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# SBA Publishes PPP Loan Forgiveness Application

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The Small Business Administration (“SBA”) and the Department of Treasury recently published the Loan Forgiveness Application for the Paycheck Protection Program (“PPP”). Any small business that received a PPP loan will need to complete the application and submit it to their lender (or complete the application electronically through their lender) to be eligible for forgiveness of the PPP loan. While the SBA has not issued an interim final rule on forgiveness, the application addresses several remaining questions for businesses, including how to calculate full-time equivalent (“FTE”) employees and how to calculate any reductions in forgiveness based on a reduction in employee wages. Because additional guidance is expected, the SBA may make subsequent revisions to the application form and forthcoming guidance. As a result, businesses should be on the lookout for additional guidance from the SBA in the coming days.

The PPP loan program was created by Congress in the Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) in order to provide low-interest forgivable loans to small-businesses in order to cover eight (8) weeks of payroll expenses during the ongoing COVID-19 outbreak and certain other permitted costs. While many small businesses have already secured loans through the PPP program, many questions still remained about how forgiveness of the loans would work. In addition to step-by-step guidance for calculating forgiveness, the application offers additional insight into other issues related to PPP loans and their forgiveness.

## 1. Covered Period

While the CARES Act defined the Covered Period for using the PPP loan proceeds as the eight (8) week period following disbursement of the loan, the Application clarifies that a business may use that 56 day period, or an alternative period for **payroll costs**. Note that the alternative period does not apply to eligible non-payroll costs such as rent or utilities.

The alternative payroll covered period may be used by businesses with a biweekly (or more frequent) payroll schedule. The alternative covered period begins on the first day of the first pay period following the disbursement of a PPP loan and runs for the following 56 days. An employer that chooses to use the alternative covered period for payroll costs *must* consistently use the alternative period in its forgiveness application when dealing with the Covered Period for payroll costs.

## 2. Summary of Costs Eligible for Forgiveness

The application clarifies that “borrowers are generally eligible for forgiveness for the **payroll costs paid and payroll costs incurred**” during the eight (8) week covered period. For purposes of PPP forgiveness, payroll costs are considered “paid” on the day that paychecks are distributed or when the business originates an ACH credit transaction. Payroll costs are considered “incurred” on the day that the employee’s pay is earned. The application clarifies that payroll costs that are incurred during the Covered Period, but not paid during the last pay period in the Covered Period are eligible for forgiveness if they are paid on or before the next regular payroll date.

The application also clarifies that eligible non-payroll costs must be paid or incurred during the Covered Period, and that such costs which

are incurred by not paid during the Covered Period must be paid on or before the next regular billing date. Eligible non-payroll costs include mortgage interest payments, business rent or lease payments, and business payments for electricity, gas, water, transportation, telephone, or internet access which were in place before February 15, 2020.

### **3. Full Time Equivalent (“FTE”) Employees**

The application clarifies one of the longest outstanding questions related to the PPP program – how are FTE employees calculated for purposes of PPP forgiveness? The application states that for each employee, an employer must determine the average number of hours paid per week during the Covered Period and divide that number by 40 and round up to the nearest tenth. Thus, an employee who works an average of 40 hours per week will be counted as 1.0 FTE (calculated by dividing  $40/40 = 1.0$ ), while an employee who works 28 hours per week would be counted as 0.7 FTE (calculated by dividing  $28/40 = 0.7$ ). The maximum for each employee is capped at 1.0, meaning that an employee who works more than 40 hours per week cannot be counted as more than 1 FTE employee.

The application also allows a business to choose a simplified system for calculating FTE employees, whereby employees who work 40 or more hours on average are counted as 1.0 FTE and employees who work less than 40 hours per week are counted as 0.5 FTE. Businesses should consider which calculation will best maximize their eligible forgiveness. While businesses can choose which calculation method to use, the business must use the same method throughout the forgiveness application.

### **4. Reductions in Forgiveness**

When it passed the CARES Act, Congress included provisions that the amount of forgiveness an employer could receive would be reduced for employers who reduced their number of FTE employees or reduced wages by more than twenty-five percent (25%). The application provides additional information on how those reductions will be calculated.

For reductions in forgiveness based on a reduction in salary or hourly wages, the application divides the average annual salary or hourly wage for each employee during the Covered Period by the average annual salary or hourly wage for the employee during time period between January 1, 2020 and March 31, 2020. If that calculation equals .75 or more, then no reduction will occur. If the calculation equals less than .75, an employer must utilize the formula provided in the application to determine the amount of forgiveness that will be reduced. If an employee’s average annual salary or hourly wage was reduced during the time period February 15, 2020 and April 26, 2020, a business may qualify for a safe harbor in which it will not be subjected to a reduction in forgiveness if the employee’s annual salary or hourly wage if, by June 30, 2020, it is restored to the level it was at as of February 15, 2020.

For reductions in forgiveness based on a reduction in the number of average FTE employees, the application states “[t]he actual loan forgiveness amount that the Borrower will receive may be less, depending on whether the Borrower’s average weekly number of FTE employees during the Covered Period or the Alternative Payroll Covered Period was less than” during the baseline period of either (1) February 15, 2019 to June 30, 2019; or (2) January 1, 2020 to February 20, 2020. However, a business can be exempt from this reduction if it qualifies for the FTE Reduction Safe Harbor.

Under the FTE Reduction Safe Harbor, a business is exempt from the reduction in loan forgiveness if both of the following are met: (1) the business reduced its FTE employee levels in the period beginning February 15, 2020 and ending April 26, 2020; and (2) the business then restored its FTE employee levels by not later than June 30, 2020 to its FTE employee levels in the pay period that included February 15, 2020.

Additionally, as previously clarified by the SBA, the application makes clear that (1) the FTE of any positions which the business made a good-faith, written offer to rehire an employee during the Covered Period which was rejected by the employee or (2) the FTE of any employees who were fired for cause, voluntarily resigned, or voluntarily requested and received a reduction in hours during the Covered Period do not count towards a reduction in the employer’s loan forgiveness.

### **5. Required Documentation**

The application also includes instructions related to the documentation that an employer must submit with its loan forgiveness application.

For payroll costs, employers will need to provide:

- Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees;
- Tax forms or equivalent third-party payroll service provider reports for the periods that overlap with the Covered Period, including payroll tax filings and state quarterly business and individual employee wage reporting and unemployment insurance tax filings; and
- Payment receipts, cancelled checks, or account statements documenting the amount of any employer contributions to employee health insurance and retirement plans that the employer included in the forgiveness amount.

For non-payroll costs, employers will need to provide:

- For mortgage interest payments – Copies of lender amortization schedule and receipts or cancelled checks verifying eligible payments; or lender account statements from February 2020 and the months of the Covered Period through one month after the end of the Covered Period verifying interest amounts and eligible payments;
- For rent or lease payments – Copies of current lease agreement and receipts or cancelled checks verifying eligible payments from the Covered Period; or lessor account statements from February 2020 and from the Covered Period through one month after the end of the Covered Period verifying eligible payments; and
- For utility payments – Copy of invoices from February 2020 and those paid during the Covered Period and receipts, cancelled checks, or account statements verifying those eligible payments.

For documentation related to establishing the number of FTE employees, businesses will need to provide documentation showing the average number of FTE employees on payroll per month for either of the two baseline time periods, as discussed above. Such documentation may include payroll tax filings reported, or that will be reported, to the IRS and state quarterly business and individual employee wage reporting and unemployment insurance tax filings reported, or that will be reported. Documents submitted may cover periods longer than the specific time period.

Additionally, the application notes that employers must maintain in their records certain documents even though they are not required to be submitted with the application. These documents are:

- Documentation supporting the listing of each individual employee on the forgiveness application and whether that employee received compensation in 2019 at an annualized rate of more than \$100,000.00;
- Documentation regarding an employee job offers and refusals, firings for cause, voluntary resignations, and written request by an employee for a reduction in work schedule; and
- Documentation supporting an employer's eligibility for the FTE Reduction Safe Harbor.

Employers are also instructed to maintain, for a period of six (6) years after the loan is forgiven or repaid in full, "all records relating to the Borrower's PPP loan, including documentation submitted with its PPP loan application, documentation supporting the Borrower's certifications as to the necessity of the loan request and its eligibility for a PPP loan, documentation necessary to support the Borrower's loan forgiveness application, and documentation demonstrating the Borrower's material compliance with PPP requirements.

## **Conclusion and Additional Considerations**

While the current version of the application addresses some of the many issues related to forgiveness of PPP loans, there are many additional complex considerations of which employers should be aware, specifically as they relate to the provisions dealing with reductions in available forgiveness. The SBA and Department of Treasury have indicated that additional written guidance will be forthcoming to assist businesses with navigating many of the complex provisions related to forgiveness. Small businesses that received PPP loans should carefully review the loan forgiveness application and that upcoming guidance to ensure that they are properly maintaining

the necessary documentation.

Should you have any questions about the PPP loan forgiveness application or about the PPP loan program generally, please contact Mike Wenig at [mwenig@tuggleduggins.com](mailto:mwenig@tuggleduggins.com) or (336) 271-5216, Ross Hamilton at [atrhilton@tuggleduggins.com](mailto:atrhilton@tuggleduggins.com) or (336) 271-5279, Vaughn Ramsey at [vramsey@tuggleduggins.com](mailto:vramsey@tuggleduggins.com) or (336) 271-5234, Scott Gayle at [atgayle@tuggleduggins.com](mailto:atgayle@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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