

PPP Update - Paycheck Protection Flexibility Act

June 4, 2020

PPP UPDATE – PPP Flexibility Act Reduces Amount Required to be Spent on Payroll; Expands Time Period for Forgiveness and Rehiring Employees; Permits Forgiveness Recipients to Defer Payroll Taxes

1. *Paycheck Protection Flexibility Act of 2020*

On June 5, the President signed the Paycheck Protection Program Flexibility Act of 2020 (the “PPP Flexibility Act”), which will amend key provisions of the Paycheck Protection Program established by the CARES Act and supersedes some of the rules and guidelines that were put in place following the CARES Act. A brief summary of the updated terms follows below:

- Covered Period of the Loan: The covered period of the PPP loan, including the period during which proceeds of the PPP loan may be used, is extended from June 30, 2020, to December 31, 2020.
- Forgiveness Period: The loan forgiveness period is extended from 8 weeks after disbursement of the PPP loan to the *earlier* of 24 weeks after disbursement or December 31, 2020.
- Payroll Minimum: The minimum amount required to be spent on payroll for loan forgiveness purposes is reduced from 75% to 60%. Put another way, up to 40% of the amount eligible for forgiveness may be spent on covered mortgage interest, rent, or utilities.
- Rehiring: Under the CARES Act, forgiveness is reduced proportionately based on reductions in employee FTE count. Under the PPP Flexibility Act the date by which employees must be rehired is extended from June 30, 2020, to December 31, 2020.

Furthermore, the PPP Flexibility Act adds two new exemptions:

- First, the forgiveness reduction will not apply if the borrower, in good faith, can document an inability to rehire the same or similar employees that were in place as of February 15, 2020.
- Second, the forgiveness reduction will not apply if the borrower, in good faith, can document an inability to return to the same level of business activity before February 15, 2020, due to COVID-related social distancing, sanitation, and other safety requirements or guidance from the Centers for Disease Control, Health and Human Services, or Occupational Safety and Health Administration issued between March 1, 2020, and December 31, 2020.

(The law is silent on whether the new exemptions apply on a “per employee FTE basis” or simply create a blanket exemption.)

- **Deferred Payments on PPP Loan:** The start date for payments on any remaining PPP loan amount is now deferred until after any loan forgiveness is remitted by the SBA to the lender. This aligns the deferral date with the final determination on forgiveness. Note, however, that if a borrower fails to apply for forgiveness within 10 months of the end of the forgiveness period, then the start date for payments will commence on that date (i.e. 10 months after the end of the forgiveness period).

All of the above are retroactive to the date that the CARES Act was enacted and apply to all PPP loans.

- **Extended Maturity for New PPP Loans:** Congress has extended the term of all PPP loans made after the PPP Flexibility Act becomes law from two years to a minimum of five years. While this provision is not effective for PPP loans already extended, the PPP Flexibility Act specifically permits existing PPP loans to be amended to reflect the longer term by “mutual agreement” of lenders and borrowers.
- **Removal of Restrictions on Payroll Tax Deferral:** Congress has eliminated the provision of the CARES Act that prohibited PPP borrowers receiving loan forgiveness from also utilizing the Act’s payroll tax deferral. PPP borrowers may now utilize the payroll tax deferral as well, regardless of whether they receive forgiveness. This provision is also retroactive to the date that the CARES Act was enacted.

1. **Updated Rules Regarding Forgiveness**

Prior to Congress considering the PPP Flexibility Act, over the past few weeks the SBA has also published its loan forgiveness application and adopted related rules that provide PPP borrowers with additional flexibility. Key clarifications and changes, as we expect them to be further modified by the PPP Flexibility Act, as applicable, include:

- **Payments to Furloughed Employees, Bonuses, or Hazard Pay Can be Included:**
 - For employees, the above payments all count as payroll costs toward forgiveness, up to the \$100,000 annualized cap. (However, note that the furloughed employees will reduce forgiveness unless one of the exemptions for reductions in “full-time equivalent” employee applies – the employees are rehired by December 31, there is a documented inability to rehire the same or similar employees, or there is a documented inability to return to the same level of business activity due to COVID-related government orders.)
 - For owner-employees and self-employed individuals/general partners, however, payroll costs are limited to the *lesser* of eight weeks’ worth of 2019 compensation or the eight-week equivalent of \$100,000/year (\$15,385).
- **Reductions in Forgiveness Clarifications:**

- Employee FTE: “Full-Time Equivalent” is based on a 40-hour workweek. For part-time employees, borrowers may elect to just count them as 0.5 FTE each or they may assign them an FTE number based on amount of hours worked compared to a 40-hour workweek. Furthermore, reductions in employee FTE attributable to employees who were fired for cause, voluntarily resigned, or voluntarily reduced their hours don’t count against the borrower.
- Wage/salary reductions: If a borrower cuts an employee’s hours, that only counts as an FTE reduction, not a wage reduction. In other words, the reduction isn’t counted twice. The Interim Final Rule also seems to indicate that to restore full forgiveness, you only need to eliminate salary/wage reductions in excess of the 25% reduction that is otherwise allowed by the CARES Act.
- Forgiveness Review. Loan forgiveness will take time: the lender has 60 days to review the forgiveness application, and then the SBA has 90 days to remit the forgiveness amount to the lender.

1. **Updated Rules Regarding PPP Loan Review**

Finally, the SBA has issued additional rules regarding its review of PPP loans. Key takeaways include the following:

- Loan Review At SBA’s Discretion: For a PPP loan of *any* size, the SBA may undertake a review at any time in SBA’s discretion, of the following.
 - Borrower eligibility, based on, among other things, the “ineligible entities” list in 13 CFR 120.110 and the affiliation rules under 13 CFR 121.301(f) as well as the certifications (including the certification of need).
 - Loan amounts and use of proceeds.
 - Loan forgiveness amounts.

Also, note that the Loan Forgiveness Application requires borrowers with loans over \$2 million (including affiliates to the extent the affiliation rules apply) to “check the box” – this will likely be the mechanism that triggers SBA review of these larger loans.

- Safe Harbor re: Need for Smaller Loans: Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith. *However*, these loans are still subject to review on other grounds (such as eligibility of the entity or proper use of the loan).
- Borrower Response: The SBA will permit a response to its initial finding of ineligibility.
- Consequences: If the SBA determines ineligibility, no forgiveness, and the SBA “may seek repayment or pursue other available remedies.”
- Appeals: There will be an appeal process, to be spelled out later in a future rule.

- Retention of Records: Borrowers must retain records for six years from the date of forgiveness or repayment.

Also of note: Lenders will *not* get processing fees for PPP loans if the SBA determines a borrower is ineligible, and the SBA will seek repayment of processing fees if it finds a borrower was ineligible within one year after the loan was disbursed.