

LEGAL UPDATES

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Service

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Application for PPP Loan Forgiveness Released by SBA and Treasury

The eight-week “covered period” for the initial group of Paycheck Protection Program (PPP) Borrowers is nearing an end, and such Borrowers have been waiting for the Small Business Administration’s (SBA) promised guidance pertaining to loan forgiveness. On May 15, 2020, the SBA, in consultation with the Department of Treasury, released the PPP Loan Forgiveness Application, along with detailed instructions for the application. The SBA also issued a statement indicating that it “will also soon issue regulations and guidance to further assist borrowers as they complete their applications, and to provide lenders with guidance on their responsibilities.” In the meantime, and subject to that additional guidance, there are a number of important immediate takeaways to highlight.

Alternative Payroll Covered Period

For purposes of loan forgiveness, the “covered period” is the 8-week period beginning on the date the PPP loan funds are disbursed. Payroll costs incurred and payments made during the “covered period” are eligible for forgiveness. However, many Borrowers have payroll periods that do not align with this 8-week covered period. Fortunately, the SBA has provided an option for Borrowers to calculate payroll costs using an “alternative payroll covered period” that aligns with Borrowers’ regular payroll cycles. Borrowers with a biweekly (or more frequent) payroll schedule may elect to calculate eligible payroll costs using the 8-week period that begins on the first day of their first pay period following their PPP loan disbursement date.

Eligible Payroll and Non-Payroll Expenses Paid or Incurred

The SBA has given Borrowers the flexibility to include eligible payroll and non-payroll expenses paid or incurred during the applicable 8-week period after receiving their PPP loan. Payroll costs are considered “paid” on the day the

paychecks are distributed or the Borrower originates an ACH credit transaction. Payroll costs are considered “incurred” on the date that the employee’s pay is earned. Payroll costs incurred but not paid during the Borrower’s last pay period of the “covered period” or the “alternative payroll covered period” are eligible for forgiveness if paid on or before the next regular payroll date.

An eligible non-payroll cost must be paid during the “covered period” or incurred during the “covered period” and paid on or before the next regular billing date, even if the billing date is after the “covered period.” It is still the case that eligible non-payroll costs cannot exceed 25% of the total forgiveness amount. It is also important to note that the “alternative” period applicable to payroll costs cannot be used to determine non-payroll expenses included in the forgiveness calculation.

Additional Application Details

Some additional highlights from the SBA’s Forgiveness Application and instructions include:

The audit threshold for loans in excess of \$2 million is based on whether the Borrower, together with its affiliates, received PPP loans with an original principal amount in excess of \$2 million.

The following non-payroll costs are eligible for forgiveness: (1) interest on business mortgage obligations on real or personal property incurred before February 15, 2020; (2) business rent or lease payments pursuant to lease agreements for real or personal property in force before February 15, 2020; and (3) business utility payments for a service for the distribution of electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020. For these amounts, the Borrower is not required to report payments that it does not want to include in the forgiveness amount.

For purposes of determining whether the Borrower’s loan forgiveness amount must be reduced due to a reduction in full-time equivalent employees (FTEs), the average FTE is calculated using the average number of hours paid per week, divided by 40 (rounded to the nearest tenth), with the maximum for each employee capped at 1.0 during the “covered period” or “alternative payroll covered period,” as applicable. The Borrower may elect a simplified method that assigns a 1.0 for employees who work 40 hours or more per week and 0.5 for employees who work fewer hours.

Any FTE reductions under the following circumstances will not reduce the Borrower’s loan forgiveness: (1) 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; or

(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.

An FTE safe harbor is available that exempts certain Borrowers from loan forgiveness reduction if both of the following conditions are 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.

A detailed list of the non-payroll documents that the Borrower must submit with its forgiveness application includes, without limitation, a copy of: (1) the mortgage amortization schedule (and receipts or cancelled checks) or lender account statements from February 2020 and the covered months; (2) the current lease agreement (and receipts or cancelled checks) or lessor account statements from February 2020 and the covered months; and (3) the utility invoices from February 2020 and those paid during the “covered period” (and receipts, cancelled checks, or account statements).

The Borrower is required to keep all records relating to its PPP loan, including documentation submitted with its PPP loan application, documentation supporting the Borrower’s certifications as to the necessity of the loan request and its eligibility for a PPP loan, documentation necessary to support its loan forgiveness application, and documentation demonstrating the Borrower’s material compliance with PPP requirements, in its files for 6 years after the date the loan is forgiven or repaid in full, and to permit authorized representatives of the SBA, including representatives of the SBA Office of Inspector General, to access such files upon request.

The Borrower’s failure to provide the information requested by the SBA may result in a determination that the Borrower was ineligible for the PPP loan or a denial of the Borrower’s loan forgiveness application.

The Borrower’s eligibility for loan forgiveness will be evaluated in accordance with the PPP regulations and guidance issued by the SBA through the date of the forgiveness application, and the

SBA may direct a lender to disapprove the Borrower's loan forgiveness application if the SBA determines that the Borrower was ineligible for the PPP loan.

For a discussion of other PPP rules relating to eligibility and forgiveness, please see our Frequently Asked Questions.

We continue to monitor these developments and await the additional promised regulations and guidance from the SBA.

Contact Us

If you have further questions or require more information regarding this update, please contact Kirstin Salzman, Jessica Zeratsky, Lauren M. Hawkins, Christopher W. Peterson or your Husch Blackwell attorney.

Comprehensive CARES Act and COVID-19 Guidance

Husch Blackwell's CARES Act resource team helps clients identify available assistance using industry-specific updates on changing agency rulemakings. Our COVID-19 response team provides clients with an online legal Toolkit to address challenges presented by the coronavirus outbreak, including rapidly changing orders on a state-by-state basis. Contact these legal teams or your Husch Blackwell attorney to plan a way through and beyond the pandemic.