

More Changes to the Paycheck Protection Program

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June 8, 2020

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In response to employer complaints that the Paycheck Protection Program (PPP) was not particularly useful to businesses (such as restaurants) that have had to remain shuttered because of the COVID-19 pandemic, Congress passed and President Donald Trump signed an amendment, the [Paycheck Protection Program Flexibility Act of 2020](#) (PPPFA), making a number of helpful changes to the PPP.

Covered Period: 24 Weeks

The PPPFA expands the covered period (the period during which a borrower may use such funds for potentially forgivable expenses) from eight weeks to 24 weeks.

Pending confirmation from the Small Business Administration (SBA), this expansion of the covered period presumably will increase the maximum amount of cash compensation that can be paid to any employee from \$15,385 (\$100,000, prorated for eight weeks) to \$46,154 (\$100,000, prorated for 24 weeks).

Borrowers that received a loan before June 5, 2020, may elect for the covered period to remain at eight weeks.

Borrowers that already have received loans and have spent the proceeds based on an eight-week covered period may be better served by making this election and accelerate the forgiveness process.

No New Loans after June 30, 2020

While not clear from the text of the PPPFA, [a letter](#) included in the Congressional Record clarifies that the changes made by the PPPFA are not intended to extend the deadline to apply for a PPP loan beyond June 30, 2020. Thus, any employer that is considering applying for a PPP loan should do so by the June 30, 2020, deadline.

New Minimum Loan Maturity

The PPPFA establishes a minimum maturity of five years (rather than the two years implemented by the SBA) for PPP loans made after June 5, 2020.

With respect to PPP loans made before June 5, 2020, the PPPFA allows lenders and borrowers to mutually agree to extend the loan term to five years.

Under the PPPFA, lenders are required to provide complete payment deferment relief for impacted borrowers, including payment of principal, interest, and fees, until the date on which the amount of forgiveness is remitted to the lender. The [Coronavirus Aid, Relief, and Economic Security Act](#) (CARES Act) had required deferment for at least six months (but not more than one year).

Additionally, if a borrower applies for forgiveness within 10 months after the last day of the covered period and receives forgiveness, the borrower need not make payment of principal, interest, or fees on the forgiven portion of the covered loan. If an eligible

recipient fails to apply for forgiveness of a covered loan within 10 months after the last day of the covered period, payments are deferred until 10 months after the last day of the covered period.

Safe Harbor Rehire Date: December 31, 2020

The CARES Act reduces a borrower's loan forgiveness proportionately based on the full-time equivalent (FTE) levels during the covered period (measured against the borrower's FTE levels during one of two pre-pandemic levels). The statute also provides a safe harbor that exempts certain borrowers from the loan forgiveness reduction based on FTE levels where both of the following conditions are met:

- The borrower reduced its FTE employee levels in the period beginning February 15, 2020, and ending April 26, 2020; and
- 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.

The PPPFA amends this provision by extending the June 30, 2020, date to December 31, 2020. This change conveniently gives borrowers until the end of 2020 to restore employment levels to the level necessary to ensure maximum forgiveness.

New Safe Harbor Based on Employee Availability or Business Activity

The PPPFA also adds a new safe harbor to allow borrowers to avoid the forgiveness reduction due to a reduction in FTE levels if the borrower can document either:

1. an inability to rehire individuals who were employees of the eligible recipient on February 15, 2020, and an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020; or
2. "an inability to return to the same level of business activity as such business was operating at before February 15, 2020, due to compliance with requirements established or guidance issued 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, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19."

The SBA is expected to help clarify what "documentation" is necessary to satisfy these exceptions. This new safe harbor could prove beneficial to certain businesses (*e.g.*, Broadway theatres and live music venues) that may not be able to operate before the end of this year due to COVID-19 limitations.

Change to Payroll Expense Threshold

The CARES Act does not require that a specified portion of any PPP loan be used for payroll expenses or that the amount of loan forgiveness be limited accordingly. The SBA, however, imposed a requirement that at least 75% of loan proceeds be used for payroll expenses and further limited nonpayroll costs to 25% of the forgiveness amount. The result of these provisions was that a borrower's loan forgiveness amount would be proportionately reduced to the extent that payroll costs did not meet the 75% threshold.

The PPPFA has imposed a new statutory limit. Under the PPPFA, in order for a borrower to receive loan forgiveness, the borrower “shall use at least 60 percent of the covered loan amount for payroll costs.” This seemingly makes the 60% payroll expense threshold an all-or-nothing “cliff” proposition; meaning, if at least 60% of the loan proceeds are not used for payroll expenses, no portion of the loan will be forgiven. While many believe that Congress did not intend this result, a technical fix is needed to clarify this issue.

Elimination of Prohibition on Deferring Employer Social Security Taxes Following Forgiveness

The PPPFA eliminates the CARES Act provision that made a PPP borrower ineligible to defer payroll tax payments following the forgiveness of a PPP loan. The change should ensure that borrowers can take full advantage of the Social Security deferral provision included in the CARES Act.

Next Steps

Borrowers should review the changes made by the PPPFA and decide whether it would be more beneficial to use an eight-week or a 24-week covered period. For some borrowers (particularly those whose operations have been restricted), the extended covered period will be the obvious choice. However, other borrowers may need to drill down the numbers to determine the best approach.

Meanwhile, a revised PPP loan forgiveness application and other guidance, as well as a technical correction to address the payroll expense threshold cliff issue, are expected.

Please contact the authors with any questions about the PPPFA or any other aspect of the PPP

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