

The Small Business Size Requirement and the Payroll Protection Program

Articles, COVID 19: Answers to Business Challenges April 14, 2020

Within the last month numerous businesses have been quickly overwhelmed by the financial effects of the COVID-19 pandemic. Many companies are examining as to whether or not they qualify for financial assistance under the Payroll Protection Program implemented under the CARES Act (“PPP Program”) and administered by the U.S. Small Business Association (“SBA”). The principal concern for many of the companies applying for assistance, under the PPP Program, is the small business size requirement.

According to the CARES Act a business qualifies as a small business if it does not employ more than the greater of:

- 500 employees; or
- The industry threshold applicable to the company established by the SBA (Applicable industry thresholds may be found by clicking the SBA link found here: [SBA Company Size Thresholds](#))
- Please note that under the CARES Act, only “Accommodation and Food Service industry” companies may have less than 500 employees per physical location and may still be eligible for loan assistance under the CARES Act and the term employee includes both individuals employed full-time, part-time, or other basis.

A company must meet the size limitations permissible under Title 13 Part 121 of the SBA’s Small Business Size Regulations (“SBA Regulations”) in order to qualify for assistance under the PPP Program. According to Section 121.106(4)(i)-(ii) of the SBA Regulations a company calculates its workforce size by:

Adding the average number of employees of the business concern with the average number of employees of each affiliate. If a concern has acquired an affiliate or been acquired as an affiliate during the applicable period of measurement or before the date on which it self-certified as small, the employees counted in determining size status include the employees of the acquired or acquiring concern. Furthermore, this aggregation applies for the entire period of measurement, not just the period after the affiliation arose...The employees of a former affiliate are not counted if affiliation ceased before the date used for determining size. This exclusion of employees of a former affiliate applies during the entire period of measurement, rather than only for the period after which affiliation ceased. However, if a concern has sold a segregable division to another business concern during the applicable period of measurement or before the date on which it self-certified as small, the employees used in determining size status will continue to include the employees of the division that was sold.

In calculating the average number of employees employed by a company, a company must count the average number of employees that it employs and it must also include employees of its applicable affiliates in the calculation. Section 121.103 of the SBA Regulations has an exhaustive list of factors when determining affiliates. Some of the main factors of affiliation are listed below:

- Companies are affiliates of each other when one controls or has the power to control the other, or a third party or parties control or has the power to control both. Control may be affirmative or negative. Negative control includes, but is not limited to, instances where a minority shareholder has the ability, under the company’s charter, by-laws, or shareholder’s agreement, to prevent a quorum or otherwise block action by the board of directors or shareholders. It does not matter whether control is exercised, so long as the power to control exists. Ownership, management, previous relationships with or ties to another company, and contractual relationships, also determine whether affiliation exists;

- Affiliation may be found where an individual, company, or entity exercises control indirectly through a third party;
- Affiliation may arise among two or more individuals or firms with an identity of interest. Individuals or firms that have identical or substantially identical business or economic interests; and
- In determining whether affiliation exists, the SBA will consider the totality of the circumstances, and may find affiliation even though no single factor is sufficient to constitute affiliation.

However, a company may exclude employees of affiliates towards the overall workforce calculation in accordance with Section 121.103 of the SBA Regulations. Some of the main exclusions are listed below:

- Business concerns owned in whole or substantial part by investment companies licensed, or development companies qualifying, under the Small Business Investment Act of 1958;
- Business concerns owned and controlled by Indian Tribes, Alaska Native Corporations (ANCs) organized pursuant to the Alaska Native Claims Settlement Act, Native Hawaiian Organizations (NHOs), Community Development Corporations (CDCs), or wholly-owned entities of Indian Tribes, ANCs, NHOs, or CDCs are not considered affiliates of such entities;
- Common administrative/ business development services which are subject to the exception to affiliation include, bookkeeping, payroll, recruiting, other human resource support, cleaning services, and other duties which are otherwise unrelated to contract performance or management and can be reasonably pooled or otherwise performed by a holding company, parent entity, or sister business concern without interfering with the control of the subject firm;
- Business concerns which lease employees from concerns primarily engaged in leasing employees to other businesses;
- Companies created for financial, management or technical assistance under the Small Business Investment Act of 1958; and
- In the case of a solicitation for a bundled contract, a small business contractor may enter into a small business teaming arrangement with one or more small business subcontractors and submit an offer as a small business without regard to affiliation, so long as each team member is small for the size standard assigned to the contract or subcontract.

After reviewing the general parameters for the calculation set forth above, if a company and its affiliates employ under 500 employees, then the company will likely qualify for the PPP Program in connection with the workforce size limitation.

If additional assistance is required in calculating the workforce size limitation, please contact Edward Grattan or any other Tucker Arensberg attorney. In the event that the company does not qualify, you may want to consider qualifying under the Title IV program of the CARES Act for financial assistance. A summary of the CARES Act's Title IV program is set forth on our COVID-19 blog.