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CLIENT ALERT - CORONAVIRUS (COVID 19)
PAYCHECK PROTECTION PROGRAM FLEXIBILITY ACT

Dear Clients and Friends:

Last Thursday, the House passed the Paycheck Protection Program Flexibility Act (the "PPP Flexibility Act"), which included changes to certain PPP loan terms and provided some additional flexibility for PPP borrowers. The Senate approved the PPP Flexibility Act last night and the President is expected to sign the bill into law in the near future.

This Client Alert provides a summary of the terms of the PPP Flexibility Act as passed by the House and Senate and its effect on the terms of the PPP loan program and PPP loan forgiveness that will occur if signed into law. This information is not legal advice and may not be suitable for all client situations. As always, if you would like specific legal assistance with respect to the PPP program or any other matters, please do not hesitate to contact your HH&K attorney.

PPP Flexibility Act

Below is a summary of the principal changes implemented by the PPP Flexibility Act, which shall become effective if and when the PPP Flexibility Act is signed into law by the President.

Extension of "Covered Period" for Loan Forgiveness

The "Covered Period" for purposes of loan forgiveness (i.e. the period during which qualified amounts spent by a borrower could be eligible for forgiveness), as established by the CARES Act and the guidance issued to date, was a period of 8 weeks that began on the date the loan funds were disbursed to the borrower. The PPP Flexibility Act extends the Covered Period for loan forgiveness from 8 weeks to 24 weeks (or to December 31, 2020, if earlier). Borrowers will now have 24 weeks after receipt of PPP loan funds to spend the funds on qualified costs and any funds appropriately spent within that 24-week period will be eligible for forgiveness (subject to other program requirements).

The PPP Flexibility Act also provides that borrowers that received PPP funds prior to the date of the act can choose to keep the original 8-week period and apply for forgiveness based on the original 8-week period.

Modification of 75% Rule

As we have discussed in numerous prior Client Alerts, guidance that was previously issued by the SBA and the Treasury Department included a requirement that at least 75% of PPP loan funds needed to be used for payroll costs and no more than 25% of PPP funds could be used for non-payroll costs. The loan forgiveness application that was issued by the SBA (available here:https://home.treasury.gov/system/files/136/3245-0407-SBA-Form-3508-PPP-Forgiveness-Application.pdf) accordingly included a required calculation to ensure that at least 75% of a borrower's forgiveness amount was spent on payroll costs and provided that forgiveness would be reduced if the 75% rule was not met.

The PPP Flexibility Act reduces the 75% rule and provides that, to receive loan forgiveness, at least 60% of PPP loan funds must be spent on payroll costs. As such, borrowers now have the ability to spend up to 40% of their PPP funds on qualified non-payroll costs (e.g. rent, mortgage interest, and utilities) and still be eligible for loan forgiveness. This is especially helpful for borrowers that have been unable to fully reopen or restore activities due to government restrictions. Also, given that the SBA forgiveness application and guidelines confirmed that non-payroll costs include rent, mortgage interest and utilities related to both real and personal property (e.g. equipment leases, etc. are qualified non-payroll expenses), many borrowers may now have more qualified non-payroll costs than they previously believed.

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It is important to note, however, that the new 60% rule in the statute appears to be a hard rule, i.e., if a borrower does not use 60% of funds on payroll costs, it is not eligible for any forgiveness. This is different from how the 75% rule had previously been implemented by the SBA. This may get modified/clarified by future guidance or even by future statutes, but for now, it appears that the 60% rule may be implemented as a hard rule (i.e., if it is not met, nothing is eligible for forgiveness) rather than how the 75% rule was implemented in the SBA loan forgiveness application (i.e., if it is not met, the borrower is still eligible for forgiveness but the forgiveness amount is accordingly reduced).

Increased Loan Term

The SBA had previously determined that all PPP loans would have a 1% interest rate and a 2-year term. The PPP Flexibility Act provides that for any PPP loans issued after the date of the Act, the minimum loan term will increase from 2 years to 5 years. The PPP Flexibility Act does not automatically extend the term of existing PPP loans, but does provide that nothing in the PPP Flexibility Act (or the CARES Act or the prior act appropriating additional funding for the PPP) will prohibit lenders and borrowers from agreeing to extend the terms of existing PPP loans to 5 years.

Extension of June 30, 2020 "Safe Harbor" Date

The CARES Act included a "safe harbor" with respect to the requirements that borrowers maintain FTEs and payroll during the forgiveness period that excused any reductions in FTEs or payroll that were made between February 15, 2020 and April 26, 2020 if the workforce and payroll had been restored by June 30, 2020. The loan forgiveness application and related guidance issued by the SBA confirmed that the June 30, 2020 "safe harbor" for FTEs and payroll was a hard rule. If FTEs were fully restored to February 15, 2020 levels by June 30, 2020, the FTE safe harbor would apply. If employee salaries were fully restored to Q1 2020 levels by June 30, 2020, the payroll safe harbor would apply. If not, in each case, there would be an associated reduction in loan forgiveness.

The PPP Flexibility Act extends this "safe harbor" from June 30, 2020, to December 31, 2020. This extension gives businesses an additional six months to rehire employees or restore employee payroll levels without incurring any reduction in the forgiveness amount.

Additional Exemptions to FTE Requirements

Guidance previously issued by the SBA and the Treasury Department included exceptions to the FTE rule for (1) employees whom the business had offered to rehire (in writing, subject to certain requirements) but who declined to return; (2) employees who were terminated for cause; and (3) employees who voluntarily resigned or voluntarily requested (and received) a reduction in hours. In any of these cases, there would be no reduction in the FTE calculation for purposes of determining loan forgiveness.

The PPP Flexibility Act provides additional exemptions to the FTE rule if (1) the borrower is able to document that it was unable to rehire employees (or similarly qualified employees) for unfilled positions; and (2) the borrower is able to document that it was unable to return to the same level of business activity due to compliance with certain COVID-19 related guidance, rules, restrictions or orders.

Extension of "Covered Period" for PPP Loans

The original "Covered Period" for PPP Loans, as established by the CARES Act, was from February 15, 2020 to June 30, 2020. The PPP Flexibility Act extends this "Covered Period" to December 31, 2020. This seemingly allows borrowers to apply for PPP loans after June 30, 2020. That said, as noted above, the now extended 24-week loan forgiveness period ends on December 31, 2020, even if the period ending December 31, 2020 is less than 24-weeks.

It is also important to note that the PPP Flexibility Act does not appropriate any additional funds for the PPP loan program. While there are still funds available, the adoption of the PPP Flexibility Act, which relaxes some of the requirements of the PPP loan program, may trigger an increase in applications based on the new, more flexible, requirements by businesses that previously did not believe a PPP loan would be helpful to them. PPP loans are still on a first-come, first-served basis.

Payroll Tax Deferral Now Available for Businesses that Obtain PPP Loan Forgiveness

As discussed in prior Client Alerts, the CARES Act included a deferral of payment of Social Security payroll taxes. The CARES Act provided that Social Security payroll taxes incurred by employers and 50% of the Social Security payroll taxes incurred by self-employed persons due from the date that the CARES Act was signed until December 31, 2020 are deferred. Half of the deferred Social Security payroll taxes will be due on December 31, 2021 and the remainder will be due on December 31, 2022. Under the terms of the CARES Act, however, this deferral was not available to businesses that obtained forgiveness of all or any portion of their PPP loans. The PPP Flexibility Act modifies the CARES Act to permit businesses that obtain PPP loan forgiveness to also take advantage of the payroll tax deferral.

Contact Your HH&K Attorney For Legal Guidance

This information is not legal advice and may not be suitable for all client situations. This Client Alert provides general information regarding the PPP program and does not outline all of the important considerations related thereto. We anticipate that the terms of the PPP program will continue to evolve as the SBA releases additional guidance. In particular, it is likely that the SBA and/or the Treasury Department will be releasing updated guidance regarding loan forgiveness to account for the changes implemented by the PPP Flexibility Act.

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