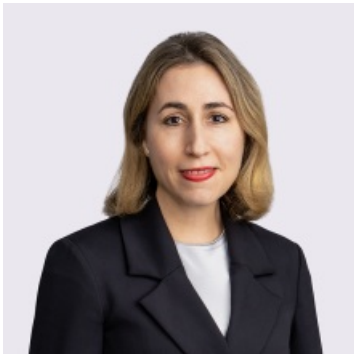


Small Business Administration Issues Guidance on Forgiveness of Paycheck Protection Program Loans

By Melissa Ostrower & Robert R. Perry

May 20, 2020

Meet the Authors



Melissa Ostrower

(She/Her)

Principal

212-545-4000

Melissa.Ostrower@jacksonlewis.com



Robert R. Perry

Principal

212-545-4000

Robert.Perry@jacksonlewis.com

Related Services

COVID-19

Employee Benefits

Wage and Hour

The Small Business Administration (SBA) has issued guidance on the forgiveness provisions applicable to loans made under the Paycheck Protection Program (PPP) created by the [CARES Act](#).

The SBA was required to issue guidance on these provisions within 30 days of the enactment of the CARES Act, or no later than April 26, 2020. On May 15, 2020, the SBA finally issued guidance in the form of the PPP Loan [Forgiveness Application and Instructions](#).

(For details on PPP, see our article, [Paycheck Protection Program Loans: Basics for Small Businesses, Sole Proprietorships](#).)

The Forgiveness Application answers many questions, including:

1. Is there flexibility in determining Covered Period?

Under previously issued guidance, the SBA made clear that the Covered Period is the eight-week (56-day) period following the date the PPP loan proceeds are disbursed. For example, if the employer received its PPP loan proceeds on Monday, April 20, the first day of the Covered Period is April 20 and the last day of the Covered Period is Sunday, June 14.

In the Forgiveness Application, the SBA has introduced an Alternative Payroll Covered Period concept. Under this alternative, employers with a biweekly (or more frequent) payroll schedule may elect to calculate eligible payroll costs using the eight-week (56-day) period that *begins on the first day of their first pay period following their PPP Loan Disbursement Date* (Alternative Payroll Covered Period). For example, if the employer received its PPP loan proceeds on Monday, April 20, and the first day of its first pay period following its PPP loan disbursement is Sunday, April 26, the first day of the Alternative Payroll Covered Period is April 26 and the last day of the Alternative Payroll Covered Period is Saturday, June 20.

2. What are “costs incurred and payments made” during the Covered Period?

The Forgiveness Application provides: “Borrowers are generally eligible for forgiveness for the *payroll costs paid and payroll costs incurred during the eight-week (56-day) Covered Period (or Alternative Payroll Covered Period)*.” (Emphasis added.) Costs that are incurred but not paid during the applicable period are eligible for forgiveness if they are paid on or before the next regular payroll date (for payroll costs) or before the next regular billing date (for nonpayroll costs.)

Additionally, the Forgiveness Application provides that eligible nonpayroll costs eligible for forgiveness include expenses *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. This provision appears to permit the payment of past due eligible nonpayroll costs during the applicable period (subject to the 25% limitation on nonpayroll costs).

3. What does “full-time equivalent employee” mean?

The Forgiveness Application is the first guidance to shed light on the meaning of “full-time equivalent.” This critical term was not defined in the CARES Act or addressed in any other guidance issued.

To calculate the average full-time equivalency (FTE) during the Covered Period or the Alternative Payroll Covered Period, determine the average number of hours *paid* for each *employee* per week, divide by 40, and round the result to the nearest one-tenth (but in no event greater than 1.0). Employers with a workforce that has a lower headcount but greater hours and earnings (such as a nursing home) get no extra credit (and could actually be penalized, depending on applicable facts and circumstances) under this formula. 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 may be used at the election of the employer.

The reference to “employee” and “paid” in this definition suggests that furloughed employees or other employees receiving pay while not rendering services should be included in the FTE calculation. However, as terminated employees are generally no longer considered to be “employees,” it is unlikely that former employees who are receiving pay can be included.

4. If an employer decides to give employees bonuses or raises during the Covered Period or Alternative Payroll Covered Period, do these count as payroll costs?

When calculating cash payroll costs under the Forgiveness Application, the borrower is directed to include the sum of gross salary, gross wages, gross tips, gross commissions, paid leave (vacation, family, medical or sick leave, not including leave covered by the Families First Coronavirus Response Act), and allowances for dismissal or separation paid or incurred during the Covered Period or the Alternative Payroll Covered Period (subject to the \$100,000 annual salary cap, as prorated for the Covered Period).

This language would appear to include any increase in wages made during the covered period (subject to the cap noted above). While bonuses certainly can be considered to fall within “gross wages” for tax purposes, it is also possible the SBA could take the position that bonuses were not intended to be included (although it does not make this clear in the Forgiveness Application). Additional SBA guidance is needed.

5. Are some FTE reductions excluded?

Yes. The Forgiveness Application recognizes it is appropriate to exclude certain employees from the FTE calculation. The following FTE reductions do not reduce an employer’s loan forgiveness:

- Any positions for which the employer made a good-faith, written offer to rehire an employee during the Covered Period or the Alternative Payroll Covered Period that was rejected by the employee (previously announced in [FAQ 40](#)); and
- 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.

To utilize these exceptions, employers must maintain documentation regarding any employee job offers and refusals, firings for cause, voluntary resignations, and written requests by any employee for reductions in work schedule.

6. How do salary and wage reductions affect the forgiveness calculation?

The Forgiveness Application provides detailed guidance on how to calculate the loan forgiveness amount where the salary or hourly wages of certain employees have been reduced during the Covered Period or the Alternative Payroll Covered Period (as compared to the January 1, 2020, to March 31, 2020, period). If the employer timely restored or restores salary/hourly wage levels, the employer may be eligible for elimination of the Salary/Hourly Wage Reduction amount.

Significantly, the Forgiveness Application form requires that this reduction apply only with respect to employees the employer is counting in its FTE reduction fraction. To the extent an employee has been terminated and is receiving no salary, the reduction in such terminated employee's salary would not appear to be included in this calculation.

7. What about amounts paid to general partners and members of an LLC?

The Forgiveness Application also clarifies whether and to what extent amounts paid to partners and LLC members count as potentially forgiven payroll costs. Line 9 of Schedule A includes in the calculation of payroll costs the “[t]otal amount paid to owner-employees/self-employed individual/general partners.” The instructions to Schedule A provide that Line 9 includes “any amounts paid to owners (owner-employees, a self-employed individual, or general partners) ... capped at \$15,385 (the eight-week equivalent of \$100,000 per year) for each individual or the eight-week equivalent of their applicable compensation in 2019, whichever is lower.”

The SBA has indicated that additional guidance will be forthcoming. Jackson Lewis attorneys will continue to monitor this situation. Please contact the authors if you have questions or need assistance.

©2020 Jackson Lewis P.C. This material is provided for informational purposes only. It is not intended to constitute legal advice nor does it create a client-lawyer relationship between Jackson Lewis and any recipient. Recipients should consult with counsel before taking any actions based on the information contained within this material. This material may be considered attorney advertising in some jurisdictions. Prior results do not guarantee a similar outcome.

Focused on employment and labor law since 1958, Jackson Lewis P.C.'s 1,000+ attorneys located in major cities nationwide consistently identify and respond to new ways workplace law intersects business. We help employers develop proactive strategies, strong policies and business-oriented solutions to cultivate high-functioning workforces that are engaged and stable, and share our clients' goals to emphasize belonging and respect for the contributions of every employee. For more information, visit <https://www.jacksonlewis.com>.