

The Legal Aid Society
Community Development Project

**The Federal Response to the Economic Impact of the COVID-19 Pandemic on
Small Businesses in New York State**

Wednesday, May 13, 2020

The Legal Aid Society's Community Development Project (CDP) has provided free legal services to qualified low-income small businesses and nonprofit organizations, and has assisted in the development and preservation of low-income housing for over 20 years. We assisted businesses after major disasters, including Superstorm Sandy and 9/11, and continue to provide assistance after local disasters--fire, building collapse, water main break--affecting small businesses in our work with the NYC Department of Small Business Services Emergency Response Unit. Today, we are here to help during the COVID-19 pandemic and call on the Federal government to improve its response by reforming the Paycheck Protection Program ("PPP") to provide technical support for applicants, ensure equitable distribution of funds, and ensure fair access to those funds.

The services of The Legal Aid Society's Community Development Project have come into even greater demand due to the COVID-19 pandemic. Although experiencing massive business interruptions and income loss, small businesses and nonprofits remain subject to ongoing contractual obligations. Business owners and nonprofit directors have questions and requests for representation surrounding issues of commercial leasing and their obligations to pay (or not pay) rent during the pandemic, lease provisions that may excuse non-performance, conditions under which leases may be terminated, employment and payroll, intellectual property, tax, filing insurance claims for business interruption losses, and guidance in applying for grants and loans from the City, State, and Federal governments.

Just about every business sector has been impacted and suffered business interruption losses due to forced closures, disruptions in their supply line, and cancelled events. While the insurance industry's response has been to generally

dissuade policyholders from making claims, small business policyholders file anyway and, after the inevitable denial, few owners who can afford it are filing lawsuits.¹

States such as New York have introduced bills that would require first-party property policies to insure business interruption losses due to COVID-19. New York State Assembly Bill A-10226-B² (Carroll) and identical Senate Bill S-08211-A³ (Gouardes) introduced on March 27, 2020 would apply to restaurants and other businesses with 100 or fewer full time eligible employees, override any policy provisions requiring physical damage, and get around virus exclusions. If approved, the New York bill shall take effect immediately and be retroactive to March 7, 2020. Since insurance regulatory law is primarily enforced by state insurance departments as authorized and directed by state laws, it is important that the legislature move this bill forward to protect our vulnerable small businesses.

The Federal government has responded to the COVID-19 pandemic with funding that has proved woefully inadequate to New York's small businesses. On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), Public Law Number 116-136, aimed at providing financial relief to the American people and American businesses in response to the economic fallout from the COVID-19 pandemic, was signed into law. Among its provisions was the Paycheck Protection Program meant to provide \$349 billion for small business loans to cover operating expenses such as payroll costs, a portion of which may qualify for forgiveness, and rent, utilities, etc. Small businesses and sole proprietorships were permitted to apply as soon as April 3, 2020 and independent

¹ Examples of claims and lawsuits: *Oceana Grill v. Certain Underwriters at Lloyd's, London*, No. 20-02558 (La. Civ. Dist. Ct. Mar. 16, 2020). New Orleans restaurant alleges CV-19 damaged property. *Choctaw Nation v. Lexington Ins. Co.*, No. CV-20-42 (Okla. Dist. Ct. Mar. 24, 2020). "As a direct result of this pandemic and infection, the Nation's Property has been damaged...and cannot be used for its intended purpose." *French Laundry Partners, LP v. Hartford Fire Insurance Co.* (Cal. Super. Ct. Mar. 25, 2020). Upscale California restaurant also filed declaratory judgment action for coverage due to losses caused by Napa County "stay at home" order to fight the spread of coronavirus. *Big Onion Tavern Grp., LLC v. Soc'y Ins., Inc.*, No. 1:29-cv-02005 (N.D. Ill. Mar. 27, 2020). Series of restaurants and movie theaters challenge blanket denials regarding Illinois "cease operations" orders without investigation (attaches "no coverage" email from insurance company).

² https://nyassembly.gov/leg/?default_fld=&leg_video=&bn=A10226&term=2019&Summary=Y&Text=Y

³ <https://www.nysenate.gov/legislation/bills/2019/s8211/amendment/a>

contractors and self-employed individuals began applying on April 10. We applaud Congress for quickly providing this desperately needed financial assistance but the program was largely a failure for our clients needing the most help and it needs to be reimagined for small businesses.

Who Are Our Small Businesses

The U.S. Small Business Administration’s Office of Advocacy defines a small business as an independent business having fewer than 500 employees.⁴ In New York State, a small business is defined as having 100 or fewer employees.⁵ Those small businesses, as we often hear, are the “backbone of the economy.” But what does that really mean? It means that, 1) based on reports from the Office of Advocacy, 30.2 million U.S. businesses--99.9% of all businesses in the United States--are small businesses,⁶ consisting of sole proprietorships, cooperations, and franchises. 2) They create jobs--47.5 percent of the private sector workforce (58.9 million people) are employed by small businesses⁷ and two out of every three new jobs is created by a small business,⁸ and 3) they account for approximately 40 percent of U.S. payroll dollars,⁹ driving consumer spending in the U.S. economy, as well as income tax dollars into government budgets. 4) Small business ownership also reflects the diversity of the United States as over 25 percent of small businesses in the U.S are minority-owned.¹⁰ 36 percent are women-owned businesses.¹¹ Unfortunately, due to the COVID-19 pandemic, many small businesses have already closed or are on the verge of closing.

⁴ <https://www.sba.gov/document/support--table-size-standards>

⁵ New York Consolidated Laws, Economic Development Law - COM § 131. Definition of a small business.

⁶ <https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf>

⁷ *Id.*

⁸ https://www.sba.gov/sites/default/files/FAQ_Sept_2012.pdf

⁹ *Id.*

¹⁰ <https://www.sba.gov/sites/default/files/advocacy/2018-Small-Business-Profiles-US.pdf>

¹¹

<https://www.sba.gov/sites/default/files/Issue%20Brief%20.%20Business%20Owner%20Demographics.pdf>

A March 2020 poll¹² from MetLife and the U.S. Chamber of Commerce revealed that one in four small businesses (24%) were two months or less from closing permanently amid the economic downturn caused by the COVID-19 pandemic. One in 10 (11%) were less than one month away from permanently going out of business. Another one in four (24%) small businesses had already shut down temporarily in response to COVID-19. The Legal Aid Society knows that without our help, many of those businesses will never reopen¹³ so we've engaged in a robust response.

To address the devastation to NYC's small business and nonprofit communities and the enormous demand for legal services in New York City by businesses struggling to survive the COVID-19 pandemic, CDP joined the Small Business Legal Relief Alliance.¹⁴ The Alliance was created in response to the pandemic and consists of some of the City's leading law firms and legal services organizations who share a common goal of providing free, timely, practical legal advice to struggling small businesses and nonprofits. To increase our reach even further, we've worked with some of our pro bono partners on fact sheets to advise business owners of their rights and obligations related to the disaster as well as best practices to keep the entities on the best legal and financial footing going forward.

Since the "New York State on PAUSE" executive order went into effect in late March, at least two-thirds of our calls are COVID-19 related, as are all of our outreach efforts and trainings requested by elected officials, community boards, and small business groups. The increased demand for our assistance has CDP on track in 2020 to provide advice and representation to 900 businesses and nonprofits (26% increase over 2019), 50 business education and outreach sessions (150%

¹²

<https://www.uschamber.com/press-release/new-us-chamber-metlife-poll-one-four-small-businesses-brink-of-permanent-closure-half>

¹³ According to the Federal Emergency Management Agency (FEMA), 40 percent of businesses do not reopen following a disaster and 90 percent fail within two years of being struck by a disaster.

https://www.fema.gov/media-library-data/1441212988001-1aa7fa978c5f999ed088dcaa815cb8cd/3a_BusinessInfographic-1.pdf

¹⁴ <https://www.sblra.org/>

increase over 2019), and will educate at least 2,000 businesses, nonprofits, etc. (300% increase over 2019).

Provide Technical Support for Applicants

Unfortunately, as mentioned earlier, the Paycheck Protection Program has fallen well short of helping small businesses in New York, the state hardest hit by the COVID-19 pandemic, where approved loans cover only 40% of eligible payroll.¹⁵ The Legal Aid Society found that there was a lot of confusion around the program between bankers and New York small business owners--many of whom had to apply on their own, were not familiar with grant and loan programs, and were not intimately familiar with their finances because they usually relied on bookkeepers and tax preparers. Sometimes the business owners were simply confused about which forms were needed to apply or which online platform to use, but by the time the issue was cleared up many business owners who at were first confused and frustrated by the program were later devastated to find out that the program was out of money and they had to wait to reapply when more funds became available. Those small businesses who did successfully apply did not know the status of their applications in order to timely apply for another State or Local program.

Additionally, not only did that first allocation of PPP money run out in 13 days, but our self-employed clients were only able to apply one week after the program opened; putting them behind other businesses in the first-come, first-served program.

The Small Business Administration should ensure a uniform application process or platform for all applicants, a way for small business owners who are not financially or technologically savvy to get answers, and more time to submit a completed application. Also, all business owners, whether or not they are incorporated should be permitted to apply at the same time to ensure that the smaller businesses are not left behind.

¹⁵

<https://www.bloomberg.com/news/articles/2020-04-29/trump-s-rural-base-fared-better-than-coastal-cities-in-sba-loans>

Ensure Equitable Distribution of Funds

The first-come, first-served nature of the program also created a problem for our clients. While the drafters may have thought that this would result in a fair system where every business was treated equally, in reality it actually favored the larger multi-million dollar businesses with accounting departments and law firms on retainer or who had personal relationships with their bankers that could polish and push their application. In order to achieve greater fairness of outcomes with PPP applications, there should be a sense of equity where smaller businesses with, for example, less than 20 employees (they make up 88% of small businesses¹⁶), have as great a chance of succeeding as those with 100 to 499 employees (they make up 1.7% of small businesses¹⁷).

With many businesses unable to reopen, owners wonder how to spend PPP funds to get the most out of the forgiveness provisions. Forgiveness calculations will be based on how businesses spend their money within eight weeks of receiving it but, with many states closed, some businesses currently have little or no work for their employees. Others cannot get furloughed employees to return who may be receiving enhanced unemployment benefits. The CARES Act supplements state unemployment insurance benefits with an additional \$600 a week if someone is unable to work or are working reduced hours as a result of the COVID-19. It also expanded unemployment benefits to include part-time and self-employed workers, including contractors and gig workers. While PPP encourages employers to get people back to work, the competing unemployment provisions keep some employees away, forcing employers who can open to train unseasoned staff at a time when they're simply trying to stay afloat. Those who cannot hire will be left with interest-bearing loans that may prove unaffordable.

Ensure Fair Access to the Funds

Furthermore, under PPP, lenders had an incentive to prioritize larger loans for larger businesses which brought in greater fees.¹⁸ An NPR analysis found that over

¹⁶ <https://www.jpmmorganchase.com/corporate/institute/small-business-economic.htm>

¹⁷ *Id.*

¹⁸ <https://home.treasury.gov/system/files/136/PPP%20Lender%20Information%20Fact%20Sheet.pdf>

the first two weeks of PPP, banks earned more than \$10 billion in fees processing these SBA-guaranteed loans that carry very little risk. This resulted in loans to thriving businesses including 103 publicly-traded companies.¹⁹ Also awarded funds were national chain restaurants like Shake Shack and Ruth's Chris Steak House, and the eighth most valuable sports team in the world, the Los Angeles Lakers, all three of which returned the money after receiving loan proceeds due to public outcry.²⁰

During this time of crisis, many New York small businesses already operating on thin margins before the COVID-19 pandemic find themselves in even more dire circumstances unable to pay staff, suppliers, cover utilities, etc. In order to ensure that these economic backbones and engines of this great State keep running, The Legal Aid Society urges the New York State government to not only provide additional funding for small businesses, but to pass the stalled bill that would force insurers operating in the State to cover losses experienced by restaurants and small businesses that have lost income or has been forced to close due to the COVID-19 pandemic.

The Legal Aid Society also calls on the Federal government to create a workable and equitable PPP that focuses on the most financially vulnerable small businesses. Otherwise, millions of small businesses may not receive this much-needed financial assistance and will struggle to meet their basic needs, employ members of our communities, and stimulate the local and national economies. We also urge the Federal government and Small Business Administration to implement the suggestions outlined above in order to quickly deliver financial relief and support to as many small businesses as possible under a better PPP program.

¹⁹

<https://www.marketwatch.com/story/here-are-the-public-companies-that-got-coronavirus-aid-meant-for-sm-all-businesses-2020-04-22>

²⁰

<https://www.npr.org/2020/05/04/848389343/how-did-the-small-business-loan-program-have-so-many-problems-in-just-4-weeks>