

# Welcome to Pillsbury's Industry Insights: Restaurant, Food & Beverage

Wednesday, April 8, 2020

The Pillsbury logo is displayed in a white rectangular box in the bottom right corner. The word "pillsbury" is written in a lowercase, sans-serif font, with the letters in a dark red or maroon color.

# Speakers



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# Agenda

- Employment Decisions and Issues
- Families First Coronavirus Response Act
- CARES Act Stimulus Bill
- Alcohol Beverage Law Temporary Relief
- Q&A

# Paula Weber



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**Paula Weber, a Pillsbury Employment partner and member of the firm's board, litigates complex employment-related actions in federal and state courts and has wide-ranging ADR experience.**

Paula represents employers in a variety of complex employment litigation matters, supplemented by compliance advice and counseling for large institutional employers and smaller companies. She has resolved a broad array of individual and multiplaintiff employment claims at trial and in arbitration, and has extensive experience defending putative and certified class actions, including both state wage and hour law and FLSA collective actions.

# Furlough v. Termination

- WARN
- Payout of accrued vacation
- Effect on benefits
- State or local laws
- Any collective bargaining agreements
- Loans under CARES Act

# Employment Decisions

- Wage/hour reductions
  - Contract rights
  - Exempt status
  - Minimum wage
  - Unemployment insurance
  - WARN?
  - California Work Sharing Program
- “Hardship” pay
- Check for any state or local requirements

# Sick Employees

- Ill or symptomatic employees should be required to tell employer ASAP
- Send the worker home for 14 days or until tested and cleared
- Deep clean if they came into the restaurant
- Tell co-workers who worked closely with employee and advise of signs of the virus
- If restaurant is practicing “social distancing” with its employees, you do not need to send everyone home. If no “social distancing” you may need to send them home for 14 days or until tested and cleared

# Family First Coronavirus Response Act (“FFCRA”)

Applies to employers with less than 500 employees

## Rights under Act

- Up to 80 hours paid leave for own COVID-19 related illness
  - Full pay up to \$511 per day/\$5,110 per employee
- Up to 80 hours leave to care for another with COVID-19 illness or childcare
  - 2/3 pay up to \$200 per day/\$2,000 per employee
- Up to 10 weeks at 2/3 paid leave to take care of child due to lack of school/childcare
  - 2/3 pay up to \$200 per day/\$10,000 per employee



# FFCRA

## Key issues on use

- Does not apply if not working due to lack of work
- Does not apply to furloughed employees
- Does apply if not working because government has ordered shelter in place
- The parties can agree that childcare be intermittent
- Check state and local laws

# FFCRA

## Documentation needed to obtain tax credit

### For sick leave:

- The employee's name;
- The date or dates for which leave is requested;
- A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason;
- A statement that the employee is unable to work, including by means of telework, for such reason; and
- If quarantined, name of the government entity order the quarantine, name of the health care professional advising quarantine

# FFCRA

## Documentation needed for tax credit

### For Emergency Family and Medical Leave:

- Name and age of the child (or children) to be cared for;
- The name of the school that has closed or place of care is unavailable;
- Representation that no other person will be providing care for the child during the period for which the employee is receiving Family Medical Leave; and
- If the child is older than 14 a statement that special circumstances exist requiring the employee to provide care during daylight hours

# FFCRA

## Exception for Small Employers

- Applies only to paid sick leave and expanded FMLA due to school or place of care closures or childcare provider unavailability for COVID-19 related reasons
- Test: “jeopardize the viability of the small business as a going concern”
  - Would result in expenses exceeding revenue
  - Substantial risk to revenue or operations due to absence of necessary skill set
  - Insufficient employees to operate the business

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**Anna Graves, Pillsbury's Restaurant, Food & Beverage Industry Group co-leader, handles complex M&A transactions, private offerings, joint ventures, start-up structuring and financing, and general corporate matters.**

Anna represents both buyers and sellers in merger and acquisition transactions. Her clients include major national and international restaurant chains, early-stage restaurant ventures, food and beverage manufacturers and distributors, and consumer and retail companies. Increasingly, she advises global operators as they bring their brands to the U.S. or invest in existing U.S. companies. Anna also negotiates brand licenses and extensions, restaurant management agreements, and supply and distribution agreements for restaurant and retail companies.

# The Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”)

The Coronavirus Aid, Relief, and Economic Security (CARES) Act was signed into law on March 27, 2020. The sweeping legislation includes \$2 trillion in stimulus funding to support states, businesses, and individuals during the COVID-19 emergency.

The CARES Act is the third federal measure targeting the effect of the COVID-19 pandemic and by far the largest. It will provide financial assistance and loan programs to industries and individuals throughout the economy, with special assistance to the restaurant industry.

Under the CARES Act, Congress has appropriated \$350 billion for Small Business Administration (SBA) Paycheck Protection Loans of up to \$10 million to small businesses impacted by COVID-19.

The Act also appropriates \$10 billion for SBA Economic Injury Disaster Loans of up to \$2 million to small businesses impacted by natural disasters, now including the COVID-19 pandemic, modifies this program, and provides additional tax benefits.

# Paycheck Protection Program Loans

Title I of the CARES Act appropriates \$350 billion to provide for small business loans. The Act amends Section 7(a) of the Small Business Act to make loans up to \$10 million in *forgivable* loans available to “small businesses” and certain larger businesses in NAICS Code Sector 72 such as restaurants.

Paycheck Protection Loans are administered by the Small Business Administration (SBA) and available until June 30, 2020.

Collateral requirements and the requirement to first seek credit elsewhere have been waived.

Congress is considering extending the Paycheck Protection Program and adding another \$250 Billion and a longer time period to use the funds.

# Eligible Businesses

Paycheck Protection Loans are available to:

- Companies with fewer than 500 employees unless an applicable SBA size standard for an industry allows for a greater number of employees; and
- NAICS Code Sector 72 “Accommodation and Food Services” business concerns with fewer than 500 employees per location. The Act expands eligibility for Paycheck Protection Program loans to restaurant chains with more than 500 employees, but fewer than 500 employees per location.

If a restaurant company has operating subsidiaries which have their own EIN and their own workforce, it may be appropriate to have those subsidiaries separately file for a PPP loan, especially if the subsidiaries file separate payroll tax returns, to avoid application of the SBA affiliation rules.



# SBA Affiliation Rule Waiver

Typically, in determining when an applicant for a loan is, in fact, a “small business,” the SBA takes into consideration the applicant’s affiliates. Affiliation exists when one business controls another, or has the power to control another, or when a third-party controls both businesses.

A great debate has been raging among SBA lawyers since the CARES Act was passed about whether the affiliation rules apply to NAICS Sector 72 companies given the language in Section 1102(a)(1)(D)(iii) of the CARES Act which reads:

- ...any business concern that employs not more than 500 employees per physical location of the business concern and that is assigned a [NAICS Code] beginning with 72... shall be eligible to receive a covered loan.

This seems to say that if a restaurant company has fewer than 500 employees in a single location, then it is eligible to receive a PPP loan.

# SBA Affiliation Rule Waiver

However, Section 1102(a)(1)(D)(iv) of the CARES Act states:

**WAIVER OF AFFILIATION RULES.**—During the covered period, the provisions applicable to affiliations under section 121.103 of title 13, Code of Federal Regulations, or any successor regulation, are waived with respect to eligibility for a covered loan for—

- **(I) any business concern with not more than 500 employees that, as of the date on which the covered loan is disbursed, is assigned a North American Industry Classification System code beginning with 72;**
- (II) any business concern operating as a franchise that is assigned a franchise identifier code by the Administration (see the [SBA's Franchise Directory](#)); and
- (III) any business concern that receives financial assistance from a company licensed under section 301 of the Small Business Investment Act of 1958 ([15 U.S.C. 681](#)).

The single location language isn't included in 1102(a)(1)(D)(iv)(I). This means that the affiliation rules are waived for NAICS 72 employers which have 500 or fewer employees, and, conversely, that they are not waived for NAICS 72 employers which have more than 500 employees.

# Calculating the Number of Employees

The term “employee” includes individuals employed on a full-time, part-time, or other basis, but does not include independent contractors.

The SBA explained in FAQs released on April 6, 2020 that applicants may calculate the number of employees as the average number of employees during the preceding 12 months or during calendar 2019. For seasonal businesses, the applicant may use average monthly payroll for the period between February 15, 2019, or March 1, 2019, and June 30, 2019. An applicant that was not in business from February 15, 2019 to June 30, 2019 may use the average number of employees for the period January 1, 2020 through February 29, 2020.

# SBA Affiliation Rules

NAICS Sector 72 companies with more than 500 employees will be tested under the normal SBA affiliation rules and affiliated with owners with positive or negative control (as defined in the SBA affiliation rules) that have control over one or more other companies. However, just because a company must be affiliated with its owners and other entities affiliated with its owners does not disqualify a company; it depends on the facts. For instance, if the affiliated companies are also in Sector 72 and do not have more than 500 employees per location, then these companies would still be eligible. Under this standard, even some publicly-traded restaurant companies may meet the size test.

For PPP Loans, an applicant business concern must satisfy two criteria:

- The size of the applicant alone (without affiliates) must not exceed the size standard designated for the industry in which the applicant is primarily engaged [500 per location for Sector 72 companies for PPP loans]; and
- The size of the applicant combined with its affiliates must not exceed the size standard designated for either the primary industry of the applicant alone or the primary industry of the applicant and its affiliates, whichever is higher.
- These size standards are set forth in § 121.201 and can be found here: [https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards Effective%20Aug%202019%2C%202019 Rev.pdf](https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards%20Effective%20Aug%202019%2C%202019%20Rev.pdf) (If there is no number in the far-right column, the usual 500 employee limitation applies.)

# SBA Affiliation Rules

When affiliation rules apply, the primary NAICS Code for the applicant and all its affiliates on a combined basis needs to be determined using the mechanism described in the SBA regulations:

13 CFR § 121.107 How does SBA determine a concern's "primary industry"? In determining the primary industry in which a concern or a concern combined with its affiliates is engaged, SBA considers the distribution of receipts, employees and costs of doing business among the different industries in which business operations occurred for the most recently completed fiscal year. SBA may also consider other factors, such as the distribution of patents, contract awards, and assets

Once the applicable NAICS Code is determined, look at the size standard for the applicant and all affiliates on a combined basis to determine the effect on eligibility. If the combined number of employees exceeds the size standard for the primary NAICS Code in the SBA table, none of the affiliated companies would qualify. Similarly, if the primary NAICS Code remains 72, but one of the Sector 72 affiliates has more than 500 employees in a single location, none of the affiliated companies would qualify. This does not apply to NAICS Code Sector 72 entities with fewer than 500 employees – the affiliation rules are waived for those entities and they are not deemed to be affiliated with any of the other companies based on the affiliation waiver in the CARES Act.

# Calculating the Loan Amount

The available loan amount is the lesser of:

- (1) \$10M, or
- (2) the sum of the following formula: (average monthly payroll costs incurred during the 1-year period before the loan origination x 2.5) + (outstanding amount of existing SBA loans made after January 31, 2020).

In FAQs published by the SBA on April 6, 2020 it was clarified that applicants could calculate their average monthly payroll using data from the same time periods used to determine the number of employees, i.e., the previous 12 months or calendar 2019. Again, seasonal businesses may use average monthly payroll for the period between February 15, 2019, or March 1, 2019, and June 30, 2019. 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 January 1, 2020 through February 29, 2020.

# Allowable Uses

Loans may be used for: (1) payroll costs; (2) mortgage interest; (3) rent and (4) utilities—in each case for up to eight weeks following the issuance of the loan. No less than 75% of the loan proceeds must be used to fund payroll costs.

Payroll costs consist of (a) U.S.-based employee salaries, wages, and commissions (up to \$100,000 annual salary for an individual employee; prorated for the covered period) or similar compensation; (b) payment of cash tips or equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips); (c) payment for vacation, parental, family, medical, or sick leave; (d) allowance for dismissal or separation; (e) payment required for group health care benefits, including insurance premiums; (f) payment of retirement benefits; (g) payment of state or local tax assessed on employee compensation.

# Loan Forgiveness

The Government will forgive the portions of Paycheck Protection Loans used to pay (1) payroll costs; (2) interest on a mortgage obligation (incurred prior to February 15, 2020); (3) rent obligations (leased prior to February 15, 2020); (4) utility payment (when service began before February 15, 2020) in the eight weeks following the issuance of the loan. To obtain loan forgiveness, the borrower must provide specified documentation relating to employee retention and payment of covered costs.

The amount of loan forgiveness shall be reduced proportionally by any reduction in employees (as compared to the prior year) and by reduction in employee pay (beyond 25 percent of their prior year's compensation). Borrowers who re-hire employees previously laid off due to the COVID-19 crisis will not be penalized for having reduced payroll at the beginning of the period.



# Section 7(b) Economic Injury Disaster Loans

The CARES Act also contains provisions related to SBA's existing Section 7(b) Economic Injury Disaster Loan program. The program provides long-term loans at 3.75% to small businesses located in areas that SBA has declared to be geographic disaster zones. Small businesses can apply for up to \$2 million in 7(b) Disaster Loans.

SBA Disaster Loans, as modified by the CARES Act, will be available until December 31, 2020, unlike the PPP loans which, under present legislation, are only available until June 30, 2020.

The EIDL program does not include the same special terms for NAICS Code 72 employers as the PPP and is only for businesses with no more than 500 employees (unless the company falls into one of the NAICS Sectors with a higher permitted number of employees).

The borrower cannot duplicate uses, and should use Section 7(a) PPP loans for payroll, mortgage interest, rent, and utilities, and Section 7(b) EIDL for other permitted purposes.

Small businesses can also apply for an emergency advance of up to \$10,000, which does not have to be repaid.

# Bonus Depreciation for Qualified Improvement Property

The CARES Act fixes a drafting error in the 2017 Tax Cuts and Jobs Act (P.L. 115-97) that prevented businesses, including restaurants, from depreciating building improvements in a single year. Instead, establishments had to depreciate improvements (placed in service after December 31, 2017) over 39 years. With the CARES Act, taxpayers may now claim 100 percent bonus depreciation for “qualified improvement property.”

The term “qualified improvement property” generally means any improvement to an interior portion of a building which is nonresidential real property if such improvement is placed in service after the date of such building was first placed in service.

The bonus depreciation will be particularly helpful if restaurants remodel their space after reopening to add new sanitation or operational features (adding more space between tables, removing ordering kiosks, enlarging take-out areas, etc.).

The CARES Act amendments to the Tax Cuts and Jobs Act are retroactive. This means that taxpayers who placed “qualified improvement property” in service in 2018 may be entitled to amend and receive refunds on their 2018 tax returns.

# Employee Retention Tax Credit

Section 2301 of the CARES Act provides a refundable payroll tax credit for 50 percent of “qualified wages” paid by employers to employees between March 13, 2020 and December 31, 2020.

Any employer may take advantage of the Employee Retention Tax Credit if during a calendar quarter:

- Business operations are fully or partially suspended due to orders from a governmental authority limiting commerce, travel, or group meetings due to COVID-19; or
- The business experiences a significant decline in gross receipts.

A “significant decline in gross receipts” is every calendar quarter (beginning with Q1 of 2020) in which gross receipts are less than 50 percent of gross receipts for the same quarter in the prior year *until* the calendar quarter when gross receipts are 80 percent of gross receipts for the same quarter in a previous year.

**Exception:** Employers who have received a PPP Loan are not eligible for the employee retention tax credit.

# Employee Retention Tax Credit – Qualified Wages

For employers with more than 100 full-time employees during 2019, “Qualified Wages” are:

- Wages paid by the employer with respect to which an employee is not providing services due to (a) full or partial suspension of business operations due to governmental order related to COVID-19, or (b) a significant decline in gross receipts.
- Amounts paid or incurred by the employer to provide and maintain a group health plan (to the extent such amounts are excluded from the gross income of employees).

Qualified wages paid or incurred may not exceed the amount an employee would have been paid for working an equivalent duration during the 30 days prior.

The amount of qualified wages that may be taken into account for any individual employee for purposes of the Employee Retention Tax Credit may not exceed \$10,000 (total for all calendar quarters).

The tax credit may not exceed the applicable employment taxes on the wages of all employees (per calendar quarter). If the amount of allowable credit exceeds this limitation for any calendar quarter, the excess shall be refundable to the employer.

# Modification of Credit for Prior Year Minimum Tax Liability

- Although the corporate alternative minimum tax (AMT) was repealed as part of the Tax Cuts and Jobs Act of 2017, corporate AMT credits were made available as refundable credits over several years ending in 2021.
- Under Section 2305 of the CARES Act, businesses may use past AMT credits at an accelerated rate, thereby permitting companies to claim a refund immediately. Corporations can claim 100 percent of the AMT credits in 2019 as fully refundable and make an election to accelerate claims to 2018.

# Treasury Loans

Treasure is expected to roll out the new \$454 billion loan and loan guarantee program to support to mid- to large- sized companies and nonprofits with 500-10,000 employees impacted by COVID-19 soon.

Direct loans from Treasury are expected to be larger in size than those made available through the SBA, although there are conditions and disclosure requirements that are more extensive than those that apply to SBA loans. There will also be significant public oversight of the program.

A topic for a future webinar!

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**Carrie Bonnington, leader of Pillsbury's Wine, Beer & Spirits Law practice and co-leader of the Restaurant, Food & Beverage Industry Team, is recognized in *Chambers USA* for her mastery of alcohol beverage laws and regulations.**

Carrie is highly regarded for her extensive alcohol beverage industry knowledge, Carrie represents wineries, breweries, distilleries, importers, distributors and retailers (on- and off-sale) in regulatory, transactional and litigation matters. She advises on advertising, promotional, marketing, and other trade practice and tied house issues. Carrie represents licensees in state alcohol beverage regulatory administrative proceedings and trials, and structures multifaceted deals relating to sponsorships, winemaking, distribution, acquisitions, and other similar matters.

# Temporary Relief for the Alcohol Beverage Industry

## \*Restaurants\*

### Unprecedented temporary relief to the Alcohol Beverage Industry

“This regulatory relief is designed to *support* the alcoholic beverage industry in its efforts to assist California in *slowing the spread* of the virus while *assisting the industry* in dealing with the *economic challenges* it is facing as a result. The Department has carefully considered the public’s health, safety, and welfare in providing this relief, and the Department has concluded that none of these measures, *exercised on a temporary basis*, will jeopardize the public’s health, safety, or welfare. In lieu of individual requests for relief submitted to the Department, the temporary relief from the regulatory requirements set forth in this notice are *applicable to all* affected Department licensees and will continue until further notice, as provided below.”

California Department of Alcoholic Beverage Control (emphasis added)



# Types of Temporary Relief

- “To-go” and “Delivery”
- Hours
- Returns
- Sale Terms
- Renewals, Fees and Taxes
- Trade Practices/Free Goods/Other Relief
- Duration

# Allowing/Expanding “To-Go” Privileges

## Common themes:

- Removing no-off sale privileges restrictions
- Expanding off-sale privileges to include spirits
- Expanding off-sale privileges to include “open” beverages and cocktails with meals
- Curbside
- Drive-thru

## Specific Examples:

- Alabama – curbside and to-go permitted; volume restrictions
- California – conditions removed; spirits added; “sealed containers” with meals
- Colorado – “sealed” alcohol beverages with meals; growlers not permitted
- Indiana – carryout consumption permitted
- Maine – beer and wine only
- Missouri – original packaging
- Nebraska – drive-thru and curbside for wine, beer and spirits
- New York – cocktails in sealed containers with food

# Allowing/Expanding “Delivery” Privileges

## Common themes:

- Permitting delivery where previously prohibited
- Third-party delivery models (*i.e.*, Instacart, Uber Eats)
- Suspending signature requirements
- Adding different license types

## Specific Examples:

- California – all manufacturer licensees with off-sale privileges may deliver own products
- Colorado – no third party deliveries continued; “sealed container”; labeling requirement
- Illinois – permitted with local approval
- Iowa – bars and restaurants may offer carry-out and delivery including mixed drinks
- Washington – non-factory sealed cider growlers, jugs; factory sealed bottles, cans, kegs

# Revising Hours

## Common themes:

- Closing retail premises
- Reducing hours
- Expanding hours
- Removing conditions

## Specific Examples:

- California – eliminated hours conditions; expanded wholesaler delivery hours; check local restrictions
- Connecticut – take out sales of alcohol limited to same hours as package stores
- Florida – local jurisdictions addressing hours of sales

# Returns

## Common themes:

- New permissions
- Limited re time, products
- Wholesaler discretion

## Specific Examples:

- Arizona – returns permitted if due to COVID-19
- California – “may accept returns”
- Illinois – beer sold and delivered to a retailer on or before March 23 may be returned
- Texas – unused/unopened product from retailers impacted by COVID-19 (event cancellation), sold February 16 or later may be returned
- Virginia – may accept return and provide refunds

# Credit Laws

## Common themes:

- Eliminated or revised
- Not required

## Specific Examples:

- California – parties may “determine appropriate credit terms”; no COD requirement
- Illinois – not enforcing 30-day terms for “bona fide disputes”
- Texas – no penalty for being delinquent; must still pay before purchasing new inventory

# Renewals, Fees and Taxes

## Common themes:

- Extended deadlines
- Waiving renewal fees
- Strict adherence
- License surrenders

## Specific Examples:

- California – 30-day grace period; no need to surrender
- DC – payments and expirations extended to June 1; no need to surrender
- New York – temporarily waiving renewal fees
- Washington – not required to pay renewals if closed

# Trade Practices / Free Goods / Other Relief

## Common themes:

- Tied house and trade practice laws mostly intact
- Limited temporary relief
- Enforcement priority?

## California:

- “All provisions of the Alcoholic Beverage Control Act, including ... tied-house and trade practice restrictions, remain in effect and subject to enforcement unless the Department has provided express notice that specific provisions will not be enforced.”
- Free delivery permitted
- On-sale retailers may sell to off-sale retailers
- Charitable giving – portion of purchase price permitted; general donations to fundraises benefiting restaurant workers permitted



# Duration of Relief

## Common themes:

- Changing frequently
- Federal, state, local

## California:

- “The relief provided by this notice is temporary and may be withdrawn by the Department at any time. The Department intends to provide a 10-day notice of the termination of any such relief, although such relief may be withdrawn immediately should the needs of public safety dictate.”
- Be aware of local orders which may be more restrictive.

Please Visit Pillsbury's COVID-19 (Coronavirus)  
Resource Center @ [www.pillsburylaw.com](http://www.pillsburylaw.com)

