

PPP Safe Harbor 1: An Outline of New York Executive Orders to Rely On for Your Forgiveness Application

As previously discussed [here](#), the Paycheck Protection Program (PPP) Flexibility Act established an additional safe harbor to the loan forgiveness reductions and full-time equivalent headcounts for the PPP. A borrower's reduction in the number of full-time equivalent employees will not affect forgiveness if the borrower, in good faith, is able to document an inability to return to the same level of business activity as such business was operating at or before February 15, 2020 due to compliance with requirements established or guidance issued by the Secretary of Health and Human Services, Director of the CDC, or OSHA during the period beginning on March 1, 2020 through December 31, 2020, related to the maintenance standards for sanitation, social distancing, or any other worker or customer safety requirements related to COVID-19 (the Safe Harbor). The Small Business Association (SBA) later clarified that the Safe Harbor includes state and local governmental orders.

It appears that the SBA will be broadly interpreting this Safe Harbor and anticipates that the vast majority of borrowers will rely on this particular safe harbor (as opposed to the other available safe harbors).

If a borrower intends to certify that it qualifies for the Safe Harbor, the PPP forgiveness application requires the borrower to maintain documentation supporting the certification. This documentation includes copies relevant governmental orders, copies of the applicable requirements for each borrower location, and relevant borrower financial records.

As of September 10, 2020, Gov. Cuomo has issued more than 60 executive orders (EOs) related to the COVID-19 pandemic. Below is comprehensive outline of the executive orders and other governmental documents that your business may maintain if certifying to this Safe Harbor to avoid forgiveness reduction. *However, note that it is important to consider when your specific region was approved to reopen according to Gov. Cuomo's four phases, including which phase your business qualifies under.*

General Overview

- **Reduction of Capacity/Occupancy:**
 - EO 202.1 issued March 12, 2020 (reducing to 50% capacity and attendance)
- **Reduction of Non-Essential Workforce:**
 - EO 202.6 issued March 18, 2020 (reducing by 50%); EO 202.7 issued March 19, 2020 (reducing by 75%); EO 202.8 issued March 20, 2020 (reducing by 100%); EO 202.13 issued March 30, 2020 (continuing reduction to April 15, 2020); EO 202.14 issued April 7, 2020 (continuing reduction to April 29, 2020); EO 202.18 issued April 16, 2020 (continuing reduction to May 15, 2020); EO 202.31 issued May 14, 2020 (continuing reduction to May 28, 2020); EO 202.34 issued May 29, 2020 (implementing phases of re-opening):
 - **Phase 1:** EO 202.31 issued May 14, 2020
 - **Industries:** Construction; Agriculture, Forestry, Fishing and Hunting; Retail (limited to curbside or in-store pickup or drop off); Manufacturing; Wholesale Trade

- **Phase 2:** EO 202.35 issued May 29, 2020
 - **Industries:** Offices; Real Estate; Retail (in-store); Vehicle Sales, Leases and Rentals, Retail Rental, Repair and Cleaning, Commercial Building Management
- **Phase 3:** EO 202.41 issued June 13, 2020
 - **Industries:** Restaurants/Food Services; Personal Care
- **Phase 4:** EO 202.45 issued June 26, 2020
 - **Industries:** Higher Education; Pre-K to Grade 12 Schools; Low-Risk Outdoor Arts & Entertainment; Low-Risk Indoor Arts & Entertainment; Media Production; Professional Sports Competitions with No Fans; Malls; Gyms and Fitness Centers

As a reminder, each region entered into each phase at different times and your region's reopening phase date may differ from the dates of the EOs set forth above. Further, industry-specific guidelines, which may also be relevant to your ability to assert the Safe Harbor, have also been released. These guidelines set forth re-opening information for industries including, but not limited to: (i) schools; (ii) camps; (iii) personal care services; (iv) malls; (v) food and bar services; (vi) large gatherings and event venues; (vii) gyms, fitness centers and exercise classes; (viii) video lottery and casino gaming facilities; (ix) movie theaters; and (x) places of amusement.

If you need assistance determining the exact date when your particular industry and region entered into a phase, or would like guidance on which EOs to use as documentation for your forgiveness application, please contact [Jeffrey B. Scheer](#) or the attorney at the firm with whom you are regularly in contact.



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