Coronavirus relief legislation: Business provisions

On December 27, 2020, the Consolidated Appropriations Act (CAA), 2021 was enacted, creating a second round of stimulus designed to aid individuals, families, and businesses impacted by COVID-19 as part of a larger appropriations bill. This Act changed and extended a number of provisions that were passed as part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act on March 27, 2020. Some of the key provisions of both of those Acts that impact businesses are highlighted below. For coverage of the individual provisions, see **Coronavirus relief legislation: Individual provisions**. We will continue to provide additional information and analysis as guidance becomes available.

Loans

Paycheck Protection Program (PPP)

Initial Paycheck Protection Program

The CARES Act created a new, potentially forgivable loan program to expand the Small Business Administration (SBA) loan programs currently in place. This program is available for both for-profit and tax-exempt businesses (including independent contractors, sole proprietors, and self-employed individuals) that can certify in good faith that current economic uncertainty makes the loan request necessary to support ongoing operations.

These loans are intended to provide financial assistance to businesses impacted by COVID-19 that need help with certain specific expenses (such as U.S. payroll costs and "covered compensation," including sick or medical leave, group health benefits, insurance premiums, retirement benefits, mortgage interest, rent, and utility payments, among others, as expanded by the CAA). The CAA allocated additional funding to this initial PPP loan program to benefit those businesses that have not yet taken advantage of the PPP and extended the application deadline to March 31, 2021, unless funding runs out earlier.

Second Draw Paycheck Protection Program (PPP2)

For those businesses that received a PPP loan already and have used or will use the full amount, the CAA created a Second Draw PPP. This program is specifically targeted at smaller, harder hit businesses (those that have less than 300 employees and at least a 25% reduction in gross receipts in at least one quarter of 2020 versus the same quarter in 2019). And, under this program, businesses also have until March 31, 2021 to apply.

For both programs, the formula for determining the maximum amount of the loan is driven by when the company was in business and whether other loan and grant programs were utilized. But in general, as related to initial PPP, the amount of the loan is 2.5 times the average total monthly payroll costs for the previous 12 months or in 2019, up to a maximum of $10 million.

Although the PPP2 also uses 2.5 times average total monthly payroll costs for the previous year (or 3.5 times for restaurant, lodging, and similar type businesses, i.e. those with NAICS code beginning with 72) to calculate the loan amount, the maximum loan under the PPP2 is $2 million. (The salary that may be counted for this calculation under both programs is capped at an annualized $100,000 (whether paid or incurred)).

A business not in operation on February 15, 2020 is not eligible to receive any PPP loans. As before, neither PPP loan has SBA fees, neither requires a personal guarantee, and both provides for deferral of payments. Most importantly, both PPP loans are potentially completely forgivable. (For details regarding the forgiveness feature see “Loan forgiveness for PPP loans” under “Grants” section below.)

Express Loans
In addition to the PPP program, the new legislation increases the limit for Express Loans from the SBA from the pre-CARES Act limit of $350,000 to $1 million for loans issued before the October 1, 2021. Also, the CAA resets the limit for these loans issued after October 1, 2021 to $500,000.

Emergency Economic Injury Disaster Loans (EIDLs)
The CAA allocated more funds to the EIDL program, replenishing funding for Emergency Economic Injury Grants, explained below under “Grants.” The CARES Act relaxed the requirements and expanded the previously existing SBA EIDL program to also include sole proprietorships, independent contractors, agricultural cooperatives, tax-exempts, and ESOPs with 500 or fewer employees, for loans made due to the impact of COVID-19. It relaxed the verification of repayment rules to allow more businesses to qualify and waived multiple previously enforced requirements: that the business has been existing for more than one year, that a personal guarantee be provided on the loan for amounts under $200,000, and that the business is unable to obtain credit elsewhere.

The maximum loan amount is $2 million, and it features lower interest rates (2.75% for tax-exempts; 3.75% for others) to businesses that were in operation at least as of January 31, 2020. These loans were designed to provide funds for providing sick leave, maintaining payroll, meeting increased costs, making rent/mortgage payments, and repaying obligations.

The CAA extends the covered period for the EIDL through December 31, 2021. The business may also request an additional grant of up to $10,000 that does not need to be repaid. See “Grants” section below.

A business can utilize both the PPP and the EIDL programs, as long as they are not used for the same expenses. (In other words, the limitations are designed to prevent double dipping.)

Subsidy for certain loan payments
For currently existing (non-disaster) SBA loans (made under Section 7(a) of the Small Business Act), the CARES Act required the SBA to pay the principal, interest, and any fees associated with that loan for six months beginning on the due date of the next payment. Similarly, it provided that even if the current loan is in deferment, once the deferral period ends, the SBA will pay six months of payments as they come due.

The CAA extends this provision for an additional three months for most businesses and an additional five months for certain smaller, harder hit businesses. Even for new loans approved between February 1 and September 30, 2021, the SBA is required to pay principal and interest for the first six months. These payments are generally capped at $9,000 per month.

The SBA has other loan programs that may be available to qualified applicants in addition to those under the CARES or CAA Acts.

Grants

Loan forgiveness for PPP loans
In addition to making it easier to receive a significant loan under the PPP programs, the CARES Act created, and CAA expanded, the potential for such a loan to be forgiven. Forgiveness generally applies to loan proceeds used to pay certain specified expenses that were incurred or paid during the forgiveness period. This forgiveness of the loan is not subject to federal income tax.

The CAA provides more flexibility as to how long businesses have to spend the money and which expenses count toward forgiveness. In general, the CAA allows the business to elect a covered period that is anywhere between eight and 24 weeks from when the loan is distributed to be the covered period for the loan.

During this covered period, amounts used by the business to cover certain expenses are eligible to be forgiven in full (up to the loan principal amount). These include payroll, mortgage interest, rent, utility payments, operations expenditures, property damage costs, supplier costs, and worker protection expenditures.

The calculation for covered payroll differs: for an eight-week forgiveness period, payroll is subject to a ceiling of $15,385 per owner and employee, while for a 24-week forgiveness period, payroll for employees is subject to a ceiling of $46,154 per employee, and payroll for owners is subject to a ceiling of $20,833. For other covered periods, additional guidance may be issued to provide clarity as to calculating this amount.

At least 60% of the forgiveness amount must be for payroll costs, and no more than 40% can be for the remaining eligible expenses (such as mortgage interest, rent, and utility payments, other covered expenses like operations expenditures, property damage costs, supplier costs, and worker protection expenditures). If less than 60% of the loan amount is used for payroll, the forgiveness amount is adjusted to the level at which 60% of it is payroll.

To receive maximum loan forgiveness, the business must continue to employ all its employees at approximately the same salary as the previous year. If the number of employees or their salary is reduced, so is the amount of the loan that may be forgiven (however, with regard to the reduction based on compensation, a reduction of up to 25% of an employee's compensation is permitted, and employees earning more than $100,000 are not considered).

If the loan is $50,000 or less (and, together with affiliates*, less than $2 million), the business is exempt from having the forgiveness reduced based on any reductions in FTE and/or salary and wages under the *de minimis* exemption.

Businesses with a loan amount greater than $50,000 that have already reduced their workforce or an employee's compensation due to COVID-19 have the opportunity to rehire workers and reinstate compensation (by December 31, 2020 for pre-CAA loans and by the end of the selected forgiveness period for post-CAA loans), and still be eligible for the loan forgiveness. There are other ways to avoid a reduction in loan forgiveness when head count is reduced.

Additionally, the amount of loan forgiven is not subject to federal income tax. And, business expenses that were otherwise deductible, continue to be deductible even when paid with PPP proceeds that are later forgiven and do not reduce the tax basis of these assets. These changes are specifically authorized by the CAA.

There are a number of loan forgiveness applications that have been created by the SBA and they differ in complexity depending on the amount of the loan and certain other requirements. However, the CAA also creates a simplified one-page certification for loans under $150,000 that outlines the number of employees retained due to the loan, an estimate of the loan spent on payroll and total loan amount.

* See 85 FR20817 regarding SBA affiliation rules.

Any portion of the loan taken prior to June 5, 2020 that is not forgiven is to be repaid over two years at 1% interest (though a longer term may be used if the lender and borrower agree). Businesses that take a PPP loan on or after June 5, 2020, have up to five years to repay any portion of the loan that is not forgiven. The interest on the loan is non-compounding and not adjustable.

The CAA provides that if the business receives an EIDL grant (see below), that amount does not reduce the amount of the PPP loan that qualifies for loan forgiveness (an important change from previous law).

Emergency Economic Injury Grant
Businesses applying for the EIDL (see above) may request an emergency advance of up to $10,000 (previously limited to $1,000 per employee, up to $10,000). This amount does not need to be repaid (regardless of whether the loan is ultimately approved by the SBA), is free of federal income tax and may be used to pay sick leave, additional costs incurred related to COVID-19, or other business obligations. The CAA replenished funding for these grants, which had been depleted in 2020.

The CAA also gives priority for the grants to eligible smaller businesses (300 employees or less), independent contractors, gig workers, and self-employed individuals if they are located in a low income community and can show that they suffered an economic loss of greater than 30% during a predetermined period. It also provides that those smaller, higher impacted businesses in low-income communities can request to receive a supplement to any grant that they received that was less than $10,000 to get them to the full grant amount. The covered period for the EIDL is now through December 31, 2021.

In addition, the CAA provides that the grant received no longer reduces the amount of the PPP loan that qualifies for loan forgiveness (an important change from previous law). This change applies retroactively to the inception of the CARES Act.

Grant for shuttered venue operators
A new grant created by the CAA provides assistance to live venue operators, theater and live performance operators. These grants are intended to be used for expenses similar to those outlined in the PPP loan program. A PPP loan is not available to businesses that receive this grant.

Payroll tax relief

Employee retention credit for shuttered businesses
The CAA extends and expands the credit against payroll taxes for wages paid to employees from March 12, 2020 through June 30, 2021 and now makes colleges, universities and medical or hospital providers, among certain other entities, eligible. The maximum credit for wages paid starting January 1, 2021 is now 70% of eligible wages up to $10,000 per employee per quarter (i.e. max of $7,000 per employee per quarter, for a total of up to $14,000 per employee for the first two quarters of 2021, when this credit is set to expire). This credit is available even if a business received the credit for 2020 wages.

To qualify, the business must have experienced a full or partial shutdown of operations as a result of the order to limit travel, meetings, and commerce (whether for commercial, social, religious, or other purposes) due to COVID-19. It is also available to a business that experienced 20% or more reduction in gross receipts from the same quarter in 2019.

For businesses with more than 500 employees, the credit is available only with respect to wages paid to employees who are not actually working. For businesses with 500 or less employees, the same credit is available for all wages paid whether the employee is actually working or not.

In addition, even businesses that received a PPP loan are eligible to claim the credit, so long as the wages for which it is claimed were not paid with PPP loan proceeds. This change is retroactive to wages paid from

March 12, 2020, so a business might consider amending the 2020 return if it had wages that it paid beyond those covered by the PPP loan.

Finally, companies with 500 or fewer employees can now request an advance payment of the credit up to 70% of the average quarterly payroll for the same quarter in 2019. The Treasury will issue more guidance on how this will be implemented.

Delay of payment of *employer* portion of Social Security payroll taxes
The CARES Act provided that Businesses and self-employed individuals may be able to defer paying the employer share of the Social Security tax (but not Medicare tax) for 2020. Half of the deferred amount must be paid by December 31, 2021, and the second half by December 31, 2022.

Delay of payment of *employee* portion of Social Security payroll taxes
Businesses and self-employed individuals were able to defer paying the employee share of the Social Security tax for wages paid between September 1, 2020 and December 31, 2020. The CAA provides that this deferred amount now must be repaid before January 1, 2022 to avoid accruing interest or penalties.

Payroll tax credit for required paid sick leave under Families First Coronavirus Response Act
Although the requirement that the employer pay FFCRA wages for COVID-19 related reasons expired on December 31, 2020, the CAA provides that those employers who voluntarily provide this paid leave, can continue to receive credits for wages paid through March 31, 2021.

Business charitable deduction
The CARES Act made two enhancements to the charitable deduction for businesses. First, the 10% limitation for charitable deductions by a C corporation was increased to 25% for calendar year 2020. Second, the percentage limitation for charitable contributions of food inventory by businesses during 2020 was increased from 15% to 25%.

The CAA now allows a full deduction up to 100% of taxable income for qualified disaster relief contributions made between January 1, 2020 and February 25, 2021 (60 days after CAA enactment).

Business Meals Deduction
Although generally a business meal deduction is limited to 50% of the allowable amount, for food and drinks purchased at a restaurant between December 31, 2020 and January 1, 2023, the CAA increases the deduction to 100% of the allowable amount.

Exclusion for certain employer payments of student loans
If a business makes a student loan payment to or on behalf of an employee, up to $5,250 of that payment may be excluded from the employee’s income, so long as the payment is made after March 27, 2020 and before January 1, 2026, as changed by the CAA.

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