

Key Takeaways for PPP Borrowers: The Forgiveness Application is Finally Out!!

Labor & Employment Law Update

on May 18, 2020

Late Friday, May 15th, the SBA released long overdue guidance on how to determine and apply for forgiveness of loans received under the Paycheck Protection Program. The application and corresponding instructions can be found here on the SBA website.

Within the application and instructions, several common questions have finally been answered:

1. ***How do we calculate payroll costs? Do we go by pay period date or pay date? What if the 8-week covered period doesn't match up with our payroll?***

A payroll cost must be either incurred OR paid. Initially, the CARES Act indicated that it had to be both incurred and paid during the 8-week period. You look to costs paid or incurred during the 8-weeks (or 56 days) counting the date you received the loan proceeds. You can also adjust your 8-week period to an "alternative" covered period if your payroll is at least bi-weekly or more frequent. In that case, you can begin the 8-week period starting with the first pay period that begins immediately following the date you received the loan proceeds.

Payroll costs are considered "incurred" on the day that the employee's pay is earned. Payroll costs are considered "paid" on the day paychecks are distributed or the date the borrower originates an ACH credit transaction.

This is not exactly a windfall that will allow you to randomly payout money in order to maximize forgiveness. In terms of cash compensation, no individual employee can account for more than \$15,385 (i.e., \$100,000 prorated over 8-weeks). This cap operates to limit the amount of cash payroll costs that you can account for.

2. ***Can we pay non-payroll costs early and use PPP loan proceeds for those?***

The answer to this is: maybe. Again, this is better than expected with the original language in the CARES Act indicating the cost had to be both incurred and paid. Instead, the forgiveness application indicates that a permissible non-payroll cost must be either incurred or paid during the covered period. Going a bit further, the instructions permit borrowers to account for those non-payroll expenses

“paid on or before the next regular billing date, even if the billing date is after the Covered Period.”

For example: A borrower’s eight-week “Covered Period” ends on May 31st. The borrower’s internet bill is paid on the 15th of each month. That borrower can use PPP loan proceeds to pay the bill due on May 15th and also pay the bill that would otherwise be due on June 15th as long as three things apply: 1) the internet service being paid is one that began before February 15th; 2) the June 15th bill is paid before the expiration of the 8-week period on May 31st; and 3) the additional payment is not going to cause the borrower to have total non-payroll costs that exceed 25% of the total forgiveness amount.

3. What is an FTE? And how do we count part-timers?

Full-Time has been clarified to mean 40 hours per week. To account for part-timers, a borrower has two options. The borrower can take weekly hours worked and divide by 40 to determine a percentage FTE for anyone working less than 40 hours/week. Alternatively, and at a borrower’s election, employees working 40 hours/week or more can be counted as 1 and employees working on a part-time basis can be counted as a .5.

4. In determining FTE headcount, do we have to account for people who can’t, or don’t want to, work?

No! This is a big relief for those employers that have been struggling with natural attrition of their employees. The instructions recognize certain circumstances where a borrower can claim an exception and account for an individual as a FTE even though they are no longer employed with the company as of the date of the forgiveness application. These are: 1) an employee that was “fired for cause;” 2) an employee who voluntarily resigned; or 3) an employee who voluntarily requested and received a reduction of his or her hours.

In the event a borrower is going to rely on one of the exemptions, they will want documentation for the file to substantiate the basis of the exemption in the event they are subject to an audit by the SBA at a later date.

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