

Scheffel Boyle

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PPP Loans and the Employee Retention Credit

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Introduction



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Overview



Creation of Second Draw PPP Loans (PPP2)

Changes to Existing PPP Loans (PPP1)

PPP Loans for Farmers

Changes to Employee Retention Credit (2020 ERC)

Creation of Second Draw PPP Loans (PPP2)



- **PPP expenses used to obtain forgiveness are deductible**
- CAA 2021 authorizes \$284B for PPP2 which ends 3/31/21
- Generally, PPP2 loans build off the PPP1 program. But there are some significant changes

Creation of Second Draw PPP Loans (PPP2)



- PPP2 borrower eligibility
 - Must have fewer than 300 employees (PPP1 was 500)
 - Exceptions (as for PPP1) may be provided for certain businesses that exceed the 300-employee limit
 - Must be able to establish a 25% drop in gross receipts for any one calendar quarter in 2020 relative to that same calendar quarter in 2019
 - Gross receipts are defined as follows...

All revenue in whatever form received or accrued (in accordance with the entity's accounting method, i.e., accrual or cash) from whatever source, including from the sales of products or services, interest, dividends, rents, royalties, fees, or commissions, reduced by returns and allowances but excluding capital gains and losses. Gross receipts do not include taxes collected from customers (sales taxes), proceeds from transactions between affiliates, amounts collected on behalf of another and forgiven PPP loans
 - Special rule for taxpayers not in existence during any quarter in 2019 if they were in operation as of 2/15/20
 - Affiliation rules apply in determining gross receipts

Creation of Second Draw PPP Loans (PPP2)



- PPP2 borrower eligibility (cont.)
 - §501(c)(6) organizations (business leagues, chambers, etc.) now qualify, but lobbying restrictions are in place
 - Ineligible if Shuttered Venue Operators Grant is received
 - Must have received PPP1 loan and used or will use the full proceeds
- Loans are determined by taking 2.5 times either (a) 2019 avg monthly payroll, (b) 2020 avg monthly payroll, or (c) avg monthly payroll costs incurred or paid during the 1-year period before the date on which the loan is made
 - Maximum loan limited to \$2M
 - Businesses in the hospitality industry (NAICS Code 72), such as bars, restaurants and hotels, use a multiple of 3.5 to determine their maximum loan amount
 - Special rule for seasonal employers – average payroll costs for any 12-week period between 2/15/19 and 2/15/20

Creation of Second Draw PPP Loans (PPP2)



New expenses eligible for use/forgiveness

- Clarification that group life, disability, vision and dental insurance are included in payroll costs
- In addition to the payroll, rent, utilities and mortgage interest CAA, 2021 added the following expenses...
- Covered operations expenditures – 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 – an expenditure made by an entity to a supplier of goods that are:
 - Essential to the operations of the entity at the time at which the expenditure is made, and
 - Made pursuant to a contract, order or purchase order that was either
 - In effect at any time before the covered period with respect to the loan, or
 - With respect to perishable goods, in effect before or any time during the covered period

Creation of Second Draw PPP Loans (PPP2)



New expenses eligible for use/forgiveness (cont.)

- Covered worker protection costs – operating or *capital* expenditures that are required to facilitate the adaptation of the business to comply with requirements established or guidance issued by HHS, CDC or OSHA beginning 3/1/20 and ending on the date that the national emergency expires as declared by the President
 - Eligible costs are those related to the maintenance of standards for sanitation, social distancing and any other worker or customer safety requirement related to COVID-19
 - Examples of eligible costs include the purchase, maintenance or renovation of assets that create or expand a drive-through window facility; an indoor, outdoor, or combined air or air pressure ventilation or filtration system; a physical barrier such as a sneeze guard; an indoor, outdoor, or combined commercial real property; an onsite or offsite health screening capability; personal protective equipment; or other similar assets relating to requirements of certain protective guidance
 - Residential real property and intangible assets are specifically excluded

Creation of Second Draw PPP Loans (PPP2)



- Clarification of length of covered period
 - Includes any period lasting between 8 and 24 weeks
- Forgiveness no longer reduced by EIDL emergency grants
 - EIDL grants are not taxable, and expenses are fully deductible
 - Basis increase for these tax-exempt amounts, just as PPP loan forgiveness
- Seasonal employers are defined
 - Employer does not operate more than 7 months in any calendar year, or
 - During the preceding calendar year, had gross receipts for *any* 6 months of that year that were not more than 1/3 of the gross receipts of the employer for the other 6 months of that year
 - EXAMPLE – ABC Corporation had gross receipts of \$10M in 2020. ABC determines that the highest 6 months of gross receipts were \$8M. Therefore, the other 6 months were \$2M. ABC would be considered a seasonal employer since \$2M is less than 1/3 of \$8M (\$2.67M).

Creation of Second Draw PPP Loans (PPP2)



- Definition of payroll costs modified
 - CARES Act limited payroll costs to \$100,000 as prorated for the covered period
 - CAA 2021 revised this to limit payroll costs to \$100,000 on an annualized basis
 - EXAMPLE – Employer X used a 12-week covered period to determine its loan forgiveness. X paid one of its employees \$30,000 during this 12-week period. X is limited to \$23,077 ($\$100,000 * (12/52)$) for purposes of determining forgiveness.
- Coordination with Employee Retention Credit (ERC)
 - Qualified wages, for purposes of determining forgiveness, do not include wages used to determine the ERC

Creation of Second Draw PPP Loans (PPP2)



- Streamlined forgiveness for loans under \$150,000
 - Form 3508S modified to apply to loans below \$150,000
 - One-page online or paper form
 - Only subject to audit if borrower commits fraud or uses proceeds for an improper purpose
 - Documentation supporting borrower certifications is not required to be submitted with the application, but should be retained by borrower (4 years for payroll records and 3 years for other records)
 - No penalty for FTE reduction or greater than 25% decrease in wage/salary amounts for loans of \$50,000 or less
 - For loans between \$50,000 and \$150,000 must calculate penalty for FTE or wage reduction unless one of the 3508-EZ exceptions apply
 - PPP2 borrowers under this amount will be required to submit documentation substantiating the required 25% revenue loss if not already submitted



Revised Form 3508S



Paycheck Protection Program PPP Loan Forgiveness Application Form 3508S Revised January 19, 2021

OMB Control No.: 3245-0487
Expiration Date: 7/31/2021

A BORROWER MAY USE THIS FORM ONLY IF THE BORROWER RECEIVED A PPP LOAN OF \$150,000 OR LESS

Business Legal Name ("Borrower")		DBA or Tradename, if applicable	
Business Address	NAICS Code	Business TIN (EIN, SSN)	Business Phone
		() -	
		Primary Contact	E-mail Address

First Draw PPP Loan Second Draw PPP Loan (check one)

SBA PPP Loan Number: _____ Lender PPP Loan Number: _____

PPP Loan Amount: _____ PPP Loan Disbursement Date: _____

Employees at Time of Loan Application: _____ Employees at Time of Forgiveness Application: _____

Covered Period: _____ to _____

If Borrower (Together with Affiliates, if Applicable) Received First Draw PPP Loans of \$2 Million or More or Second Draw PPP Loans of \$2 Million or More, Check Here:

Amount of Loan Spent on Payroll Costs: _____ Requested Loan Forgiveness Amount: _____

By Signing Below, You Make the Following Representations and Certifications on Behalf of the Borrower:

The Authorized Representative of the Borrower certifies to all of the below by **initialing** next to each one.

_____ The Borrower has complied with all requirements in the Paycheck Protection Program Rules (Sections 7(a)(36), (7)(a)(37), and 7A of the Small Business Act, the PPP interim final rules, and guidance issued by SBA through the date of this application), including the rules related to:

- eligible uses of PPP loan proceeds;
- the amount of PPP loan proceeds that must be used for payroll costs;
- the calculation and documentation of the Borrower's revenue reduction (if applicable); and
- the calculation of the Borrower's Requested Loan Forgiveness Amount.

Information regarding these requirements may be found in the Form 3508S Instructions and the Paycheck Protection Program Rules.

_____ The information provided in this application is true and correct in all material respects. I understand that knowingly making a false statement to obtain forgiveness of an SBA-guaranteed loan is punishable under the law, including 18 U.S.C. 1001 and 3571 by imprisonment of not more than five years and/or a fine of up to \$250,000; under 15 U.S.C. 645 by imprisonment of not more than two years and/or a fine of not more than \$5,000; and, if submitted to a Federally insured institution, under 18 U.S.C. 1014 by imprisonment of not more than thirty years and/or a fine of not more than \$1,000,000.

Following submission of this forgiveness application, the Borrower must retain all records necessary to prove compliance with Paycheck Protection Program Rules for four years for employment records and for three years for all other records. SBA may request additional information for the purposes of evaluating the Borrower's eligibility for the PPP loan and for loan forgiveness, and the Borrower's failure to provide information requested by SBA may result in a determination that the Borrower was ineligible for the PPP loan or in a denial of the Borrower's loan forgiveness application.

The Borrower's eligibility for loan forgiveness will be evaluated in accordance with the Paycheck Protection Program Rules. SBA may direct a lender to disapprove the Borrower's loan forgiveness application if SBA determines that the Borrower was ineligible for the PPP loan.

Signature of Authorized Representative of Borrower

Date

Print Name

Title

Creation of Second Draw PPP Loans (PPP2)



- What is the next step?
 - Determine if you are eligible for PPP2
 - Determine quarterly gross receipts for 2020 and 2019, based on SBA guidance
 - Consider how claiming payroll costs will interact with ERC

Changes to Existing PPP Loans (PPP1)



- Increase in loan amount
 - PPP1 borrowers who would have been eligible for a larger loan can request an increased amount from their lender based on PPP1 loan rules (as enhanced)
 - Eligible borrowers are those who have not had their PPP1 loan forgiven as of the date of enactment (12/27/20)
 - Includes those who did not apply for a PPP1 loan
- New rules which also apply to PPP1 borrowers
 - New categories of eligible expenditures
 - No reduction for EIDL advances
 - Seasonal employer definition
 - Streamlined forgiveness application for loans under \$150,000

Changes to Existing PPP Loans (PPP1)



- What is the next step?
 - For borrowers who have not had their loans forgiven
 - May be eligible for streamlined forgiveness (< \$150,000)
 - May want to coordinate forgiveness request with ERC by minimizing payroll costs
 - If full forgiveness not achieved, additional eligible costs may help
 - May be able to re-submit to increase loan amount using any rules that were issued after original loan was received (see PPP2 loan changes)

PPP1 Loans for Farmers



- Special rule for Schedule F farmers in existence on 2/15/20
 - Loan amount is based on 2019 Schedule F gross revenue rather than 2019 Schedule F net earnings from self-employment
 - Gross revenue does not appear to include equipment sales
 - Gross revenue is still limited to \$100,000, which means the maximum loan for a Schedule F farmer with no employees would be \$20,833 ($(\$100,000/12) * 2.5$)
 - Appears to exclude farming partnerships from the gross revenue rule
 - Schedule F farmers can request that their PPP1 loans be recalculated using the gross revenue formula, rather than the net earnings formula
 - However, if their PPP1 loan has been forgiven as of 12/27/20, the borrower is not eligible for additional funds under the new formula

PPP2 Loans for Farmers



- Schedule F, partnership and corporate farmers are also eligible for PPP2 loans if they meet the eligibility criteria applicable to regular borrowers
- However, only Schedule F farmers can base their PPP2 loan amounts on gross income. Other farmers must base the loan amounts on net earnings from self-employment (partnerships) and wages (corporations)

Changes to 2020 Employee Retention Credit (2020 ERC)



- CAA 2021 retroactively removed the prohibition of businesses to claim both the ERC and receive a PPP loan
- The ERC is a refundable payroll tax credit equal to 50% of qualifying wages, up to \$10,000 per employee, paid by eligible employers.
- Eligible employers must have one of the following apply during a 2020 calendar quarter.
 - The operation of the trade or business must be fully or partially suspended during the calendar quarter due to orders from an appropriate governmental authority limiting commerce, travel, or group meetings (for commercial, social, religious, or other purposes) due to COVID-19; or
 - The employer must experience a significant decline in gross receipts during the calendar quarter.
 - A significant decline is defined as a more than 50% decrease in gross receipts in a 2020 calendar quarter relative to the same 2019 calendar quarter
- Once it is determined that an eligible employer experienced a full or partial shutdown or significant decline in gross receipts, it must be determined what the qualifying wages are for that employer.

Review of 2020 ERC



Qualifying Wages

- Qualifying wages differ based on whether the employer averaged more or less than 100 full-time employees during 2019.
- For eligible employers that averaged 100 or fewer full-time employees during 2019, qualified wages are wages paid to any employee.
- For eligible employers that averaged more than 100 full-time employees during 2019, qualified wages are the wages paid to an employee for the time the employee is not providing services.

Eligible employers are:

- Employers that carry on a trade or business during calendar year 2020
- Tax-exempt organizations
- Does not include government employers (federal, state, local or instrumentalities of such entities)
- Self-employed individuals can claim ERC for employee wages, but not for their SE income

Review of 2020 ERC



Qualifying Wages (cont.)

- Wages paid to employees may not exceed what would have been paid to them working an equivalent amount of time during the 30-day period preceding the hardship.
- Qualifying wages are wages paid between March 13, 2020 and December 31, 2020 during a full or partial shutdown affecting the employer or during a quarter in which there was a significant decline in gross receipts.

Review of 2020 ERC



Qualifying Wages (cont.)

- Full-time employees are those who averaged 30 hours per week or 130 per month in 2019.
- Wages paid to related individuals (family members of more than 50% owners) are not qualifying wages.
- Wages for which an employer received a credit for qualified sick leave and/or family leave wages are not qualifying wages.
- An employee included in the calculation of the Work Opportunity Credit may not be included for purposes of the ERC.
- Qualifying wages also include health plan expenses paid by the employer or those that are paid by the employee on a pre-tax basis. However, the total of health plan expenses and qualifying wages cannot exceed \$10,000 per employee for the year.

Changes to 2020 Employee Retention Credit (2020 ERC)



- No double up of payroll costs
 - If payroll costs are used to claim the ERC, those same payroll costs cannot be used to achieve forgiveness of a PPP loan
 - For PPP1 borrowers who have not applied for or received forgiveness, may want to re-consider the amount of payroll costs used to achieve forgiveness in order to maximize the ERC
 - What if the borrower already applied for or received forgiveness? Are those borrowers “stuck” with the payroll costs submitted? Can it be amended? If more than the required amount of payroll was submitted, can the excess be considered for purposes of calculating ERC? Guidance is needed
- How is the ERC claimed?
 - File Form 941-X or
 - Make a catch-up calculation on the 2020 4th quarter Form 941

Extension of ERC through 6/30/21 (2021 ERC)



- Rules for the 2020 ERC apply to 2021 ERC except as otherwise noted
- Definition of eligible employer for 2021
 - Decrease in gross receipts required to qualify is reduced
 - Gross receipts for a 2021 quarter must be less than 80% of gross receipts for that same quarter in 2019
 - For employers not in existence during that entire quarter in 2019, employer will use that same quarter in 2020
 - Employers can elect to use the immediately preceding calendar quarter to determine gross receipts
 - Certain public instrumentalities may now claim the credit (§207(d)(3))
- Changes to credit calculation for 2021
 - Credit is calculated by applying 70% to qualifying wages for 2021 only
 - The per employee limitation is \$10,000 per quarter for 2021 only

Extension of ERC through 6/30/21 (2021 ERC)



- Modification in threshold for determining if large employer rule applies
 - Large employer rule was triggered at 100 FTEs for 2019 and meant that only wages paid to employees for not working qualified
 - New threshold is now 500 FTEs for 2019
 - Removes limit on wages to an equivalent based on those paid during the previous 30-day period
 - Lifting this restriction will allow employers to increase pay or bonus amounts to increase the 2021 ERC
- Advance payments for small employers
 - Small employer defined as 500 or fewer FTEs during 2019
 - These employers may request an advance payment of the 2021 ERC equal to 70% of the average quarterly wages paid by the employer in calendar year 2019
 - Special rule for seasonal employers (§207(j)(2)(B)) and those not in existence in 2019 (§207(j)(2)(C))
 - Advance credit will be reconciled when 941 is filed



2021 ERC Example

Example - XYZ is a small employer (< 500 FTEs during 2019) with the following gross receipts and payroll during the 1st and 2nd quarters of 2019 and 2021

Gross Receipts	1st Quarter	2nd Quarter
2019	1,500,000	1,700,000
2021	1,100,000	1,450,000
% of comp period	73%	85%

Payroll	2021 1st Quarter	2021 2nd Quarter
Related EE	25,000	25,000
EE 1	12,000	11,000
EE 2	10,000	10,000
EE 3	8,000	12,000
EE 4	7,000	8,000
EE 5	5,000	7,000
Qualifying Wages	40,000	-

2021 1st Quarter Credit is \$28,000 ($\$40,000$ qualifying wages * 70%)

2021 2nd Quarter Credit is zero since gross receipts in quarter were 80% or more of gross receipts in the same quarter of 2019

Anything to be done to maximize credit?

Accelerate EEs 3, 4 and 5 wages into 1st quarter to maximize credit

XYZ needs 2nd quarter gross receipts to be less than \$1,360,000 (\$1,700,000). Can XYZ defer at least \$90,000 of gross receipts to make this a qualifying quarter?

Questions?



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