

COVID-19 Breaking News

June 8, 2020

New Legislation - Paycheck Protection Program Flexibility Act

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On June 5, 2020, the President signed the [Paycheck Protection Program Flexibility Act](#) into law. The Flexibility Act, which amends the CARES Act, gives borrowers who took loans under the Paycheck Protection Program (PPP) additional flexibility to achieve loan forgiveness. This breaking news alert highlights important provisions of the Flexibility Act so that businesses can be prepared.

Extended Covered Period

The Flexibility Act allows existing borrowers to extend the Covered Period from 8 weeks to 24 weeks. New PPP borrowers will have a Covered Period of either 24 weeks, or until December 31, 2020, whichever is earlier. This change extends the amount of time that borrowers have to spend their PPP loans to qualify for forgiveness and extends the amount of time that borrowers have to avoid a reduction in loan forgiveness due to a reduction in full-time equivalent (FTE) employees and/or a reduction in employee wages/hours.

Extended Safe Harbor

Under the CARES Act, if a borrower's average FTE during the Covered Period is less than its average FTE during the Reference Period¹, then less of its loan will be forgiven. As originally written, a borrower could avoid a forgiveness reduction if (1) the event that caused the FTE reduction occurred between February 15 and April 26, 2020, and (2) the borrower restored its FTE employees to its February 15, 2020, level by June 30, 2020.

The Flexibility Act extends the safe harbor rehire date from June 30 to December 31, 2020. This gives borrowers that experience a decrease in FTE between February 15 and April 26 more time to qualify for the safe harbor. However, borrowers that experience a decrease in average FTE because of an event that occurs outside the February 15 to April 26 window must qualify for another safe harbor to avoid a reduction in loan forgiveness.

New Safe Harbors

The Flexibility Act adds two additional safe harbors that borrowers can use to avoid a reduction in loan forgiveness. Borrowers who had a reduction in FTE employees can avoid a reduction in loan forgiveness if:

- 1) the borrower (a) could not rehire terminated employees that were in its employ on February 15, 2020, and (b) was unable to hire similarly qualified employees to fill positions on or before December 31, 2020; or
- 2) the borrower is unable to return to its February 15, 2020, level of business activity due to compliance with certain federal agency requirements that are issued (a) between March 1 and December 31,

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.

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2020, and (b) relate to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.

To be eligible for these new safe harbors, the borrower must document, in good faith, that it meets the relevant criteria.

Relaxed Loan Spending Requirements

The Flexibility Act also overrides prior guidance from the SBA regarding the portion of a loan that can be spent on certain non-payroll expenses. Prior SBA guidance had required that at least 75% of the forgivable portion of loan proceeds must be spent on payroll expenses. The Flexibility Act, however, requires borrowers to spend only 60% of the PPP loan on payroll expenses and allows borrowers to spend up to 40% on certain other expenses (namely, interest on covered mortgage obligations, covered rent obligations, and covered utility expenses) to obtain loan forgiveness.

There is an important caveat. If a borrower spends less than 60% of the loan on payroll expenses, loan forgiveness is ***barred in its entirety***. This is a much harsher result than previously existed. Previously, if a borrower spent less than 75% of the loan on payroll expenses, forgiveness was reduced, not barred.

Payroll Tax Deferral

The Flexibility Act allows employers who receive PPP loan forgiveness to take advantage of the CARES Act provision allowing deferral of the employer portion of certain payroll taxes. Previously, if an employer received forgiveness the deferral authorized under the CARES Act was not available.

Conclusion

While the information above does not cover all of the provisions in the new Flexibility Act, it highlights some of the important points. We expect guidance to be issued soon that clarifies some of the changes in the Flexibility Act. For more information, please feel free to contact us.

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