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# Navigating the Next Stages of the SBA Paycheck Protection Program

Posted on May 8, 2020

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Following the creation of the Small Business Administration's ("SBA") Paycheck Protection Program ("PPP"), numerous small businesses have applied for and received forgivable SBA loans to help cover payroll costs and other expenses during the ongoing COVID-19 outbreak. PPP loans are designed to assist small businesses with eight (8) weeks of payroll costs and other certain other expenses, such as rent and utilities. At the end of the 8-week period, employers will be able to apply for forgiveness of most, if not all, of the loan if the loan proceeds have been used for approved expenses.

Many employers who have received PPP loans are quickly approaching the halfway point of the applicable 8-week period and are beginning to have questions about forgiveness and usage of the loan proceeds. While the Treasury Department and the SBA have continued to issue additional guidance and regulations, many small businesses still have questions. The following are issues with which small businesses continue to grapple and the current status on guidance from the federal government on those issues.

## **Good-Faith Certification Related to the Necessity of PPP Loan**

In the wake of concerns that larger, publicly-owned companies were crowding out smaller businesses attempting to apply for PPP loans, the Treasury Department and the SBA issued additional guidance for businesses to consider when determining whether a PPP loan was necessary to support its operations. While the law creating the PPP program specifically stated that businesses did not have to demonstrate that they were unable to obtain credit from other sources, the additional guidance issued by the SBA stated that "**borrowers should review carefully the required certification that current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.**" In making this determination, SBA instructed businesses to take "into account their current business activity and their **ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business.**" Following this additional guidance, SBA stated that it would create a safe-harbor period for businesses to repay PPP loans which they received and which they subsequently determined were not economically necessary. The lack of any concrete guidance as to how a business should make such a determination has left many small businesses unclear about how to proceed.

Seemingly recognizing the confusion its revised guidance had created, on May 6, 2020, the **SBA extended the safe harbor period until May 14, 2020 and indicated it would provide additional guidance** to assist businesses in assessing how to proceed with assessing the economic necessity of PPP loans. Accordingly, businesses should likely wait on the additional guidance from the SBA before making any decisions about whether to return their PPP loans.

## **Clarification on Reductions in Forgiveness Based on Employees who Decline to Return to Work**

While the PPP lending program was designed for the loans to be forgiven if spent on payroll costs and other approved expenses, the CARES Act included provisions for reducing the amount of forgiveness a business was entitled to if it reduced its number of full-time equivalent employees during the time period for which the loan funds were to be used. Under the law, if an employer laid off full-time

equivalent (“FTE”) employees between February 15, 2020 and April 26, 2020, it would not be subject to a reduction in forgiveness if it rehired those employees (or otherwise filled those positions) by June 30, 2020.

On May 3, 2020, the **SBA clarified that if an employer has made a “good faith, written offer of rehire” and the employee rejects that offer, the business will not be subject to a reduction in forgiveness based on a failure to rehire that employee.** Businesses encountering such a situation should clearly document that the employee has refused to accept the offer.

### **What Portion of PPP Funds can be Used on Compensation for Highly-Compensated Employees?**

The CARES Act excludes from the definition of payroll costs any employee’s salary or wages in excess of \$100,000.00. For purposes of using PPP funds to pay payroll costs during the eight (8) week period following disbursement of the funds, this means that businesses can only use PPP funds to cover a pro-rated amount of an employee’s salary if the employee is making in excess of \$100,000.00 per year. For such highly-compensated employees, this means that PPP funds can only cover \$1,923.07 per week of the employee’s wages (\$100,000.00 divided by 52 weeks) or \$15,384.61 for the entirety of the eight week period. While employers can pay such highly-compensated employees their salaries in excess of that amount, those portions will not be eligible for forgiveness.

### **Best Practices While Using PPP Funds**

While the Treasury Department and the SBA have not issued specific guidance on accounting practices while using PPP funds, businesses should be diligent in maintaining detailed, careful records of how the funds are being used as they will be required to provide documentation to support their forgiveness applications. For many businesses, it may make sense to keep the PPP funds in a separate account for better documentation of how those funds are utilized.

### **Important Questions Remain Unanswered by the SBA**

As noted above, the SBA has stated that additional guidance is forthcoming on what considerations it will look at in determining whether a PPP loan was economically necessary. In addition to this question, other questions related to how the forgiveness process will be handled. As a specific example, as of this date, the SBA has yet to state how it will define FTE employees for purposes of calculating forgiveness. The SBA has stated that additional guidance on this topic will also be made available soon. If you have specific questions on this topic prior to the SBA’s additional guidance being issued, contact Tuggle Duggins for assistance.

Should you have any questions about the PPP program, please contact Nathan Duggins at [nduggins@tuggleduggins.com](mailto:nduggins@tuggleduggins.com) or (336) 271-5246, Ross Hamilton at [rhamilton@tuggleduggins.com](mailto:rhamilton@tuggleduggins.com) or (336) 271-5279, Scott Gayle at [atsgayle@tuggleduggins.com](mailto:atsgayle@tuggleduggins.com) or (336) 271-5232, or Daniel Stratton at [dstratton@tuggleduggins.com](mailto:dstratton@tuggleduggins.com) or (336) 271-5240. Please also follow our Twitter account @TuggleDuggins at <https://twitter.com/TuggleDuggins> for continuing, up-to-date information related to navigating the law during the COVID-19 outbreak.

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