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**AMERICAN RESCUE PLAN ACT OF 2021:
REVISIONS TO PAYCHECK PROTECTION LOAN FORGIVENESS PROGRAM
AND OTHER CHANGES FOR EMPLOYERS
(enacted March 11, 2020)**

Note: We are periodically updating all of our public coronavirus materials as new information becomes available. For updated versions and memos on new topics, please visit <https://tristerross.com/update/>.

The American Rescue Plan Act of 2021 (ARPA) modifies several programs designed to alleviate burdens imposed on organizations by the pandemic. Below is a discussion of the provisions of the new law that revise the Paycheck Protection Program (PPP) that was first enacted one year ago as part of the Coronavirus Aid, Relief and Economic Security (CARES) Act, and that has already been revised several times since then. The ARPA makes PPP loans available to organizations that were not previously eligible – including labor organizations – and eases restrictions on the way a borrower calculates its number of employees when determining if it is eligible. The ARPA also modifies COBRA, tax credits for coronavirus-related paid leave, and the employee retention tax credit.

Basic Elements of the Paycheck Protection Program

The Paycheck Protection Program (PPP) makes *forgivable loans* available to eligible entities that may be used to cover payroll, rent, mortgage interest, utilities, and certain expenses related to COVID-19, such as worker protection expenditures like personal protective equipment, ventilation or air filtration systems, and expenses for health screening capabilities. The loans are made by private lending institutions using Small Business Administration (SBA) forms under the PPP rules, and the SBA repays the lenders for loans the SBA later approves for forgiveness. (See previous memos [here](#) (p. 4) and [here](#) (pp. 2-3).)

The maximum loan amount is the *lesser* of 2.5 times the borrower's monthly payroll costs or \$10 million.

The interest rate is 1%. (See previous memo [here](#) (p. 4).) Borrowers must certify that “[c]urrent economic uncertainty makes [the] loan request necessary to support [its] ongoing operations.” (See previous memo [here](#) (p. 3).) Borrowers are eligible for up to 100% forgiveness of the loan so long as the entire loan amount is used for eligible purposes during the 24-week period after the loan is disbursed and at least 60% of the loan is used for payroll. (See previous memos [here](#) (p. 5) and [here](#) (pp. 2-3).) The forgiven amount is reduced if less than 60% is used for payroll or the borrower has reduced wages paid or its number of employees in comparison to their levels during specified pre-coronavirus reference periods.

The Deadline to Apply for a PPP Loan Remains March 31, 2021

The ARPA does not extend the time frame during which PPP loans are available; the application deadline remains March 31, 2021.

Labor Organizations and Some Other 501(c) Groups Are Newly Eligible, With Special Conditions

The ARPA expands eligibility for PPP loans to organizations it identifies as “additional covered nonprofit entities,” which include most organizations described in any paragraph of section 501(c) of the Internal Revenue Code (IRC) that weren’t previously eligible. **501(c)(5) labor organizations – unions, central labor bodies and other worker organizations – are eligible for the first time.** Nonprofit organizations that are tax-exempt under IRC sections **501(c)(3)** (charities), **501(c)(6)** (trade associations) and **501(c)(19)** (veterans groups) were already eligible for PPP loans and remain so. But Section **501(c)(4)** social welfare/advocacy organizations continue to be denied access to PPP loans.

An “additional covered nonprofit entity” is eligible for a PPP loan *only* if it satisfies *all* of the following criteria:

- it does not receive more than 15% of its receipts from lobbying activities;
- its lobbying activities do not comprise more than 15% of its total activities (the meaning of “total activities” is unclear, but likely means actual activities, as opposed to just spending);
- the cost of its lobbying activities did not exceed \$1,000,000 during its most recent tax year that ended prior to February 15, 2020; and
- it employs not more than 300 employees, counting both full- and part-time employees, at any one location, evidently at the time of applying for the loan.

“Lobbying activities” is not defined in the ARPA, but based on the interpretation of the term when used in a similar context elsewhere in the PPP, it likely has the same meaning that it is given in the federal Lobbying Disclosure Act (LDA). So, for the purposes of determining PPP eligibility, *only federal lobbying is taken into account* and “lobbying activities” is defined as communications with covered executive (senior level) and legislative branch (any elected or staff) employees regarding the formulation, modification, or adoption of federal legislation or the formulation, modification, or adoption of a federal rule, regulation, executive order, or any other program, policy, or position of the federal government.

The additional covered nonprofit entities are now also eligible for a second PPP (“second draw” or

“PPP2”) loan, but they must first receive and spend their first PPP (“first draw” or “PPP1”) loan. The differences between PPP1 and PPP2 loans and their eligibility criteria are described in our earlier memo, available [here](#). The second loan prospect is most likely illusory for **501(c)(5)s** and other newly eligible entities due to the retained March 31 PPP application deadline.

The 300-Employee Cap Is No Longer Calculated by Including Affiliates, and That Cap Is Applied Separately to Each of an Organization’s Physical Locations

Prior to the ARPA, **501(c)(3)** organizations with more than 500 employees, including the employees of “affiliated” organizations, were ineligible for PPP loans. The ARPA eliminates the requirement that employees of affiliates must be counted when calculating the number of employees, and imposes the 500-employee maximum on a *per physical location* basis. As a result, a 501(c)(3) organization with not more than 500 of its own employees at *each* of its physical locations is now eligible for a PPP loan, whereas previously only a 501(c)(3) organization that together with its affiliated organizations had not more than 500 employees total across all locations was eligible.

The affiliation rules also do not apply to “additional covered nonprofit entities” such as a **501(c)(5)** labor organization, or to **501(c)(6)** organizations, when they are calculating their number of employees, and their lower, 300-employee maximum also applies on a *per physical location* basis.

COBRA Premium Subsidy

The ARPA allows individuals to retain health insurance coverage through COBRA at no cost to them for up to six months, from April 1 through September 30, 2021. This option is available to individuals who are newly terminated or whose hours are reduced, and individuals who were eligible but initially declined COBRA coverage. It is not restricted by individual income. Employers must pay these premiums and will be able to recoup their payments during this period first as a credit against payroll taxes and the remainder as a refundable tax credit. Additional regulations on this COBRA subsidy are forthcoming.

Extension of Tax Credit for Wages Paid During Coronavirus-Related Leave

Prior to passage of the ARPA, an employer’s ability to take a tax credit for paid leave taken for coronavirus-related reasons allowed by the Emergency Paid Sick Leave (EPSL) Act or the expanded Family and Medical Leave Act expired on March 31, 2021. (See previous memos [here](#) (p. 4) and [here](#) (pp. 4-5).) The ARPA extends that credit until September 30, 2021.

Beginning April 1, the ARPA also expands the reasons for which paid leave may be taken to include the following:

- the employee is seeking or awaiting the results of a diagnostic test for, or a medical diagnosis of, COVID–19 where the employee has been exposed to COVID–19 or the employer has requested such test or diagnosis, and
- the employee is obtaining immunization related to COVID–19 or recovering from any injury,

disability, illness, or condition related to such immunization.

An employer may claim the credit for up to 10 days of paid sick leave for full-time employees from April 1 through September 30, 2021. This is a new bank of leave, in addition to leave taken under the FFCRA of 2020. The maximum credit for paid family leave is \$12,000 per employee for the period from April 1 through September 30, 2021.

The credit may not be claimed for wages taken into account as payroll costs paid with a PPP loan.

Extension of Employee Retention Credit

The ARPA extends and modifies the employee retention credit enacted by the CARES Act. (See previous memo [here](#) (pp. 9-11.)) The credit as amended by the ARPA applies to wages paid after June 30, 2021 and before January 1, 2022. The amended provision allows employers to claim a refundable payroll tax credit against the employer's Medicare payroll tax imposed under IRC § 3111(b),¹ equal to 70% of the qualified wages paid up to \$10,000 per quarter per each eligible employee for that quarter (up from 50% pre-ARPA).

Employers of all sizes – including tax-exempt organizations – may be eligible for the employee retention credit. Organizations eligible for the tax credit are those who are carrying on a trade or business during the calendar year and:

- Has a full or partial suspension of operations during the calendar quarter due to orders from a governmental entity limiting commerce, travel, or group meetings due to COVID-19;
- Whose gross receipts are less than 80% of the gross receipts for the same calendar quarter in 2019;
or
- Is a “recovery startup business,” which means a new business that:
 - Began operations after February 15, 2020;
 - Has less than \$1 million in annualized gross receipts; and
 - Would not otherwise satisfy the employer eligibility tests based on gross receipts decline or suspension due to governmental order.

The employee retention credit for recovery startup businesses is calculated under the normal retention credit rule based on per-employee qualified wages, but is capped at \$50,000 per quarter per employer.

Like the credit for paid leave wages described above, the employee retention credit may not be claimed for wages taken into account as payroll costs paid with a PPP loan.

NOTE: This document does not constitute legal advice. For application of the matters discussed in this document to a particular situation, please consult legal counsel.

¹ Prior to July 1, 2021, the refundable payroll tax credit applies against an employer's Social Security Old Age, Survivor's and Disability Insurance (OASDI) taxes.

