

COVID-19 STRATEGIES & CANNABIS

WYKOWSKI ||| LAW

EST. 2013



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With the passage of the CARES and related acts, Congress has created one of the single largest disaster relief programs in history. Unfortunately, the cannabis industry has largely been left out of the relief efforts.

While official recognition of the essential nature of cannabis related services is a victory for the cannabis industry, operating during the epidemic creates many new challenges for an industry already facing unfavorable tax and banking treatment. Businesses should prepare for increased compliance and other operational changes. With this guide, Wykowski Law hopes to substantively address:

- 1) Potential California loan alternatives to SBA and EIDL loans.
- 2) Both Federal and California tax relief programs that cannabis businesses can take advantage of.
- 3) Compliance issues that the COVID-19 virus has raised.
- 4) California-specific regulatory relief efforts.
- 5) New California and federal regulatory requirements; and
- 6) Federal and state employment relief programs that Cannabis businesses can potentially take advantage of.

We are available to consult further on any issues raised by this guide or any further questions that individual businesses may have.

Please be advised that the information you obtain in this guide is meant to be informational only and is not, nor is it intended to be, advice legal or otherwise. You should consult an attorney for advice regarding your individual situation and should consult individually with tax advisors before taking particular tax positions. We invite you to contact us and welcome your calls and e-mails. Contacting us does not create an attorney-client relationship. Please do not send any confidential information to us until such time as a professional relationship has been established.

If you wish to discuss anything raised within this guide, or further matters related to cannabis-specific strategies for COVID-19 survival and adaptation, we can be contacted below:

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LOAN PROGRAMS

Can Cannabis Businesses Apply for Federal Loans?

Unfortunately, no. The SBA has stated that both the Paycheck Protection Program (“PPP”) and Economic Injury Disaster Loans (“EIDL”) are not available to the cannabis industry given that cannabis remains federally illegal. Given the certifications required for such loan programs, we strongly urge any cannabis businesses with non-cannabis business lines, or businesses that otherwise support the cannabis industry, who may be considering applying for such loans, to consult with counsel about any potential application.

Are There Alternative State and/or Private Loans?

Possibly, though traditional barriers for cannabis lending still exist and make obtaining such loans difficult.

State Alternatives

The State has the California Capital Access Program (“CalCAP”) loans, the California Infrastructure Economic Development Bank (“IBank”) loans, and the Jump Start Loan Program (“JSLP”), among other smaller programs. CalCAP and IBank must be done through a private lending institution, many of whom will not do business with cannabis. However, several institutions have encouraged cannabis businesses to apply and see if relief might be available upon examination of a full application. If an institution is willing to advance the loan, up to 100% of the loan (95% for IBank) may be guaranteed by the State. JSLP provides loans to individuals facing unexpected financial hardships and may be a viable option for furloughed employees and/or officers who need to take temporary pay cuts.

Links to the programs and links to the list of approved lending institutions can be found in the links below:

[CalCAP Loan Information](#)

[IBank Loan Information](#)

A link to the potential CalCAP lending partners can be found in the link below:

[CalCAP Lender Contact Info](#)

Though many of the above institutions have already indicated that they are unable to lend to cannabis businesses, one institution in particular has encouraged cannabis businesses to apply:

[Pacific Community Ventures](#)

Some Private Alternatives Without Guarantees

There are also several regional lending institutions that may be worth attempting to obtain relief from. Again, as with the institutions above, the following are often FDIC insured and are unwilling to ultimately lend to cannabis. Several however, have encouraged businesses to apply to more fully evaluate whether they are able to potentially loan to cannabis businesses:

[Working Solutions Loans](#) (which provides \$5,000 - \$50,000 loans to Bay Area small businesses)

[San Diego Commercial & Business Financing](#) (though primarily real estate loans, it offers some lines of credit and other options for small businesses)

[Heritage Bank of Commerce](#) (providing loans primarily to small businesses in the San Jose area)

[Los Angeles County Development Authority](#) (primarily providing funding to LA-based businesses who participate in manufacturing, health, green technology and transportation).

Peer-to-Peer Private Lending

Finally, depending on the capital needs, particularly for smaller loans, a cannabis business could potentially consider peer-to-peer loans. Such programs typically act as brokers for private loans, and thus vary heavily in terms, application requirements, and funding amounts. Many peer-to-peer loans, however, are often for smaller amounts and carry higher interest rates than other commercial loans. Given that such loans are a newer form of lending, and generally have less oversight than traditional institutions, we highly recommend vetting such potential lenders carefully and evaluating potential loans with trusted advisors prior to committing.

For those that wish to explore peer-to-peer lending, we recommend initially viewing companies such as Funding Circle, which is traded on and regulated by the London Stock Exchange:

[Funding Circle](#)

COVID TAX RELIEF

Can Cannabis Businesses Take Advantage of Payroll Tax Credits?

Uncertain. While items like the employee retention tax credit may generally be available for businesses with at least a partial suspension in operations or a reduction in at least half of their gross receipts, section 280E may preclude marijuana businesses in the cannabis industry from taking advantage of such tax credits. Marijuana businesses that have separate lines of business have a greater chance of successfully claiming such credits. Finally, businesses should consider filing and paying their payroll taxes without the benefit of the credits or deferral and then filing a claim for refund, alleviating the risk of penalties and interest. Businesses wishing to take advantage of payroll tax credits should consult their tax advisors. Again, tax professionals should be consulted for each individual business's tax needs.

Are there other Tax Programs that Cannabis Businesses Can Take Advantage of?

There are several programs that may assist cannabis businesses.

Federal Payroll Contribution Deferral Programs.

Cannabis employers who do not benefit from the Payroll Protection Program loan forgiveness get to defer their portion of FICA taxes (6.2%) from March 27, 2020 to December 31, 2020 to two later dates: half at December 31, 2021 and the remainder at December 31, 2022.

In addition, the EDD is also accepting applications to defer state payroll reports and/or to deposit state payroll taxes for up to 60 days without penalty or interest.

State Sales/Use Tax Deferral Programs

The California Department of Tax and Fee Administration ("CDTFA") has created a special program that allows for businesses with less than \$5 million in annual sales to receive deferrals of up to \$50,000 in sales or use taxes. The deferral is interest free and allows the deferred amount to be paid over a 12-month period. Qualifying cannabis businesses can apply online through the CDTFA's website:

[CDTFA COVID FAQ](#)

Employer Disaster Relief Payments to Employees

Employers may decide to provide disaster relief payments to employees during this time. While such payments may not be deductible to the employer, the payments themselves may not be considered taxable income to the employee, depending on certain circumstances. Doing so may provide certain relief for employees undergoing economic hardship. A tax professional should be consulted as to what

benefits could be provided to ensure that such payments are not taxable to the individual.

Have Any Tax Filing Deadlines Been Impacted by the Disaster?

Yes. In addition to the widely-publicized extension for federal and state income tax returns to July, the CDTFA has provided an additional 90-days for the 1) filing of tax returns, and 2) payments of both prepayments and principal amounts owed, provided that such returns are for \$1 million dollars or less in tax owed. Such tax returns include not only sales and use taxes, but also cannabis taxes. For example, 1st quarter sales and use tax returns that are for less than \$1 million dollars would normally be due by April 30, 2020. So long as the tax owed is less than \$1 million, the return can be deferred until July.

Please note, that special care should be taken to calculate cannabis excise tax payments with such extensions. The 50% penalty for failure to remit the excise tax on time is still in place. Though it is possible to apply with the CDTFA for a penalty abatement, whether or not an abatement can be obtained is not guaranteed.

A full schedule of the CDTFA's current extensions can be found below:

[CDTFA Deferral Schedules](#)

Have Any Other Tax Procedural Deadlines Been Impacted?

Yes. As part of the overall tax relief, Governor Newsom's recent executive order extended the filing deadline, by 60-days, for claims for state tax refunds or for filing notices of appeal with the Office of Tax Appeal ("OTA"). This extension is effective for deadlines through July 31, 2020. Despite this extension, taxpayers should consult with professionals and carefully evaluate deadlines. If a deadline is missed, a taxpayer may lose certain appeal or other substantive rights.

A description of such extensions may be found in the link below:

[Refund and OTA Deadline Extensions](#)

Can we Take Advantage of Federal Charitable Tax Deductions if My Business Wants to Support Relief Efforts?

Whether or not federal charitable contributions are precluded for cannabis businesses by 280E is currently being litigated in the US Tax Court. However, a cannabis business should still be able to take advantage of contributions of tangible goods to relief efforts. For example, a cannabis business that was able to procure and donate masks may be able to take advantage of by including such items in cost of goods sold. We encourage cannabis businesses that wish to support relief efforts to consult with tax advisors when considering large contributions.

COVID REGULATORY RELIEF

Will California Allow Any Regulatory Variances During the Crisis?

Yes. Under BCC regulation 5038, CDFA regulation 8207, and CDHP regulation 40182, cannabis licensees may apply to their respective state regulatory agencies for temporary relief from regulatory requirements that they are unable to satisfy due to COVID-19. Such licensing requirements must be requested BEFORE the variance occurs, but could potentially save cannabis businesses significant amounts in the short term for licensing fee delays (if the agency will consider such a delay) and relief from previously approved standard operating procedures that are no longer feasible. Licensees applying for such relief must demonstrate how the current pandemic has impacted their ability to comply. A cannabis business should consult with regulatory advisors on potential savings and procedures. Please note that the BCC has already stated that it is not considering granting application or fee delays at this time. Despite this, our state trade organizations are lobbying the Governor's office heavily on this particular matter, and relief for BCC licensees may be available soon. Licensees should still apply to the other agencies to see if they will consider any fee or application delays.

Please note that, thus far, only the BCC appears to have issued any guidance encouraging licensees to apply for variances. Despite this, each licensing authority has specified regulations regulated to disasters, which potentially provide for relief. Despite the lack of public comment from the CDFA and CDPH so far, we encourage licensees to apply and see what can be obtained.

A link to the BCC's guidance and the form needed for the BCC request can be found below:

[BCC Notification and Request Form](#)

[BCC COVID-19 FAQ](#)

Can Retailers Engage in Delivery or Curbside Operations During the Crisis?

Yes. Many cannabis businesses have adjusted their business models to accommodate online orders, curbside pick-up, contact-less drop-offs, or new delivery services for customers. While these adjustments are more than necessary in many circumstances, it is important to remember that unless privileges for these activities were already included in the business's licenses, the business will likely need to apply for local and BCC approval before it starts new delivery or curbside operations.

BCC retail licensees are permitted to engage in delivery or curbside operations. However, licensees must amend the operating procedures submitted with their BCC license application if curbside or delivery services were not already included. Even if

you have approval from a state agency for these services, a business will still need a local authorization.

Other new COVID-related programs may also require licensee to submit amended operating procedures.

COVID-SPECIFIC REGULATORY REQUIREMENTS

In addition to relief programs, both the federal government and the State of California have implemented new requirements on cannabis businesses. Failure to comply with such requirements can lead to significant fines and penalties for operators.

Are There Further Requirements that Cannabis Employers Must Follow During the Crisis?

Yes. Cal OSHA has implemented further requirements that employers must meet, including implementing specific safety guidelines regarding illness and injury. Ironically, given that cannabis has largely been declared an “essential service” to cater to consumer’s medical cannabis needs, it is likely that cannabis businesses are subject to stricter standards than other businesses that would include requirements for anti-contamination procedures, among others.

Additionally, the State and many local governments have implemented specific new signage requirements for employees with significant penalties for non-compliance.

In addition, Governor Newsom has ordered that cannabis businesses are required to follow CDC guidance in operations, which includes procedures for dealing with contamination in the workspace, increasing ventilation for a business’s premises, and employee education.

We are available to help clients with any questions they may have about these new rules.

The full guidance can be found below.

[CDC Guidance](#)

NEW EMPLOYMENT RELIEF PROGRAMS AND REQUIREMENTS

Are There New Requirements Associated with Employees that Can't Work because of COVID?

Yes, there are new paid time off (PTO) requirements that went into effect on April 1st. The Family's First Corona Virus Protection Act requires any employer with under 500 employees to provide up to 80 hours of PTO to any full-time employee that cannot work or cannot work remotely because of the virus. Part-time employees are entitled to a sum equal to up to 2 weeks of PTO at their normal rate for however many hours that they would have normally worked in those two weeks. Employers do not have to pay more than \$511 a day for those seeking COVID related care and \$200 a day for those taking care of someone else.

Employers cannot make finding a replacement worker to cover the shift a condition of taking the PTO and must post these new requirements conspicuously on the job site.

For most businesses these new PTO requirements would be paid for with tax credits and deductions. Cannabis businesses may be INELIGIBLE for these because of IRC 280E and the federal illegality of cannabis.

Are There Exceptions to the New PTO Requirements?

Yes, employers that have fewer than 50 employees and can demonstrate that providing the above PTO would cause significant financial burden can possibly be exempt from the program. Especially given the uncertain impact of 280E on the tax credits for such program, cannabis business employers should consult with tax and regulatory counsel about this exemption and the ability to qualify for it.

Are There Any State Relief Programs that May Help Avoid Employee Layoffs?

Yes. The EDD currently has its Work Share Program in place which provides, so long as the employer meets specific requirements, that a portion of an employee's salary be paid through unemployment Insurance.

The EDD is also accepting applications to defer state payroll reports and/or to deposit state payroll taxes for up to 60 days without penalty or interest.

The requirements for the program can be found below:

[EDD Work Share Program FAQ](#)