

## Business Law Alert

# Paycheck Protection Program Update

**O**n June 5, 2020, the President signed into law the Paycheck Protection Program Flexibility Act (Act). The Act provides greater flexibility on the use of Paycheck Protection Program (PPP) loan funds in order to maximize forgiveness. In addition, the Act makes certain changes to the CARES Act (under which the PPP was originally enacted).

This Alert summarizes the changes to the PPP made by the Act. Please note there are several areas that require clarification. Accordingly, we expect the Small Business Administration to issue further guidance and update its existing guidance to incorporate these changes.

### Extension of Eight-Week Covered Period

For borrowers that have not yet applied for a PPP Loan, the “covered period” for loan forgiveness has been extended so it will end 24 weeks after the date their PPP Loan is funded but not later than December 31, 2020.

Borrowers that have already received a PPP Loan will have the option to use the 24-week covered period or keep the covered period at the original eight-week covered period previously set forth under their PPP loan.

This change affords borrowers more time to ramp up their business to qualify a greater portion of their PPP Loan for forgiveness.

Note: the Act does not extend the time to submit a PPP loan application. All PPP loan applications must be submitted by June 30, 2020.

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## Relief From the 75/25 Rule

The Act eliminated the rule that no more than 25 percent of the loan forgiveness amount may be attributable to non-payroll costs. Instead, the Act now provides that in order to receive loan forgiveness, at least 60 percent of the loan amount must be used on permitted payroll costs **and** no more than 40 percent of the loan amount may be attributable to approved non-payroll costs (rent, mortgage interest and utilities). Previous guidance placed the cap on non-payroll costs at 25 percent of the total forgiveness amount, not a percentage of the total loan amount.

The new 60/40 rule is a “cliff,” such that if a borrower does not use at least 60 percent of the loan amount on permitted payroll costs, the borrower will not be eligible for any forgiveness. In other words, this is “all or nothing.” Under current SBA rules, a borrower is required to reduce the amount eligible for forgiveness if less than 75 percent of loan funds are used for permitted payroll costs, but forgiveness is not eliminated entirely if the 75 percent threshold is not satisfied. Members of Congress have indicated that the intent of the Act was not to eliminate the sliding scale, and technical fixes to restore a sliding scale at the 60 percent threshold may be enacted.

## Loan Forgiveness – Extended Time to Rehire FTEs

The Act extends the time for a borrower to restore the number of FTEs from June 30, 2020, to December 31, 2020. A borrower that rehires or replaces workers who were previously laid off will be exempt from the reduction in loan forgiveness during the eight-week or 24-week covered period, provided that the employee reduction occurred between February 15, 2020, and April 26, 2020, and the borrower restores its FTE employee levels by no later than December 31, 2020 (previous date was June 30, 2020) to its FTE employee levels in the borrower's pay period that included February 15, 2020. As long as on December 31, 2020, the FTE and salary levels are returned to the same level as they were on February 15, 2020, there will be no reduction of forgiveness.

## New Safe Harbor for Inability to Rehire or Restore FTE

In addition to the current rehiring exceptions, the Act provides two new safe harbors whereby any reduction in forgiveness based on a reduction in the number of FTEs will be disregarded in the event a borrower complies with the safe harbor. The exemption states that the amount of loan forgiveness will be determined “without regard to a proportional reduction in the number of full-time equivalent employees” if the borrower, in good faith:

1. Is able to document that it was unable to rehire individuals who were employees on February 15, 2020, and unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020; or
2. Cannot restore its operations to comparable levels of business activity due to social distancing, sanitation requirements or customer safety needs. These requirements must have been established 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.

These exemptions are important for businesses that are unable to return to full operation because of restrictions on customer capacity or similar reopening restrictions. Although the first item was set forth in the recently issued SBA Forgiveness Application, the second item is new and may be subject to additional guidance.

## **Loan Repayment Period Extended to Five Years**

The original PPP legislation provided that the period to repay loans would be two years. The Act extended the repayment period to five years for those loans that are issued after the date of the Act. Existing PPP loans can be extended up to five years if the lender and the borrower agree.

Payment of principal, interest and fees are deferred until the date that the amount of forgiveness is remitted to the lender by the SBA or if forgiveness isn't sought within 10 months after the last day of the "covered period" described above, then the deferral ends on that 10-month date. Borrowers must submit applications for forgiveness within 10 months after the last day of the covered forgiveness period.

## **Payroll Tax Deferral**

The Act allows borrowers that took a PPP loan to be able to defer payment of their payroll taxes (the employer's 6.2 percent portion of 2020 Social Security taxes). As such, regardless of whether forgiveness is granted, borrowers will have the ability to defer their share of payroll taxes incurred through December 31, 2020, with 50 percent then due on December 31, 2021, and 50 percent due on December 31, 2022.

*For further information, or if you have questions about this Alert, please contact your [Aronberg Goldgehn attorney](#).*