

LEGAL UPDATES

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## Services

Employee Stock  
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Retirement, Health,  
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## Professional

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# Calculating Paycheck Protection Program Retirement Contributions

We are getting a lot of questions regarding the amount of retirement contributions paid during the qualifying period for the forgiveness calculation, such as:

Will a contribution for the 2019 plan year count toward forgiveness?

Will a contribution for a full year count, or will some proration apply to account for the 8/52 weeks concept? You can imagine the complexities of this concept: who's to know that a contribution made during the qualifying period is the only contribution that will be made for the year? Even if you know that the contribution would be the only one for 2020, you can't really prorate it because you won't yet know total qualifying compensation for 2020. If they attempt to limit you to 8/52 of the 2019 contribution, what if you had multiple plans (e.g., 401k and ESOP) but terminated one during or after 2019? What if you adopted a plan during or after 2019? What if your qualifying payroll changed materially during or after 2019? What if contributions are discretionary and you decided not to make a contribution for 2019 or have not yet made a contribution for 2019, but intend to do so for 2019 and/or 2020?

If you have more than one plan, will it be necessary to contribute to both plans in order to maximize your forgiveness eligibility? It seems that should not be necessary: if you make a 2020 contribution of \$400,000 to retirement, why should it matter whether all of that goes to ESOP, or part to ESOP and part to Profit Sharing or 401k Match, regardless of the proration of any 2019 contribution?

It seems possible that the complexities are such that Treasury/SBA will simply allow any retirement contribution paid during the qualifying period to count, but we don't have any guidance yet, so there are no answers to these questions.

Secretary Mnuchin has been quoted as telling a Senate committee at yesterday's hearing, "I thought the guidance we put out dealt with all the issues." Secretary Mnuchin indicated he would answer the committee's specific questions received from constituents but did not say those answers would be widely available. Therefore, it is not clear what additional guidance might be issued. Let's plan for the worst (no guidance) and hope for the best. In that regard, our advice is to:

Estimate and continue to monitor:

the amount of retirement contribution that might be needed to plug any gap to achieve the desired PPP loan forgiveness,

the amount of 2019 qualifying payroll,

an estimate of 2020 qualifying payroll and

an estimate of the maximum 2019 and 2020 retirement contributions permitted by the rules.

If you have questions about calculating the maximum contribution for a year, please let us know.

Ask your board of directors (via a meeting or unanimous consent) to adopt a resolution that authorizes the officers to make retirement contributions during the qualifying period up to a stated maximum. If you have more than one plan, authorize the officers to decide the portion of the total retirement contribution to be contributed to each plan, including the ability to allocate all of it to one plan, and authorize them to determine the extent to which the contribution(s) are for 2019 or 2020. The maximum would be based on the estimated amount needed to achieve forgiveness, and the maximum retirement contributions permitted for 2019 and 2020 based on estimates of qualifying payroll and the maximum retirement contribution rules. Let's call that the "Maximum Retirement Contribution for PPP Forgiveness".

If you have an ESOP and your current policy is to use funding sources in addition to contributions (such as S distributions, 80-26 loan proceeds or redemptions), the board should consider changing that policy for 2019 and/or 2020 to authorize the officers to increase use of contributions to the extent needed to achieve the Maximum Retirement Contribution for PPP Forgiveness, and consider that change in setting the maximum.

If you would like assistance in drafting board resolutions, please let us know.

Delay making the contribution(s) until the end of the qualifying period, to allow maximum time to receive guidance.

In the meantime, continue to monitor the estimated Maximum Retirement Contribution for PPP Forgiveness.

Also in the meantime, estimate and monitor the Minimum Retirement Contribution you will need to make for 2019 and 2020, such as for committed (but as yet unpaid) 2019 and 2020 matching contributions to a 401k, contributions to fund ESOP loan payments, and contributions for ESOP repurchase liability. Let's call the sum of that the "Minimum Retirement Contribution".

Monitor Treasury/SBA guidance and our eblasts to assist you in determining the amount to contribute.

If you have an ESOP and either another plan or another non-ESOP source within the ESOP plan, consider prioritizing making the contribution first to the ESOP, up to the amount you would intend to use for ESOP loan payment and ESOP repurchase liability, since those are amounts you will need to contribute anyway. Or, if you are committed to pay a match and have a known amount of matching obligation, then it would be equally effective to designate the contribution as being for that match.

If no guidance is forthcoming, consider:

Paying retirement contribution(s) during the qualifying period in an amount equal to at least the Minimum Retirement Contribution and up to the Maximum Retirement Contribution for PPP Forgiveness. Let's call that the "Desired Contribution Amount"

- If you have an ESOP and an ESOP loan is outstanding, the IRS and DOL expect you to actually contribute cash and then have the cash paid back to the company if the company is the lender; however, if you don't have access to the cash, we should discuss your ability to declare a contribution in the form of partial loan forgiveness.

Designating the Desired Contribution Amount as being first for 2020, up to the maximum you'd want to be applied to the 2020 year (since we are assuming no guidance in this scenario, it seems that would be the most conservative position). You will need to inform the recordkeeper of this designation.

Designating the remainder of the Desired Contribution Amount to be for 2019. You will need to inform the recordkeeper of this designation.

Note: even if you make a 2020 contribution during the qualifying period for purposes of PPP loan forgiveness, that does not change your ability to later make a 2019 contribution by the due date of that contribution (which should still be open for calendar year taxpayers if you extended your tax return).

## **Contact us**

If you have further questions or require more information regarding this update, please contact Mark Welker 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.