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US Paycheck Protection Flexibility Act

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June 2020

On June 3, 2020, the US Senate unanimously passed and on June 5, 2020, the president signed the Paycheck Protection Program Flexibility Act of 2020 (the "Flexibility Act") into law. The Flexibility Act amends the Paycheck Protection Program ("PPP"), as created by the Coronavirus Aid, Relief, and Economic Security ("CARES") Act. These modifications to the PPP arrive just as many PPP loans are approaching the end of the period during which PPP loan proceeds must be utilized ("covered period") in order for the PPP loan recipients to qualify for forgiveness. Notably, the Flexibility Act extends the initial covered period from eight to a maximum of 24 weeks after PPP loan origination, allows forgiveness of a larger portion of operating expenses covered with the PPP loan, and provides PPP loan forgiveness recipients the ability to defer payroll taxes under the CARES Act.

Maturity date

The Flexibility Act extends the maturity of PPP loans granted on or after June 5, 2020 from two to five years. Although this portion of the legislation does not apply to previously granted PPP loans, the Flexibility Act provides that current lenders and borrowers may modify the existing terms of their PPP loan agreement. Therefore, upon mutual agreement, a PPP borrower and lender may amend the maturity date of the PPP loan obtained prior to the enactment of the Flexibility Act to a five-year term.

Covered period

Currently, the PPP allows a borrower to apply for forgiveness for those PPP funds expended in the eight-week covered period for authorized purposes. The initial covered period under the PPP begins the day the PPP loan is funded. For a PPP loan funded prior to the Flexibility Act, a borrower may now elect to extend the covered period to 24 weeks; however, the covered period may not extend past December 31, 2020. It is unclear whether a borrower may choose a date for the covered period between eight weeks and 24 weeks under the Flexibility Act. For PPP loans disbursed after the Flexibility Act, the 24-week covered period (not to extend beyond December 31, 2020) will apply. This extended covered period will allow borrowers additional time to spend PPP funds and allow for more of the PPP loan to be forgiven.

Restoring workforce

Under the CARES Act, borrowers can be penalized for reducing the number of full-time equivalent employees and employee wages through a proportional reduction of the PPP loan forgiveness amount. The Flexibility Act moves the deadline to restore workforce numbers and employee wages to December 31, 2020 (previously June 30, 2020). This grants borrowers more time to restore their workforce to pre-pandemic numbers and avoid that the PPP loan forgiveness is reduced.

With some borrowers facing difficulties in restoring their workforce, the Flexibility Act now allows exceptions to the PPP loan forgiveness reduction. A borrower will not be penalized for reductions in the workforce if the borrower can document and demonstrate that (1) it was unable to rehire the individuals who were employees of the borrower as of February 15, 2020 and (2) it was unable to fill the positions with similarly qualified employees before December 31, 2020.

A borrower's PPP loan forgiveness will also not be reduced if the borrower is unable to restore its workforce to its February 15, 2020 numbers due to compliance with social distancing, health and safety requirements or guidance established by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration from March 1, 2020 to December 31, 2020.

Spending ratios

The Flexibility Act also amends the PPP loan's spending ratio to obtain PPP loan forgiveness. A borrower must only utilize at least 60 percent of its loan proceeds on permissible payroll expenses and a maximum of 40 percent of the loan proceeds on additional authorized expenses, including payment of interest on a covered mortgage obligation (not including the payment of principal on a covered mortgage obligation), any payment on a covered rent obligation, or a covered utility payment. Prior to the Flexibility Act, a borrower was required to spend at least 75 percent of PPP loan proceeds on payroll costs to obtain full forgiveness and forgiveness was reduced if this threshold was not met; however, non-compliance with this ratio did not completely eliminate PPP loan forgiveness. Borrowers should carefully document PPP loan proceed expenditures in order to ensure that the PPP loan forgiveness is not jeopardized.

Payroll taxes

PPP recipients seeking PPP loan forgiveness were originally excluded from receiving payroll tax deferral benefits available under the CARES Act. Under the CARES Act, an employer may defer the employer's share of Social Security taxes payable on wages from March 27, 2020 through December 31, 2020. The employer must pay the deferred taxes in two equal installments due December 31, 2021 and December 31, 2022. The Flexibility Act allows borrowers to delay payment of their payroll taxes and benefit from the CARES Act deferrals and seeking PPP loan forgiveness will not impact the payroll tax deferral.

For more information on the PPP program, please visit our previously published article: Small business loan options under the CARES Act.

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