

You Just Received Your PPP Loan Money. Now What?

Labor & Employment Law Update

on April 17, 2020

NOTE: This is general information and should not be construed as legal advice. New guidance is continually being published. This information is only current through April 16, 2020.

So far, the CARES Act and related guidance published by the Treasury indicates that two general factors will be examined in determining forgiveness:

1: Were at least 75% of the funds spent on "payroll costs"?

2: Have you maintained the same headcount and salary levels for full-time equivalent (FTE) employees?

First factor to keep in mind: AT LEAST 75% of the PPP Loan Proceeds were used on "payroll costs."

- **"Payroll cost"** is referring to the same definition employers looked at when performing calculations for the amount of available loan proceeds.
 - This includes gross cash compensation up to \$100k on a prorated basis
 - Employer monies spent on retirement plan funding (such as pension contribution payments or 401(k)/403(b) matching funds)
 - Employer monies spent on health plan premiums (do not include amounts charged to your employees and paid for by them)
 - Employer taxes paid to state and local government
 - This does NOT include employer portions of federal payroll taxes such as Social Security and Medicare
 - This DOES include employer payroll taxes paid to state unemployment agencies.
- Absent fraud DO NOT be concerned if you don't spend 75% of the funds on payroll costs. There are multiple potential scenarios where that could innocently occur. Some examples:
 - You have a significant portion of your employee population eligible for paid leave through the FFCRA. Since you will receive payroll tax credits to fund that paid leave, you cannot claim it as a payroll cost incurred by the

Company.

- You don't have work to resume employment for individuals. And, depending upon an employee's annual salary level, current unemployment levels may have provided them with an increase in compensation. You don't have to interfere with that and disqualify them from unemployment by resuming their compensation.

- **How was the remaining percentage (of not more than 25%) spent?**

- Permissible expenses include interest on mortgages, rents, utilities.
- Generally, the obligation or service agreement needs to have been in existence prior to 2/15/2020.

Next factor to keep in mind: Determining whether there's a reduction in employee headcount OR in an employee's salary.

- Forgiveness is NOT all or nothing – it can be prorated. Proration is based on headcount or salary levels – or both.
- Calculation used to determine **if reduction in headcount:**
 - First divide A by B
 - A =
 - Average number of full-time equivalent employees per month employed during the 8 weeks following receipt of loan proceeds
 - B =
 - the average number of full-time equivalent employees per month during 2/15/2019 through 6/30/19
 - OR, the average number of full-time equivalent employees per month during 1/1/2020 through 2/29/2020
 - Then, multiply that percentage by:
 - The total amount spent on permissible “payroll costs” and other permissible expenses such as business debt/mortgage interest and utilities during the first 8-weeks after you received loan proceeds
 - The resulting final number is the principal amount eligible for forgiveness.
- Forgiveness can also be reduced **if you reduce employee compensation:**
 - Look at salaries paid during the 8 weeks following receipt of loan proceeds.
 - Loan forgiveness will be reduced by the amount of reduction in an employee's wages.
 - Reduction is determined by looking at the total amount paid during the 8-week period after loan proceeds are received and comparing it to the total salary or wages of that employee during the most recent full quarter.

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Received
Your PPP
Loan
Money.
Now What?

- Factored in only where reduction greater than 25%
- As long as a salary reduction does not cause an individual to fall below \$100k prorated over the 8-week period, it should not factor into forgiveness.
- This is a conclusion based on 2 different parts of the Act. One part allows complete disregard for any reductions made for someone making \$100k or more a year, and another part of the Act which requires 75% of loan proceeds to be paid out as payroll costs (and with that same individually presumably counting for at least \$100k in determining loan availability).

What about the option to fix things?

- CARES provides an opportunity for employers to “fix” things and have headcount or salary reductions entirely disregarded in determining forgiveness.
- Circumstances where “fix” is an option:
 - Employer reduced headcount or salary between 2/15/2020 and 4/26/2020 (30 days after CARES went into effect), but the employer fixes it by:
 - Increasing the headcount of full-time equivalent employees by 6/30/2020.
 - At least 1 employee had their salary reduced by more than 25%, and the employer eliminates that reduction by 6/30/2020.
 - There is zero clarification on what the “fixes” mean. We presume averages of some sort will be published to eliminate the potential abuse of allowing for last minute corrections.

What documentation should I be maintaining?

- CARES mentions the following as eligible documentation that can be provided to a lender to verify calculations for forgiveness:
 - Payroll tax filings (both state and federal)
 - Cancelled checks
 - Payment receipts
 - Transcripts of accounts verifying payments made
 - Certification from a person authorized to do so on behalf of the business that the documentation is true and correct and the amount for which forgiveness is requested was used to retain employees, make interest payments on a covered mortgage obligation, make payments on a covered rent obligation, or make covered utility payments.

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Loan
Money.
Now What?

Summary: Things to Do and Keep in Mind

- Maintain a ledger of total loan principal received
 - Immediately calculate 75%:
 - This is the total minimum amount you must spend on employee payroll, unemployment taxes and employer share of costs of health and retirement benefits (including insurance premiums paid).
 - Note the remaining 25% number:
 - This is the total maximum amount you can put towards all utilities, all business interest expenses and any rental or lease obligations.
 - Keep in mind the documentation noted above. These items may be required to verify the expenses you claim towards the required percentages.
- The forgiveness calculations are complex with some potential implications not yet occurring and/or being outside of your control. All you can do initially is carefully track how you spend the loan proceeds during the first 8 weeks after receipt.
- Amounts you cannot receive forgiveness for will be subject to repayment and will be a loan on the following terms:
 - 2 – year term
 - 1% interest rate
 - No payments due for first 6 months
 - No personal guarantees
 - No collateral at-risk

Example:

TOTAL Loan received of \$645,421.00

A = ? (Possibly 14)** (Average FTE employees per month during 8 weeks following receipt of loan proceeds) B = 21 (Average FTE employees per month for the period of 2/15/19 to 6/30/19 OR 1/1/20 to 2/29/20) **66.7% = \$430,281** (Potential percentage ratio/ \$ eligible for forgiveness) 75% of total loan amount = \$484,065.75 (Minimum amount of loan that must be spent on “payroll costs”) 25% of total loan amount = \$161,355.25 (Maximum amount of loan that may be spent on rent, lease, utilities, and/or mortgage interest) Amount of loan to be repaid at 1% interest —> \$215,140 Total loan proceeds less ratio described above

** Note that this example anticipates a scenario where wages are not paid to individuals in the event there is no work for them to perform with unemployment a better alternative for the individuals. If the estimated number

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Your PPP
Loan
Money.
Now What?

for A increases, the amount of the loan available for forgiveness will also increase.

**Also note that this example does not account for any salary reductions for any individuals that earn less than \$100k annually.

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Your PPP
Loan
Money.
Now What?