

CLIENT ALERT - CORONAVIRUS (COVID 19)
PAYCHECK PROTECTION PROGRAM LOAN FORGIVENESS UPDATE

Dear Clients and Friends:

In response to the Paycheck Protection Program Flexibility Act (the “PPP Flexibility Act”), the SBA has issued new Interim Final Rules implementing various changes to the Paycheck Protection Program (“PPP”) that were included in the PPP Flexibility Act. In addition, last week the SBA issued a revised loan forgiveness application and a new “Form EZ” loan forgiveness application, which replace the original loan forgiveness application that had previously been issued by the SBA before the PPP Flexibility Act was adopted.

This Client Alert provides a summary of certain matters related to PPP loan forgiveness that are addressed and/or clarified in these recent Interim Final Rules and in the new loan forgiveness applications. 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.

Loan Forgiveness Updates

The Interim Final Rules and the loan forgiveness applications issued by the SBA in response to the PPP Flexibility Act serve to update certain guidance and the original loan forgiveness application to incorporate the terms of the PPP Flexibility Act. In addition, in certain circumstances, the recent Interim Final Rules and the new loan forgiveness applications provide additional guidance and clarifications for borrowers regarding how the SBA will implement the provisions of the PPP Flexibility Act and considerations of which borrowers should be mindful when contemplating loan forgiveness.

60% Rule is NOT a Hard Rule

As we noted in a prior Client Alert on the PPP Flexibility Act, the text of the statute implied that the 60% rule may be a hard rule (i.e., if a borrower did not use 60% of its PPP funds on payroll costs, it would not be eligible for any loan forgiveness). We also noted that we believed this concern may be allayed by future guidance, which the SBA has now done.

In its Interim Final Rules and in the new loan forgiveness applications, the SBA makes clear that it is not interpreting or implementing the 60% rule as a hard rule. Instead, if the borrower does not spend at least 60% of its PPP loan proceeds on payroll costs during the “covered period” for loan forgiveness, it will still be eligible for loan forgiveness but the amount of forgiveness for which it is eligible will be accordingly reduced. As an example, if a borrower received \$100,000 in PPP loan funds but only spent \$50,000 on payroll costs during the loan forgiveness “covered period”, it would only be eligible for a maximum of \$83,333.33 in loan forgiveness (i.e. $\$50,000/0.60$).

Increased Caps on Forgivable Wages

The Coronavirus Aid, Relief, and Economic Security Act (the “CARES Act”) that originally established the PPP program and the guidance issued in connection with the CARES Act included a \$100,000 per person annual cap on wages. This cap was both a limit on the amount that could be borrowed and on the amount that could be forgiven. Before the PPP Flexibility Act, for purposes of loan forgiveness, that \$100,000 limit meant that (1) the maximum amount of employee wages for which a borrower could receive forgiveness was \$15,385 per employee (i.e. $\$100,000 \times 8/52$) and (2) for owners, forgiveness was limited to 8/52 of 2019 net profit, up to a maximum of \$15,385 per owner.

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In the new guidance issued by the SBA in the wake of the PPP Flexibility Act, there is still a cap on forgivable wages that is based on \$100,000 per year (or 2019 net profit in the case of owners), but the cap has been modified for borrowers that elect to use the 24 week “covered period” for loan forgiveness. For employees (but NOT owners), the cap on forgivable wages is now \$46,154 per employee (i.e. $\$100,000 \times 24/52$) for borrowers using the 24 week covered period. For owners (e.g. self-employed individuals, partners, sole proprietors, owner employees), the cap is now 2.5 months’ worth ($2.5/12$) of 2019 net profit (up to a \$20,833 maximum) per owner for borrowers using the 24 week covered period.

For borrowers that elect to use the 8 week covered period, the cap remains \$15,385 for employees and owners (subject, for owners, to $8/52$ of 2019 net profit, if less).

New FTE Safe Harbor

As we noted in our prior Client Alert, the PPP Flexibility Act included an additional exemption to the PPP program FTE rules set forth in the CARES Act for situations where 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. The SBA loan forgiveness applications have implemented this exemption as an additional FTE safe harbor. If a borrower can certify that it was unable to operate during the loan forgiveness “covered period” at the same level of business as before February 15, 2020 due to compliance with COVID-19 related requirements or guidance that were established or issued between March 1, 2020 and December 31, 2020 by applicable governmental entities, the borrower is deemed exempt from the FTE requirements set forth in the CARES Act with respect to the PPP program.

We do not yet have any guidance from the SBA regarding how a borrower may be able to document or establish that it was unable to return to normal operations during the loan forgiveness “covered period” due to COVID-19 requirements. It is possible that the SBA will provide additional guidance regarding this new FTE safe harbor at a later date, but there is no guarantee. If you believe you may qualify for this new safe harbor, please reach out to your HH&K attorney. We can assist you with evaluating if and how this safe harbor may apply to you and what implications that may have on decisions you are making regarding use of your PPP loan funds and maximizing your PPP loan forgiveness. Borrowers that qualify for this safe harbor may have the option of utilizing the new simplified Loan Forgiveness Application Form EZ that is described further below.

Updates to Existing FTE and Salary/Wages Requirements and Safe Harbors

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 PPP Flexibility Act extended this “safe harbor” date from June 30, 2020 to December 31, 2020. The new loan forgiveness applications offer a couple clarifications to the FTE and Salary/Wages requirements and safe harbors established by the CARES Act and modified by the PPP Flexibility Act.

First, the loan forgiveness applications provide that the FTE and salary/wages safe harbor date (i.e. the date where you have to demonstrate that you have restored FTEs or salary/wages to prove you meet the applicable safe harbor) is the earlier of December 31, 2020 or the date you submit your loan forgiveness application. This allows a borrower that has restored FTEs or salary/wages (as applicable) before December 31, 2020 to submit its loan forgiveness application before December 31, 2020 (assuming its loan forgiveness “covered period” expires before December 31, 2020) rather than requiring all borrowers looking to take advantage of these safe harbors to wait until after December 31, 2020 to file loan forgiveness applications.

Second, the loan forgiveness applications make clear that the FTE and the salary/wages requirements are independent of each other. The salary/wages requirements apply only to annual salary or hourly wage rates, not to the number of hours worked by an employee. The loan forgiveness applications make clear that any reduction in the number of hours worked by an employee is part of the FTE calculations, not the salary/wages calculations.

Loan Forgiveness Applications

The SBA has published two different forgiveness applications: (1) a revised Loan Forgiveness Application (revised June 16, 2020); and (2) a new Loan Forgiveness Application Form EZ.

The revised Loan Forgiveness Application is available here:

<https://home.treasury.gov/system/files/136/3245-0407-SBA-Form-3508-PPP-Forgiveness-Application.pdf> and the associated instructions are available here:

https://home.treasury.gov/system/files/136/PPP-Loan-Forgiveness-Application-Instructions_1_0.pdf. The Form EZ is available here:

<https://home.treasury.gov/system/files/136/PPP-Forgiveness-Application-3508EZ.pdf> and the associated instructions are available here:

<https://home.treasury.gov/system/files/136/PPP-Loan-Forgiveness-Application-Form-EZ-Instructions.pdf>.

The revised Loan Forgiveness Application is similar to the original loan forgiveness application issued by the SBA. Most of the rules established and implemented by the original loan forgiveness application still apply to the revised Loan Forgiveness Application. The revisions principally relate to implementation of the changes to the PPP program set forth in the PPP Flexibility Act.

The new Form EZ is a simplified version of the Loan Forgiveness Application that requires fewer calculations and less supporting documentation. The Form EZ is targeted to (1) borrowers that do not have employees (e.g. applicable self-employed individuals, independent contractors and sole proprietors); and (2) borrowers that can self-certify that they meet the FTE and salary/wages requirements.

Borrowers are not eligible to use the Form EZ if they (1) reduced the annual salary or hourly wages of any applicable employee by more than 25 percent during the loan forgiveness “covered period”; or (2) reduced the number of employees or the average paid hours of employees between January 1, 2020 and the end of the loan forgiveness “covered period” (ignoring certain specified exceptions to the FTE requirements), unless they were unable to return to normal operations during the loan forgiveness “covered period” due to compliance with COVID-19 related guidance and requirements from applicable governmental authorities.

The Form EZ relies on self-certifications from borrowers regarding compliance with the FTE and salary/wages requirements and, accordingly, does not require borrowers to perform the salary/wages and FTE calculations that are required in the regular Loan Forgiveness Application. Borrowers that are eligible for the Form EZ are still required to maintain documentation regarding salary/wages and FTEs during the applicable periods, but unlike with the regular Loan Forgiveness application, the borrower does not have to submit this documentation or the associated calculations as part of its loan forgiveness application.

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. This Client Alert is not a substitute for legal guidance regarding program details and how those may be applicable to your business. As always, if we can be of assistance during this difficult time, please do not hesitate to contact your HH&K attorney.



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