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PPP Updates and the Current State of PPP Loan Forgiveness

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Paycheck Protection Program Flexibility Act of 2020 (PPPFA)

Paycheck Protection Program Flexibility Act of 2020 (H.R. 7010)

- **STATUS:**
  - Signed into law on June 5, 2020
- **IMPACT:**
  - Made many employer-friendly changes

PPPPFA - New Minimum Loan Maturity

- The PPPFA establishes a minimum maturity of 5 years (rather than the 2 years implemented by the SBA) for PPP loans made after June 5, 2020.
- With respect to PPP loans made prior to that date, the PPPFA allows lenders and borrowers to mutually agree to extend the loan term to 5 years.
- Under the PPPFA, lenders are required to provide complete payment deferment relief for impacted borrowers, including payment of principal, interest, and fees, until the date on which the amount of forgiveness is remitted to the lender.
- The CARES Act had required deferment for at least 6 months (but not more than 1 year).

PPPPFA - Change in 75% Threshold Payroll Expense

- The SBA had imposed a requirement that at least 75% of loan proceeds be used for payroll expenses and limited nonpayroll costs to 25% of the forgiveness amount. The result of these provisions was that a borrower's loan forgiveness amount would be proportionately reduced to the extent that payroll costs did not meet the 75% threshold.
- The PPPFA has imposed a new statutory limit. Under the PPPFA, in order for a borrower to receive loan forgiveness, the borrower "shall use at least 60 percent of the covered loan amount for payroll costs."
- The 60% payroll expense threshold appears to be a "cliff," meaning that if at least 60% of the loan proceeds are not used for payroll expenses no portion of the loan will be forgiven.
- SBA has interpreted this not to be a cliff in recent regulations.

PPPPFA - Exemption Based on Employee Availability/Business Activity

- PPPFA adds a new safe harbor to allow borrowers to avoid the forgiveness reduction due to a reduction in FTE levels if the borrower *can document* either:
- an inability to rehire individuals who were employees of the borrower on February 15, 2020 and an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020; or
- "an inability to return to the same level of business activity as such business was operating at before February 15, 2020, due to compliance with requirements established or guidance issued by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration during the period beginning on March 1, 2020, and ending December 31, 2020, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19."

PPPPFA - Change in Safe Harbor Rehire Date to December 31, 2020

- The CARES Act reduces a borrower's loan forgiveness proportionately based on the FTE levels during the covered period (measured against the borrower's FTE levels during one of two pre-pandemic levels.)
- Also provides a safe harbor that exempts certain borrowers from the loan forgiveness reduction based on FTE levels where both of the following conditions are met: the borrower reduced its FTE employee levels in the period beginning February 15, 2020, and ending April 26, 2020 and 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.
- **The PPPFA amends this provision by extending the June 30, 2020 date to <u>December 31, 2020</u>.**

PPPPFA - Elimination of Prohibition on Deferring Employer Social Security Taxes Following Forgiveness/Deadline to Apply for PPP Loans

- The PPPFA eliminates the CARES Act provision that made a PPP borrower ineligible to defer payroll tax payments following the forgiveness of a PPP loan.
- The change should ensure that borrowers can take full advantage of the Social Security deferral provision included in the CARES Act.
- NOTE also – PPPFA extends end of covered period to December 31, 2020 (from June 30) – **application deadline is still June 30.**

Loan Forgiveness Details

Payroll and Non-Payroll Expenses – Meaning of Paid and Incurred

- Statute provides for potential forgiveness of eligible “costs incurred and payments made” during covered period.
- Uncertainty removed by Forgiveness Application:
  - Confirms that either costs incurred **or** payments made are eligible.
  - Payroll costs incurred but not paid during covered period are eligible if paid on or before next regular payroll date.
  - Nonpayroll costs incurred but not paid during covered period are eligible if paid on or before next regular billing date.

Payroll Expenses - Bonuses and Hazard Pay

- **Bonuses and Hazard Pay:** If an employee’s total compensation does not exceed $100,000 on an annualized basis, the employee’s hazard pay and bonuses are eligible for loan forgiveness because they constitute a supplement to salary or wages, and are thus a similar form of compensation.

FTE Calculation Explained

- Generally, the FTE employee reduction fraction is:
  - avg # of full time equivalent employees (FTEs) per month employed by the employer during the 8/24-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
- FINALLY we have a definition of “Full-Time Equivalent”:
  - determine the average number of hours paid for each employee per week
  - divide by 40
  - round the result to the nearest one-tenth (but in no event greater than 1.0)
- Two ways to calculate for part-time employees:
  - Assume employee usually works 30 hours per week
    - Method # 1: 30\40 = .75
    - Method # 2: Treat all part-time employees as .5

FTE Impact – Employees who were fired for cause, voluntarily resigned or voluntarily requested a schedule

- When an employee of the borrower is fired for cause, voluntarily resigns, or voluntarily requests a reduced schedule **during the covered period or the alternative payroll covered period** (FTE reduction event), the borrower may count such employee at the same full-time equivalency level before the FTE reduction event when calculating the FTE employee reduction penalty.
- Borrowers must maintain records demonstrating that each such employee was fired for cause, voluntarily resigned, or voluntarily requested a schedule reduction.

Furloughed Employees

- Salary, wages and commissions paid to furloughed employees during the covered period are eligible for forgiveness as long as they do not exceed an annual salary of $100,000, as prorated for the covered period.
- This is an important clarification as many employers have been paying employees not to work during the downturn. The Interim Final Rule clarifies that if furloughed employees are paid during the covered period, such payments are eligible for forgiveness and are included in the denominator of the forgiveness fraction.

Laid Off Employees Refusing to Return to Work

- Employees whom the borrower offered to rehire are generally exempt from the loan forgiveness reduction calculation. Exemption is also available if the borrower previously reduced the hours of an employee and offered to restore the employee's hours at the same salary or wages.
- Requirements for exemption:
- Borrower made good faith, written offer to rehire such employee (or, if applicable, restore the reduced hours of such employee) during the covered period or the alternative payroll covered period;
- Offer was for the same salary or wages and same number of hours as earned by such employee in the last pay period prior to the separation or reduction in hours;
- Offer was rejected by such employee;
- Borrower has maintained records documenting the offer and its rejection; and
- Borrower informed the applicable state unemployment insurance office of such employee's rejected offer of reemployment within 30 days of the employee's rejection of the offer.

Covered Period/Alternative Period

- Borrowers may seek forgiveness for payroll costs for the 8 weeks (or 24 weeks) beginning on either:
  - the date of disbursement of the borrower’s PPP loan proceeds from the lender (i.e., the start of the covered period); or
  - the first day of the first payroll cycle in the covered period (the “alternative payroll covered period”).
- Use of the alternative payroll covered period is elective.

Review of Forgiveness Applications

- SBA may review **any** PPP loan in its discretion
  - whether a borrower is eligible for the PPP loan
  - whether a borrower calculated the loan amount correctly
  - whether a borrower used loan proceeds for the allowable uses specified in the CARES Act
  - whether a borrower is entitled to loan forgiveness in the amount claimed on the borrower's Loan Forgiveness Application (SBA Form 3508)

Documentation Requirements

- Documents that must be submitted with forgiveness application:
  - Payroll - Documentation verifying the eligible cash compensation and non-cash benefit payments from the Covered Period or the Alternative Payroll Covered Period
  - FTE calculation information
  - Nonpayroll - Documentation verifying existence of the obligations/services prior to February 15, 2020 and eligible payments from the Covered Period
- Documents that Must be Maintained:
  - PPP Schedule A Worksheet or equivalent
- Borrowers must maintain documentation for 6 years after date loan is forgiven or repaid in full.
- Must permit SBA access to files upon request.

Reductions and Safe Harbors

- **FTE Reduction:**
  - Reduction in FTE employees during the covered period or the alternative payroll covered period generally reduces the loan forgiveness amount by the same percentage as the percentage reduction in FTE employees.
- **Salary or Wage Reduction:**
  - Reduction in certain employee’s salary or hourly wage in excess of 25% will generally result in a reduction in the loan forgiveness amount.
    - new employee in 2020
    - each existing employee who was not paid more than the annualized equivalent of $100,000 in **any** pay period in 2019

Reductions and Safe Harbors (cont.)

- **FTE Reduction Safe Harbor:**
  - The Borrower is exempt from the reduction in loan forgiveness based on FTE employees if both of the following conditions are met:
    - the Borrower reduced its FTE employee levels in the period beginning February 15, 2020, and ending April 26, 2020; and
    - the Borrower then restored its FTE employee levels by not later than **December 31, 2020** to its FTE employee levels in the Borrower's pay period that included February 15, 2020

- **Salary or Hourly Wage Reduction:**
  - The Borrower is exempt from the reduction in loan forgiveness based on salary or hourly wage reduction if both of the following conditions are met:
    - the Borrower reduced the salary or hourly wage of a covered employee in the period beginning February 15, 2020, and ending April 26, 2020; and
    - Such employee's salary or hourly wage on **December 31, 2020** was restored to prior levels

Q&A

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Thank you.