

NAPEO

COVID-19 RESOURCE CENTER

Frequently Asked Questions for PEO Clients on Paycheck Protection Program (PPP) Loans

Q: I have heard that only businesses with fewer than 500 employees (outside of limited exceptions) can qualify for a PPP loan. My professional employer organization (PEO) provides services for over 500 co-employees. Does that mean I can't qualify for a PPP loan?

A: Fear not: your PEO's co-employees will not be counted against you for PPP loan purposes, unless your business are otherwise related (such as with common ownership).

This question was raised and resolved as far back as 1989, when the Small Business Administration's Office of Hearings and Appeals reversed a regional office's determination that the PEO's total number of co-employees must be counted against the small-business client.

Based in part on this ruling, 13 CFR § 121.103(b)(4) of the SBA's affiliation regulations were amended to codify the same result:

Business concerns which lease employees from concerns primarily engaged in leasing employees to other businesses or which enter into a co-employer arrangement with a professional employer organization (PEO) are not affiliated with the leasing company or PEO solely on the basis of a leasing agreement.

Of course, if your company and the PEO are related in other ways that would trigger the SBA's affiliation rules (such as with common ownership), then the result may not be the same. However, for the majority of PEO clients, the PEO's co-employees should not be included in your business's employee count for PPP loan purposes.

Q: My Paycheck Protection Program (PPP) lender is asking for my Forms 941 for purposes of determining my eligibility for, and the amount of, a PPP loan. Because I use a professional employer organization (PEO), I don't file my own Form 941. What should I tell them?

A: Don't be worried. It's not surprising that the lender may be asking for Forms 941 for purposes of underwriting the PPP loan. Thankfully, the SBA does not require lenders to use any tax information, such as a Form 941, for purposes of underwriting your loan.

The SBA makes clear in its interim final rule (SBA IFR) that lenders are not limited in the types of documentation they can use to determine your eligibility for a PPP loan, and the amount of such loan. Specifically, the SBA IFR provides as follows:

Borrowers must submit such documentation as is necessary to establish eligibility ***such as payroll processor records***, payroll tax filings, or Form 1099-MISC, or income and expenses from a sole proprietorship. ***For borrowers that do not have any such documentation, the borrower must***

provide other supporting documentation, such as bank records, sufficient to demonstrate the qualifying payroll amount. (SBA IFR section 3.b.(iv).II. Emphasis added.)

It might be helpful if you provide this language to the lender and request that the lender utilize other documentation (such as payroll records) to confirm your eligibility for a PPP loan.

Q: Looking at the SBA's website, I see that I can apply for an Economic Injury Disaster Loan (EIDL). Is that the same as a PPP loan? If I've already received an EIDL loan, does that mean that I can't receive a PPP loan?

A: It can certainly get confusing with all of the new terms and acronyms flying around. While both loans are authorized by Section 7(a) of the Small Business Act (as amended by the CARES Act) and are meant to help businesses hurt by the COVID-19 pandemic, an EIDL is not the same as a PPP loan in many key areas.

For example, their purposes are different. PPP loans are primarily meant to help businesses with "payroll costs," which includes certain wages, benefits, and state and local taxes, as well as to help with payments on mortgage interest, rent, utilities, and interest on pre-existing loans. EIDLs, on the other hand, are meant to provide working capital and can be used to pay fixed debts, accounts payable, and other similar bills, as well as the items covered under PPP loans.

Their covered periods and loan caps are different. COVID-19 EIDLs are available for economic injuries that occurred between January 31, 2020 and December 31, 2020 and are capped at \$2,000,000, while PPP loans only cover costs incurred from February 15, 2020 through June 30, 2020 and are capped at the lesser of 2.5 times the average monthly total of "payroll costs" or \$10,000,000.

HOWEVER, the biggest difference between the two is that, under certain conditions, some (or all) of the PPP loan is forgivable while EIDLs are not forgivable (although eligible applicants for an EIDL can receive a \$10,000 emergency grant within three days of application). The amount of a PPP loan that is forgivable may not be comprised of more than 25% of non-payroll (but otherwise qualifying) costs. Such costs would include certain qualifying payments for rent, utilities, and mortgage interest. And the amount that is eligible for forgiveness is generally reduced if the employer reduces headcount or reduces an employee's total salary or wages. **EIDLs have no such provisions for forgiveness.**

So, what happens if you need a PPP loan but have already received an EIDL? If you received an EIDL loan between January 31, 2020 and April 3, 2020, you can still apply for and receive a PPP loan. To prevent "double dipping," EIDL funds cannot be used for "payroll costs" or other PPP allowable uses if you want to qualify for both. **HOWEVER**, even if you used some of the EIDL's funds for PPP purposes, you may still be able to "refinance" those amounts into the PPP loan during the application process and then be able to seek forgiveness on certain of the PPP loan proceeds (because the qualifying costs incurred during the life of the EIDL would now relate to a PPP loan versus an EIDL).