

RESOURCES

Paycheck Protection Program Flexibility Act and Other PPP Updates

Please see our previous client alerts regarding PPP loans here and here.

There have been a number of recent updates regarding the Paycheck Protection Program (“PPP”). On June 5, President Trump signed into law the Paycheck Protection Program Flexibility Act of 2020 (“PPPFA”), which enacted important changes to the program designed to make the Act more accommodating for borrowers. In addition, the Small Business Administration (“SBA”) has also released the forgiveness application (soon to be revised to address the PPPFA changes), as well as new guidance and revisions to its interim rules for the program.

Paycheck Protection Program Flexibility Act of 2020

The PPPFA includes significant changes to the PPP that are beneficial to borrowers. Below is an overview of these changes:

Reduction of Payroll Expense Ratio – To receive full forgiveness, the percentage of PPP loan funds that must be used exclusively for payroll during the covered period has been reduced from 75% to 60%. The remaining 40% must still be used for qualifying non-payroll expenses such as mortgage obligations, rent obligations, and/or utility payments.

Extension of Maturity Date – The maturity date for PPP loans that are not forgiven has been increased from two (2) years to five (5) years. **However**, this only applies to loans that were made **on or after June 5, 2020**. For loans made prior to June 5, 2020, the maturity date remains two years, but the SBA has revised its First Interim Final Rule to state that borrowers and lenders may mutually agree to extend the maturity date of such loans to five years.

Extension of Covered Period – The “covered period” has been extended from eight (8) weeks after the date of loan origination, to twenty-four (24) weeks after origination (but not to exceed December 31, 2020). This means that all borrowers (regardless of when the loan was made) will have twenty-four, rather than eight, weeks to use their PPP funds for proper purposes. However, borrowers that received their loan before June 5, 2020, can elect to still use the eight-week covered period.

Extension of Time to Rehire Employees – As borrowers are aware, the amount of PPP loan forgiveness is reduced as a result of the borrower’s reduction in the number of full-time equivalent employees. However, under the original PPP legislation, if the borrower was able to restore its number of full-time equivalent employees by June 30, 2020, forgiveness would not be reduced. The PPPFA extends this date to December 31, 2020.

Relief for Employers Who Cannot Rehire Employees – In addition, even if a borrower cannot restore the number of its full-time equivalent employees by December 31, 2020, the amount of loan forgiveness will not be reduced if the borrower can document, in good faith:

1. An inability to rehire individuals who were employees of the borrower on February 15, 2020, **AND** an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020; **OR**
2. An inability to return to the same level of business activity as the borrower was operating at before February 15, 2020, due to compliance with requirements established or guidance issued by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety

and Health Administration during the period beginning on March 1, 2020, and ending December 31, 2020, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.

Loan Deferral Extension – Loan repayment for each borrower will be deferred until the date on which the amount of loan forgiveness for that borrower is remitted from the SBA to the lender. Furthermore, if a borrower fails to apply for loan forgiveness within 10 months after the end of their covered period, loan repayment will be deferred until the end of those 10 months.

Deferral of Payroll Tax Payments – PPP loan recipients who have had their loans forgiven can now participate in the payroll tax deferral program under the CARES Act.

Forgiveness Application

The PPP loan forgiveness application was released in May, and helped clarify several outstanding issues and concerns. Although the application will need to be revised in light of the enactment of the PPPFA, many of its substantive provisions should not change.

One overarching takeaway from the application is that it will require employers to perform **very thorough and detailed calculations**, so borrowers should not delay in starting the process.

Other points of note/clarification from the application include:

- If a borrower fails to spend the requisite percentage (now 60% under the PPPFA) of its PPP loans on payroll, the forgiveness amount will be proportionally reduced rather than denied entirely.
- A full-time equivalent employee (“FTE”) is defined based on a 40-hour week, and FTE’s are measured on an employee-by-employee basis.
- Borrowers can use an “alternative payroll covered period” if their payroll schedule is at least biweekly and does not line up cleanly with the covered period (now 24 weeks). The alternative payroll covered period begins on the first day of their first pay period following loan disbursement.
- Payroll costs may include payments of bonuses to employees.
- Eligible payroll costs include costs paid during the covered period (or alternative payroll covered period) or incurred during the applicable covered period and paid by the next scheduled payroll date.
- Eligible non-payroll costs include costs paid during the covered period or incurred during the covered period and paid on the next billing cycle. Therefore, for example, this should mean that if a borrower was behind on rent before it received its PPP loan proceeds, but used those proceeds to catch up, those catch up payments should be eligible.
- Covered utilities include “electricity, gas, water, transportation, telephone, or internet access.”

Again, this list is not comprehensive, and the SBA will be releasing a revised forgiveness application that incorporates the changes to the PPP made by the PPPFA.

Conclusion

The enactment of the PPPFA is welcome news for borrowers. Many borrowers who had concerns about using 75% of the loan proceeds on payroll or being able to restore their workforce to pre-coronavirus levels by June 30, 2020, should be a little more relaxed with the additional flexibility introduced by the PPPFA. However, keep in mind many loans were obtained before June 5, 2020, so to the extent those borrowers do not get their entire loan forgiven, those borrowers will need to work with their bank to have their loan repayment period extended to five years. Also, bear in mind that borrowers will need to continue to keep detailed records over the twenty-four week covered period to submit with their loan forgiveness application. Borrowers should also start working on their loan

forgiveness application now, as it requires detailed computations on an employee-by-employee basis.

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