



NEW YORK STATE  
RESTAURANT  
ASSOCIATION

JacksonLewis

# PPP LOAN PROGRAM WHAT RESTAURANTS NEED TO KNOW

Thursday, April 30 | Webinar will begin at 2 p.m.  
Please reserve your questions until the end of the presentation.

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# **Paycheck Protection Program What Restaurants Need to Know**

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**April 30, 2020**

Jackson Lewis P.C. | New York City

## Please note: No legal advice

- The information provided is not legal advice. We will not be able to provide individualized answers to an operator's particular circumstances. We urge our restaurant operators to consult with retained professionals to secure legal compliance.



# Agenda

- PPP Overview
- Discussion of Open Questions

# Section 1102 – Paycheck Protection Program

# The Basics

- Generally, companies with **not more than 500 employees** are eligible for “Paycheck Protection” Loans under Sect. 1102 (although there are some additional ways to qualify).
  - All employees count toward this threshold, including full-time, part-time, and individuals employed on another basis (i.e. temporary or per diem).
  - The general rule is that employees of affiliates count toward the 500-employee threshold.
  - Two exceptions make it easier for businesses in the **hospitality and restaurant** industries to qualify for loans – one exception allows businesses in these industries to qualify as long as they have no more than 500 employees per physical location and the other exception waives the affiliation rules.
- Eligibility considerations include whether the business:
  - Was in operation on February 15, 2020, **and**
  - Had employees whom the borrower paid salaries and payroll taxes.
- Borrower is required to make a **good faith certification** that due to the uncertainty of the current economic conditions it is necessary to obtain the loan to support ongoing operations of the business.
- Funds must be used to maintain payroll or make mortgage interest, lease or utility payments.

# The Finer Points

- Covered employers may receive loans up to a maximum amount equal to the lesser of:
  - The sum of:
    - 2.5 x the average total monthly payments by the applicant for payroll costs incurred during the one-year period prior to the date on which the loan is made or during 2019, **plus**
    - Any outstanding amount of an EIDL loan made during the period beginning on January 31, 2020.
  - **Or \$10,000,000.**
  - Special rules apply for seasonal businesses and new employers.
- Loan amounts must be used for allowable purposes, including:
  - Payroll costs
  - Costs related to the continuation of group health care benefits during period of paid sick, medical or family leave, and insurance premiums
  - Employee salaries, commissions, or similar compensation
  - Payments of interest on any mortgage obligation
  - Rent
  - Utilities
  - Interest on any other debt obligations incurred before the covered period

# Section 1106 – Loan Forgiveness

# The Basics

- Borrowers are eligible for forgiveness of indebtedness on a PPP loan in an amount equal to the sum of the following costs **incurred and payments made** during the **covered period**:
  - Payroll costs
  - Any payment of interest on any covered mortgage obligation (not including prepayment of or payment on principal)
  - Any payment on any covered rent obligation
  - Any covered utility payments
  - Additional wages are considered for employers with tipped employees
- Not more than 25 percent of the loan forgiveness amount may be attributable to non-payroll costs.
- The covered period means the 8-week period beginning on the date the covered loan is first disbursed. The lender must make a one-time, full disbursement of the PPP loan within ten calendar days of loan approval - for the purposes of this rule, a loan is considered approved when the loan is assigned a loan number by SBA.
- This “Base Loan Forgiveness Amount” may be subject to potential reductions for reduction in employees and reductions in salaries, though reductions will not apply if employer rehires *certain* employees and/or restores wages to certain employees no later than June 30, 2020.

# The Finer Points

- To claim loan forgiveness, the borrower must submit to the lender an application that includes:
  - Documentation verifying the number of full-time equivalent employees on payroll and pay rates for the applicable periods including:
    - Payroll tax filings reported to the Internal Revenue Service and
    - State income, payroll, and unemployment insurance filings;
  - Documentation verifying payments on covered mortgage interest, lease obligations and utility payments;
  - Certifications that:
    - The documentation presented is true and correct,
    - The amount for which forgiveness is requested was used to retain employees, make interest payments on a covered mortgage obligation, make payments on a covered rent obligation, or make covered utility payments; and
  - Any other documentation the SBA determines necessary.
- The loan forgiveness is not considered taxable income to the borrower.

# Open Questions

# Open Question #1 - What is the definition of full-time equivalent employee?

- Not defined in CARES Act.
- SBA FAQs provide that “for purposes of loan forgiveness, the CARES Act uses the standard of “full-time equivalent employees” to determine the extent to which the loan forgiveness amount will be reduced in the event of workforce reductions.”
  - However, the term is not defined in FAQs.
- Possible definitions?
  - Follow ACA definition under Section 4980H of the IRC - Count each full-time employee (those expected to work 130 hours a month) as one employee, add hours of all part-time employees and divide by 120 to determine total full-time equivalent employees?
  - Under Section 4980H regulations – the term hour of service means each hour for which an employee is paid, or entitled to payment, for the performance of duties for the employer; and each hour for which an employee is paid, or entitled to payment by the employer for a period of time during which no duties are performed due to vacation, holiday, illness, incapacity (including disability), layoff, jury duty, military duty or leave of absence.
- Of course, such interpretation is not binding on the SBA.

## Open Question #2 - What are costs incurred and payments made during the covered period?

- Not clear based on language in CARES Act.
- Do the costs have to be both incurred and paid within the 8-week period following loan disbursement to be eligible for forgiveness?
- How is the forgivable portion of rent, mortgage interest and utilities computed?
- When are retirement expenses incurred and paid for this purpose? Most employer contributions are actually made after the applicable plan year.

## Open Question #3 – How are eligible payroll costs, rents, mortgage interest, utilities determined? Are there any limitations?

- May an employer increase an employee's pay during the covered period and still have such payroll expense be eligible for forgiveness?
- What if an employer pays rent to a related entity?
- What if an employee is receiving unemployment due to a workshare arrangement? If the employer also pays the employee with PPP funds, will such expenditure be forgiven?
- May I use PPP funds to pay a relative that is also an employee?

# Open Question #4 - How is the reduction fraction impacted when employee counts/compensation amounts change?

- Generally, the reduction fraction is:
  - avg # of full time equivalent employees (FTEs) per month employed by the employer during the 8-week period following loan disbursement divided by
  - avg # of FTEs per month between February 15, 2019, and June 30, 2019, or January 1, 2020, and February 29, 2020, as selected by the employer
- How should employers count employees who voluntarily terminated or were terminated for cause?
- Do employees on paid leaves of absence count?
- Do employees receiving severance count?
- Does an employee need to be actively working to be counted or is the fact that the employee is being paid sufficient?
- How do wage reductions impact the fraction?

## Open Question #5 – Are forgiven expenses also deductible?

- The answer is not clear.
- This needs to be addressed by the SBA.

# Next Steps

- **What should an employer who has received PPP funds do to ensure maximum forgiveness?**
  - There is not a one-size fits all answer.
  - Depends on each employer's unique situation and tolerance to withstand all or a portion of the PPP loan not being forgiven.

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Thank **you.**