SBA Releases PPP Loan Forgiveness Application and Provides Additional Clarity

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On May 16, 2020, the SBA released its long-awaited forgiveness application that includes detailed guidance on calculating how much of a Paycheck Protection Program (PPP) loan may be forgiven. Here are the highlights of the application and guidance:

> **1. Clarity provided on the calculation of eligible payroll costs and payroll periods, including businesses who run payroll in arrears.**

Eligible Payroll Costs. The application notes that, generally, payroll costs to be forgiven are those that have been paid and those that have been incurred during the eight week "Covered Period" beginning on the date the loan is received. As such, some businesses who sought to utilize PPP funds relating to payroll costs that were incurred outside the Covered Period may not be entitled to forgiveness for those amounts (according to the application). Payroll costs are considered paid on the day paychecks are distributed or the employer originates an ACH credit transaction. Payroll costs are considered incurred on the day that the employee's pay is earned.

A borrower applying for forgiveness may also elect an "Alternate Payroll Covered Period" using an eight-week period that begins on the first day of its first pay period after receipt of the PPP loan. This can help employers match their Covered Period with their payroll schedule. A borrower who elects the Alternate Payroll Covered Period must use it consistently except where the application specifies the "Covered Period" only.

Special Rule for Mismatched Periods. The application recognizes that payroll periods may not correspond exactly with the eight week Covered Period and provides that costs incurred during the last pay period but not paid by expiration of the eight weeks may be eligible for forgiveness as follows:

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Payroll costs incurred but not paid during the Borrower's last pay period of the Covered Period (or Alternative Payroll Covered Period) are eligible for forgiveness if paid on or before the next regular payroll date. Otherwise, payroll costs must be paid during the Covered Period (or Alternative Payroll Covered Period). For each individual employee, the total amount of cash compensation eligible for forgiveness may not exceed an annual salary of $100,000, as prorated for the covered period.

Allocation of Compensation of $100,000 or More. The application follows the CARES Act in restricting cash compensation for any employee that may be included in forgiveness to an annual rate not greater than $100,000. Although the application requires the applicant to specify its payroll schedule (weekly, bi-weekly, semi-monthly, monthly or other), for purposes of allocating compensation it treats all applicants as having a weekly or bi-weekly pay period. It does this by limiting the amount that may be included for any employee to $15,385, which is 8/52 (or 4/26) of $100,000. Employers who operate on a semi-monthly or monthly pay schedule actually pay 4/24 (or 2/12, the same fraction) of an employee's annual compensation over the eight week period, which would yield $16,667 when multiplied by $100,000, but appear to be precluded from using this amount.

2. Non-payroll costs cannot exceed 25%.

The application confirms previous SBA guidance that non-payroll costs, such as interest on mortgage and covered rent and utility obligations, cannot exceed 25% of the total forgiveness amount. Eligible non-payroll costs must have been paid during the Covered Period, or incurred during the Covered Period and paid on or before the next billing date (even if that date is after the Covered Period).

3. A "full time equivalent" employee is now defined.

The SBA has specified that, for purposes of determining who is a full time equivalent employee (FTE) during the covered eight week period, employers should calculate the number of hours paid per week, divide by 40, and round the total to the nearest tenth. The maximum for each employee is capped at 1.0. Alternatively, forgiveness applicants may elect a simplified method that assigns an FTE value of 1.0 for employees who work 40 hours or more per week and 0.5 for employees who work fewer hours.

4. New FTE reduction exceptions.

Importantly, the application sets forth exceptions for employers who have lost employees for reasons attributable to the employee. A reduction in FTE headcount, therefore, will not count against forgiveness for: (1) any positions for which the Borrower made a good-faith, written offer to rehire an employee during the Covered Period or the Alternative Payroll Covered Period which was rejected by the employee; and (2) any employees who during the Covered Period or the Alternative Payroll Covered Period (a) were fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of their hours. In all of these cases, the employee may still be included as an FTE on the application, but only if the position was not filled by a new employee.

5. June 30 "safe harbor" still applies.

Many businesses were uncertain of language in the CARES Act that suggested that certain restoration of pay or headcount by June 30, 2020, would lead to complete PPP loan forgiveness. The application clarifies this "safe harbor" and states as follows:

> A safe harbor under applicable law and regulation exempts certain borrowers from the loan forgiveness reduction based on FTE employee levels. Specifically, the Borrower is exempt from the reduction in loan forgiveness based on FTE employees described above if both of the following conditions are met: (1) the Borrower reduced its FTE employee levels in the period beginning February 15, 2020, and ending April 26, 2020; and (2) the Borrower then restored its FTE employee levels by not later than June 30, 2020 to its FTE employee levels in the Borrower's pay period that included February 15, 2020.

Note, however, that while this safe harbor may eliminate the reduction in forgiveness for FTE changes, the employer must still have qualifying expenditures during the Covered Period to support its request for loan forgiveness, and at least 75% of the forgiven amount must be payroll costs.

The Butzel Long CARES Act Specialty Team will continue to monitor guidance provided by the Department of Treasury and Small Business Administration, including concerns regarding eligibility, SBA affiliation rules, and loan calculations and forgiveness, as well potential modifications to the PPP by Congress.

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