

June 9, 2020

More Flexibility for Updated Paycheck Protection Program Rules

Human Resources & Employment

UPDATE: SBA Administrator Jovita Carranza and Treasury Secretary Steven Mnuchin released a joint statement on June 9, 2020, confirming that partial forgiveness is still permissible: "If a borrower uses less than 60 percent of the loan amount for payroll costs during the forgiveness covered period, the borrower will continue to be eligible for partial loan forgiveness, subject to at least 60 percent of the loan forgiveness amount having been used for payroll costs."

Significant updates to the Paycheck Protection Program (PPP) were enacted at the end of last week, addressing complaints about rigid and impractical terms that many small business owners have voiced since the COVID-19 stimulus program began in late March 2020.

The "Paycheck Protection Program Flexibility Act" targets two of the most widely criticized restrictions in the original PPP:

- The requirement that 75% of loan proceeds be used for payroll expenses, reducing the amount to 60%.
- The time during which PPP loan proceeds can be used, extending it from 8 weeks to 24 weeks (allowing new borrowers until the end of 2020 to spend their loan proceeds).

It's worth noting that the new law states that forgiveness is available only when payroll costs equal at least 60% of loan funds used, suggesting an all-or-nothing situation for forgiveness despite the program's prior regulations providing for some partial forgiveness even if payroll costs didn't account for at least 75% of loan proceeds used. However, Congressional debates and various lawmakers' comments in the media suggest that a sliding scale might be applied by further legislation and/or the SBA's expected forthcoming guidance.

New borrowers will receive 24 weeks to use their loan, but the Dec. 31, 2020 deadline for the program will remain. Existing borrowers will have the choice as to whether to extend their 8-week period of loan usage or not. There may be tax-related consequences, and borrowers should consult with their tax attorney or CPA on the best scenario for them.

Additionally, the new regulations permit employees to restore their full-time equivalent (FTE) employee count by Dec. 31, 2020. The deadline is currently June 30. The FTE count will also be easier to achieve. As we recently wrote about, the SBA added additional exemptions for employers who do not return to their previous FTE count due to terminations for cause, voluntary resignations or voluntary requests to reduce hours.

The new law adds exemptions based on employee availability and safety concerns: Employers will not be penalized for a reduced FTE count if they can certify in good faith that they are unable to hire the same employees or similarly qualified employees, or that they cannot "return to the same level of business activity" as they were operating at before Feb. 15, 2020, due to OSHA and other health department requirements or guidance "related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19."

Finally, the new regulations provide businesses 10 months after the last day of the covered period to apply for loan forgiveness, extend repayment of any portion of the loan that is not forgiven from two years to five years, and permit employers to delay payroll taxes until 2021, even if their covered period has expired. The interest rate remains 1%.

As its name suggests, the new law injects flexibility to the program and will undoubtedly help businesses in high-rent areas and those who struggled to reopen due to shelter-in-place orders. We expect employers in high-density, urban areas to take advantage of the new flexibility of the act. We will continue to monitor the PPP and any additional reforms impacting its recipients.