

Congress Provides Additional \$15 Billion in COVID-Related Payroll Support Funding for U.S. Airlines



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Related Practice Areas

- Aviation Regulatory
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Congress has passed and the president has signed into law the Consolidated Appropriations Act, 2021, a comprehensive \$900 billion COVID relief stimulus package and \$1.4 trillion omnibus bill. The bill will provide additional payroll support program (PSP) funding for U.S. passenger air carriers and aviation contractors, essentially creating a second round of PSP funding based on the model established earlier in 2020 in the CARES Act.

U.S. passenger air carriers will receive up to \$15 billion in financial assistance in aggregate. Airline contractors — defined broadly as persons contracting with Part 121 air carriers for catering, aircraft loading/unloading, security, ground handling, and other assistive functions — will receive an additional \$1 billion in support in aggregate. All funds must be used exclusively for the continuation of payment of employee wages, salaries, and benefits. Additionally, airports received \$2 billion in financial assistance in the aggregate “to prevent, prepare for, and respond to coronavirus,” subject to certain provisions. A summary of the new bill’s financial assistance provisions for airlines and their contractors follows:

Amounts Awardable to U.S. Passenger Air Carriers

- The amount Treasury may allocate to a passenger air carrier depends on whether the carrier is required to file a report with DOT under 14 CFR Part 241, and whether or not the carrier received CARES Act funding.
- U.S. Passenger Air Carriers **required** to file under 14 CFR 241 as of March 27, 2020, may receive:
 - (A) the amount of PSP funding the air carrier was approved to receive (without taking into account any pro rata reduction) under the CARES Act; **or**
 - (B) at the request of an air carrier, or in the event such air carrier did not receive PSP assistance under the CARES Act, the amount of the salaries and benefits reported by the air carrier to DOT under Part 241 for the period from October 1, 2019, until March 31, 2020.
- U.S. Passenger Air Carriers **not** required to file under 14 CFR 241 as of March 27, 2020, may receive:
 - (A) the amount of PSP funding the air carrier was approved to receive (without taking into account any pro rata reduction) under the CARES Act plus an additional 15 percent of such amount; **or**
 - (B) provided the air carrier received PSP funding under the CARES Act, and at the request of the air carrier, the sum of:
 - (i) the amount that the air carrier certifies as the amount of total salaries and related fringe benefits that the air carrier incurred and would be required to report to DOT under Part 241 had the carrier been required to transmit it during the period from April 1, 2019, through September 30, 2019; and
 - (ii) an additional amount equal to the difference between the amount certified under clause (i) and the amount of PSP funding the air carrier received under the CARES Act; **or**
 - (C) in the event the air carrier **did not** receive assistance under the CARES Act, an amount that the air carrier certifies as the amount of total salaries and related fringe benefits that the air carrier incurred and would be required to report to DOT under Part 241 had the carrier been required to transmit it during the period from October 1, 2019, through March 31, 2020.

- Note: The Treasury IG is required to audit air carrier and contractor certifications underlying their applications for PSP funding. The bill does not specify a timeline for conducting these audits.
- Treasury may receive warrants, options, preferred stock, debt securities, or other financial instruments from applicants who receive the above financial assistance.

Terms and Conditions

- Treasury must provide the financial assistance to passenger air carriers and contractors in the same form and on the same terms and conditions to the maximum extent practicable as under the CARES Act. The legislation specifically notes two particular terms and conditions: audit requirements and the ability to claw back of financial assistance if a recipient fails to honor the assurances that accompany PSP funding.
- Financial assistance to air carriers that did not receive CARES Act funding should be provided in the same form and on the same terms and conditions as those Treasury agreed to impose with similarly situated recipients of assistance.

Timeline for Disbursement

- No later than five days after enactment, Treasury must, to the maximum extent practicable, publish streamlined and expedited procedures for passenger air carriers and contractors to submit requests for financial assistance.
- No later than 10 days after enactment, Treasury must make initial payments to passenger air carriers and contractors. Treasury can then determine an appropriate method for timely distribution of payments to passenger air carriers and contractors with approved requests for assistance.

Pro Rata Reductions

Treasury has the authority to reduce, on a pro rata basis, the amounts due to passenger air carriers and contractors “to address any shortfall in assistance that would otherwise be provided.”

Required Assurances

Passenger air carriers and contractors who accept additional PSP funding must enter into an agreement with Treasury or otherwise certify that they will:

- Refrain from involuntary furloughs or reducing pay rates
 - Passenger air carriers: until March 31, 2021
 - Contractors: until March 31, 2021, or the date when the contractor expends the funds, whichever is later
- Not buy back shares in the air carrier, contractor, or parent company
 - Passenger air carriers: until March 31, 2022
 - Contractors: until March 31, 2022, or the date when the contractor expends the funds, whichever is later
- Refrain from paying dividends or other capital distributions with respect to common stock
 - Passenger air carriers: until March 31, 2022
 - Contractors: until March 31, 2022, or the date when the contractor expends the funds, whichever is later
- Comply with provisions covering employee compensation limits and protection of collective bargaining agreements

Mandatory Employee Recalls

Passenger air carrier and contractor agreements with Treasury for additional PSP funding must require the performance of the following actions:

- Passenger air carriers/contractors who **received** CARES Act funding must:

1. Recall, not later than 72 hours after executing an agreement or making a certification, any

employees involuntarily furloughed by the passenger air carrier or contractor between October 1, 2020, and the date the passenger air carrier or contractor enters into an agreement with Treasury.

2. Compensate these returning employees for lost pay and benefits (offset by any amounts received by the employee from a passenger air carrier or contractor as a result of the employee's furlough, including, but not limited to, furlough pay, severance pay, or separation pay) for the following time periods:
 - For passenger air carriers, between December 1, 2020, and the date on which the passenger air carrier enters into an agreement with Treasury
 - For contractors, between the date of enactment and the date when the contractor enters into an agreement with Treasury
3. "Restore the rights and protections for such returning employees as if such employees had not been involuntarily furloughed"
 - Passenger air carriers/contractors who **did not receive** CARES Act funding:
 1. Recall, not later than 72 hours after executing such agreement or certification, any employees involuntarily furloughed by the passenger air carrier or contractor between March 27, 2020, and the date the passenger air carrier or contractor enters into an agreement with Treasury
 2. Compensate these returning employees for lost pay and benefits (offset by any amounts received by the employee from a passenger air carrier or contractor as a result of the employee's furlough, including, but not limited to, furlough pay, severance pay, or separation pay) for the following time periods:
 - For passenger air carriers, between December 1, 2020, and the date on which the passenger air carrier enters into an agreement with Treasury
 - For contractors, between the date of enactment and the date when the contractor enters into an agreement with Treasury
 3. "Restore the rights and protections for such returning employees as if such employees had not been involuntarily furloughed"

Protection of Collective Bargaining Agreements

Treasury and other federal government agencies may not condition the issuance of additional financial assistance on a passenger air carrier or contractor's implementation of measures to enter into collective bargaining agreement negotiations. For passenger air carriers, this section remains in effect from the date on which the passenger air carrier is first issued financial assistance and ends March 31, 2021.

Limitations on Employee Compensation

- The same limits on employee compensation stated in the CARES Act apply to the additional funding, which apply to employees other than those whose compensation is determined through an existing collective bargaining agreement.
- Employees with Total Annualized Compensation that exceeded \$425,000 in 2019
 - May not receive total compensation that exceeds, during any 12 consecutive months, total compensation received in calendar year 2019
 - May not receive severance pay or other benefits upon termination of employment with the air carrier that exceeds twice the maximum total compensation received in calendar year 2019
- Employees with Total Annualized Compensation that exceeded \$3 million in 2019
 - May not receive total compensation that exceeds, during any 12 consecutive months, the excess of the sum of: \$3 million; and 50 percent of the excess over \$3 million of the total compensation received in calendar year 2019
- In the CARES Act, these limits applied from March 24, 2020, until March 24, 2022. Under this bill, the applicable time period is October 1, 2020, until October 1, 2022.
- "Total compensation" continues to be defined as including "salary, bonuses, awards of stock, and other financial benefits."

Minimum Service Guarantees

- DOT continues to have the authority to require that an air carrier provided financial assistance under the bill continue to serve U.S. points served by that carrier before March 1, 2020.
- DOT must take into consideration the needs of small and remote communities and the need to maintain well-functioning health care and pharmaceutical supply chains.
- However, unlike in the CARES Act, the legislation includes “sense of Congress” language describing factors DOT should consider when exercising its authority to require minimum service:
 - “(1) A number of airports and communities have lost air service as a result of consolidated operations by covered air carriers, as permitted by the Department of Transportation, including smaller airports that are located near larger airports.
 - (2) Airports covering common points, as determined by the Department of Transportation, do not align with the grouping commonly used by many air carriers, other Federal agencies, and distribution channels used by consumers to purchase air travel
 - (3) The demographic, geographic, economic, and other characteristics of an area and affected communities when determining whether consolidated operations at a single airport effectively serve the needs of the point
 - (4) Maintaining a robust air transportation system, including maintaining air service to airports throughout the United States, plays an important role in the effective distribution of a coronavirus vaccine.
 - (5) The objections from community respondents on whether a specific airport should or should not be included in a consolidated point, including those objections noting the importance of the required considerations” described above.

Reporting

- Not later than May 1, 2021, Treasury must submit to various Congressional committees a report on financial assistance provided to passenger air carriers and contractors. The report must include:
 - a description of any financial assistance provided to passenger air carriers
 - any audits of passenger air carriers or contractors receiving financial assistance
 - any reports filed by passenger air carriers or contractors receiving financial assistance
 - any instances of non-compliance by passenger air carriers or contractors receiving financial assistance with the requirements of the bill or the agreements entered into with Treasury
 - information relating to any clawback of any financial assistance provided to passenger air carriers or contractors under the legislation
 - the report must be updated and submitted again to Congress no later than the last day of the one-year period following the date of enactment
- Treasury must update the Treasury website at least weekly to reflect new or revised financial assistance distributions to passenger air carriers or contractors. It must identify applicants who applied for assistance and the date of application.

Other Limitations on Contractor Spending

Once a contractor expends any PSP funds, the requirement to comply with mandatory assurances continues until September 30, 2021, or until all funds are expended, whichever is later. Contractors are also required to report to Treasury on April 5, 2021, the amount of funds the contractor expended through March 31, 2021. If the contractor has not expended the entire amount, Treasury must recover funds that are unexpended as of April 30, 2021. Contractors must also recall employees under certain conditions.
