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Legal Update

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Payroll Protection Program Loan Forgiveness Guidelines

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Recently, the Small Business Administration released additional information regarding the Payroll Protection Program ("PPP") including the Interim Final Rules for Loan Forgiveness and the Loan Forgiveness Application. The U.S. Chamber of Commerce also released "A Guide to PPP Loan Forgiveness." This newsletter highlights information from those sources to help borrowers better understand the PPP loan forgiveness requirements.

Clarification of Amount Forgiven for Payroll Expenses

The Forgiveness Application clarifies that the amount forgiven for payroll expenses is based on the amount incurred during the Covered Period (the 8 week period beginning with disbursement of the loan). While Congressional intent to cover 8 weeks of payroll was clear, the language used in the CARES Act caused some confusion based on the realities of payroll methods. The Application requires the employer to use the payroll expenses **incurred** during the Covered Period and recognizes that the last week of accrual will be paid in the first paycheck after the Covered Period. In addition, the Application allows weekly and bi-weekly employers to begin the 8 week period at the beginning of the next pay period after receipt of the funds instead of the day of receipt (referred to as the Alternative Payroll Covered Period). This eliminates any proration requirement for those employers for payroll expenses that may have been incurred at one time but paid at another time straddling the beginning or end of the relevant Covered Period.

Clarification Regarding Full-Time Equivalent Employees

The Application also clarifies how to count a borrower's full-time equivalent (FTE) employees during the Covered Period and their chosen Reference Period[1]:

- The maximum average FTE per employee is 1. So, employees who averaged 40 or more hours per week during the Covered Period would have an FTE of 1.
- For employees that worked less than 40 hours per week employers may either:
    - take the average number of paid hours an employee worked per week, divide by 40, then round to the nearest tenth. Example: an employee who averaged 35 hours of paid time per week during the Covered Period has an FTE of 0.90. (35 / 40 = 0.875, round up to the nearest tenth, 0.9); or
    - assign an FTE value of 0.5 to all employees who averaged under 40 hours.

[1] Borrowers can choose their Reference Period from either (a) February 15 to June 30, 2019, or (b) January 1 to February 29, 2020. Seasonal borrowers can also choose from any 12 week period between May 1, 2019 and September 15, 2019.

- NOTE: Borrowers must use the same method to measure FTEs in the Covered Period and the Reference Period.

If a borrower's average FTE during the Covered Period is less than its FTE during the Reference Period, then less of the loan will be forgiven. However, a borrower can avoid a reduction in its loan forgiveness if it reduced its FTE during the period from February 15 to April 26, 2020, but it restores its FTE to its February 15, 2020, level by June 30, 2020. The Interim Rules and the Application also allow a borrower to avoid a reduction in its loan forgiveness if either of the following occurs during the Covered Period or the Alternative Payroll Covered Period:

- The borrower made a good-faith, written offer to rehire an employee (for the same salary/hours) that was then rejected by the employee and the borrower informed the applicable state unemployment insurance office within 30 days of the employee's rejection; or
- The borrower fires the employee for cause, the employee voluntarily resigned, or the employee voluntarily requested a reduction in hours.

Questions Remain

While the Application and the Guidance provide much needed answers, many questions remain. We are hopeful that the SBA will issue additional guidance soon, as there are many situations not specifically addressed. These include clarifying whether employees that may have voluntarily left or whose employment has been terminated for cause prior to the Covered Period, but not replaced, will impact the forgiveness amount[2].

The House recently passed a bill that changes several aspects of PPP loan forgiveness. For example, the bill allows borrowers to spend 40% of the loan proceeds on expenses other than payroll, and extends the Covered Period from 8 weeks to 24 weeks. The bill now goes before the Senate where it will hopefully be approved, but may be changed. The Senate has been working on a similar bill.

While the information above does not cover all the information released by the SBA and the Chamber of Commerce, we hope this highlights some of the important points. For more information, please feel free to contact us.

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[2] The Guide from the Chamber of Commerce seems to allow for an exemption for employees who voluntarily left or whose employment was terminated for cause prior to the Covered Period; however, the Application and Interim Final Rules presently do not.