



A Robinson+Cole Legal Update

Coronavirus (COVID-19)

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PPP Update: Loan Forgiveness Application

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On May 15, 2020, the Small Business Administration (SBA), in consultation with the Department of the Treasury (Treasury), released the Paycheck Protection Program (PPP) loan [forgiveness application and related instructions](#) (collectively, the Forgiveness Application). The Forgiveness Application provides some long-awaited clarity with regard to loan forgiveness eligibility and the application process, but still leaves unanswered questions that some borrowers will have as they prepare their applications.

Key Takeaways

- **Alternative Payroll Covered Period:** The Forgiveness Application allows a borrower to elect an alternative payroll covered period if its payroll schedule is bi-weekly or more frequent. Thus, a borrower may now choose to calculate eligible payroll costs using either (a) the traditional “Covered Period” defined under the PPP as the eight-week (56-day) period running from, and including, the date the borrower’s PPP loan was disbursed (the Covered Period), or (b) the eight-week (56-day) period beginning on the first day of the borrower’s first pay period after the borrower’s PPP loan was disbursed (the Alternative Payroll Covered Period). The effect of this alternative is that a borrower may now start its eight-week eligible payroll cost period at the beginning of a payroll period rather than during one. Nevertheless, it is important to emphasize that the Alternative Payroll Covered Period applies only to payroll costs, calculation of full-time equivalent (FTE) employees and salary/hourly wage reductions; it does not apply to non-payroll costs, which continue to be calculated based on the applicable Covered Period.[1]
- **Costs Eligible for Forgiveness:** Initial PPP guidance indicated that payroll and non-payroll costs eligible for forgiveness had to be both incurred and paid during the Covered Period. The Forgiveness Application clarifies this initial PPP guidance by providing that although payroll and non-payroll costs eligible for forgiveness must be incurred during the Covered Period (or Alternative Payroll Covered Period in the case of payroll costs, if applicable), such costs incurred but not scheduled to be paid by the end of the Covered Period (or Alternative Payroll Covered Period, if applicable) may be paid after the Covered Period (or Alternative Payroll Covered Period, if applicable), so long as they are paid on or before their first applicable due date immediately following the end of such period (i.e., on or before the next regular payroll date for payroll costs or the next regular billing date for non-payroll costs). It is important to note that under the Forgiveness Application, payroll costs are considered incurred on the day that the employee’s pay is earned and are considered paid on the day a paycheck is distributed or an ACH credit transaction is initiated.
- **Forgiveness Reduction Safe Harbors:** The Forgiveness Application articulates a FTE Reduction Safe Harbor and a Salary/Hourly Wage Reduction Safe Harbor. In each instance, if the safe harbor applies, then the borrower is exempt from a forgiveness reduction based on the borrower’s FTE reduction or salary/hourly wage reduction, as the case may be.
 - **FTE Reduction Safe Harbor:** Borrowers will be exempt from a reduction in loan forgiveness based on FTE employee levels if both of the following conditions are met: (a) the borrower reduced its FTE employee levels in the period beginning February 15, 2020, and ending April 26, 2020; and (b) the borrower then restored its FTE employee levels by not later than June 30, 2020 to its FTE employee levels in the borrower’s pay period that included February 15, 2020.

- **Salary/Hourly Wage Reduction Safe Harbor:** Borrowers will be exempt from a reduction in loan forgiveness based on salary/hourly wage reductions if, for each employee whose average annual salary or average hourly wages were reduced by more than 25 percent, such employee's salary or hourly wages as of June 30, 2020 are equal to or greater than such employee's average annual salary or hourly wages as of February 15, 2020.
- **Additional Forgiveness Reduction Exceptions:** The Forgiveness Application states that a borrower's forgiveness amount will not be reduced for employee headcount reductions due to: (a) positions for which the borrower made a good-faith, written offer to rehire an employee during the Covered Period or the Alternative Payroll Covered Period if the employee rejected the offer (which is consistent with SBA FAQ Question #40 previously issued); and (b) any employees who during the Covered Period or the Alternative Payroll Covered Period (i) were terminated for cause, (ii) voluntarily resigned or (iii) voluntarily requested and received a reduction of their hours.
- **FTE Calculation:** The Forgiveness Application instructs borrowers to determine FTE numbers by taking the average number of hours paid per week for the applicable employee, dividing by 40, and rounding to the nearest tenth. No employee may be counted as more than one (1) FTE. A borrower may elect to use a simplified calculation by assigning a 1.0 to employees who work 40 hours or more per week, and .5 for employees who work fewer than 40 hours per week.[2]
- **Documents Submission Requirement:** The Forgiveness Application sets forth documents that a borrower must submit with an application for forgiveness. Specifically, a borrower will need to provide: (a) payroll documentation verifying the eligible cash compensation and non-cash benefit payments from the Covered Period or the Alternative Payroll Covered Period, including (i) bank account statements or third-party service provider reports documenting the amount of cash compensation paid to employees, (ii) tax forms for the periods that overlap with the Covered Period or the Alternative Payroll Covered Period, and (iii) payment receipts, cancelled checks or account statements documenting the amount of any employer contributions to employee health insurance and retirement plans that have been included in the forgiveness amount; (b) FTE employee documentation, including documentation evidencing the average number of FTE employees for specified periods of time; and (c) non-payroll documentation verifying the existence of the obligations/services prior to February 15, 2020 and eligible payments from the Covered Period.
- **Document Retention Requirement:** Borrowers must maintain all records relating to their PPP loan for six (6) years after the date the loan is forgiven or repaid in full, including documentation submitted with its PPP loan application, documentation supporting the borrower's certifications as to the necessity of the loan request and its eligibility for a PPP loan, documentation necessary to support the borrower's loan forgiveness application, and documentation demonstrating the borrower's material compliance with PPP requirements.
- **Disclosure of \$2 Million Audit Threshold:** The Forgiveness Application requires a borrower to specifically disclose if it, together with its affiliates, received a PPP loan in excess of \$2 million. This disclosure is in line with the SBA's automatic audit of PPP loans in excess of \$2 million.
- **Absence of Notable Changes:** The Forgiveness Application provides borrowers with important clarifications regarding calculation methods, document requirements and the forgiveness process in general. However, the Forgiveness Application still leaves many important questions unanswered. For example, although there has been significant discussion among elected officials and in proposed legislation about extending the Covered Period beyond eight weeks and giving businesses more flexibility for forgiveness-eligible uses of a PPP loan (e.g., expanding forgiveness eligible uses and/or relaxing the 75 percent payroll costs requirement), these changes were not addressed. The Treasury has indicated that the SBA will issue regulations and additional guidance "soon" for both borrowers and lenders with respect to the forgiveness process. That guidance undoubtedly will be of interest to borrowers and lenders as it continues to unfold in real-time.

Robinson & Cole LLP has been tracking government relief programs being offered to help alleviate the economic impact of COVID-19 on businesses in the United States. The SBA, in consultation with the Treasury, has provided and continues to provide guidance in the form of [Interim Final Rules](#) and [Frequently Asked Questions \(FAQs\)](#) to address borrower and lender questions concerning the implementation of the Paycheck Protection Program (PPP), established by section 1102 of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act). For more information on the PPP, see our [Primer](#), [FAQ on the PPP](#), our article addressing [SBA affiliation rules](#), our article on [The Paycheck Protection Program and Health Care Enhancement Act](#), and our article on the ["necessity certification"](#). This alert is being issued as of May 19, 2020. Please note that future legislation, guidance and regulations could modify certain provisions of the topics discussed above.

ENDNOTES

[1] Borrowers that elect to use the Alternative Payroll Covered Period must apply the Alternative Payroll Covered Period wherever there is a reference in the Forgiveness Application to "the Covered Period or the Alternative Payroll Covered Period." However, borrowers must apply the Covered Period (not the Alternative Payroll Covered Period) wherever there is a reference in the Forgiveness Application to "the Covered Period" only.

[2] Prior to the Forgiveness Application, the SBA had not defined the requisite hours per week for one (1) FTE.

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