

Insights: Alerts

PPP Update: Forgiveness Gets More Flexibility and Clarity, as Congress Passes Paycheck Protection Program Flexibility Act of 2020 on the Heels of Recent SBA Guidance

June 5, 2020

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On Friday, June 5, 2020, the Paycheck Protection Program Flexibility Act of 2020 was signed into law by President Trump, after being approved by both the U.S. Senate and U.S. House of Representatives. The new legislation amends certain provisions of the CARES Act relating to the forgiveness of PPP loans, with the intent of making it easier for PPP borrowers to obtain full forgiveness of their PPP loans. The overall picture regarding PPP forgiveness is now coming into focus, as the new legislation follows recent SBA forgiveness guidance which came in the form of a series of Interim Final Rules, FAQ's and the SBA Loan Forgiveness Application.

PPP Flexibility Act of 2020

Key points of the PPP Flexibility Act of 2020 include the following:

- The “covered period” in which to use PPP funds and obtain forgiveness has been increased from 8 weeks to 24 weeks. It is unclear at this time whether the 24-week covered period will effectively increase the annualized \$100,000 per-employee maximum from \$15,000+ (8-week calculation on a \$100,000 salary) to \$46,000+ (24-week calculation on a \$100,000 salary).
- The June 30, 2020 deadline for using PPP funds has been extended to December 31, 2020.
- The prior requirement that 75% of the forgiveness amount must be used on payroll costs has been changed to require 60% of the “covered loan amount” to be used on payroll costs. The new terminology used with respect to this percentage suggests that borrowers must use at least 60% of the PPP loan funds for payroll costs to qualify for any forgiveness, but it remains to be seen if this ambiguity will be clarified through a technical amendment or further guidance.
- The prior 6-month deferral of payments due under a PPP loan is replaced with a deferral until the date on which the forgiveness application is remitted to the lender. If the borrower fails to apply for forgiveness within 10 months after the end of the covered period, the borrower must then begin to make payments.
- The legislation includes two new exceptions allowing borrowers to achieve full PPP loan forgiveness (without a proportional reduction based on employee FTEs) even if they do not fully restore their workforce. Forgiveness will not be reduced for borrowers who are in good faith able to document that they (i) could not re-hire or find qualified employees by December 31, 2020 or (ii) were unable to restore

business operations to February 15, 2020 levels due to governmentally imposed COVID-19 related operating restrictions.

- New PPP borrowers now have 5 years to repay the loan (amounts not forgiven) instead of 2 years. Existing PPP loans can be extended up to 5 years if the lender and borrower agree.
- The act allows businesses that took a PPP loan to also delay payment of their payroll taxes, which was previously prohibited under the CARES Act.

Other Recent SBA Guidance Regarding Forgiveness

The new legislation comes on the heels of other recent SBA guidance which was released in late May 2020 in the forms of an [Interim Final Rule](#) and the SBA's [Loan Forgiveness Application](#). Key forgiveness-related takeaways from the recent SBA guidance include the following:

- Clarification of the overall forgiveness process. A PPP borrower must complete and submit the Loan Forgiveness Application (SBA Form 3508) to its lender. The lender then has 60 days to issue its forgiveness decision to the SBA and request payment from the SBA for the amount of forgiveness. Subject to its review of the application, the SBA will then remit the appropriate forgiveness amount (with interest to the date of payment) within 90 days of receiving the request from the lender.
- Clarified that bonuses and hazard pay are eligible for loan forgiveness, as are salary, wages, and commission payments to furloughed employees, in each case subject to the per-employee maximum of \$100,000 annualized.
- Established an alternative 8-week covered period for forgiveness for borrowers with payroll cycles that are bi-weekly or more frequent. These borrowers can use an 8-week covered period beginning on the date they receive the loan or the first day of the pay period after they received funds. However, the 24-week covered period under the new PPP Flexibility Act provides even more flexibility for borrowers than the alternative 8-week period under the recent guidance.
- With respect to non-payroll costs such as rent, utilities, and mortgage interest, the guidance clarified when these costs must be incurred or be paid in order to qualify for loan forgiveness. Specifically, these costs must be paid during the covered period or incurred during the period and paid on or before the next regular billing date, even if that date is after the covered period. The guidance also states that advance payments on mortgage interest are not eligible for loan forgiveness. With the new legislation extending the covered period to 24 weeks, this guidance is not as important as it was under an 8-week covered period.
- The Interim Final Rule and Loan Forgiveness Application provide additional details and clarifications to assist in calculating any reductions in forgiveness based on a reduction in employee FTEs and/or a reduction in employee compensation. The guidance also clarifies that borrowers will not be doubly penalized for both hours and wage reductions for the same employee.
- The guidance reiterates that in calculating any reduction in FTE employees, employers can exclude any employees who decline a good faith offer to return at the same pay and hours as before they were laid off or furloughed. However, the guidance includes a requirement for borrowers to notify the state unemployment office of an employee's rejected offer within 30 days of that rejection.

It is unclear at this time whether this recent guidance will be revised or clarified in light of the new legislation. However, given the frequency with which the SBA has provided guidance throughout the PPP process (whether

in the form of an Interim Final Rule or FAQs), it is reasonable to expect that the SBA will issue new guidance soon to conform to the latest legislative amendments.

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