

Paycheck Protection Program 2.0: Everything Associations and Other Nonprofits Need to Know

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Agenda

- Changes to the federal Paycheck Protection Program (PPP) and their impact on associations and other nonprofit organizations, including the expansion of the PPP program to 501(c)(6) entities.
- Details related to association PPP eligibility, loan forgiveness, etc.
- Changes to the federal Economic Injury Disaster Loan program and its impact on associations and other nonprofit organizations.
- Changes to the federal Employee Retention Tax Credit program and its impact on associations and other nonprofit organizations.
- Changes to the rules for federal charitable contribution tax deductibility for 2021.
- Q&A

Background

- The federal “Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act” became law on December 27, 2020; it was part of the federal Consolidated Appropriations Act, 2021, comprised of more than 5,500 pages and including a \$900 billion economic stimulus package.
- The Act reauthorizes lending under the federal Paycheck Protection Program (PPP) through March 31, 2021; successor to the CARES Act PPP program.
- \$284.5 billion available, with \$35 billion set aside for first-time borrowers and \$30 billion set aside for loans made by smaller lenders and community financial institutions.
- Loans are obtained through U.S. Small Business Administration (SBA)-approved lenders and not through the SBA.
- PPP loans remain fully or partially forgivable if certain conditions are met.
- Also includes \$15 billion for live venues, independent movie theaters, and cultural institutions, \$20 billion for the Economic Injury Disaster Loan (EIDL) Program, important changes to the Employee Retention Tax Credit (ERC), and changes to the charitable contribution tax deductibility rules for 2021.

Key Updates for 2021 PPP Loans

- Borrowers can set the “Covered Period” of the loan (i.e., the end date) to be between eight and 24 weeks after the loan disbursement date, meaning the funds must be spent on eligible expenses during the Covered Period.
- Borrowers that reduce wage or employment levels during the Covered Period can lose loan forgiveness unless one of the safe harbors excludes the reductions.
- PPP loans can be used to cover additional expenses, including certain operations expenditures related to software and cloud computing services, certain property damage costs, certain supplier costs, and certain worker protection expenditures – but to receive loan forgiveness, 60% of loan proceeds must be used on payroll costs (i.e., wages, payroll taxes, paid leave, healthcare payments, retirement plan contributions, and *group life, disability, dental, and vision insurance*); up to 40% can be used on the other eligible expenses.

Key Updates for 2021 PPP Loans – Continued

- For nonprofits, PPP eligibility expanded to include most (but not all) 501(c)(6) organizations, housing cooperatives, direct marketing organizations, and certain other organizations; previously included 501(c)(3) and 501(c)(19) organizations.
- The PPP provides greater flexibility for seasonal employees.
- Additional funding is available for entities that returned their original amount or did not receive the full amount for which they qualified.
- Introduces the concept of “First Draw” loans (which include *both* PPP loans received under the CARES Act *and* PPP loans received by first-time PPP borrowers in 2021) and “Second Draw” loans (which means the second PPP loan received by a borrower), the latter which are subject to tighter eligibility requirements and a lower maximum loan limit (\$2 million compared to \$10 million), but which are otherwise subject to many of the same requirements as First Draw loans.

Application Timeline

- Loans will re-open the week of January 11, 2021 with community financial institutions exclusively allowed to make First Draw PPP loans starting January 11, 2021 and Second Draw PPP loans starting January 13, 2021.
- The PPP will open to all participating lenders at a later date (unknown at this time) and remain open through March 31, 2021.
- After March 31, 2021, no First Draw or Second Draw PPP loan applications may be submitted.

First Draw Eligible Entities

- Entities with 500 or fewer full- and part-time employees that are eligible for other SBA Section 7(a) loans.
- Sole proprietors, independent contractors, and eligible self-employed individuals.
- Certain nonprofit organizations to whom contributions are tax deductible as charitable contributions; 501(c)(3) and (c)(19) entities were eligible in the previous round as well.
- Section 501(c)(6) associations and business leagues, chambers of commerce, visitors' bureaus, and destination marketing organizations (DMOs).
- Hotels and restaurants (and similar entities, i.e., those with North American Industry Classification System (NAICS) codes starting with 72) with 500 or fewer employees per physical location.
- News organizations that are majority-owned or -controlled by an NAICS code 511110 or 5151 business or nonprofit public broadcasting entities with a trade or business under NAICS code 511110 or 5151.
- Entities must have been operational on February 15, 2020 with employees for whom were paid salaries and payroll taxes, paid independent contractors (as reported on an IRS Form 1099-MISC), or were an eligible self-employed individual, independent contractor, or sole proprietorship with no employees.
- Entities that receive a grant under the new "Save Our Stages" program are not eligible.

501(c)(6) Eligibility

- Eligible 501(c)(6) organizations are those:
 - That have 300 or fewer full- and part-time employees; and
 - That do not receive more than 15% of their “receipts” from lobbying, whose lobbying activities do not comprise more than 15% of the organization’s total activities, and such lobbying activities do not cost more than \$1 million during the most recent tax year that ended prior to Feb. 15, 2020; and
 - Are not organized for the purpose of promoting or participating in a political campaign.
- ASAE has requested additional clarification from the SBA and Treasury on the scope, definition and application of “lobbying activities.” Some news reports suggest that SBA and Treasury may be inclined to rely on IRS Form 990 data for this purpose, which would mean tying the lobbying definitions to those in IRC Section 162(e) (i.e., defining lobbying as federal, state and local legislative lobbying, grassroots lobbying, political campaign activities, and certain very high-level federal executive branch lobbying).
- Sports leagues are not eligible.

Eligibility for Clients of AMCs/PEOs

- Association Management Companies (AMCs) and Professional Employer Organizations (PEOs) – as for-profit business – maintain eligibility for PPP loans in this new round of funding.
- In addition, as in the first round, clients of AMCs/PEOs do not lose eligibility due to such status.
- According to the SBA, eligible borrowers that use PEOs or similar payroll providers are required under some state registration laws to report wage and other data using the Employer Identification Number (EIN) of the PEO or other payroll provider. In these cases, payroll documentation provided by the payroll provider that indicates the amount of wages and payroll taxes reported to the IRS by the payroll provider for the borrower's employees will be considered acceptable PPP loan payroll documentation.
- Relevant information from an IRS Schedule R (Form 941), Allocation Schedule for Aggregate Form 941 Filers, attached to the PEO's or other payroll provider's IRS Form 941, Employer's Quarterly Federal Tax Return, should be used if it is available; otherwise, the eligible borrower should obtain a statement from the payroll provider documenting the amount of wages and payroll taxes.
- Employees of the eligible borrower will not be considered employees of the eligible borrower's payroll provider or PEO.

First Draw – Eligibility Criteria

- Did not receive a PPP loan under the CARES Act or now qualify for an increase of the original PPP loan amount.
 - Increase of original PPP loan under CARES Act for entities that returned any amounts or did not receive the full amount for which they were eligible.
 - Requesting an increase in the original PPP loan does not make the application a Second Draw loan.
- 500 or fewer full- and part-time employees.
- The applicant must have been in operation as of February 15, 2020 and, as of that date, had employees for whom it paid salaries and payroll taxes; the applicant cannot hire new employees now to justify the need for a PPP loan.
- Applicants must certify their economic need for a PPP loan (the “Necessity” test):
“Borrowers...must certify in good faith that their PPP loan is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that ‘[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.’ Borrowers must make this certification in good faith, 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.” (SBA Guidance)

Second Draw – Eligibility Criteria

- Employers with 300 or fewer full- and part-time employees (note the 500 employee-or-less difference for First Draw loans).
- Borrower must have experienced at least a 25% revenue reduction in 2020 as compared to 2019. This is calculated by comparing quarterly gross receipts for one quarter in 2020 with quarterly gross receipts from the same quarter in 2019. Alternatively, a borrower that was in operation for all four quarters of 2019 can submit copies of its annual federal information or tax returns that show a reduction in annual receipts of 25% or greater in 2020 compared with 2019.
- The borrower must have used, or will have used, the full amount of the First Draw loan on or before the expected date of disbursement of the Second Draw loan.
- The full amount of the First Draw loan must have been spent on eligible expenses.
- Must still meet the “Necessity” test, meaning that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”

Excluded Entities – Second Draw Loans

- A business concern or entity primarily engaged in political activities or lobbying activities, including any entity that is organized for research or for engaging in advocacy in areas such as public policy or political strategy or that describes itself as a think tank in any public documents;
- Certain entities organized under the laws of the People's Republic of China or the Special Administrative Region of Hong Kong, or with other specified ties to the People's Republic of China or the Special Administrative Region of Hong Kong (includes a U.S. entity having a Chinese resident on the board);
- Any person required to submit a registration statement under Section 2 of the federal Foreign Agents Registration Act of 1938 (22 U.S.C. 612);
- A person or entity that receives a grant for shuttered venue operators under Section 324 of the federal Economic Aid Act;
- Entities in which the President, the Vice President, the head of a federal Executive department, or a Member of Congress, or the spouse of such person, owns, controls or holds at least 20 percent of any class of equity; or
- A publicly traded company, defined as an issuer, the securities of which are listed on an exchange registered as a national securities exchange under Section 6 of the federal Securities Exchange Act of 1934 (15 U.S.C. 78f).

Loan Amounts – First Draw Loans

- Maximum loan amount is the lesser of the below calculation or \$10 million.
- How to calculate your loan amount:
 1. Aggregate payroll costs for all employees living in the U.S. for (a) calendar year 2019, (b) calendar year 2020, or (c) the one-year period before the date on which the First Draw loan is made, as selected by the loan applicant (the “Reference Period”).
 2. Subtract compensation amounts paid to an employee in excess of \$100,000 on an annualized basis, as prorated for the period during which the payments are made or for which the obligation to make the payments is incurred.
 3. Calculate average monthly payroll costs by dividing the amount from Step 2 by 12.
 4. Multiply the average monthly payroll costs from Step 3 by 2.5.
 5. If applicable, add the outstanding amount of an Economic Injury Disaster Loan (EIDL) made between January 31, 2020 and April 3, 2020 that you seek to refinance. Do not include the amount of any “advance” under an EIDL COVID-19 loan (because it does not have to be repaid).

Loan Amounts – Second Draw Loans

- In general, the maximum loan amount for a Second Draw PPP loan is equal to the lesser of 2.5 times the borrower's average monthly payroll costs or \$2 million. This is essentially the same as for First Draw loans, except with a \$2 million cap instead of a \$10 million cap.
- The relevant time period for calculating a borrower's average monthly payroll costs for a Second Draw PPP loan is either (i) calendar year 2019, (ii) calendar year 2020, or (iii) the 12-month period prior to when the loan is made, at the discretion of the borrower (the "Reference Period"). As with First Draw loans, employee compensation in excess of \$100,000 per year must be excluded from the calculation, and the calculation may only include employees living in the U.S.
- For those entities that are part of a "corporate group" (businesses that are majority owned, directly or indirectly, by a common parent), the limit is \$4,000,000; it is unclear if this applies to nonprofit organizations.

Eligible Uses of Funds – First and Second Draw Loans

- Payroll, rent, covered mortgage interest, and utilities.
- New law expands eligible payroll costs to include group life, disability, dental, and vision insurance. This is also retroactive to any prior PPP loans, so you may be eligible to amend your loan application for a larger amount as long as the loan has not yet been forgiven (dependent upon your corporate structure).
- Covered worker protection and facility modification expenditures, including personal protective equipment, to comply with COVID-19 federal health and safety guidelines.
- Covered property damage costs related to property damage and vandalism or looting due to public disturbances in 2020 that were not covered by insurance or other compensation.
- Expenditures to suppliers that are essential at the time of purchase to the recipient's current operations.
- Covered operating expenditures, i.e., payments for any business software or cloud computing service that facilitates business operations; product or service delivery; the processing, payment, or tracking of payroll expenses; human resources; sales and billing functions; or accounting or tracking of supplies, inventory, records, and expenses.

Loan Terms – First and Second Draw Loans

- Covered Period: Borrowers may choose the length of their Covered Period ranging from eight weeks to 24 weeks, meaning the funds must be spent on eligible expenses during the Covered Period.
- The guarantee percentage is 100 percent.
- No collateral will be required.
- No personal guarantees will be required.
- The interest rate will be one percent, calculated on a non-compounding, non-adjustable basis.
- The maturity period is five years.
- All loans will be processed by all lenders under delegated authority and lenders will be permitted to rely on certifications of the borrower to determine the borrower's eligibility and use of loan proceeds.

Loan Forgiveness – First and Second Draw Loans

- First Draw and Second Draw loans will qualify for full loan forgiveness if, during the 8-to-24-week Covered Period following loan disbursement:
 - Employee and compensation levels are maintained;
 - The loan proceeds are spent on payroll costs and other eligible expenses; *and*
 - At least 60% of the proceeds are spent on “payroll costs”; the remaining 40% (or less) can be spent on other eligible expenses.
- Must spend at least 60% of loan on payroll costs during the Covered Period. “Payroll costs” means wages, payroll taxes, paid leave, healthcare payments, retirement plan contributions, and *group life, disability, dental, and vision insurance* (these are new additions).
- May spend 40% of loan on certain other expenses during the Covered Period: rent, utilities, mortgage interest payments, interest on existing debt, essential supplier costs, personal protection equipment, and operational expenses such as software, accounting, and cloud computing.
- Borrowers must attempt to keep the same number of employees to the extent possible. A reduction in over 25% of salaries will result in a commensurate reduction in overall loan forgiveness, but if the reduction is *less* than 25% of salaries, there will be *no* reduction in loan forgiveness (one form of the “safe harbor”).
- If a borrower cannot find employees to rehire, or if the entity is shut down due to COVID-19, the borrower will have a “safe harbor” and will not be penalized for a reduction in head count of greater than 25%.

New Streamlined Loan Forgiveness for First and Second Draw Loans

- An eligible borrower that received a loan of \$150,000 or less shall not, at the time of its application for loan forgiveness, be required to submit any application or documentation for forgiveness. These borrowers will only need to provide a one-page certification that includes the following:
 - The number of employees the borrower was able to retain because of the loan;
 - The estimated total amount of the loan spent on payroll costs; and
 - The total loan amount.
- In addition, the borrower must attest that the borrower:
 - Spent the loan on eligible expenses; and
 - That the borrower will retain records that prove compliance with PPP requirements:
 - Employment records must be retained for four years following submission of the form.
 - Other records must be retained for three years following submission of the form.
- Borrower remains subject to audit which might require the documentation and result in modification.
- This form should be available by January 20, 2021.

Tax Impact for Taxable Businesses

- Forgiveness of PPP loans will not be included as taxable income.
- Expenses paid from PPP loan proceeds that are forgiven will be tax deductible as business expenses. This is applicable to both First and Second Draw loans.
- Any income tax basis increase that results from the borrower's PPP loan will remain even if the PPP loan is forgiven.

Economic Injury Disaster Loan Program

- An additional \$20 billion was authorized for the federal Economic Injury Disaster Loan (EIDL) program. The application period has been extended to December 31, 2021.
- EIDL loans are not forgivable like PPP loans.
- Applications for EIDL loans are directly with the SBA, not via private lenders.
- To qualify, an applicant must, among other things, be located in a low-income community, have suffered an economic loss greater than 30%, and employ not more than 300 employees.
- As part of the EIDL program, an “advance” of up to \$10,000 is available for those who apply for the EIDL; such “advances” do not need to be repaid. Small businesses will get \$1,000 per employee and it is available for up to 10 employees or \$10,000.

Economic Injury Disaster Loan Program – Continued

- Loans carry a 3.75% interest rate for small businesses. It includes 30-year maturity and an automatic deferment of one year before monthly payments begin.
- Borrowers can use the loan for working capital and operating expenses. This includes the continuation of health care benefits, rent, utilities, and fixed debt payments.
- To be eligible for the loan, borrowers must provide collateral for over \$25,000. Collateral can be machinery and equipment, furniture and fixtures, and other things.
- Personal guarantees are required for loans over \$200,000.
- Guidance will be forthcoming from SBA.

Employee Retention Tax Credit

- The new law clarifies and expands the federal Employee Retention (Tax) Credit program (ERC).
- Applies to federal employer-paid *payroll* taxes; applicable to associations and other nonprofit organizations.
- A welcome change: An employer that received or receives a PPP loan is no longer prohibited from claiming the ERC. This change is *retroactive* to the effective date under the original law (CARES Act) for wages paid after March 12, 2020, meaning that employers that took PPP loans are now eligible to take the ERC so long as the same wages are not used for both (i.e., the tax credit may not be claimed for wages paid with the proceeds of a PPP loan that have already been forgiven).
- Qualified wages are those paid after March 12, 2020 and before July 1, 2021.
- It is a *refundable* tax credit if the tax credit exceeds the payroll taxes due for that quarter.

Employee Retention Tax Credit – Continued

- Eligibility Requirements:
 - As of January 1, 2021, the tax credit is available to employers with operations that are either fully or partially suspended by a COVID-19 governmental order and only during the period that the order is in force (“partially suspended” means operations continue but not at a “normal capacity”); or
 - Gross receipts are less than 80% of “Gross Receipts” for the same quarter in 2019 (for tax-exempt entities, “Gross Receipts” includes contributions, gifts, grants, dues or assessments, sales or receipts from unrelated business activities, sale of assets, and investment income (e.g., interest, dividends, rents, and royalties).”
 - Employers that were not in existence in 2019 may use a comparison to 2020 for purposes of the tax credit.

Employee Retention Tax Credit – Continued

- Employer Size
 - As of January 1, 2021, the threshold increased to 500 full- and part-time employees (previously, this was 100 employees)
 - An employer with 500 or fewer full- and part-time employees will be eligible for the tax credit, even if employees are working.
 - When calculating the 500-employee threshold, the employees of all affiliated entities sharing more than 50% common ownership are aggregated (unclear whether nonprofits with “control” are covered).
- Percentage of Wages
 - Beginning January 1, 2021, the tax credit is 70% of qualified wages, plus the cost to continue providing health benefits to the employee.
- Maximum Credit Amount
 - Beginning January 1, 2021, the cap is increased to \$7,000 per employee for each of the first two quarters of 2021 (\$10,000 in qualified wages x 70%), for a possible \$14,000 credit per employee.
 - The 2021 tax credit is available even if the employer received the \$5,000 maximum credit for wages paid to such employee in 2020.
- Wages used for ERC cannot be used to obtain PPP loan forgiveness.

Charitable Contribution Tax Deduction

- The federal CARES Act provision allowing non-itemizing taxpayers to deduct up to \$300 (\$600 for married couple filing jointly) for contributions to qualified tax-exempt 501(c)(3) (and other, such as 501(c)(19)) organizations has been extended through 2021.
- The new law extends for one year the increased limits on deductible charitable contributions for individuals who itemize and for corporations. For individuals, the cap will remain at 100 percent of adjusted gross income (instead of reverting back to 60 percent). For corporations, the annual limit will stay at 25 percent of taxable income in 2021 (instead of reverting back to 10 percent).
- The cap on the charitable tax deductibility of food donations from corporations will stay at 25 percent of taxable income (instead of reverting back to 15 percent).

Resources

- [First Draw PPP Loan Application](#)
- [Second Draw PPP Loan Application](#)
- [PPP Loan Forgiveness Application](#)
- [First Draw PPP Interim Final Rule](#)
- [Second Draw PPP Interim Final Rule](#)
- [SBA COVID-19 Guidance and Resources](#)
- [SBA COVID-19 EIDL Loan Application](#)
- [Full Text of the Federal Consolidated Appropriations Act, 2021](#)

Questions?

T E N E N B A U M

L A W G R O U P P L L C



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