

PAYCHECK PROTECTION PROGRAM ROUND 2: FREQUENTLY ASKED QUESTIONS FOR MICROBUSINESSES

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Overview

On December 27, the President signed into law the Consolidated Appropriations Act, 2021. The Act includes a roughly \$900 billion COVID-19 relief package, known as the “Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act” (“Economic Aid Act”). The Economic Aid Act makes available approximately \$284.5 billion in new Paycheck Protection Program (“PPP”) funding and reopens the PPP for first and second-draw loans on terms that are generally favorable to microbusinesses. The SBA has begun accepting PPP loan applications through community financial institutions, and first and second-draw loans will open to all participating lenders on January 19. The application period for PPP Round 2 loans will end on March 31, 2021.

Key Paycheck Protection Program Round 2 Updates

- Certain borrowers are now eligible for a second-draw PPP loan of up to \$2 million. Eligible businesses must have fewer than 300 employees, have used or will soon use the entire amount of their first PPP loan, and have experienced a decline in gross receipts of at least 25% during any quarter of 2020 as compared to the same quarter of 2019.
- The maximum loan amount for food services and lodging businesses is increased to 3.5 times average monthly payroll. (The maximum for other businesses remains 2.5 times average monthly payroll.)
- Potentially forgivable costs are now expanded to include operating expenses (e.g., payments for business software and cloud computing services); costs related to property damage, vandalism, or looting resulting from public disturbances that occurred in 2020; worker protection expenses and facility modifications necessary to comply with COVID-19 safety guidelines; and the cost of supplies essential to entity operations.
- The loan forgiveness application process is now simplified for loans up to \$150,000. The law directs the SBA to release a new streamlined loan forgiveness application for loans up to \$150,000 by January 20, 2021.
- Any Economic Injury Disaster Loan (“EIDL”) advance received by a borrower is no longer deducted from the borrower’s PPP loan forgiveness amount.
- Borrowing by under-resourced and underbanked micro-businesses is facilitated by setting aside certain portions of the newly appropriated funds for particular groups, including \$35 billion for first-time borrowers. The law also earmarks \$15 billion for first-time borrowers and \$25 billion for second-time borrowers with 10 or fewer employees or for loans of less than \$250,000 made to businesses operating in low- or moderate-income areas. \$30 billion of the newly appropriated funds are reserved for smaller financial institutions that historically serve

underserved borrowers. The law allocates \$25,000,000 to the Minority Business Development Centers Program to assist minority borrowers with applying for financial relief.

- For-profit businesses may deduct from taxes business expenses paid for with PPP funds, contrary to previous guidance issued by the Treasury Department.

Since the start of the COVID-19 pandemic, we have been sharing [client alerts](#) about the Small Business Administration (“SBA”) Paycheck Protection Program (“PPP”) created by the CARES Act. Below are some frequently asked questions and answers with respect to the PPP that we hope will help you understand this program.

Questions & Answers

What is the Paycheck Protection Program?

The PPP is a loan program that allows eligible borrowers to obtain loans on favorable terms to cover payroll and other eligible expenses. Under the original program, loan proceeds could only be used for payroll costs, rent payments, mortgage interest payments, and utility payments. Effective December 27, PPP loans (including existing loans) may be used for additional categories of non-payroll expenses including operating expenses, costs to repair property damage, costs for supplies, and expenses for protecting workers.

This loan program is for the specific purpose of helping eligible borrowers affected by the coronavirus pandemic to continue paying employees and to keep their doors open for business. To the extent the PPP loan is promptly used to pay eligible expenses, *the loan never has to be repaid* (“terms and conditions apply,” naturally).

Who is eligible for a First- or Second-Draw PPP loan?

In general, you are eligible for a first-draw PPP loan if you employ fewer than 500 employees (full-time and part-time) who live in the United States, AND you were in operation on February 15, 2020. Businesses, nonprofit organizations, self-employed individuals, sole proprietors, and independent contractors may apply.

You are eligible for a second-draw PPP loan if you have or will have used your first-draw PPP loan by the time you receive the second-draw PPP loan; you have no more than 300 employees; and you experienced a decline in “gross receipts” of at least 25% in any quarter of 2020 compared to the same quarter of 2019. (Special rules apply for businesses that did not operate in 2019.) “Gross receipts” include all revenue in whatever form received or accrued from any source. The amount of a forgiven PPP loan is excluded. Specific instructions for calculating gross receipts can be found on page 22 of this [SBA Interim Final Rule](#). Ask your financial advisor for help if you are not sure how to calculate this figure.

The Economic Aid Act also authorizes \$15 billion for grants to live performance, museum, and movie theater operators that have been forced to close due to the pandemic. You can only receive a grant through this “Shuttered Venues Operator” program if you have not received a PPP loan on or after December 27, 2020. If you are eligible for a Shuttered Venues Operator program grant, you should consider applying for that grant rather than a PPP loan because the terms of the grant are more flexible and the award is potentially larger. Contact legal counsel to help you evaluate your options.

The Act extends PPP loan eligibility to certain new types of businesses, for example housing cooperatives, news organizations, and 501(c)(6) organizations such as chambers of commerce and professional associations. Certain entities are expressly excluded, such as businesses engaged in political or lobbying activities and businesses affiliated with entities in the People’s Republic of China. Additional information can be found in this [summary](#).

Do independent contractors count as employees for purposes of PPP calculations?

No. Independent contractors can apply for a PPP loan on their own; the entities that engage them cannot count them for purposes of a PPP loan application.

I don't have employees. Can I still qualify?

Yes. The [rules](#) issued under the CARES Act state: "You are also eligible for a PPP loan if you are an individual who operates under a sole proprietorship or as an independent contractor or eligible self-employed individual . . ." In that case, you must submit documents such as payroll processor records, payroll tax filings, Forms 1099-MISC, income and expenses from a sole proprietorship, or other documents sufficient to demonstrate the qualifying loan amount.

Can I apply for a PPP loan if I am receiving unemployment assistance?

Yes, but proceed with caution. There is no restriction on receiving both benefits, but you cannot use the PPP loan to cover your own compensation while at the same time receiving unemployment benefits. If you are receiving unemployment benefits, you can use your PPP loan for other business expenses, such as other employees' compensation, rent, mortgage interest, utilities, operating costs, property damage costs, and supplier costs.

At least 60% of the forgiven loan amount must be used for payroll costs; if you use all or most of your loan for non-payroll expenses, therefore, the forgivable amount may be low.

How do I apply for a PPP loan?

You will need to complete the Paycheck Protection Program Round 2 loan application and submit the application with the supporting documentation to an approved lender. The SBA has released model [first-draw](#) and [second-draw](#) PPP loan applications (which individual lenders may modify).

You should contact your existing lender or lending institution where you maintain your bank accounts. Many participating lenders are accepting applications only from existing customers. Lenders accept PPP applications through their own online portals. Unlike applying for an EIDL, you cannot apply for a PPP loan directly with the SBA. If your existing bank is not participating in the program or is not accepting PPP Round 2 applications, you may wish to apply with a community financial institution that is accepting applications from new customers. We have heard from clients that [Northeast Bank](#), [Old Dominion Bank](#), and FinTech companies such as [PayPal](#) provided timely and quality service to microbusinesses and nonprofit clients during PPP Round 1. (We do not endorse any particular lender and we do not receive any payment or commission for referrals made to any institution.) If you need additional help finding a qualified lender, this [SBA search tool](#) will identify lenders near you.

When can I apply?

PPP Round 2 applications will be accepted through March 31, 2021, or until the funds for the program are exhausted, whichever is sooner. APPLY AS SOON AS YOU CAN.

What is the maximum amount I can borrow?

It's a formula amount: for businesses other than NAICS sector 72 entities (e.g., and restaurants and hotels) it is 2.5 times your average monthly payroll expenses for any of the following time periods: (1) the 12 months before you apply for the loan, (2) calendar year 2019, or (3) calendar year 2020. Choose the time period that reflects the largest payroll costs if

you want to maximize your loan amount. Under the PPP Round 2, restaurants and hotels are allowed to borrow 3.5 times their average monthly payroll expenses.

The Treasury Department has released guidance to help general partnerships, sole proprietors, and independent contractors calculate payroll. See [Paycheck Protection Program: How to Calculate Maximum Loan Amounts – By Business Type](#), for complete instructions.

If you are a seasonal business, under PPP Round 2 you can borrow 2.5 times your average total payments for payroll costs incurred or paid in any 12-week period between February 15, 2019 and February 15, 2020.

If you are a startup business that did not exist during the one-year period before February 15, 2020, under PPP Round 2 you can borrow 2.5 times your average total monthly payroll costs paid or incurred as of the date you apply for the PPP loan.

Salary and wages above \$100,000 per employee are excluded from the calculation of average monthly payroll, but all benefits the business pays on behalf of such employees (e.g., health insurance, retirement benefits, group life insurance, and disability, vision, and dental insurance benefits) are counted in the payroll calculation.

Finally, there's an absolute cap of \$10 million on every first-draw PPP loan. Second-draw PPP loans are capped at \$2 million.

What information should I gather in order to apply for a PPP loan?

You should have evidence of paying payroll or self-employment taxes. Your lender may require any or all of the following information for the relevant period; check before applying:

- organizational documents for your business;
- 2019 and 2020 profit and loss statements to show revenue loss during 2020;
- 2019 and 2020 business tax returns:
 - for partnerships, include IRS Form 1065 and Schedule K-1
 - for sole proprietors and independent contractors, include IRS Form 1040 Schedule C and Form 1099-MISC
- 2019 and 2020 IRS quarterly 940, 941, or 944 payroll tax reports;
- documentation for the following:
 - gross wages for each employee
 - paid time off for each employee
 - vacation pay for each employee
 - family medical leave pay for each employee
 - state and local taxes assessed on the employee's compensation for each employee
 - documentation to support the total health, dental, vision, life and disability insurance expenses and retirement expenses incurred as a part of payroll expenses

What can I use the loan proceeds for?

The Economic Aid Act expanded what loan proceeds can be used for. Permissible uses for existing and new PPP loans now include:

- payroll costs (including employer expenses related to providing health, dental, vision, disability and life insurance benefits and retirement benefits);

- costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- payments of interest on any mortgage obligation (but not to pay principal or prepay a mortgage);
- rent (including rent under a lease agreement);
- utilities (including electricity, water, gas, sewage, telephone, cell phone, Internet, and transportation costs);
- interest on any other debt obligations that were incurred before the covered period (though such expense is not eligible for PPP loan forgiveness);
- operating expenses, including 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;
- costs related to property damage and vandalism or looting resulting from public disturbances that occurred in 2020 and that were not covered by insurance or other compensation;
- worker protection expenses including any operating or capital expenditures to adapt business activities to comply with government-issued COVID-19 safety guidelines (*e.g.*, air pressure ventilation or filtration systems, physical barriers to ensure social distancing, a drive-through window, an expansion of indoor or outdoor business space, onsite or offsite health-screening, or the purchase of personal protective equipment); and
- the costs of supplies that are essential to your operations at the time of purchase, made pursuant to a contract in effect prior to your covered loan period, or with respect to perishable goods, in effect before or at any time during your covered loan period.

When will I have to repay the loan?

You will not have to start making payments on the loan until after you submit your forgiveness application and the SBA pays the forgiveness amount to the lender. You have 10 months from the end of your covered loan period to submit your forgiveness application. If you do not submit your application by such time, you will need to begin making payments on the loan to your PPP lender.

For PPP loans made before June 5, 2020, the full amount will be due within 2 years of when you received the money. If you received your PPP loan on or after June 5, you will have 5 years to repay the loan. Pre-June 5th loans can be extended up to 5 years if the lender and borrower mutually agree. If you want to pay earlier, there are no penalties for pre-payment.

Are there any other PPP loan terms I should know about?

- Interest rate will be 1%.
- No collateral will be required.
- No personal guarantees will be required.

Will all or a portion of my PPP loan be forgiven?

The loan amounts will be forgiven so long as:

- the loan is used to cover payroll costs and other eligible expenses over the 8- to 24-week period after the loan is made; and
- for loans greater than \$50,000, employee and compensation levels are maintained.
- Note: An October 2020 [SBA Interim Final Rule](#) exempts PPP loans of \$50,000 or less from loan forgiveness reductions based on workforce and wage reductions. Borrowers of loans of \$50,000 or less should complete the streamlined 1-page [PPP Loan Forgiveness Application Form 3508S](#) (unless and until the form is replaced by a new

form for all loans up to \$150,000). It is possible that the SBA will extend this exemption to borrowers of loans between \$50,000 and \$150,000. As of this writing, the SBA has not issued guidance to that effect.

(Earlier in the program, to qualify for full forgiveness borrowers had to spend the funds over the 8-week period after the loan was made. The law was amended to give borrowers the option to spend the funds over a longer 24-week period. The Economic Aid Act clarifies that a borrower may choose a covered period between 8 weeks and 24 weeks and submit the forgiveness application before the end of the 24-week period if they use their PPP funds early.)

PPP borrowers are eligible for full loan forgiveness so long as they use at least **60%** of loan proceeds for payroll expenses, with no more than **40%** of loan proceeds going to eligible non-payroll expenses.

Reductions to Forgiveness: For loans greater than \$50,000, forgiveness is **reduced** based on workforce reductions and wage reductions. Both are hard to work through and may require the assistance of legal counsel.

For borrowers of loans over \$50,000, some reductions in workforce will not count against you for the purpose of loan forgiveness. Loan forgiveness will not be impacted if:

- you laid off workers between February 15, 2020 and April 26, 2020 and then rehired them by December 31, 2020.
- you fire an employee for cause; an employee voluntarily resigns; or an employee voluntarily requests and receives a reduction in hours.
- you have laid off employees, and then:
 - made a good faith, written offer to rehire,
 - documented the employee's rejection of that offer,
 - informed the state unemployment insurance office within 30 days of the employee's rejection of the offer (employees who reject offers of reemployment may forfeit eligibility for continued unemployment compensation), and
 - documented your inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020.
- you can document in good faith that your business is unable to return to the same level of activity it was operating at before February 15, 2020, due to compliance with operating restrictions related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.

Is loan forgiveness automatic?

No. You will need to submit an application for forgiveness directly to the lender that provided your PPP loan.

Borrowers of loans up to \$150,000 will submit a streamlined 1-page PPP loan forgiveness application. According to the Economic Aid Act, the form will only require you to describe the number of employees you were able to keep on payroll as a result of the loan, estimated total payroll costs, and the total amount of your PPP loan. You must also attest that you accurately completed the forgiveness application and complied with the PPP loan requirements. As of this writing, the new forgiveness application form for loans up to \$150,000 has not been published on the [SBA website](#). The law requires the SBA to publish the form by January 20, 2021. If you received a PPP loan in an amount less than \$150,000 and have not yet sought forgiveness, we recommend that you wait until the simplified forgiveness application form becomes available to request forgiveness.

Borrowers of loans exceeding \$150,000 will submit a more detailed forgiveness application. The SBA's current forms are a [7-page loan forgiveness application](#) and a simplified [3-page "EZ" loan forgiveness application](#). The "EZ" loan forgiveness application may be submitted by borrowers who can satisfy any of the following requirements:

- the borrower applied for a PPP loan as a self-employed individual, independent contractor or sole proprietor who had no employees at the time of the PPP loan application.
- the borrower did not reduce salary or wages for any employee by more than 25% during the covered loan period as compared to the period between January 1, 2020 and March 31, 2020, and did not reduce the number or hours of employees between January 1, 2020 and the end of the covered loan period (ignoring reductions related to employees who refused offers of rehire and whose positions could not be filled with similarly qualified workers).
- the borrower did not reduce salary or wages for any employee by more than 25% during the covered loan period as compared to the period between January 1, 2020 and March 31, 2020, and was unable to return to the same level of business activity it was operating at before February 15, 2020, due to compliance with official requirements related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.

These forms are subject to change as a result of regulations and guidance issued by the SBA to implement the Economic Aid Act. Check with your lender to confirm which form you should submit at the time you apply for forgiveness.

Is my PPP loan forgiveness amount reduced by the EIDL advance I received?

No. The Economic Aid Act amends the CARES Act to remove the requirement that borrowers subtract the amount of any EIDL advance (*i.e.*, the \$1,000 to \$10,000 EIDL grant received from the SBA) from the PPP loan forgiveness to which the borrower is otherwise entitled. You are now eligible for full forgiveness of your PPP loan even if you also received an EIDL advance. This rule applies to both prior and new PPP loans. The SBA will issue rules to extend this benefit to borrowers whose loans have already been forgiven and whose EIDL advance was deducted from the forgiven amount.

Is the amount forgiven taxable?

Maybe. The amount of any loan forgiveness will not be considered gross income under the Internal Revenue Code, although state and local tax authorities may or may not tax the forgiven amount.

May I claim tax deductions for expenses paid with my PPP loan?

Yes. The Economic Aid Act clarifies that otherwise deductible business expenses paid for with PPP loan proceeds are eligible for federal tax deduction. This rule applies even if business expenses are paid for with the proceeds of a PPP loan that is fully forgiven. State and local authorities may take a different approach, so double check state and local requirements when you are preparing your business tax filings.

What happens if PPP loan funds are misused?

If you use PPP funds for unauthorized purposes, the SBA will direct you to repay those amounts. If you knowingly use the funds for unauthorized purposes, you will be subject to additional liability such as charges for fraud. If one of your shareholders, members, or partners uses PPP funds for unauthorized purposes, SBA will have recourse against the shareholder, member, or partner for the unauthorized use.

Can I apply for more than one PPP loan?

Yes. As discussed above, businesses with up to 300 employees that have used or will soon use their first-draw PPP loan and have experienced a drop in gross receipts of at least 25% during any quarter of 2020, as compared to the same quarter of 2019, may apply for a second-draw PPP loan.

Will the details of my PPP loan be made public?

Yes. On November 5, a federal judge [ordered](#) the SBA to provide the names, addresses, and precise loan amounts of all individuals and entities that obtained PPP and EIDL loans by November 19, 2020. Loan data through August 20, 2020 is available on the [SBA website](#).

What other relief may I be eligible for?

In addition to a first- or second-draw PPP loan, you may be eligible for other types of relief. Below is a non-exhaustive list of options to explore:

- **EIDL Advance**: The Economic Aid Act approved an additional \$20 billion for emergency EIDL advances (*i.e.*, grants) of up to \$10,000 through December 31, 2021. You may be eligible if you are located in a low-income community, have suffered greater than a 30% economic loss in 2020 as compared to 2019, and have no more than 300 employees. If you previously received an EIDL Advance less than \$10,000, you may be eligible for an additional advance up to the difference between \$10,000 and the amount previously received. The program is expected to reopen soon. Monitor the SBA website [EIDL portal](#).
- **Shuttered Venue Operator Grant Program**: The Economic Aid Act also approved grant funding to qualifying live venue operators and promoters, theatrical producers, live performing arts organizational operators, museum operators, motion picture theater operators, and talent representatives. Eligible venue operators must document a drop in gross receipts of at least 25% in any quarter of 2020, as compared to 2019. Grants are calculated as 45% of the venue operator's gross earned revenue in 2019, capped at \$10 million. Grants can be used for any PPP-eligible expenses. The program is only open to qualifying organizations that do not receive a PPP loan after December 27, 2020. Organizations that qualify for both will need to choose which program to apply for. As of the date of this writing, the SBA has not yet released program guidance or the application form.
- **State and Local Relief**: Certain states and cities have enacted relief programs for small businesses and nonprofits. The [NJ COVID-19 Business Emergency Assistance Eligibility Wizard](#) is a helpful resource for companies and nonprofits in New Jersey. The New York City Department of Small Business Services offers [weekly webinars](#) on financial assistance for organizations financially impacted by COVID-19 that may be helpful for companies and nonprofits in the New York City area.
- **Private Sector Grants and Loans**: A number of websites aggregate private sector grant and loan opportunities. This [searchable list of private-sector grant and loan opportunities](#) developed by Start Small Think Big covers various geographical locations and industries.