PACE UNIVERSITY | ELISABETH HAUB SCHOOL OF LAW | FOOD LAW INITIATIVE

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Updated FAQ on Funding Programs Available to Small and Mid-sized Farms in Response to COVID-19

Q: We are a small farm wondering if we can still access COVID-19 funding. There have been so many changes to the funding programs available, and we are unsure where to start. Currently, what funding options are available?

A: *First*, we recommend that you consider whether you are eligible for the SBA's Paycheck Protection Program (PPP). If you think you may be eligible for a loan amount that can make a difference for your business, we recommend that you apply ASAP, for three reasons:

(1) PPP loans are available on a first-come first-serve basis. The deadline for applications is currently **March 31st, 2021** (which *may* be extended by Congress to May 31st, 2021).
(2) PPP loan availability has been expanded. If you are eligible and have not applied for a PPP loan before, you can access a First Draw PPP Loan. If you meet eligibility requirements and *have already* received PPP funding in previous cycles, you can still access funding through the Second Draw PPP Loan. There has also been a major change to loan calculation for self-employed Schedule F Farmers that allows far more access to funding than in previous cycles.
(3) PPP loans are forgivable, meaning that if the conditions are met this can be free money.

Given the potential impact of the PPP for farms, and the number of questions that have arisen in how it applies to farms, the bulk of this FAQ addresses these questions below under *Paycheck Protection Program (PPP)*.

Second, we recommend considering if you are eligible for the SBA's other COVID-19 relief funding program, the Economic Injury and Disaster Loan (EIDL) program.

Third, we recommend checking the USDA website for updates on their programming. Currently, USDA COVID- 19 programs have been frozen while the new administration reviews them. Presumably, USDA will release further guidance in the coming weeks on their website *here*.

Q: I have already received assistance during the COVID-19 pandemic. Are there any funding sources still available to me?

A: Yes, you may still be eligible for money under both the PPP and EIDL depending on a variety of factors discussed in this FAQ. Additionally, the January and February 2021 changes make funding available retroactively for some self-employed schedule F farmers under the PPP and Employee Retention Credit (ERC) programs.

Paycheck Protection Program (PPP)

Q: What is the Paycheck Protection Program?

A: PPP is a Small Business Administration (SBA) loan program under the CARES Act designed to allow small businesses and 501(c)(3) and 501(c)(19) nonprofits to keep paying their workers. This includes *farm businesses*. Most importantly, these loans are forgivable – *i.e. if the program's conditions are met, you do not have to pay the money back*.

PPP loans have an interest rate of 1% and a maturity of 5 years. Borrowers have 24 weeks to spend the funds, and in order to access loan forgiveness must spend funds on approved uses discussed later in the FAQ.

For most businesses, PPP loans are calculated based on payroll costs, and you can receive up to 2.5 times your average monthly payroll costs. However, this loan calculation meant that many sole proprietors, independent contractors, and self-employed individuals had little to no access to funding. In January 2021, the loan calculation procedures were changed for Schedule F sole proprietors, independent contractors, and self-employed individuals. For these groups, loans are now calculated using 2.5 times the average monthly gross income. *For more information about PPP loans for Schedule F Farmers, look at the flowchart here.*

Q: If I never received PPP funding before, am I eligible to get PPP funding now? If I *already* received PPP funding, am I eligible to get more?

A: PPP loans are now available in two forms:

(1) First Draw PPP Loans are for businesses that have not received money through the program. For a First Draw Loan, you can request up to 2.5 times your average monthly payroll costs.
(2) Second Draw Loans are for businesses that have already received a PPP loan but want more funding.

Eligibility varies depending on the type of PPP loan you are applying for:

First Draw PPP: Businesses are eligible to apply for a First Draw PPP loan if any of the following requirements are met: (1) the business employs 500 or fewer employees, (2) the business meets the SBA employee-based or revenue-based size standard corresponding to its primary industry (click *here* for information on this standard), or (3) the business satisfies the SBA's "alternative size standard." Based on the test in (1) above, all small and mid-sized farms should be eligible.

Second Draw PPP: Businesses are eligible for Second Draw PPP if three conditions are met: (1) the business previously received a First Draw PPP and has or will use the full amount on designated purposes, (2) the business has no more than 300 employees, and (3) the business can demonstrate at least a 25% reduction in gross receipts between comparable quarters in 2019 and 2020.

Gross receipts are defined by the SBA to include all revenue in all forms including but not limited to revenue from sales of products or services, dividends, and commissions or fees. Generally, gross receipts can be calculated as total income plus the cost of goods sold.

Q: I have not applied for a PPP loan, but I believe I am eligible. Can I still apply?

A: Yes, the window to apply for PPP money has been extended to **March 31st, 2021**, and *may* be extended by Congress to May 31st, 2021. Because PPP loans are distributed on a first come first serve basis, we still encourage you to apply ASAP.

Q: How do I apply for a PPP loan?

A: Ask your bank if they are providing PPP loans. Applications can be submitted through any existing SBA 7(a) lenders or through any federally insured depository institution, federally insured credit union or Farm Credit System institution that is participating. Current eligible lenders can be found by searching the SBA website *here*. Applications can be made until March 31, 2021, pursuant to the Economic Aid to Hard-Hit Small Businesses, Nonprofits and Venues Act signed on December 27, 2020.

First Draw PPP: A two-page sample application form is available here. Please consult your local banks for their official applications. A list of lenders participating in the PPP program by state is available here. For updated information on requirements and new deadlines visit the SBA's page on First Draw PPP here.

Second Draw PPP: The application process for second draw PPP is similar to the process for first draw PPP. A two page sample application form is available *here.* The SBA lender match *here* can help connect you with a participating lender. For updated information on requirements and new deadlines visit the SBA's page on Second Draw PPP *here*.

Schedule F Applicants: If you are a sole proprietor, independent contractor, or self-employed Schedule F farmer who is using gross income to calculate PPP amounts, you can access the application form for First Draw PPP loans *here* and the application form for Second Draw PPP loans *here*.

Q: How much money will I receive through the PPP?

A: The payout you receive will vary depending on the type of loan you are receiving and the loan calculation applicable to your business:

First Draw PPP: Loans are based on your average monthly payroll expense, measured over a 12 month period, multiplied by 2.5.

The SBA broadly defines "payroll" to include an average month of: wages and commissions for all full-time and part-time employees (wages for high-earning individuals are capped at $100,000/year); the amount of tips typically made by workers (including cash ones); payments for vacation and sick leave; costs of benefits; and of state and local employment taxes.

Significantly, compensation to independent contractors and to any employees with a primary residence outside of the United States *does not* count as payroll for PPP purposes. Based on the latter restriction, compensation to H2-A farm workers likely does not count as payroll.

Second Draw PPP: The borrowing formula is the same as first draw PPP (2.5x monthly payroll), however second Draw PPP loans are capped at $2 million rather than $10 million.

Schedule F Applicants: For self-employed individuals, independent contractors, and sole proprietors that file a Schedule F, the calculation for loans was changed in February 2021. Now, loans are calculated based on gross income, rather than payroll. The calculation is now gross income (found on Line 9 of your Schedule F tax form) divided by 12 then multiplied by 2.5. Like the payroll calculation, gross income is capped at $100,000 in the equation.

Q: I am a Schedule F sole proprietor, independent contractor, or self-employed farmer who applied for PPP but didn't receive much on my first round because I used the payroll calculation. Can I receive more money under the First Draw PPP based on a gross income calculation?

A: Yes. For Schedule F farmers, you may be able to get more money retroactively from the First Draw PPP if: (1) you did not get loan forgiveness from the SBA before December 27th, 2020 and (2) your gross income was less than $100,000 for 2019. In order to access the retroactive funds, you must reapply for First Draw PPP using the new calculation. If you receive an increase in your First Draw PPP, you must wait at least 8 weeks to apply for Second Draw PPP.

For more information about retroactive First Draw PPP look at this chart.

Q: How much of my loan will be forgiven?

A: All forms of PPP Loan are forgivable to the extent their proceeds are used during a specified period following loan disbursement for the categories established under the CARES Act:

(1) payroll costs,
(2) rent under lease agreements in force before Feb. 15, 2020,
(3) utilities for which service began before Feb. 15, 2020,
(4) interest for mortgage obligations incurred before Feb. 15, 2020,
(5) business expenditures including software updates, accounting needs, and Personal Protective Equipment (PPE) for employees, and
(6) expenditures to a supplier pursuant to a contract formed before getting the loan.

Proceeds from PPP loans must be used within 24 weeks of receipt. In addition, at least 60% of the forgiven amount must be used for payroll. *More detailed information on use of PPP funds can be found here.*

On June 17, 2020, the SBA released a new and more user-friendly PPP Loan Forgiveness Application pursuant to the PPP Flexibility Act's new rules, which has fewer calculations and required documentation. The SBA also published a *new "EZ" version* of the application for borrowers who (a) are self-employed and have no employees, or (b) did not reduce the salaries or wages of their employees by more than 25%, and did not reduce the number of hours of their employees, or (c) experienced reductions in business activity as a result of health directives related to COVID-19 and did not reduce the salaries or wages of their employees by more than 25%.

The full PPP Flexibility Act bill text can be found here. The "EZ" Loan Forgiveness application instructions can be found here.

Q: What if I do work for my own farm business, or for a farm business that I own with others? Can we still qualify for PPP if we don't have any salaried employees on payroll, and if so how is the loan amount determined?

A: Unless you are a sole-proprietor, independent contractor, or self- employed Schedule F farmer, PPP loan calculations are based on payroll. However, you may still eligible for the PPP, if you can demonstrate self-employment income in 2019, as detailed below. Your lender will want to see all documents related to any wage, commission, income, or net earnings from self-employment that you have received. What constitutes self-employment income for this purpose depends on your legal structure and tax status. In additional guidance provided on March 12th, 2021 the SBA clarified the treatment of self-employment income under different situations as follows:

- Partnerships/LLCs: If you are a partner in a partnership (or a member in an LLC taxed as a partnership) you may not submit a separate PPP loan application for yourself as a self-employed individual. Instead, the partnership (or LLC) itself may file a PPP loan application, including the self-employment income of "general active partners" as payroll costs. The SBA has clarified that for PPP payroll costs calculation purposes, this includes any U.S based general partners that are subject to self-employment tax. Their income will be the amount shown on line 14a of the partner's Schedule K-1 (reduced by expense deduction claimed under section 179, unreimbursed partnership expenses and depletion claimed). The result should then be multiplied by 0.9235 and just like with any other payroll counted for PPP purposes, this amount would be capped at $100,000 for each partner. Then, multiply this number by 2.5/12 to determine 2.5 months of average monthly payroll, which is the eligible loan amount. See the March 12th, 2021 SBA guidance on this topic linked to below for more detail.

- S-Corporations and C-Corporations: Your payroll will be the total of all 2019 gross wages and tips paid to employees with principal place of residence in the U.S. (2019 IRS Form 941 Taxable Medicare wages & tips – line 5c, column 1) from each quarter, added by any pre-tax employee contributions for health insurance and other benefits (excluded from Taxable Medicare wages & tips), again capped at $100,000 per employee. If you are the owner or co-owner of the corporation, this would include wages paid to yourself as an employee. Then, multiply this number by 2.5/12 to determine 2.5 months of average monthly payroll, which is the eligible loan amount. See the March 12th SBA guidance on this topic linked to below for more detail.

If you also have W-2 employees, you can include the cost of their salaries and certain benefits as detailed in the April 24 SBA guidance. Keep in mind that all salaries are subject to the cap of $100,000 and you cannot include any 1099 independent contractors or any employees whose primary residence is outside of the United States.

For guidance from the SBA on application of the PPP for self-employed individuals, see the SBA's supplemental Interim Final Rule on this topic here and their more detailed March 12th guidance on this topic here.

Q: We are a small farm that relies on owner and family labor, with little to show for payroll in 2019. Is this program simply not helpful for us?

A: If you operate your farm as a Schedule F sole-proprietor or self-employed farmer, you can access PPP money using a calculation based on gross income as discussed above.

Unfortunately, if you do not fall under those categories, you must use payroll for your calculation. If the self-employment income you can show for 2019 (as described in the previous question) is zero or negative, and you did not have any W-2 employees on payroll in 2019, you will not be eligible for PPP. And if your self-employment income in 2019 was minimal, you will only qualify for a small amount: remember, the loan amount is based on your average monthly payroll expense multiplied by 2.5.

That being said, if you think there may be a way to demonstrate sufficient income, we encourage you to contact your bank or consult with an accountant.

Q: What if I am a seasonal farm business? Will there be a mismatch between the payroll that is counted for determining my loan amount, and my actual payroll needs during the time I will use the loan?

A: To determine number of employees and average payroll costs for purposes of determining the maximum eligible PPP loan amount, *generally* borrowers can use average monthly payroll based on data either from the previous 12 months or from the calendar year 2019.

Seasonal businesses can use one of three periods for average monthly payroll in the calculation. Seasonal businesses may use payroll for either (1) the period between February 15, 2019 and June 30, 2019, (2) the period between March 1, 2019 and June 30, 2019, or (3) any consecutive 12-week period between February 15, 2019 and February 15th, 2020. The latter option will be more beneficial for seasonal businesses with greater payroll needs during summer months.

Q: Are there any other programs that support keeping my employees on payroll through this crisis, if I do not obtain a PPP loan?

A: Yes. Another option is the Employee Retention Credit (ERC). The credit is a refundable payroll tax credit that employers can claim on their federal employment tax return to cover employee wages and qualified health plan expenses. Eligible employers are those who carry on a trade or business during the calendar year 2020 that experience either of the following: a full or partial suspension of operations during any calendar quarter in 2020 due to Covid-19 related government orders, or a 50% decline in gross receipts during any quarter between 2019-2020, but eligibility ends in first quarter of 2020 where gross receipts are greater than 80% when compared to 2019. For 2021 calculations, you must show a 20% reduction in gross receipts based on the months of January 2020 and January 2021. However, the same wages cannot be used for both the PPP and ERC calculations.

In addition to the ERC, employers may defer the deposit and payment of the employer's portion of social security taxes. Deferment does not preclude you from getting a PPP loan, but once your PPP loan is forgiven you are not permitted to continue deferring these payments.

Finally, employers who are required under the CARES Act to provide paid leave to employees impacted by COVID-19 are entitled to receive a tax credit for the amount of the paid leave wages. Participation in the PPP does not affect this tax credit.

See the following links for more information from the IRS on the ERC, the deferment of social security tax, and the paid leave tax credit.

Economic Injury and Disaster Loan (EIDL)

Q: What about the SBA's other loan program, the Economic Injury Disaster Loan (EIDL) Program? Can farms apply for that as well?

A: ***Farm businesses are eligible for the EIDL program.*** Currently, as a result of the latest round of funds appropriated by Congress in response to the pandemic, as of December 27th, 2020 the SBA is accepting applications from all qualified small businesses and U.S. agricultural businesses.

The EIDL program can provide up to $150,000 in loans to small businesses or nonprofits that suffer substantial economic injury as a result of a declared disaster. Certain businesses in low-income communities that can demonstrate a reduction in revenue of greater than 30%, and have fewer than 300 employees, may be eligible for Targeted EIDL Advance, which are emergency grants that do not have to be repaid. Qualifying businesses or non-profits can receive up to $10,000 in emergency aid under this program. The Targeted EIDL Advance program is *only* available by email invitation from the SBA directly.

For purposes of eligibility, agricultural businesses include those businesses engaged in the production of food and fiber, ranching, and raising of livestock, aquaculture, and all other farming and agricultural related industries (per section 18(b) of the Small Business Act (15 U.S.C. 647 (b)). To be eligible, agricultural businesses must employ 500 or fewer employees and will have to show that they have been hurt by the economic downturn caused by coronavirus. Applications for the program are administered by the Small Business Administration.

The size of the EIDL depends on the amount of economic injury that a business has suffered, and may range up to $150,000. This amount is determined by the SBA on a case-by-case basis after businesses apply. The interest rate is 3.75% for companies and 2.75% for non-profits, and the loan term can be as long as 30 years. The EIDL also includes an automatic one-year deferral on repayment, though interest begins to accrue when the loan is disbursed.

For updated information on the New Eligibility applications limited to U.S. agricultural businesses click here.

Q: How do I apply for an EIDL loan?

A: To apply for the EIDL you must submit an application directly to the SBA (unlike PPP, applications do not go through local lenders). The application is linked below.

For the EIDL application form and additional information on eligibility, click here. For additional information on the EIDL process, click here.

Q. As a self-employed farmer, can I still benefit from the EIDL even if I don't have any employees?

A: Yes. However, if you have few or no employees, the emergency advance component of your loan will be limited since the amount you will receive is capped at $1,000 per employee.

The EIDL provides an option for a long-term loan at a low interest rate that can be used to cover a broad array of expenses incurred due to COVID-19. Not only can the EIDL be used for payroll costs like the PPP, but it can also be used to provide working capital for expenses such as fixed debts, accounts payable, and other obligations that cannot be met due to revenue losses as a result of COVID-19. It is worth noting that funds cannot be used for refinancing, making loan payments on other federal debts, to repair physical damages, to pay IRS tax penalties or to pay out dividends.

Q. Can I apply for both the PPP loan and the EIDL?

A. Yes! However, there is something you should consider: ***You cannot use funds from both loans for the same purposes***. For example, you cannot use both EIDL and PPP towards payroll. If you first obtained an EIDL loan that was used to pay payroll, and later obtained a PPP loan, you would be required to use the proceeds of the PPP loan to pay down the EIDL loan.

For more information on how the PPP and EIDL programs interact with each other, click here.