Coronavirus relief legislation: Business provisions

On March 11, the American Rescue Plan Act of 2021, (ARPA) was enacted, creating a third round of stimulus designed to aid individuals, families, and businesses impacted by COVID-19. This Act created new programs, as well as changing and extending a number of provisions that were passed as part of the Coronavirus Aid, Relief, and Economic Security (CARES) Act on March 27, 2020, and the Consolidated Appropriations Act (CAA), 2021, passed on December 27, 2020. Some of the key provisions of these 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 businesses and tax-exempt organizations (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 and organizations 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).

On, March 3, 2021, the SBA released additional guidance specifically intended to help independent contractors and sole proprietors that had not yet received this initial loan, as well as extending eligibility to certain businesses and tax-exempt organizations that had previously been excluded. (See Coronavirus relief legislation: Paycheck Protection Program overview and Paycheck Protection Program guidance for businesses filing Schedule C. The ARPA allocated additional funding to this initial PPP loan program to benefit those businesses that have not yet taken advantage of the PPP. The deadline to apply remains March 31, 2021.

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, or in all of 2020 compared to 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. Recent guidance provides a more favorable means of calculating the maximum loan for Schedule C filers. See Paycheck Protection Program guidance for businesses filing Schedule C for guidance specific to independent contractors and sole proprietors filing a Schedule C.

Although the second draw PPP loan 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 second draw PPP 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 that was 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 provide for deferral of payments. Most importantly, both initial and second draw 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 CAA increased 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 reset the limit for these loans issued after October 1, 2021, to $500,000.

Emergency Economic Injury Disaster Loans (EIDL)
The ARPA and the CAA allocated more funds to the EIDL program, replenishing funding for the Economic Disaster Injury Loans, as well as creating a new Targeted EIDL Advance program, explained below under "Grants." The CARES Act had 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 organizations and businesses that were in operation at least as of January 31, 2020. These loans are designed to provide funds for providing sick leave, maintaining payroll, meeting increased costs, making rent/mortgage payments, and repaying obligations.

The covered period for the EIDL runs through December 31, 2021. Certain businesses may also be eligible for the Targeted EIDL Advance 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 extended 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.

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 provided more flexibility as to how long businesses have to spend the money and which expenses count toward forgiveness. In general, the CAA allowed 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.

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 general partners, the prorated amount is further reduced for self-employment taxes by multiplying it by .9235. For a forgiveness period between eight and 24 weeks, the amounts are similarly prorated.

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 reduce 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 forgiveness amount 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 the forgiveness does not reduce the tax basis of these assets. These changes were implemented 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.

* 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). See [Coronavirus relief legislation: Paycheck Protection Program overview] for detailed information.

Emergency economic injury grant/Targeted EIDL advance
Previously, businesses applying for the EIDL (see above) could request an emergency advance of up to $10,000. If you received this advance, you do not need to repay it (regardless of whether the loan was ultimately approved by the SBA). These funds were fully allocated and are no longer available. However, the ARPA and CAA allocated funding to Targeted EIDL Advance specifically to help certain businesses located in low-income communities that previously received an EIDL Advance for less than $10,000, or those who applied but did not receive the advance due to lack of available program funding.

If you think your business may qualify for a Targeted EIDL Advance, you don't need to do anything. The SBA will be contacting eligible recipients in two separate waves. First, it will reach out to businesses that received a partial EIDL Advance (between $1,000 - $9,000) that are located in a low-income community. If they can show that they suffered an economic loss of greater than 30% during a predetermined period, they will receive a supplement to their previous advance to get them up to the full $10,000. Next, the SBA will reach out to those who applied for EIDL assistance on or before December 27, 2020, but did not receive an EIDL Advance due to lack of program funding. If the business can show that they meet the above criteria of being located in a low income community and suffered an economic loss of more than 30%, and that it has 300 or fewer employees, the business will also be eligible for the full $10,000 advance.

All EIDL advances (the initial ones and the new targeted advances) are free from federal income tax and may be used to pay sick leave, additional costs incurred related to COVID-19, or other business obligations that were not paid with PPP loan proceeds.

In addition, the CAA provided that the advance received does not reduce the amount of the PPP loan that qualifies for loan forgiveness (an important change from previous law). This change was applied retroactively to the inception of the CARES Act.

Restaurant revitalization grant
The ARPA established a new grant to be administered by the SBA, specifically targeted to privately held restaurants, bars, caterers and similar businesses with 20 or less physical locations. The grant amount is limited to pandemic-related revenue loss calculated by comparing 2020 versus 2019 annual revenues, up to $10 million and limited to $5 million per location (though the value of the grant will be reduced by any amount received under the PPP program). Additional guidance is provided for businesses that did not operate the full year of 2019 or 2020.

The grant may be used to cover eligible expenses (similar to those covered by the PPP loan) incurred from February 15, 2020, through the end of 2021. The Act prioritized smaller establishments (those with gross receipts in 2019 of less than $500,000 and small businesses owned by women, veterans, or socially and economically disadvantaged individuals) in the initial three weeks of the program. This grant is available to establishments that elect to take the Employee Retention Credit (as long as not used for the same expenses), but not to those that receive a Grant for shuttered Venue Operators (below).

The ARPA provides that this grant is not treated as federally income taxable, while the expenses paid with the funds continue to be deductible. In addition, a partnership or S corporation receiving this grant is treated as receiving tax-exempt income, meaning that it will increase the basis of partners and S corporation owners.

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. Businesses that receive this grant are not eligible for a PPP loan or a restaurant revitalization grant.

Payroll tax relief

Employee retention credit
The ARPA extends and expands the credit against payroll taxes for wages paid to employees from March 12, 2020 through December 31, 2021. The maximum credit for wages paid starting January 1, 2021, is 70% of eligible wages, up to $10,000 per employee per quarter (i.e. max of $7,000 per employee per quarter). However, for certain businesses that began operating after February 15, 2020, the ARPA limits the total credit to $50,000 per quarter.

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. The credit is also available to a business that experienced a 20% or more reduction in gross receipts in a calendar quarter in 2021 from the same quarter in 2019 (where previously to be eligible in 2020, the gross receipts must have declined more than 50% in 2020 over the same quarter in 2019). Separate rules apply to businesses that did not exist in 2019 and those that wish to use a preceding quarter to measure the reduction in gross receipts (more guidance expected from the IRS).

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. However, the ARPA expands the availability of the credit to all wages paid to employees, even if the business exceeds the 500 employee threshold for "severely financially distressed" businesses (those that experienced a gross receipt reduction of more than 90%).

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 their 2020 tax return if it had wages that it paid beyond those covered by the PPP loan.

It is important to note that the deduction for qualified wages, including qualified health plan expenses, is reduced by the amount of the credit received (though the deduction is not reduced for the employer share of Social Security and Medicare taxes by any portion of the credit). See Notice 2021-20 Question 60.

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 provided that this deferred amount must be repaid by January 3, 2022, to avoid accruing interest or penalties.

Payroll tax credit for paid sick leave and family and medical 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 ARPA provides that those employers who voluntarily provide this paid leave, can continue to receive credits for wages paid through September 30, 2021. In the case of family and medical leave payments, the limit on the credit is increased to $12,000 per individual. This credit is also available to self-employed individuals who would be entitled to receive it if they were an employee. A business may receive this credit even if it received the PPP loan or restaurant revitalization grant. However, the amount of the PPP loan is reduced by the amount of the qualified leave wages for which the business is allowed tax credits, and those wages are not eligible as "payroll costs" for purposes of receiving PPP loan forgiveness.

COBRA continuation coverage credit
The ARPA provides a new 100% COBRA subsidy for premiums paid for coverage between April 1 and September 30, 2021 to employees who lost their jobs or had significantly reduced hours and are eligible for COBRA coverage. To offset this expense to businesses, the ARPA allows the business to take a quarterly tax credit (against the Medicare payroll tax) corresponding to the amount of the COBRA premiums the business would have received from eligible recipients. There are a number of notice requirements that must be provided to assistance-eligible individuals by the business. For information as to how the subsidy affects individuals, see Coronavirus relief legislation: Individual provisions.

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

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.

Executive compensation

Limitation on executive compensation
Generally, publicly traded companies are prohibited from taking a deduction for executive compensation that exceed $1 million when paid to the CEO, CFO and the next three highest-paid employees. The ARPA expands this limitation to cover the eight highest-paid executives, in addition to the CEO and CFO. This change becomes effective for tax years beginning after December 31, 2026.