

SBA Publishes Updated Loan Forgiveness Application

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On June 16, the SBA published the updated PPP Loan Forgiveness Application. The application provides PPP borrowers with step-by-step instructions to calculate the amount of their PPP loan eligible for forgiveness. In addition, the SBA published the Loan Forgiveness Application Form EZ.

The latest loan forgiveness applications incorporate the changes to the PPP put in place by the PPP Flexibility Act, as further discussed here.

Notably, the Flexibility Act extended the covered period for use of PPP loan proceeds from 8 weeks to 24 weeks. Prior to the extension of the covered period, the dollar amount for which forgiveness was requested could not exceed 8 weeks' worth of 2019 compensation for any owner-employee or self-employed individual, capped at \$15,385.

Per the updated application, borrowers who elect to use a 24-week covered period may not exceed 2.5 months' worth of 2019 compensation paid to any owner-employee or self-employed individual, capped at \$20,883. While this limitation is not based in the actual wording of the legislation, the SBA and Treasury have stated in the Interim Final Rule on revisions to the Third and Sixth Final Rules that this limitation is consistent with the 2.5 month period used to calculate the loan amount and is consistent with the intent of the CARES Act to protect payroll rather than to provide "windfalls that Congress did not intend." We will leave it open to interpretation as to whether Congress' clear intent to extend the covered period to 24 weeks was faithfully honored with this rule, but we are skeptical.

Another item that has been left unclear by the latest Forgiveness Application is the absence of previously included FTE reduction safe harbors. The forgiveness application published by the SBA prior to the Flexibility Act stated as follows:

FTE Reduction Exceptions: Indicate the Full-Time Equivalency (FTE) of (1) any positions for which the Borrower made a good-faith, written offer to rehire an employee during the Covered Period or the Alternative Payroll Covered Period which was rejected by the employee; and (2) any employees who

during the Covered Period or the Alternative Payroll Covered Period (a) were fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of their hours. In all of these cases, include these FTEs on this line only if the position was not filled by a new employee. Any FTE reductions in these cases do not reduce the Borrower's loan forgiveness.

However, while the latest forgiveness application adds the new safe harbor created under the PPP Flexibility Act, it does not provide for the safe harbors above. It is unclear why the previously included safe harbors were omitted. Frequently Asked Question number 40 is still included in the FAQs. That FAQ provided as follows:

“Question: Will a borrower's PPP loan forgiveness amount (pursuant to section 1106 of the CARES Act and SBA's implementing rules and guidance) be reduced if the borrower laid off an employee, offered to rehire the same employee, but the employee declined the offer? Answer: No. As an exercise of the Administrator's and the Secretary's authority under Section 1106(d)(6) of the CARES Act to prescribe regulations granting de minimis exemptions from the Act's limits on loan forgiveness, SBA and Treasury intend to issue an interim final rule excluding laid-off employees whom the borrower offered to rehire (for the same salary/wages and same number of hours) from the CARES Act's loan forgiveness reduction calculation. The interim final rule will specify that, to qualify for this exception, the borrower must have made a good faith, written offer of rehire, and the employee's rejection of that offer must be documented by the borrower. Employees and employers should be aware that employees who reject offers of re-employment may forfeit eligibility for continued unemployment compensation.”

Further, the Interim Final Rule on Loan Forgiveness continues to provide the following:

“Will a borrower's loan forgiveness amount be reduced if an employee is fired for cause, voluntarily resigns, or voluntarily requests a schedule reduction? No. 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 section 1106(d)(2) FTE employee reduction penalty. The Administrator and the Secretary have decided to exempt such employees from the calculation of the FTE reduction penalty.”

Additionally, the latest forgiveness application reflects changes to the FTE reduction safe harbor as modified by the Flexibility Act.

Previously, a borrower was exempt from the reduction in loan forgiveness based on FTE reduction if both of the following conditions were met: (1) the borrower reduced its FTE employee levels in the period beginning February 15, 2020 and ending April 26, 2020; and (2) 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.

Now, pursuant to the Flexibility Act, borrowers will have until December 31, 2020 to restore their FTE employee levels to the levels in the borrower's pay period that included February 15, 2020. However, the new forgiveness application indicates that the deadline to restore FTEs is the earlier of (i) December 31, 2020 or (ii) the date the forgiveness application is submitted. This makes practical sense as the forgiveness amount depends, in part, on whether FTEs were fully restored, but borrowers should be aware of this caveat in the application, which could cut off a borrower's time to restore FTEs prior to December 31, 2020 (assuming the application is submitted prior to that date). On a positive note, this offers the benefit of potentially using the 24-week covered period and receiving forgiveness in this calendar year.

We anticipate further clarification to provide guidance on the yet unanswered questions arising out of the latest forgiveness application. Please contact the Lowndes COVID-19 Practice Group with all of your PPP-related questions.