

# NEW LAW RELAXES RULES FOR PAYCHECK PROTECTION PROGRAM

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**PRACTICE AREAS**

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On June 5, 2020, President Trump signed into law the Paycheck Protection Program Flexibility Act. The Act modifies the Paycheck Protection Program contained in the CARES Act to provide businesses additional time and flexibility to achieve forgiveness on their PPP loans. At the outset, it is important to note that the PPP Flexibility Act does not change the deadline for businesses to apply for a PPP loan. Any business interested in applying needs to do so before the June 30, 2020 deadline.

The key changes created by the PPP Flexibility Act can be summarized as follows:

## **(1) Forgiveness Period Extended From 8 to 24 Weeks or End of Year**

The PPP Flexibility Act extended the time period to spend PPP loans from 8 weeks after the loan disbursement date to the earlier of (i) 24 weeks after the loan disbursement date or (ii) December 31, 2020. The extension of time gives businesses the option to slow their reopening and gradually spend funds on payroll and other authorized expenses through the end of the year, which should result in more businesses being eligible for complete loan forgiveness. The PPP Flexibility Act does not affect the option for businesses to apply for loan forgiveness after the original 8-week period if they prefer.

## **(2) Payroll Spending Requirement Reduced From 75% to 60%**

Originally, PPP borrowers needed to spend at least 75% of their PPP loans on eligible payroll costs during the forgiveness period in order to qualify for loan forgiveness. The PPP Flexibility Act reduced that amount to at least 60% on eligible payroll costs during borrowers' elected forgiveness period. The remaining 40% may be spent on any combination of eligible or non-payroll expenses. The Act does not change the list of non-payroll expenses eligible for forgiveness, which includes rent, mortgage, utilities, and interest on loans.

## **(3) Deadline for Rehiring Workers Continued from June 30 to December 31, 2020**

The PPP Flexibility Act extended the deadline for businesses to restore the number of full-time equivalent employees (FTEs) and the salaries/wages of FTEs in order to have those salaries and wages count towards loan forgiveness. Originally, the deadline was June 30, 2020, but now businesses have until December 31, 2020 to rehire FTEs to count their compensation towards forgiveness. However, the Act did not affect how employee compensation is calculated towards forgiveness. The payroll calculation used in borrowers' loan applications still applies, and these amounts for forgiveness-eligible "payroll compensation" remain capped for any owner-employee or self-employed individual/general partner at the lesser of eight weeks' worth of their annual 2019 compensation or at \$15,385 (*i.e.*, a \$100,000 salary prorated at eight weeks).

#### **(4) New Safe Harbor Added to FTE-Based Forgiveness Reductions**

The PPP required businesses to rehire the same number of FTEs used to calculate the loan with the only exception being documentation showing that an individual who had been an employee as of February 15, 2020 had rejected the offer of re-hire. The new PPP Flexibility Act adds exceptions for reduced FTE headcounts. The Act allows businesses to remain eligible for forgiveness if the business (i) is not able to find similarly qualified employees to hire on or before December 31, 2020; or (ii) cannot restore the business to comparable activity levels as such business was operating at prior to February 15, 2020 due to compliance with social distancing or other federal guidelines (*i.e.*, HHS, CDC, or OSHA requirements).

#### **(5) Repayment Term Extended From 2 Years to 5 Years**

In the event that any portion of a PPP loan is not fully forgiven, the PPP Flexibility Act eases terms for repayment. The PPP Flexibility Act extended the repayment period from two years to five years at 1% interest. Further, the first payment on the loan is deferred for six months after the SBA makes a determination on forgiveness. Since banks have 60 days to make forgiveness determinations on PPP loans and the SBA has 90 days after the bank's determination to make its own determination, this could mean that businesses will have up until May of 2021 to make a first payment on their PPP loans. For PPP loans issued after enactment of the PPP Flexibility Act, the Act sets minimum maturity date at five years. For PPP loans that were already in existence, borrowers can agree with their lenders to a longer maturity date in conformance with the PPP Flexibility Act.

#### **(6) Exclusion Stricken for CARES Act Payroll Tax Deferrals**

The PPP originally prevented businesses that obtained PPP loan forgiveness from also benefitting from Section 2302(a) of the CARES Act, which provides that employers may defer the deposit and payment of the employer's portion of Social Security taxes and certain railroad retirement taxes. The PPP Flexibility Act strikes that exclusion to allow businesses to benefit from both loan forgiveness and Section 2302(a) payroll tax deferral.

#### **Concluding Observations**

The PPP Flexibility Act eases many of the more restrictive provisions attached to PPP loans. However, it leaves many questions unanswered and all of the provisions summarized here remain subject to change. All businesses with existing PPP loans or businesses contemplating PPP loans should stay tuned for further guidance from the SBA in the near future.

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