



Applicability of Federal Civil Rights Laws to Recipients of CARES Act Loans

May 1, 2020

The Coronavirus Aid, Relief, and Economic Security Act (CARES Act) [authorizes](#) the Small Business Administration (SBA) to provide economic assistance temporarily to [eligible organizations](#). [Section 1102](#) of the CARES Act establishes the Paycheck Protection Program (PPP), which enlarges the SBA's authority to guarantee loans under [Section 7\(a\)](#) of the Small Business Act. [Section 1110](#) of the CARES Act broadens SBA's authority to distribute Economic Injury Disaster Loans (EIDL) under [Section 7\(b\)\(2\)](#) of the Small Business Act. Applicants for the latter loan can receive an emergency grant advance that the recipient does not have to repay, even if the loan is denied. Congress expanded the funding for these accounts in the [Paycheck Protection Program and Health Care Enhancement Act](#).

This extension of federal funds to new recipients raises questions about what obligations may accompany the issuance of such loans. [Various federal](#) civil rights [laws condition](#) the receipt of federal funds on recipients' adherence to certain antidiscrimination mandates. This Sidebar examines the potential application of these civil rights laws to recipients of EIDL grants and PPP and EIDL loans. It also considers potential limits on the scope of these obligations.

The Small Business Act and the CARES Act

The SBA guarantees loans for certain small businesses under [Section 7\(a\)](#) of the Small Business Act. SBA-guaranteed loans are then [distributed](#) to recipients by third-party lenders. The CARES Act [amends](#) [Section 7\(a\)](#) to authorize the SBA to guarantee loans under the PPP for a broader pool of entities. Subject to various conditions and limitations, PPP loans are [forgivable](#) if recipients keep their employees on payroll and use the funds for payroll, rent, mortgage interest, or utilities. The CARES Act also amends [Section 7\(b\)\(2\)](#) of the Small Business Act, which authorizes SBA to [distribute](#) loans directly to eligible organizations that suffer economic injury due to a disaster. It also expands eligibility for these EIDL loans and [awards applicants](#) grant advances that need not be repaid (even if a loan application is not approved).

SBA Regulations and Civil Rights Laws

Federal civil rights laws prohibit various types of discrimination in any program or activity that receives federal financial assistance. For instance, Title VI of the Civil Rights Act of 1964 (Title VI) [prohibits](#)

Congressional Research Service

<https://crsreports.congress.gov>

LSB10459

discrimination based on race, color, or national origin; Title IX of the Education Amendments of 1972 (Title IX) **bars** discrimination based on sex in educational programs; the Age Discrimination Act of 1975 **proscribes** discrimination based on age; and Section 504 of the Rehabilitation Act **forbids** discrimination based on a disability. These statutes are generally **enforced** against recipients of financial assistance in two ways: (1) by the federal agencies that distribute the assistance; and (2) through private rights of action brought against recipients in federal court. In the latter case, plaintiffs may seek injunctive relief, monetary damages, or other relief against the recipient.

SBA regulations currently prohibit entities that receive federal financial assistance from discriminating based on a number of considerations. Three antidiscrimination regulations have similar compliance procedures: 13 C.F.R. Section 112 implements Title VI; 13 C.F.R. Section 117 implements the Age Discrimination Act; and Subpart A of 13 C.F.R. Section 113 appears to operate as a catch-all provision, barring discrimination based on race, color, religion, sex, handicap, or national origin. Recipients **must** keep records and produce compliance reports at SBA's request concerning these requirements; they must also permit SBA access to records and facilities. Persons who believe a recipient has discriminated against them can file a complaint with the SBA. If the SBA's investigation reveals a violation, the SBA may, among other things, suspend payments to the recipient or accelerate the maturity of a recipient's obligation (the SBA might also attempt less formal means to ensure compliance).

Subpart B of 13 C.F.R. Section 113 operates somewhat differently. That regulation implements Title IX and bars discrimination based on sex in education programs. Entities subject to this provision are subject to similar **compliance procedures** as set forth above, and also must (1) **designate** an employee to coordinate compliance with the regulation; (2) **adopt** and publish grievance procedures for complaints of violations of the regulations; and (3) **notify** students, employees, and applicants for admission that the entity is barred from discriminating based on sex.

Do EIDL Loans and Grants and PPP Loans Constitute Federal Financial Assistance?

In the absence of a statutory definition, precisely what constitutes federal financial assistance such that an entity becomes subject to federal civil rights laws is a question that has elicited **considerable contention**. As an initial matter, receipt of federal **grants** and **loans** from a federal agency is generally considered under case law to be federal financial assistance under Title IX, Title VI, the **Age Discrimination Act**, and **Section 504** of the Rehabilitation Act. SBA regulations also **define** federal financial assistance as including grants and loans of federal funds. Thus, at least under the terms of these statutes and implementing regulations, emergency grants and loans under the EIDL program disbursed *directly from SBA* appear to constitute federal financial assistance. As such, the SBA may be able to enforce antidiscrimination requirements for recipients of loans and grants under the EIDL program.

But less certain is whether receipt of *guaranteed* loans under the PPP subjects a recipient to these civil rights requirements. As mentioned above, PPP loans are guaranteed by the SBA but actually disbursed by third-party lenders. Because recipients of PPP loans receive federal funds from third parties rather than directly from the government, they may not be subject to the same requirements.

Adding to the uncertainty, Title IX, Title VI, and the **Age Discrimination Act** appear to exempt "contract[s] of insurance or guaranty" from their requirements, and those exemptions may apply to guaranteed loans. **Section 504 of the Rehabilitation Act** lacks an express exemption, but Department of Justice **implementing regulations** nevertheless include it. Courts have taken **differing approaches** in deciding whether the lack of the exemption in Section 504 means that banks that distribute federally guaranteed loans are subject to the statute. SBA regulations are also inconsistent. Some, such as those implementing Title VI, **include** the exemption, while other regulations implementing civil rights law

requirements **do not**. Thus, the precise reach of these statutory and regulatory civil rights requirements for entities that receive PPP loans, but do not also receive EIDL loans or grants, is difficult to predict.

That said, as a practical matter, applicants for PPP loans must nonetheless **agree** “not to discriminate in any business practice, including employment practices and services to the public on the basis of categories cited in 13 C.F.R., Parts 112, 113, and 117 of SBA Regulations.” As mentioned above, the categories in those regulations extend to age, race, color, religion, sex, handicap, or national origin. Aside from whether specific civil rights statutes are directly enforceable against recipients of loans issued under the PPP program, the SBA might argue that recipients nonetheless are contractually obligated not to discriminate on the basis of these categories. The remedy for noncompliance might conceivably arise in a **lawsuit** brought by the government to enforce the contractual terms or via the administrative procedures **outlined** in SBA regulations. However, to the extent a recipient is only obligated to follow these nondiscrimination provisions through the force of a contract, rather than because a statute directly applies to an entity, potential victims of discrimination may not have a cause of action to enforce these statutes.

In sum, recipients of EIDL grants and loans are likely subject to the statutory and regulatory civil rights requirements discussed above. At least some of those requirements may not apply to recipients who only receive PPP loans, meaning that aggrieved individuals might not be able to sue recipients under those statutes. However, because recipients of PPP loans agree to abide by certain nondiscrimination provisions in SBA regulations, the SBA might nonetheless be able to enforce those requirements against recipients.

Enforcement of Civil Rights Laws in Court

Besides federal agency enforcement, Title VI, Title IX, Section 504 of the Rehabilitation Act, and the Age Discrimination Act are all also enforceable through private suit. As noted above, while it is uncertain whether these statutes’ requirements attach to recipients of PPP loans, the statutes likely apply to entities participating in the EIDL program, as they receive grants and loans directly from the SBA. The constitutional authority for enactment of these civil rights statutes is the **Spending Clause** of the Constitution, which reviewing **courts** have construed to not only enable Congress to distribute federal funds, but also to impose conditions on the use of that assistance. Federal courts have analyzed Spending Clause legislation by **drawing upon** the concept of a contract.

The Supreme Court has drawn upon the contract metaphor to reason that **Title VI, Title IX, and Section 504** are each “**an arrangement in the nature of a contract**” between Congress and the recipient of federal funds (and has **noted** that the Age Discrimination Act is defined identically). Drawing upon this conception of Spending Clause statutes as akin to contracts, the Court has reasoned that these statutory requirements extend to the intended recipients of federal financial assistance, whether transmitted **directly or indirectly** (e.g., a university receiving federal funds initially granted to students), but do **not extend** to parties who merely benefit from the extension of that aid to others. For instance, in *Department of Transportation v. Paralyzed Veterans of America*, the Court held that Section 504 of the Rehabilitation Act did not apply to commercial airlines because they were not recipients of federal financial assistance. The Court noted that while airport operators accepted federal funds and were therefore recipients under the law, commercial airlines did not do so. Benefiting from funds given to airport operators, in and of itself, did not mean that the airlines were themselves recipients.

In addition, the Court has cited the contractual nature of Spending Clause civil rights statutes as a basis for narrowly construing the liability of recipients. For instance, in *Gebser v. Lago Vista Independent School District*, the Court crafted a restrictive damages remedy in a private suit brought under Title IX for sexual harassment. (Title IX contains no express private right of action; rather, such lawsuits were judicially implied and thus have largely been shaped by judicial construction.) In that case, the Court emphasized the contractual nature of Title IX to hold that a recipient could only be liable for damages if they have actual notice of harassment. The Court rejected theories of **constructive notice** or **respondeat**

[superior](#) and instead required plaintiffs seeking damages to show that recipients were deliberately indifferent to sexual harassment.

Similarly, the Supreme Court has interpreted Spending Clause legislation that imposes conditions on *states* that accept federal funds according to a contract model. The Court has indicated that the “financial inducement offered by Congress” may not be [impermissibly coercive](#) such that the offer [compels](#) compliance. Given the nature of states as sovereign entities, the Court’s recognition of limits on the federal government’s power to coerce states may not similarly constrain the federal government’s relationship with private entities. But because the Court’s reasoning in these decisions turned in part on the nature of Spending Clause statutes as contracts, the decisions might also be instructive in how a court could construe requirements for private entities that receive federal funds.

Nevertheless, in light of the Court’s reliance on principles of contract law to interpret the reach of civil rights statutes that apply to federal funding recipients, it is likely that at least some contract principles would apply in a situation where an individual brings an antidiscrimination suit against a recipient of CARES Act funds. In general, this means that any conditions for recipients of financial assistance must be [unambiguous](#) in order to establish damages liability. Recipients must have notice [both](#) of the potential remedies available against them and the “scope of conduct” for which they may be held liable.

More broadly, many recipients of CARES Act funds will presumably receive one loan or grant (rather than continuously accepting funds over time, as certain entities do). Neither the CARES Act nor civil rights statutes explicitly address the duration of obligations, although one interpretation of an [SBA regulation](#) is that these requirements expire upon repayment or forgiveness of the loan. Assuming that recipients are only obligated to comply with these requirements during that time, the potential applicability of federal civil rights requirements may be somewhat limited, as the abbreviated time period in which an entity could actually be considered a recipient of federal financial assistance restrains the avenues for litigation.

In sum, because these nondiscrimination statutes rest on Congress’s Spending Clause power, courts have generally interpreted their operation in accordance with contract law principles. This means that the conditions imposed on recipients of federal financial assistance must be unambiguous for individuals to prevail in a lawsuit alleging violation of these requirements. However, due to the potentially abbreviated nature of financial assistance under the CARES Act, the effect of these nondiscrimination provisions on entities that receive federal funds may be relatively limited.

Considerations for Congress

Given the uncertainty surrounding which entities are subject to federal civil rights requirements, Congress might consider clarifying these statutes’ scope. For CARES Act funding recipients, Congress could explicitly provide that recipients of certain categories of assistance are (or are not) subject to particular civil rights requirements (e.g., specifying whether CARES Act funds qualify as “federal financial assistance” for purposes of a specific statute). Alternatively, Congress could clarify who is subject to federal civil rights laws more broadly by providing a definition of “federal financial assistance” for various civil rights laws. Likewise, Congress could more specifically define the precise legal obligations that arise under civil rights laws for recipients of federal financial assistance, rather than let courts and federal agencies shape and define the relevant standards. The [parameters](#) of the Supreme Court’s Spending Clause [decisions](#) would necessarily limit Congress’s discretion in this area—as the Court has established limits on the conditions that such legislation may impose on states.

Author Information

Jared P. Cole
Legislative Attorney

Disclaimer

This document was prepared by the Congressional Research Service (CRS). CRS serves as nonpartisan shared staff to congressional committees and Members of Congress. It operates solely at the behest of and under the direction of Congress. Information in a CRS Report should not be relied upon for purposes other than public understanding of information that has been provided by CRS to Members of Congress in connection with CRS's institutional role. CRS Reports, as a work of the United States Government, are not subject to copyright protection in the United States. Any CRS Report may be reproduced and distributed in its entirety without permission from CRS. However, as a CRS Report may include copyrighted images or material from a third party, you may need to obtain the permission of the copyright holder if you wish to copy or otherwise use copyrighted material.