

INSIGHTS

Many Companies With More Than 500 Employees Could Qualify For Stimulus Loans

March 29, 2020

By: [David J. Ball](#), [David A. Shargel](#), [Joshua C. Zive](#), [Robert J. Wagman Jr.](#), and [Boris Shkuta](#)

As the nation scrambles to take advantage of the \$2 trillion stimulus benefits in the CARES Act, numerous sources have stated that only businesses with 500 or fewer employees are eligible to apply for loans under the Act's Paycheck Protection Program. In fact, businesses with far more than 500 could be entitled to participate in the program.

First, section 1102(a) of the Act applies to any business concern, nonprofit organization, veterans' organization, or Tribal business having the greater of:

- 1) 500 employees **or**
- 2) the "size standard in number of employees established by the [Small Business] Administration for the industry" in which the business operates.

These "size standards" **are contained in a list** maintained by the Small Business Administration, organized by North American Industry Classification System ("NAICS") code, which establishes the maximum number of employees that a particular entity operating in certain industries can have and still qualify under the Paycheck Protection Program. Depending on the applicable NAICS code, a business with significantly greater than 500 employees may still qualify. For example, petroleum refineries (with capacity of less than 200,000 barrels per calendar day) and turbine manufacturers with up to 1,500 employees could qualify, businesses in the crude petroleum extraction, natural gas extraction and coal mining industries could qualify if they have up to 1,250 employees, and entities in the electric power distribution and natural gas distribution industries may have up to 1,000 employees and still qualify. These are only a handful of examples of hundreds of industries contained on the size standards list. Given the Act's "greater of" language referenced above, the 500 employee maximum will apply even if the SBA's size standard table indicates a lower number for a particular industry.¹ Bear in mind that the SBA generally considers both the actual business concern, as well as all of its affiliates, in determining whether an entity qualifies as small.

Second, businesses must count "employees" as that term is defined under Title I of the CARES Act, i.e., an individual retained on a full-time, part-time, or "other basis." While the SBA previously had not expressly defined the term "employee," the CARES Act has adopted preexisting SBA guidance from the SBA's HUBZone Program to provide an explicit definition. As a result, it is likely that the full SBA guidance will be used to calculate the number of employees

under section 1102(a) of the CARES Act. Under that guidance, an “employee” is an individual who works a minimum of 40 hours per month, including any employees obtained through temporary employee agencies. Independent contractors may also be considered an “employee” where there is evidence of an employee-employer relationship, which is assessed under a multi-factor test. On the other hand, independent contractors who are not considered employees would not count toward the entity’s employee count for purposes of determining eligibility under the Paycheck Protection Program.

Bracewell has established a task force to help firms navigate the uncertainty surrounding the impact of COVID-19 generally, including helping to ensure that clients have access to the benefits that Congress has provided. Your Bracewell point of contact can help you learn more.

¹ The SBA’s size standard list also provides standards for certain industries expressed in annual receipts. These are not relevant under the stimulus package. If an industry’s NAICS code reflects a dollar figure, but does not include a number of employees, the 500 employee limit will apply.