June 4, 2020

COVID-19 Update: Highlights of the Paycheck Protection Program Flexibility Act of 2020

The Paycheck Protection Program Flexibility Act of 2020 (PPP Flexibility Act) was passed by the House and the Senate and is now awaiting the president's signature. As the Paycheck Protection Program was implemented, Congress, the Small Business Administration (SBA) and businesses recognized gaps and challenges in its implementation. The PPP Flexibility Act amends some key provisions in the Coronavirus Aid, Relief, and Economic Security (CARES) Act, providing additional relief to small businesses. The following are some of the highlights of the PPP Flexibility Act:

- Under the CARES Act, the covered period was eight weeks from the loan disbursement with a cutoff of June 30, 2020. Only eligible expenses incurred or paid during the covered period were eligible for forgiveness. The PPP Flexibility Act expands the covered period to a maximum of 24 weeks with a cutoff of December 31, 2020.
- The language of the PPP Flexibility Act appears to allow eligible businesses to apply for PPP loans until December 31. However, in a published revision to the Interim Rules, the SBA made it clear that they will only accept applications for PPP loans until June 30. Given that there is still more than $100 billion available for PPP loans, the application deadline may change or be the subject of additional litigation for the SBA.
- The CARES Act contains a forgiveness calculation reduction if the borrower has a reduction in full-time equivalent employees (FTEs) during the covered period as compared to two other "test" periods. In the Interim Final Rule on Loan Forgiveness, the SBA provided a number of exceptions to the forgiveness reduction calculation for situations in which the borrower experienced a reduction in FTEs through no fault of its own. The PPP Flexibility Act codifies and expands these exceptions. It also provides that a borrower will not have to include employees in the forgiveness reduction calculation if:
    - The borrower is able to document an inability to rehire the employees or similarly qualified employees; or
    - The borrower is able to document an inability to return to the same level of business activity as it had on February 15 due to compliance with requirements or guidance issued by HHS, CDC or OSHA related to the maintenance of standards for sanitation, social distancing, or worker or safety requirements relating to COVID-19.

Although the PPP Flexibility Act does not elaborate on the documentation required to show a reduction in business activity, this may provide relief to businesses that were required to remain closed or modify operations, such as hair salons and restaurants.

- The SBA provided guidance that at least 75 percent of the loan forgiveness amount must be attributable to payroll costs. The PPP Flexibility Act reduced that threshold to 60 percent, saying, "To receive loan forgiveness under this section, an eligible recipient shall use at least 60 percent of the covered loan amount for payroll costs." As drafted, this language could be read to say that if a borrower spends more than 60 percent of the proceeds of its PPP loan on nonpayroll costs, none of its PPP loan would be eligible for forgiveness. It is unclear whether that was Congress' intent, and we expect this to be clarified in future legislation or SBA guidance.
- The PPP Flexibility Act now provides that borrowers must apply for forgiveness within 10 months after the last day of the newly expanded covered period, and principal, interest and fees are deferred until the date on which the amount of the loan to be forgiven is submitted to the lender. Failure to apply for forgiveness prior to the deadline will automatically trigger a requirement to repay the loan amount in accordance with its terms.

- The PPP Flexibility Act also extended the term of the loan to a minimum maturity of five years. This extension only applies to loans made after the enactment of the PPP Flexibility Act; however, the PPP Flexibility Act expressly provides that nothing restricts lenders from amending loans previously made.
- The CARES Act allows businesses to delay payment of certain 2020 employer payroll taxes until December 31, 2021, and December 31, 2022. However, the PPP loan program and the tax deferral were mutually exclusive. Businesses that had loans forgiven under the PPP loan program were not eligible for payroll tax deferral. The PPP Flexibility Act removes this restriction and allows borrowers that have PPP loans forgiven to defer payroll taxes.

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For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center. COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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