Congress Passes Bill Making Changes to SBA Paycheck Protection Program

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On Wednesday, June 3, 2020, the Senate passed the Paycheck Protection Program Flexibility Act ("PPP Flexibility Act"), H.R. 7010, which was previously passed by the House of Representatives on May 28, 2020. The PPP Flexibility Act makes several changes to the SBA's PPP loan program in order to make it easier for businesses to use provided funds and to receive forgiveness. Specifically, the new law extends the period of time that a small business may use the loan funds and eases the restrictions on how those funds may be spent. The PPP loan program was originally 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 to cover eight (8) weeks of payroll expenses during the ongoing COVID-19 outbreak and certain other permitted costs.

The PPP Flexibility Act makes the following changes to the PPP Program:

1. **Extended Period to Apply for a PPP Loan**

As originally created, small businesses had until June 30, 2020 to apply for a PPP loan. The PPP Flexibility Act extends that deadline out to **December 31, 2020**. While small businesses now have more time to apply, they should remember that the program likely will run out of funds before the end of the year, and should not delay if they are still interested in applying.

2. **Extending the Covered Period**

While the CARES Act defined the Covered Period for using the PPP loan proceeds as the eight (8) week period following the disbursement date of the loan, **the PPP Flexibility Act extends that period to the earlier of twenty-four (24) weeks or December 31, 2020**. As a result of this change, employers will now have up to six months in which they can use PPP loan funds on payroll costs and other covered expenses. Business which have already received PPP funding will have the option to still use the 8 week period and receive loan forgiveness earlier without waiting until December 31, 2020.

3. **Loosening the Restrictions on How Much Can be Spent on Non-Payroll Costs**

Following passage of the CARES Act, the Treasury Department and SBA issued regulations requiring that businesses use at least seventy-five percent (75%) of PPP loan funds on payroll costs, meaning that businesses could only use twenty-five percent (25%) on non-payroll costs like rent, utilities, and payments of mortgage interest. For businesses in certain high-cost regions, this breakdown imposed hardships for some businesses, where rent and utilities account for a larger percentage of the business' costs.

The PPP Flexibility Act eases that restriction, requiring that businesses **spend at least sixty percent (60%) of their PPP loan funds on payroll costs** and allowing businesses to **use up to forty percent (40%) on covered, non-payroll costs such as rent and utilities**. Note, however unlike the prior law which reduced the forgiveness amount if an employer did not meet the threshold for payroll costs, the new legislation appears to create a "cliff" effect – meaning that if at least sixty percent (60%) of the funding is not used for payroll cost, none of the loan will be forgiven.

4. **Extension of Period to Rehire Full-Time Equivalent ("FTE") Employees and Eliminate Reductions in Salary**

The CARES Act included provisions that 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%), but included a safe harbor period that allowed businesses to be exempt from such reductions if they restored their FTE levels and/or wages that had been reduced by June 30, 2020. **The PPP Flexibility Act extends that safe harbor deadline to December 31, 2020.**

The PPP Flexibility Act also provides**additional exemptions for employers**who, in good faith, are able to document (1) "an inability to rehire individuals who were employees" as of February 15, 2020 and an inability to hire employees for similarly qualified positions on or before December 31, 2020; or (2) an inability to return to the same level of business activity as the business had before February 15, 2020 due to compliance federal guidance and requirements related to COVID-19, such as social distancing.

5. **Deadline for Applying for Forgiveness**

The PPP Flexibility Act also clarifies that**a business must apply for forgiveness of its PPP loan within ten (10) months of the end of its Covered Period**, or it may otherwise be required to begin making payments of principal, interest and fees.

6. **Increased Ability for Small Businesses to Utilize Payroll Tax Deferral**

In addition to enacting the PPP loan program, the CARES Act also included provisions that allow businesses to defer paying a portion of payroll taxes, but excluded businesses from using that deferral once they received forgiveness under the PPP loan program. **The PPP Flexibility Act changes that prohibition and allows recipients of PPP loans to continue deferring the employer portion of their FICA payments through December 31, 2020, even after receiving forgiveness.** Half of the deferred taxes would then be due on December 31, 2021, and the second half would be due on December 31, 2022. The deferral is without interest or penalty, effectively providing an interest free loan to businesses that utilize it.

Conclusion and Additional Considerations

While the changes included in the PPP Flexibility Act will come as a welcome relief to many businesses that received PPP loans, they will also likely necessitates some changes to the current guidance and regulations promulgated by the SBA and the Treasury Department. For example, the current regulations cap the amount of money that can be spent on an employee's wages during the Covered Period at $15,385. That number was based on an annual salary cap of $100,000.00 (the maximum amount of salary that could be counted for the PPP program) being prorated for during the covered time period (i.e. 8 weeks out of 52 weeks). Because the CARES Act requires the maximum amount to be based on an employee's annual salary being prorated for the extent of the Covered Period, it is likely that SBA will need to revise that amount to account for an amount prorated over 24 weeks, instead of eight. However, at this time that cap has not been increased. Businesses should check for updates from the SBA on these issues here.

Should you have any questions about the changes to the PPP loan program or about the PPP loan program generally, please contact Nathan Duggins at nduggins@tuggleduggins.com or (336) 271-5246, Mike Wenig atmwenig@tuggleduggins.com or (336) 271-5216, Ross Hamilton at rhamilton@tuggleduggins.com or (336) 271-5279, Scott Gayle atsgayle@tuggleduggins.com or (336) 271-5232, or Daniel Stratton at 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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