

DOES THE “ECONOMIC AID TO HARD-HIT BUSINESSES, NONPROFITS, AND VENUES ACT” ACTUALLY SOFTEN ANY BLOWS?

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Tags: [Danielle Durban](#), [Michelle Schwerin](#)



The **Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act** (the “**Act**”, which Congress passed on December 21, and President Trump signed into law on December 27), is designed to provide a second round of financial support for businesses and independent contractors after the devastating economic impact of COVID-19. But will this expanded program actually benefit those in desperate need of a second stimulus? This post explores a potential pitfall of this latest relief program: the practical question of whether the expanded list of eligible, forgivable expenses actually expands the usefulness of the **Paycheck Protection Program** (“**PPP**”) loans for potential borrowers.

Expanded Eligible Expenses

Recall the initial PPP Loan under the CARES Act (“**PPP One Loan**”) required borrowers’ to spend PPP One Loan proceeds on specific, allowed expenses (“**Permissible Expenses**”). The list of expenditures that qualified for loan forgiveness (“**Forgivable Expenses**”) was even shorter. The new Act allocates

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\$284 billion (including \$138 billion of unspent proceeds from round one) for a second round of **Paycheck Protection Program Loans** (“**PPP Two Loan**”) and expands the list of Forgivable Expenses to include:

- **Covered Operations Expenditures:** 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.
- **Covered Property Damage Costs:** Costs related to property damage and vandalism or looting due to public disturbances that occurred during 2020 that was not covered by insurance or other compensation.
- **Covered Supplier Costs:** Expenditures made to a supplier of goods for the supply of goods—
 - (A) essential to the operations of the entity at the time the expenditure is made; **and**
 - (B) provided pursuant to a contract, order, or purchase order—
 - (i) in effect at any time before the covered period with respect to the applicable covered loan; **or**
 - (ii) with respect to perishable goods, in effect before or at any time during the covered period with respect to the applicable covered loan
- **Covered Worker Protection Expenditures:** Any operating or capital expenditures to facilitate the adaptation of the business activities to comply with requirements established or guidance issued by the Department of Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration, or any equivalent requirements or guidance issued by a state or local government, during the period starting March 1, 2020. Examples of such worker protection expenses include the purchase, maintenance, or renovation of assets that create or expand an indoor, outdoor, or combined air pressure ventilation or filtration system, a physical barrier to ensure social distancing, an expansion of additional indoor or outdoor business space, and other kinds of personal protective equipment.
- **Payroll Costs Expanded Definition:** Now includes payments for group life, disability, vision, and dental insurance payments.

We wonder: *Is it realistic that eligible borrowers will actually benefit from these expanded categories of expenses?* For example, many borrowers and potential borrowers likely already incurred Covered Worker Protection Expenditures expenses to come into compliance with health standards and COVID-19 safety rules (e.g., drive-through windows, acrylic safety shields, adding walls/offices, etc.). We have dealt with COVID-19 for ten months now and most municipalities, cities, and states have long since enacted some level of safety protocols that required businesses to change their operations. Thus, if a business has *not* already made such change(s), that business is likely in violation of a government safety order.

PPP Two Loan borrowers will apply for forgiveness based on expenses incurred during a Covered Period existing sometime in the future; no forgiveness will be granted for Covered Worker

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Protection Expenditures incurred prior to the loan funding date. Since many of these expenditures have already been incurred and a growing percentage of our population soon will receive vaccinations against COVID-19, the value of this category of forgivable expenses to PPP Two Loan borrowers will diminish in the coming months.

PPP One Loan borrowers, on the other hand, may have incurred Covered Worker Protection Expenditures at some point during their Covered Period (sometime in the late spring through fall of 2020). The expansion of Forgivable Expenses *may* benefit a PPP One Loan borrower—so long as the borrower's loan was not forgiven as of December 21, 2020—if the borrower expended funds on such Covered Worker Protection Expenditures during its Covered Period **and** such expenses will increase the amount of the PPP One Loan eligible for forgiveness. (In such a scenario, we recommend the borrower collect any supporting documentation showing it spent its PPP One Loan proceeds on such expanded eligible expense during the Covered Period to include as part of its Forgiveness Application.) Whether many borrowers find themselves in this situation remains to be seen.

(We would be remiss not to recognize that there are other new categories of expenses, including Operations Expenditures and Supplier Costs, that may have broader reaching benefits for borrowers into 2021 and the future. Nevertheless, remember that whether a PPP One Loan borrower and/or a PPP Loan Two borrower, **60%** of the loan proceeds must still be spent on payroll costs to qualify for full forgiveness.)

Time will tell whether the new Act's expansion of eligible expenses will materially benefit PPP borrowers. Unfortunately for many businesses that have been hit hard by the pandemic, time is in short supply.

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