

WE'RE BACK...AND SO IS THE GOVERNMENT WITH ANOTHER ROUND OF PPP AND EIDL FUNDING

Posted on December 24, 2020 by Michelle F. Schwerin



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Late in the evening of **Monday, December 21, 2020**, Congress passed the **Consolidated Appropriations Act**—a holiday gift to the tune of **\$900 billion**—which contains the **Economic Aid to Hard-Hit Small Businesses, Nonprofits, and Venues Act**. For businesses and independent contractors that considered or participated in **The CARES Act** programs, this new law looks like a chance for another bite at the apple. But before sinking your teeth in, closely analyze several new eligibility requirements under the Second PPP and EIDL Loan programs.

Paycheck Protection Program

The **Paycheck Protection Program Second Draw Loans** (“**PPP Two Loan**”) is the second wave of loans (grants, if forgiven) to small businesses and non-profits affected by COVID-19. Borrowers who received an initial Paycheck Protection Program Loan under The CARES Act (“**PPP One Loan**”) and borrowers who never received a PPP One Loan can take advantage of a PPP Two Loan, so long as the borrower:

1. **employs** not more than **300** employees;

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2. has used, or will have used, the entire proceeds of its PPP One Loan (this requirement, of course, does not apply to a prospective PPP Two Loan borrower who did not obtain a PPP One Loan); **and**
3. experienced a decline in gross receipts of at least **25%** when comparing the same quarters in 2019 to 2020 (the legislation provides several options for comparison).

If a borrower has more than one location, then this changes to “employs not more than 300 employees per location”.

*If the borrower was not in business during any quarter or all of 2019, the Act provides **an alternative means of measurement**. For purposes of this analysis, “**gross receipts**” includes all revenues from normal operations, but does not include amounts borrowed (e.g., a PPP One Loan).*

Besides satisfying the eligibility criteria, a potential borrower must also certify, just like with the PPP One Loan, that the PPP Two Loan is “necessary” to support ongoing operations. The Small Business Administration (the “**SBA**”) does not clearly define “necessary” for purposes of supporting ongoing operations, thus suggesting a case-by-case, fact-based analysis. As the SBA explained in [FAQs 31 and 37](#), which have collectively caused these authors endless headaches, borrowers should take “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.” Further complicating the analysis, the IRS, whistleblowers, or others, may challenge this “necessity” requirement, even if the SBA will not inquire into the necessity of borrowers with loans less than \$2,000,000. Borrowers will now also be listed in the public record, opening the door to public scrutiny.

If a borrower meets the eligibility requirements and is able to certify as to necessity, the maximum amount it can receive is **\$2,000,000**. **The PPP Two Loan amount is calculated as 2.5 times the average monthly payment of payroll costs** incurred or paid by the borrower during—as selected by the borrower—**either** the one-year period before the loan origination date **or** the calendar year 2019.

This calculation differs for seasonal employers.

Additionally, the borrower is directed to select the length its own “**covered period**”, the time the borrower has to expend the funds on allowable and/or forgivable expenses (a period **beginning** on the **loan origination date** and **ending** between **8** and **24 weeks** after the loan origination date). This customized “covered period” should be analyzed strategically to maximize spending and forgiveness (not the kind that comes sentimentally with the holidays, but, rather, the kind that means that some or all of the loan does not have to be repaid).

Speaking of spending and forgiveness, what a borrower may spend its loan proceeds on has opened up to include a wider range of expenses, including, for example, expenses incurred to make the borrower’s physical space safe for employees during COVID-19. The inclusion of the following allowable uses are effective as if included in The Cares Act but **shall not apply** to PPP Loans for which the borrower already received forgiveness *prior to* **December 21, 2020**:

Covered Operations Expenditures

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Defined as “a payment 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

Defined as “a cost 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

Defined as “an expenditure made by an entity to a supplier of goods for the supply of goods that—

- (A) are essential to the operations of the entity at the time at which the expenditure is made; and
- (B) is made 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

Defined as

- (A) “an operating or a capital expenditure to facilitate the adaptation of the business activities of an entity 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 established or guidance issued by a State or local government, during the period beginning on March 1, 2020 and ending the date on which the national emergency declared by the President under the National Emergencies Act with respect to the Coronavirus Disease 2019 (COVID-19) expires related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19
- (B) may include—
 - (i) the purchase, maintenance, or renovation of assets that create or expand—
 - (I) a drive-through window facility;
 - (II) an indoor, outdoor, or combined air or air pressure ventilation or filtration system;
 - (III) a physical barrier such as a sneeze guard;
 - (IV) an expansion of additional indoor, outdoor, or combined business space;
 - (V) an onsite or offsite health screening capability; or
 - (VI) other assets relating to the compliance with the requirements or guidance

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described in subparagraph (A), as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor; and

- (ii) the purchase of—
 - (I) covered materials described in section 328.103(a) of title 44 (namely, personal protection equipment), Code of Federal Regulations, or any successor regulation
 - (II) particulate filtering facepiece respirators approved by the National Institute for Occupational Safety and Health, including those approved only for emergency authorization; or
 - (III) other kinds of personal protective equipment, as determined by the Administrator in consultation with the Secretary of Health and Human Services and the Secretary of Labor; and
- (C) does not include residential real property or intangible property."

Payroll Costs Expanded Definition

Now include payments for group life, disability, vision, and dental insurance payments.

Due to these changes, if a borrower's PPP One Loan amount would have been more (likely due to the new definition of "payroll costs") **or** if a borrower returned all or part of its PPP One Loan, the borrower may reapply for additional funds. But don't forget, no matter the PPP Loan, **60%** of the loan **must** still be spent on "**payroll costs**" in order to maximize forgiveness.

March 31, 2021 is the deadline to apply for a PPP One Loan and/or a PPP Two Loan. Please note that special rules apply for certain industries and entity types, including **501(c)(6)** nonprofits (which, aside from lobbyists and professional sports organizations, are now eligible for a PPP One Loan and/or a PPP Two Loan), and theater and performing arts organizations (which have an entire granting section dedicated to their revival).

Economic Injury Disaster Loan Program

The new legislation also created a targeted **Economic Injury Disaster Loan Advance Grant** ("**EIDL Advance Grant**"), which provides for immediate grants to borrowers that:

1. have suffered an **economic loss of greater than 30%**;
2. are located in **low-income communities**; and
3. **employ** not more than **300**

The EIDL Advance Grant is available, whether or not the borrower ultimately takes an EIDL Loan. The EIDL Advance Grant is calculated at **\$1,000/employee**, up to **\$10,000** (unless a borrower previously received an EIDL Grant, then the amount of the EIDL Advance Grant will be the difference between \$10,000 and the amount of the previous EIDL Grant). Neither a previous EIDL Grant nor the current EIDL Advance Grant will reduce the amount of PPP Loan forgiveness.

The deadline to apply for an EIDL Advance Grant is **December 31, 2021**.

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