CORONAVIRUS SPECIAL REPORT

PAYCHECK PROTECTION PROGRAM (PPP) LEGISLATIVE ACTIVITY AND ADDITIONAL LOAN FORGIVENESS GUIDANCE

As of May 25, 2020

NOTE: This report is intended as a reference for PPP loan recipients, and is an update to this WSW Special Report on PPP Forgiveness issued on May 20, 2020.

STATUS AND OUTLOOK: PENDING PPP LEGISLATION

The House and Senate have different versions of legislation to make changes to the Paycheck Protection Program. The differences will have to be reconciled and the legislation will have to pass both the House and Senate, and be signed into law by the President, before any PPP changes go into effect.

As the House and Senate work on their proposals, the most likely changes that will be made to the PPP in the near term (next week or two) are as follows:

- Extension of the deadline to apply for a PPP loan from June 30, 2020, to December 31, 2020.
- Allow borrowers up to 16 weeks to use their funds, instead of the current 8 weeks.

More details on the House legislation and the Senate legislation are below.

House legislation

The main focus in the House is on H.R. 6886, Paycheck Protection Program Flexibility Act. House leaders have announced a vote on H.R. 6886 will occur as soon as Wednesday, May 27. Key provisions include:

- Extends the deadline to apply for a PPP loan from June 30, 2020, to December 31, 2020.
- Allows borrowers 24 weeks to use their loan funds, instead of the current 8 weeks.
- Eliminates the requirement that 75% of the PPP loan go to payroll in order to be forgiven.
- Sets a minimum loan maturity of five years.

- Extends the rehiring deadline from June 30, 2020, to December 31, 2020.

Senate legislation

The main focus in the Senate is on S. 3833, the Paycheck Protection Program Extension Act, which was introduced by Small Business Committee Chairman Rubio (R-FL) and Ranking Member Cardin (D-MD). Senate leaders are working to secure passage of the bill using parliamentary procedures intended to speed up consideration of the legislation. Key provisions include:

- Extends the deadline to apply for a PPP loan from June 30, 2020, to December 31, 2020.
- Allows borrowers 16 weeks to use their loan funds, instead of the current 8 weeks.
- Allows borrowers to use loan funds to purchase personal protective equipment for employees, and to pay for modifications to businesses that are required to reopen safely.

Note: The Senate bill does not address the 75/25 requirement, loan maturity, or June 30th rehiring deadline.

PPP FORGIVENESS GUIDANCE:

On Friday, 5/22, SBA issued two additional Interim Final Rules (IFRs) providing guidance on PPP forgiveness: Interim Final Rule on Loan Forgiveness, and Interim Final Rule on SBA Loan Review Procedures and Related Borrower and Lender Responsibilities. These IFRs are effective immediately, and are in addition to the PPP Loan Forgiveness Application that was released on May 15, 2020.

The rules DO NOT make changes sought by various impacted industries, such as extending the 8-week period, eliminating or reducing the 75/25 requirement, extending the rehiring deadline past June 30, or the two-year loan terms.

The rules also DO NOT provide clear guidance in some of the calculations on the treatment of salary/wages for employees who are paid over $100,000 per year.

Below are the key issues addressed in the IFR on Loan Forgiveness.

Costs Eligible for Loan Forgiveness

Payroll Costs Eligible for Loan Forgiveness (pages 8-12)

The following payroll costs are eligible for loan forgiveness:

- Payroll costs **paid** during the 8-week "covered period" or "alternative payroll covered period" (as described in the PPP Loan Forgiveness Application)
  - Payroll costs are considered "paid" on the day that paychecks are distributed or the day that you originate a direct deposit (ACH credit transaction).
  - Based on previous guidance, for employees who make more than $100,000 annually, borrowers can count up to $100,000 paid per employee (on an annualized basis) as a forgivable cost

- Payroll costs **incurred** during the 8-week "covered period" or "alternative payroll covered period" AND paid on or before the next regular payroll date, even if the payroll date is after the "covered period" or "alternative payroll covered period"
  - Payroll costs are considered to have been "incurred" on the day the employee's pay is earned. For employees who are not performing work but are still being paid, payroll costs are incurred based on the schedule established by the borrower – typically, each day that employee would have worked.
  - Based on previous guidance, for employees who make more than $100,000 annually, borrowers can count up to $100,000 incurred per employee (on an annualized basis) as a forgivable cost

- For employees whose compensation does not exceed $100,000 annually, payroll costs can include (even for those employees are not able to perform their duties due to lack of economic demand or public health considerations): Commission payments; bonuses; and hazard pay.

    - While not explicitly stated, the guidance implies that commission payments, bonuses, and hazard pay for employees who make over $100,000 per year CANNOT be included as a forgivable cost

- Payroll costs paid or incurred for owner-employees and self-employed individuals
    - Capped at the lesser of 8/52 of 2019 compensation, or $15,385 per individual
    - Other restrictions apply depending on your business model – refer to pages 11-12 of the IFR on Loan Forgiveness

Nonpayroll Costs Eligible for Loan Forgiveness (pages 12-13)

Note: While there is the option of using an "alternative payroll covered period" to calculate payroll costs for forgiveness, nonpayroll costs must be calculated based on the "covered period," which is the 8-week period beginning the day the borrower receives funds.

The following nonpayroll costs (up to 25% of the total loan amount) are eligible for forgiveness:

- Nonpayroll costs **paid** during the 8-week "covered period"
- Nonpayroll costs **incurred** during the 8-week "covered period" AND paid on the next regular billing date, even if that date is after the "covered period"

Reductions to Loan Forgiveness Amount

In general, a borrower's loan forgiveness amount must be reduced based on reductions in full-time equivalent employees or in employee salary and wages during the "covered period"/ "alternative covered period." In addition, if the borrower uses more than 25% of the total loan amount for nonpayroll costs, even if those costs are permissible uses of the loan, the borrower's loan forgiveness amount must be reduced by the amount spent above the 25% threshold.

"Safe Harbor" and Other Protections from Reductions to Loan Forgiveness (pages 21-22)

Borrowers avoid reductions in their loan forgiveness amount for two specific circumstances.

- A borrower's loan forgiveness amount will not be reduced (either FTE or salary/wage) for any employee who is fired for cause, voluntarily resigns, or voluntarily requests a reduced schedule during the covered period.
- If the borrower eliminates reductions in salaries or FTE employees by June 30, 2020, the borrower is exempt from any reduction in loan forgiveness amount that would otherwise be required due to reductions in salary or FTE employees.
    - Note: As of now, the "safe harbor" is a fixed date of June 30, 2020. For borrowers whose 8-week covered period extends beyond June 30, 2020, the **Reductions to Loan Forgiveness Amount** calculations described in the next two sections must be used to calculate a reduction in loan forgiveness amount.

Otherwise, any reduction in FTE or salary/wage level must be calculated as follows.

Reductions to Loan Forgiveness Amount due to FTE reductions (pages 13-18)

In calculating the loan forgiveness amount, the borrower may exclude any reduction in full-time equivalent employee headcount attributable to an individual employee if:

- The borrower made a good faith written offer to rehire or restore the reduced hours of the employee during the payroll period or the alternative payroll covered period, AND
- The offer was the same salary or wages and same number of hours as the employee had before the employee was furloughed or his/her hours were reduced.

AND:

- The employee rejected the offer, AND
- The borrower maintained records documenting the offer and its rejection, AND
- Within 30 days of receiving the rejection of the offer, the borrower informed the State Unemployment Insurance Office of the employee's rejection of offer of reemployment.

Except for "safe harbor" and the exclusion for employees who refuse an offer of rehire, reductions in FTE employees will reduce the amount of loan forgiveness amount by the same percentage as the percentage reduction in FTE employees. **There are three steps a borrower must take to calculate whether there was a reduction in FTE employees.**

First, the borrower must select a "**reference period**" from the following options:

- February 15, 2019-June 30, 2019, OR
- January 1, 2020-February 29, 2020, OR
- For seasonal employers, either of the first two options, OR a consecutive 12-week period between May 1, 2019, and September 15, 2019.

Second, the borrower must calculate the number of Full Time Equivalent (FTE) employees for both their "reference period" and their 8-week "covered period"/"alternative payroll covered period". The borrower can use either of the two methods outlined below, but MUST use the same method for both the "reference period" and the "covered period"/"alternative payroll covered period."

1. Base Method: for each employee, divide the average number of hours paid per week by 40, and round to the nearest tenth, up to 1 for each individual employee.
    a. For example, Employees A, B, and C would count as **2.3 FTEs** under this scenario using the Base Method:
        i. Employee A worked an average of 40 hours per week = 1
            1. (40/40 = 1)
        ii. Employee B worked an average of 50 hours per week = 1
            1. (50/40 = 1.25, capped at 1)
        iii. Employee C worked an average of 10 hours per week = .3
            1. (10/40 = .25. rounded up to the nearest tenth, .3)

2. Simplified Method: each employee who works 40 hours or more per week is 1 FTE, and every other employee is assigned 0.5 FTE.
    a. For example, Employees A, B, and C from above would count as **2.5 FTEs** under this scenario using the Simplified Method:
        i. Employee A worked an average of 40 hours per week = 1
            1. Total of 40 hours per week or more = 1
        ii. Employee B worked an average of 50 hours per week = 1
            1. Total of 40 hours per week or more = 1
        iii. Employee C worked an average of 10 hours per week = 0.5
            1. Less than 40 hours per week = 0.5

Third, the borrower must determine the "reduction quotient," or percentage by which the forgiveness amount must be reduced, using the following method:

- Divide the average FTE employees during the "covered period"/"alternative covered period" by the average FTE employees during the reference period. This is your "reduction quotient."
- If the number of FTE employees during the "covered period"/"alternative covered period" equals or exceeds the number of FTE employees during the "reference period," there is no "reduction quotient," and therefore no reduction in the loan forgiveness amount.

Reductions to Loan Forgiveness Amount Due to Salary or Wage Reduction (pages 18-22)
If a borrower reduces an employee's salary or wages by more than 25% (compared to the base salary or wages between January 1, 2020, and March 30, 2020), the borrower must reduce the total forgiveness amount by the total dollar amount of salary or wage reductions above 25%. This reduction must be calculated on a per-employee basis, not in the aggregate.

For example: A borrower reduced a full-time employee's weekly salary from $1,000 per week during the reference period to $700 during the covered period. The employee continued working full-time.

Reference period FTE status: 1.0 FTE (40 hours or more per week)
Reference period salary: $1,000/week

Covered period FTE status: 1.0 FTE (40 hours or more per week)
Covered period (8-week period) salary: $700/week

Total reduction due to salary decrease: $300/week, $2,400 total for 8 weeks
25% of the reduction: $250/week, $2,000 total for 8 weeks

Remaining reduction that must be applied to loan forgiveness amount: $50/week, $400 total for 8 weeks

The salary/wage reduction applies only to the portion of the decline in salary and wages that is NOT attributable to FTE reduction. This is to avoid being penalized for both an FTE reduction, **<u>and</u>** the resulting salary reduction.

For example: A borrower reduced an hourly employee's hours from 40 per week (1 FTE) during the reference period to 20 hours per week (0.5 FTE) during the covered period. During the covered period, the employer paid the employee the same hourly wage as the reference period.

> Reference period FTE status: 1.0 FTE (40 hours or more per week)
> Reference period salary: $1,000/week
>
> Covered period FTE status: 0.5 FTE (20 hours per week)
> Covered period (8-week period) salary: $500/week
>
> Total reduction due to salary decrease: 0 (reduced hours account for all salary decrease)

<u>Loan Forgiveness</u>

Loan forgiveness process (pages 7-8)

- Lender has 60 days from receipt of a complete forgiveness application to issue a decision to SBA and request forgiveness amount
- SBA has 90 days to remit the forgiveness amount to the lender
    - The guidance does not include a specific deadline by which the lender must remit payment to the borrower, but lenders were required to deposit PPP loans into borrower accounts within 10 days of receipt from SBA, so reasonable to assume a similar timeline here