

ALERT

The Paycheck Protection Program Flexibility Act

On June 5, 2020, the Paycheck Protection Program Flexibility Act (the “PPPFA”) was signed into law. The PPPFA addresses many of the shortcomings in the original PPP loan program that was created under the CARES Act. The following is a summary of the changes:

Reduction in Percentage of Loan That Must Be Spent on Payroll Costs

Perhaps the most common complaint around the PPP loan program by small businesses was that it required a business to spend seventy-five percent (75%) of the loan on payroll costs in order for the entire loan to be eligible for forgiveness. The PPPFA reduces the amount of the loan that must be spent on payroll to **sixty percent (60%)** and increases the amount of funds that may be used towards mortgage, rent, utilities and interest on loans from twenty-five percent (25%) to forty percent (40%). The loan will be still be eligible for partial forgiveness if the borrower applies less than sixty percent (60%) of the funds towards payroll expenses.

Extension of Time to Spend PPP Loan Proceeds

The other most common issue with the PPP was that it required businesses to spend the funds within the eight (8)-week period from the date the funds were received in order to be eligible for loan forgiveness. The difficulty with this requirement was that many businesses were shut down during that eight (8)-week period, and businesses would have more use for the funds at such time when they were permitted to reopen and their employees returned to work. **The PPPFA extends the time to spend the funds to twenty-four (24) weeks, or December 31, 2020, whichever is earlier.** Borrowers may still apply for loan forgiveness after eight (8) weeks if they choose to spend the funds within the first eight (8) weeks.

Extension of Time to Rehire Employees and Restore Wages

Under the original PPP loan program, borrowers are required to maintain the average full-time equivalent (“FTE”) employees they had prior to the COVID-19 pandemic and to maintain the salary and wages for employees making \$100,000 or less annually, or face a proportionate reduction in the amount of the PPP loan that would otherwise be forgiven. However, the PPP provided a safe harbor that would eliminate the loan forgiveness reduction penalty to the extent that borrowers restored FTE employees and/or salaries and wages by June 30, 2020. The SBA rules implementing the original PPP loan program also provided a safe harbor for borrowers who made good-faith written offers to rehire workers even if the offers were declined, allowing borrowers to count such positions as having been rehired for purposes of determining the amount of eligible loan forgiveness.

The PPPFA now extends the deadline for rehiring and restoring wages and salaries from June 30, 2020 to December 31, 2020. The PPPFA also allows businesses to treat unfilled positions as if they were filled by the new December 31, 2020 deadline if the business can in good faith establish and document that a) the business was unable to rehire individuals who were employees of the business on February 15, 2020 and hire similarly qualified employees for the unfilled positions or b) the business was unable to return to the same level of business activity that the business had before February 15, 2020 due to compliance with COVID-19-related worker or customer safety requirements or guidance established or issued by the Secretary of Health and Human Services (HHS), the Director of the Centers for Disease Control and Prevention (CDC), or the Occupational Safety and Health Administration (OSHA) during the period beginning on March 1, 2020 and ending on December 31, 2020.

Extension of Loan Forgiveness Application Deadline

The PPPFA gives borrowers up to ten (10) months after their "covered period" (either 24 weeks after the loan is funded or 8 weeks after the loan is funded) ends to apply for loan forgiveness. If a borrower fails to apply for forgiveness before the end of the ten (10)-month loan forgiveness application deadline, the borrower will be required to make payments of principal, interest and fees on the full amount of the PPP loan.

Payroll Tax Deferred Through 2020 Regardless of Loan Forgiveness

The CARES Act permits employers to defer deposit and payment of the six point two percent (6.2%) employer's portion of Social Security payroll tax for the period from March 27, 2020 through December 31, 2020. Fifty percent (50%) of the deferred amount is due December 31, 2021, and the remaining fifty percent (50%) is due December 31, 2022. As originally enacted, however, the CARES Act prevented a business that received a PPP loan from deferring additional payroll tax once the lender issued a decision to forgive the business' PPP loan. **The PPPFA retroactively eliminates this restriction.** A business may now continue to defer the payroll tax for the entire period from March 27, 2020 through December 31, 2020, regardless of whether or not the business has a PPP loan forgiven during this period.

Extension of Maturity Date and Deferral of Principal and Interest Payments

The PPPFA extends the minimum maturity date on new PPP loans originated on or after June 5, 2020 (the date that the PPPFA was enacted) from two (2) years (which was set by the SBA's April 2, 2020 Interim Final Rule) to five (5) years. While the PPPFA does not automatically extend the term of PPP loans originated before enactment of the PPPFA, it explicitly states that nothing in the PPPFA, the CARES Act or the SBA's PPP loan program rules shall be construed to prohibit lenders and borrowers from mutually agreeing to modify the maturity terms of existing PPP loans consistent with the PPPFA. Accordingly, borrowers with PPP loans funded before enactment of the PPPFA should consider contacting their lenders to discuss a potential extension of the maturity date of their PPP loan.

The PPPFA also extends the deferral of the payment of principal, interest and fees on PPP loans from the original six (6)-month period (which was set by the April 2, 2020 Interim Final Rule) to the earlier of the ten (10)-month deadline to apply for loan forgiveness (if the borrower does not apply for loan forgiveness) or the date on which the amount of the loan forgiven is remitted to the lender by the SBA.

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