loans to support businesses affected by the pandemic. Whether or not you apply for PPP, we recommend looking into what other funding programs you may be eligible for. This FAQ addresses a few of these programs below under *Private, State, and Local Funding Programs*.

Third, we recommend you stay tuned for two other potentially significant sources of relief. With a few exceptions, farms are generally not eligible for SBA's other COVID-19 relief funding program, the Economic Injury and Disaster Loan (EIDL) program. But that may change in the near future, in which case the program could be another valuable option for farms. This is detailed below under *Economic Injury and Disaster Loan (EIDL)*. Further, the CARES Act allocated approximately $48.9 billion for USDA programs. There is currently little detail on how exactly these funds will be used, but that guidance may come soon. This is detailed below under USDA Programs.

Finally, you may be eligible for unemployment benefits if you are considered unemployed or under-employed as a result of COVID-19, including if you are a self-employed farmer. This FAQ is focused on funding programs so does not address this issue in depth, but the topic is addressed in brief below under *Q: As a self-employed farmer, can I apply for both unemployment benefits and a PPP loan?*

Paycheck Protection Program (PPP)

Q: What is the Paycheck Protection Program (PPP)?

A: PPP is a Small Business Administration (SBA) loan program under the CARES Act designed to allow small businesses and 501(c)(3) and 501(c)(19) nonprofits to keep paying their workers. This includes *farm businesses*. Most importantly, these loans are forgivable – *i.e. if the program's conditions are met, you do not have to pay the money back.*

Businesses are eligible to apply for a PPP loan if any of the following requirements are met: (1) the business employs 500 or fewer employees, (2) the business meets the SBA employee-based or revenue-based size standard corresponding to its primary industry (click here for information on this standard), or (3) the business satisfies the SBA's "alternative size standard." Based on the test in (1) above, all small and mid-sized farms should be eligible.

Q: How do I apply for a PPP loan?

A: Ask your bank if they are providing PPP loans. Applications can be submitted through any existing SBA 7(a) lenders or through any federally insured depository institution, federally insured credit union or Farm Credit System institution that is participating. Current eligible lenders can be found by searching the SBA website *here*. Applications can be made until June 30, 2020. As noted above, funding for the program is currently exhausted as of the date this FAQ was last updated (April 17, 2020), but additional funding is expected to be coming shortly and it is advantageous to get towards the front of the line by starting the application process with your lender.

A two-page sample application form is available here. Please consult your local banks for their official applications.

Q: How much money will I receive through the PPP?

A: The payout you receive will be based on your average monthly payroll expense, measured over a 12 month period, multiplied by 2.5.

The SBA's Interim Final Rule on the PPP broadly defines "payroll" to include an average month of: wages and commissions for all full-time and part-time employees (wages for high-earning individuals are capped at $100,000/year); the amount of tips typically made by workers (including cash ones); payments for vacation and sick leave; costs of benefits; and of state and local employment taxes. For a self-employed individual or independent contractor, payroll includes wage, commissions, income, or net earnings from self-employment or similar compensation (determining payroll in these situations is addressed in more detail below).

Significantly, compensation to independent contractors and to any employees with a primary residence outside of the United States *does not* count as payroll for PPP purposes. Based on the latter restriction, compensation to H2-A farm workers likely does not count as payroll.

Calculating your loan can be tedious. This link here provides a step-by-step process for calculating the maximum amount of your loan.

Q: How much of my loan will be forgiven?

A: The PPP Loan is forgivable to the extent such proceeds are used during the 8-week period following loan disbursement for the categories established under the CARES Act: (1) payroll costs, (2) rent under lease agreements in force before Feb. 15, 2020, (3) utilities for which service began before Feb. 15, 2020, or (4) interest for mortgage obligations incurred before Feb. 15, 2020. However, at least 75% of the forgiven amount must have been used for payroll.

For a detailed explanation and example of loan forgiveness calculations click here.

Q: Will my loan forgiveness be affected if I lay off employees?

A: Because the goal of the PPP is to allow small businesses to continue to pay their workers, forgiveness is based on the employer maintaining or quickly rehiring employees and maintaining salary levels. Forgiveness will be reduced if full-time headcount declines, or if salaries and wages decrease.

For more information click here.

Q: What if I do work for my own farm business, or for a farm business that I own with others? Can we still qualify for PPP if we don't have any salaried employees on payroll?

A: You may still eligible for the PPP, if you can demonstrate self-employment income in 2019, as detailed below. Your lender will want to see all documents related to any wage, commission, income, or net earnings from self-employment that you have received. What constitutes self-employment income for this purpose depends on your legal structure and tax status:

- Sole Proprietors: Your payroll will be the sole proprietorship's net profit. While the SBA guidance refers only to Schedule C (form filed by non-farm sole proprietorships), it is reasonable to assume that the same guidance applies to Schedule F (form filed by farm sole proprietorships). You will find your 2019 net farm profit (or loss) listed on line 34 of your 2019 Schedule F. It's also worth noting that if you share a sole proprietorship with a spouse, you cannot include your spouse in this application unless they are a W-2 employee.

- Partnerships/LLCs: If you are a partner in a partnership (or a member in an LLC taxed as a partnership) you may not submit a separate PPP loan application for yourself as a self-employed individual. Instead, the partnership (or LLC) itself may file a PPP loan application, and the "self-employment income of general active partners" in the partnership may be reported as payroll costs. While the SBA has not defined the term "general active partners," it is reasonable to assume this means any partner whose income is subject to self-employment tax (generally, any partner that works for or actively manages the business). Most likely, the "self-employment income" of a partner recognized for PPP purposes would be the income shown on line 14 of the partner's Schedule K-1 as their "self-employment income." Just like with any other payroll counted for PPP purposes, this amount would be capped at $100,000 for each partner.

- S-Corporations and C-Corporations: While the SBA has not provided any express guidance on this, it can be expected that any salary paid to owners as shown on a salary report from a third party payroll service, or your own payroll records, would be counted as payroll costs for PPP purposes. Potentially dividends paid to owners could be included to the extent they are subject to payroll tax or self-employment tax.

If you also have W-2 employees, you can include the cost of their salaries, state payroll taxes, health insurance benefits, sick pay, vacation pay, and severance. Keep in mind that all salaries are subject to the cap of $100,000 and you cannot include any 1099 independent contractors or any employees whose primary residence is outside of the United States.

For guidance from the SBA on application of the PPP for self-employed individuals, see the SBA's supplementary Interim Final Rule on this topic. For a guide with information on calculating your payroll costs based on entity type click here.

For more information on sole proprietorships, independent contractors, and self-employed individuals click here.

Q: We are a small farm that relies on owner and family labor, with little to show for payroll in 2019. Is this program simply not helpful for us?

A: Unfortunately, if the self-employment income you can show for 2019 (as described above) is zero or negative, and you did not have any W-2 employees on payroll in 2019, you will not be eligible for PPP. And if your self-employment income in 2019 was minimal, you will only qualify for a small amount: remember, the loan amount is based on your average monthly payroll expense multiplied by 2.5.

That being said, if you think there may be a way to demonstrate sufficient income, we encourage you to contact your bank or consult with an accountant. The official guidance on these matters is not complete and is frequently updated, so you should not be discouraged from exploring your eligibility if you think you have a chance.

Q: How is loan forgiveness determined if I am self-employed?

A: In order for the loan to be fully forgiven, at least 75% of the forgiven amount must have been used for payroll. As detailed above, to determine eligible payroll costs associated with self-employment income, you may need to look to net earnings reported on your Schedule F (for sole proprietor farms) or self-employment income reported on your Schedule K-1 (for partnerships/LLCs). But how does that work for determining the amount of the PPP loan spent on self-employment "payroll" during the 8-week period following loan disbursement (when your annual net earnings or self-employment income for 2020 will of course still be unknown)? The answer from the SBA is that you can count 8 weeks' worth (8/52) of 2019 net profit as "owner compensation replacement" for purposes of determining self-employment "payroll" in the 8-week period following loan disbursement. If you also have any actual payroll costs for W-2 workers in that period, those would also be counted for loan forgiveness purposes.

For guidance from the SBA on application of the PPP for self-employed individuals, see the SBA's supplementary Interim Final Rule on this topic.

Q: What if I am a seasonal farm business? Will there be a mismatch between the payroll that is counted for determining my loan amount, and my actual payroll needs during the time I will use the loan?

A: To determine number of employees and average payroll costs for purposes of determining the maximum eligible PPP loan amount, *generally* borrowers can use average monthly payroll based on data either from the previous 12 months or from the calendar year 2019.

But for *seasonal* businesses, you may use average monthly payroll for the period between February 15, 2019 and June 30, 2019, or between March 1, 2019 and June 30, 2019 (the borrower can determine which method gets them the higher loan amount). An applicant that was not in business from February 15, 2019 to June 30 2019 may use the average monthly payroll costs for the period of January 1, 2020 through February 29, 2020.

The seasonal calculation could either be good or bad for you in terms of maximizing your eligible loan amount, depending on the seasonality of your business. If your business has more labor costs in the second half of the year, then this calculation would result in a lower loan amount than a calculation based on 12 months.

For information from the Treasury Department on this topic, see questions 9 and 14 in the FAQ found here.

Q: What if I am an independent contractor for farm related businesses? Do I qualify for the PPP loan?

A: As an independent contractor you may still be eligible for the PPP. Your payroll cost will be the sum of your income earned through freelance work, as reported on the 2019 1099-MISC forms you received. If you have already filed your 2019 taxes, this will be added together already on Line 31 of your 2019 Schedule C. If you have not filed your 2019 taxes, you will still need to fill out a Schedule C in order to qualify for the PPP.

Q: As a self-employed farmer, can I apply for both unemployment benefits and a PPP loan?

A: Self-employed individuals and independent contractors are eligible for unemployment benefits if they find themselves unemployed, partially unemployed, or unable to work due to COVID-19. The CARES Act created a new temporary federal program called Pandemic Unemployment Assistance (PUA), which temporarily expanded unemployment benefits to certain categories of individuals who would not otherwise be eligible. It is possible that self-employed farmers who are unable to sell products because of COVID-19 may be eligible for benefits under PUA. For more detail on this topic, see pages 17-22 of the Farmers' Guide to COVID-19 Relief published by Farmers' Legal Action Group, Inc.

However, participation in the PPP may make you ineligible for state-administered unemployment compensation or unemployment assistance programs. You should consider your eligibility and the payout of each program to determine which is the best fit for you.

Q: I have already let go of employees who are pursuing unemployment benefits. Can I still apply for the PPP program?

A: Yes. In order to qualify for PPP loan forgiveness, the SBA requires you to maintain your monthly payroll expenses. However, this doesn't mean that you can't pursue the PPP for a loan; not maintaining those payroll numbers will simply reduce the amount eligible for forgiveness.

Q: Are there any other programs that support keeping my employees on payroll through this crisis, if I do not obtain a PPP loan?

A: Yes. Another option is the Employee Retention Credit (ERC). The credit is a refundable payroll tax credit that employers can claim on their federal employment tax return to cover employee wages and qualified health plan expenses. Eligible employers are those who carry on a trade or business during the calendar year 2020 that experiences either of the following: a full or partial suspension of operations during any calendar quarter in 2020 due to Covid-19 related government orders, or experiences a decline in gross receipts during the calendar year. However, the ERC is not available if you participate in the PPP.

In addition to the ERC, employers may defer the deposit and payment of the employer's portion of social security taxes. Deferment does not preclude you from getting a PPP loan, but once your PPP loan is forgiven you are not permitted to continue deferring these payments.

Finally, employers who are required under the CARES Act to provide paid leave to employees impacted by COVID-19 are entitled to receive a tax credit for the amount of the paid leave wages. Participation in the PPP does not affect this tax credit.

See the following links for more information from the IRS on the ERC, the deferment of social security tax, and the paid leave tax credit.

Economic Injury and Disaster Loan (EIDL)

Q: What about the SBA's other loan program, the Economic Injury Disaster Loan (EIDL) Program? Can farms apply for that as well?

A: The EIDL program can provide up to $2 million in loans to small businesses or nonprofits that suffer substantial economic injury as a result of a declared disaster. This program also can provide an emergency advance of up to $10,000 that businesses do not have to pay back. ***However, as of right now, the SBA explicitly excludes farm businesses (other than agricultural cooperatives, aquaculture enterprises, or nurseries) from eligibility***. The good news is that the Senate has written to the SBA to clarify Congress's intent in passing the CARES Act was to include farms as eligible for the EIDL program. It remains to be seen if farms will become eligible for this program.

If farm businesses do become eligible for the EIDL program, it is worth noting that you may apply for both PPP and EIDL, but you cannot accept both loans for the same purposes.

For the EIDL application form and additional information on eligibility, click here. For additional information on the EIDL Emergency Advance, click here. For a useful article on both the PPP and EIDL programs and how they interact with each other, click here.

USDA Programs

Q: What is the USDA doing to provide financial support to farms in response to COVID-19?

The CARES Act allocated $9.5 billion to the USDA to provide support to farms impacted by COVID-19, specifically for specialty crops, producers who supply local food systems and farmers' markets, restaurants and schools, livestock producers, and dairy farmers. At this time there is no detail as to how those funds will be distributed, but it is expected that guidance may come soon. The CARES Act also allocated $14 billion to the Commodity Credit Corporation, which is the funding mechanism for insurance programs like Price Loss Coverage and Dairy Margin Coverage.

The USDA Farm Service Agency (FSA) has announced that it is available to help agricultural producers with program signups, loan servicing and other important actions, and is relaxing the loan-making process and adding flexibilities for servicing loans to provide credit to producers in need. *You can find more information here, and can apply here.*

In addition, the Farm Credit Administration is encouraging lenders in the Farm Credit System to work with borrowers affected by COVID-19 to extend the terms of loan repayments, restructure debt obligations, and ease some loan documentation or credit extension terms for new loans. Farmers who are having difficulty paying debts owed under the Farm Credit System can contact their local Farm Credit lenders. If the lender is not providing necessary flexibility, farmers may also consider contacting the Farm Credit Administration directly at 703-883-4056 (Voice & TTY) or info-line@fca.gov.

Private, State, and Local Funding Programs

Q: Are there any other sources for *grants* to farms in response to COVID-19?

A: Yes. A notable national grant program for farmers is American Farmland Trust's Farmer Relief Fund, which offers grants of up to $1,000 to eligible farms. Applications are due April 23, 2020.

We strongly encourage farms to look at this and other programs to confirm their eligibility and to apply if eligible, as the application process is fairly simple. GrowNYC is maintaining a database of Coronavirus response resources for farmers that includes more detail on these programs, and other programs could be added in the future.

Q: Are there any other sources for *loans* to farms in response to COVID-19?

A: There are private organizations offering grants and loans with low or no interest to small businesses (including farms). These include Facebook Small Business Grants, Amazon Neighborhood Small Business Relief Fund, Honeycomb Credit Crowdfunded Relief Loan, the James Beard Foundation Food and Beverage Industry Relief Fund, Kiva Loans, and the Accion COVID-19 Relief Program. The GrowNYC database referenced above includes more detail on some of these programs, and other programs could be added in the future.

Q: What about State and Local Relief Programs?

A: Many states and cities are offering programs as well. For example, the GrowNYC database referenced above includes a list of programs offered in New York State.

The Food and Beverage Law Clinic is a part of John Jay Legal Services, a non-profit legal services organization housed at the Elisabeth Haub School of Law at Pace University. The Food and Beverage Law Clinic represents New York State farmers, food and beverage entrepreneurs, and non-profit organizations seeking to improve our food system. Together with partners at the Natural Resources Defense Council and Shearman & Sterling LLP, we are providing pro bono legal services to new and existing clients affected by this crisis who cannot afford market-rate legal services, through our Food Law Initiative's COVID-19 Legal Support Project. For more information please visit our website here. We can also be contacted here.

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