

TO: Conference Ministers, Conference Attorneys, Covenant Partners of the UCC (for further distribution)

FROM: Office of General Counsel

DATE: Updated May 4, 2020 (originally sent April 2, 2020)

RE: CARES Act for Churches

MEMORANDUM

The CARES Act was signed into law on Friday, March 27, 2020. It is a massive stimulus package introduced to combat economic damage as a result of the COVID-19 virus. The law contains several provisions of interest to churches and ministers, which are described below. A full review of the bill is beyond the scope of this memo. This memo is not legal advice to any particular church, and churches with legal questions about eligibility for any relief under the CARES Act should consult an attorney. Recipients of this memo can redistribute it and it will be posted on the UCC's Coronavirus Response resources page.

Church Acceptance of Government Funds

The General Synod of the United Church of Christ, various settings of the UCC, and its predecessor denominations, have a rich heritage of promoting religious freedom and tolerance. Believing that churches are strengthened, not weakened, by the principle of the separation of church and state, the UCC has long acknowledged its responsibility to protect the right of all to believe and worship voluntarily as conscience dictates, and to oppose efforts to have government at any level support or promote the views of one faith community more than another. At its twentieth gathering, the General Synod continued this legacy by encouraging the involvement of the United Church of Christ in a national campaign to promote the principle of the separation of church and state and the proper role of religion in society. The UCC has a long history of advocating against the establishment of religion by the government, and has taken public positions supporting the separation of church and state, including positions that argue against churches being eligible for public funding, such as the position that it took in the amicus brief it joined in *Trinity Lutheran v. Comer*.

The programs currently being promulgated by Congress make funding available to churches in ways that it has not historically been available. Churches are encouraged to carefully consider the implications of accepting funding from the government before applying for relief under the CARES Act. These implications include both the utility of the government program for

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the church, and the impact of government regulation on the church.

It is unlikely that there is a constitutional problem with churches being eligible for funding under the CARES Act. The CARES Act does not promote religion; it treats religion the same way it treats other organizations and it does not prefer one religion over another. The purpose of the Act, which is limited in time and by funding, is to stimulate the economy as whole in response to a national emergency.

With respect to the protection of religious liberty in the receipt of federal funds, recently released SBA Interim Final Rules state:

All loans guaranteed by the SBA pursuant to the CARES Act will be made consistent with constitutional, statutory, and regulatory protections for religious liberty, including the First Amendment to the Constitution, the Religious Freedom Restoration Act, 42 U.S.C. 2000bb-1 and bb-3, and SBA regulation at 13 C.F.R. 113.3-1h, which provides: “Nothing in [SBA nondiscrimination regulations] shall apply to a religious corporation, association, educational institution or society with respect to the membership or the employment of individuals of a particular religion to perform work connected with the carrying on by such corporation, association, educational institution or society of its religious activities.” SBA intends to promptly issue additional guidance with regard to religious liberty protections under this program.

Because of the speed with which this legislation has been enacted, we do not yet know what issues and problems will present themselves and will need to be worked out, so it is important that churches not view the CARES Act as guaranteed money or free money with no strings attached. Interim Final Rules have just been released. Acceptance of government money will undoubtedly come with requirements for accountability for that money. Churches should carefully consider how any accountability requirements may affect their ability to conduct their ministry, and also consider how they can plan for the future with another pandemic or crisis in mind.

Each church of the United Church of Christ can decide for itself whether to pursue funds from the government, and this memorandum is intended to encourage churches to carefully consider all of the implications when it is making these decisions.

Paycheck Protection Program

The Paycheck Protection Program (PPP) is a loan program administered by the Small Business Administration (SBA). The program expires June 30, 2020. This program is different from other SBA loan programs because small non-profit organizations (fewer than 500 employees) are eligible to apply, including churches and religious organizations. Some churches have been told by SBA lenders that churches are not eligible for SBA programs. This is not the case; lenders who are indicating this are misinformed. Congress specifically expressed its intent to SBA that religious organizations and churches are eligible for this relief. The Interim Final Rules plainly state that eligible organizations include “[a] tax-exempt nonprofit organization described in section 501(c)(3) of the Internal Revenue Code.” Further, the Interim Final Rules

reference the listing of business not eligible for SBA loans, and notes that “except that nonprofit organizations authorized under the [CARES] Act are eligible.”

A. How does inclusion in the United Church of Christ Group Exemption affect my church’s eligibility for a PPP loan?

Churches with standing in an Association of the United Church of Christ are included in the United Church of Christ’s group federal tax exemption. Some churches have asked whether that means their employee headcount will be combined with all churches in the UCC’s group exemption, thus precluding churches from being individually eligible. The answer is that inclusion in a group exemption does not mean that a church is controlled by or controls another organization such that its employees will be included in the headcount of all UCC churches—the church should use its employee headcount only in determining its eligibility.

B. How much can my church borrow?

A church is eligible for a loan up to 2.5 times the average monthly payroll cost of the church, based on the prior year. This excludes compensation over \$100,000 for any individual, prorated February 15 through June 30, 2020. The definition of **payroll costs** includes “salary, wage, commission or similar compensation,” as well as payments for vacation benefits; parental, family, medical, or sick leave (except for amounts paid for leave under the Families First Coronavirus Response Act); group health care benefits, retirement benefits, and state and local taxes. The SBA recently clarified that the housing allowance is part of qualifying payroll costs.

C. What can my church use the loan proceeds for?

Loan proceeds can be used to cover payroll costs and may also be used for mortgage interest or rent of the church’s building (except not for prepayment), existing utility payments, and interest on pre-existing debt.

D. Is it true that my church won’t have to pay the loan back?

The PPP is attractive to churches because it is potentially partially or fully forgivable if certain requirements are met. First, the church must only spend the loan proceeds on the costs described above. The Interim Final Rules clarify that to qualify for forgiveness, 75% of the loan must be spent on payroll costs, with only 25% permitted to be spent on non-payroll costs like rent, mortgage, and utilities. Second, the church must maintain the number of full-time equivalent employees (FTEs) it has during the 8-week period following the loan, based on either the number of FTEs the church had from February 15, 2019 through June 30, 2019, or from January 1, 2020 through February 29, 2020. If the church has reduced its employees already but is able to bring them back on by June 30, 2020, those reductions, if made between February 15 and 30 days after the enactment of the Act, will be ignored for purposes of loan forgiveness. Third, the amount forgiven will be reduced if the church reduces the compensation of any employees more than 25 percent. Churches should keep excellent records of how it spends the loan proceeds if it intends to pursue loan forgiveness.

Churches interested in a PPP loan should consult the SBA’s website (www.sba.gov) and apply directly with a lender.

E. If my church doesn't apply for a PPP loan or is not eligible for loan forgiveness, is there any other relief under the CARES Act?

Churches who do not obtain a PPP loan that is forgiven may be eligible for payroll tax postponement under the CARES Act. This tax postponement applies only to the employer share of the Social Security tax, and so will only apply to the wages of lay employees. Churches may postpone paying payroll taxes from March 27, 2020 through December 31, 2020 and pay them over the next two years. Half is due by December 31, 2021, and the other half is due by December 31, 2022.

Churches who do not obtain a PPP loan that is forgiven may be eligible for an employee retention payroll tax credit. To qualify for this credit, churches must have fully or partially suspended operations due to an order from a government authority, or have experienced a decline in revenue for any calendar quarter in 2020 of 50% or more compared to the same calendar quarter in 2019. The employee retention payroll tax credit has additional requirements relating to the eligibility of the church and the qualified wages; churches interested in this payroll tax credit should seek the advice of a qualified tax professional or attorney.

F. Can clergy defer their Social Security taxes too?

Clergy may postpone payment of the “employer” portion of their SECA taxes during the same period of time but must pay the “employee” portion of it according to the normal timetable. The postponed taxes are due as described for churches, above. Clergy can do this regardless of whether their employing church has had a PPP loan forgiven, because clergy pay the employer share of their Social Security taxes.

G. Our church's minister is an independent contractor and their income is reported on Form 1099.¹ Can we include payments to our minister in calculating “payroll costs?”

No. Payroll costs are limited to amounts paid to employees, not independent contractors. Independent contractors are eligible to apply for their own loans.

H. The PPP loan application form asks our church to “[l]ist all owners of Applicant with greater than 20% ownership stakes.” How should we respond?

Ordinarily, most churches will leave this blank, as there is likely no individual or organization that owns more than 20% of your church. Each church, however, should evaluate this question independently in case your church's circumstances are unique.

I. Is it true that churches with cash reserves or endowments are not eligible for the PPP loan, and if they received one, should they give it back?

From the program's inception, every borrower has had to certify that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the

¹ Ordinarily a minister is a W-2 employee of their church. It is beyond the scope of this memorandum to address employment classification of ministers, but classifying a minister as a 1099 worker should be the exception and occur under circumstances where the minister is truly an independent contractor.

Applicant.” On April 23, 2020, the SBA issued guidance directing borrowers to review the certification, “taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.” Subsequently, the SBA clarified that guidance applied to all businesses—public and private, that loans of \$2 million or greater would be reviewed for compliance with the “necessary” requirement, and that all loans were subject to review. Churches should carefully document the analysis done prior to applying for the loan and the circumstances making the loan “necessary” for business operations. Such documentation might include (but will vary based on the church’s circumstances) a memo offering an analysis of the consistency of current and future revenue, net assets of the church and the availability of cash reserves, access to alternative sources of financing, and how detrimental it would be to the church to access these alternative resources. The church’s donor base can certainly be taken into account.

J. Is forgiveness automatic?

No. Churches must apply to their lender for forgiveness. Remember that loan funds must be spent on qualifying payroll costs, mortgage interest, rent, and utilities for the eight-week period that begins on the date the lender makes the first disbursement of the PPP loan to the church. The lender will require documentation, including the number of FTE employees on payroll, hours worked by part-time employees, rates of pay for the eight-week period over which the loan proceeds must be used and over the measurement period; mortgage statements that show the amount of interest paid; utility statements; and officer certification that the funds were used for allowable purposes. If a church fails to provide adequate documentation, the loan will not be forgiven.

K. Can our church apply for a PPP loan just in case we need it and use the funds later?

No. PPP funds must be used within the eight-week period following the first disbursement.

L. Should our church open a separate bank account for tracking PPP funds?

There is no requirement in the CARES Act to open a separate bank account.

M. Will the amount of loan forgiven be taxable to the church?

No. Sec. 1106, Loan Forgiveness, states the following:

(i) Taxability.—For purposes of the Internal Revenue Code of 1986, any amount which (but for this subsection) would be includible in gross income of the eligible recipient by reason of forgiveness described in subsection (b) shall be excluded from gross income.

N. Is the minister’s housing allowance includable as part of qualifying payroll costs?

Yes. The SBA issued guidance on April 23 clarifying that the housing allowance is includable as part of qualifying payroll costs.

Pandemic Unemployment Assistance Program

The CARES Act expanded unemployment benefits to individuals who are not typically eligible. This includes those who are self-employed, independent contractors, and those not generally eligible for unemployment under state or federal law. The benefits are available for unemployment after January 27, 2020 and ending on or before December 31, 2020, for eligible reasons.

A. Are church employees eligible for unemployment compensation?

Most churches (there are some exceptions) are not required to pay into unemployment insurance in their respective states and do not do so. This means that the employees of most churches, including lay employees, are not eligible for unemployment benefits. Because the CARES Act changes that, church employees who otherwise meet the criteria below may be eligible, though this may be clarified in implementing regulations.

B. Are ministers eligible for unemployment compensation?

As for lay church employees, above, the CARES Act makes individuals eligible who are not typically eligible for unemployment compensation. This may include ministers, and implementing regulations may clarify this issue.

C. What reasons are individuals eligible for unemployment compensation under the CARES Act?

Unemployment benefits are available to individuals who are unemployed, partially unemployed, or unable to work **only because**:

- They have tested positive for COVID-19 or are experiencing symptoms of COVID-19 and are seeking a medical diagnosis;
- A member of their household has been diagnosed with COVID-19;
- They are providing care for a family or household member who has been diagnosed with COVID-19;
- A child or other person in the household for whom they have primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of COVID-19, and such school or facility care is required for the individual to work;
- They cannot reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;
- They cannot reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- They were scheduled to commence employment and do not have a job or are unable to reach the job as a direct result of the COVID-19 public health emergency;

- They have become the breadwinner for a household because the head of the household has died as a direct result of COVID-19;
- They had to quit their job as a direct result of COVID-19;
- Their place of employment is closed as a direct result of the COVID-19 public health emergency; or
- They meet any additional criteria established by the Secretary for unemployment assistance.

D. Are employees who are on paid FMLA or Paid Sick Leave under the Families First Coronavirus Response Act eligible for unemployment?

No. Individuals receiving any paid leave benefits, whether under the FFCRA or not, are not eligible. Individuals who have the ability to telework are not eligible.

E. How do employees apply for unemployment compensation?

All unemployment benefits will be administered by the states. Information about state unemployment benefits can be found for each state here: <https://www.careeronestop.org/WorkerReEmployment/UnemploymentBenefits/unemployment-benefits.aspx>. It is difficult to say how quickly states will be prepared to administer benefits to those to whom it has not administered benefits before. States may be setting up separate systems to handle claims that are not typically eligible for unemployment.