May 26, 2020

COVID-19: More guidance from SBA regarding PPP loans

On May 22, the Small Business Administration (SBA) released two new interim final rules, one providing guidance on requirements for loan forgiveness and the other providing guidance on SBA loan review procedures and related borrower and lender responsibilities. With these interim final rules, the SBA provides further clarification of the loan forgiveness and the Paycheck Protection Program (PPP) loan application processes. These rules are intended to assist borrowers in preparing and submitting their loan forgiveness application and to provide instructions to lenders on the forgiveness decision process. The following are highlights from the new interim rules.

Loan Forgiveness

- Loan Forgiveness Process. The SBA provided guidance on the loan forgiveness process and timelines:
    - (1) The borrower completes and submits the PPP Loan Forgiveness Application.
    - (2) The lender must review the application and submit its decision to the SBA within 60 days of the receipt of the completed application. If the lender has determined that the borrower is eligible for forgiveness of some or all of the loan, the lender must request payment from the SBA at the same time the decision is submitted.
    - (3) The SBA has 90 days from when the lender submits its decision to the SBA to remit to the lender the appropriate forgiveness amount plus any interest accrued (subject to SBA review of the loan and deductions regarding Economic Injury Disaster Loan advance amounts).
    - (4) The lender must notify the borrower of the forgiveness amount. Any balance due on the loan must be repaid by the borrower on or before the two-year maturity of the loan.
    - (5) The borrower has 30 days from receipt of the notice from the lender to request that the SBA review the lender's decision.
- Payroll Costs. The interim rules confirm two expansions of the covered period. First, the SBA recognized that some borrowers have a logistical problem because the covered period does not always align with the borrower's payroll cycle. Therefore, the SBA introduced the concept of the alternative covered period. The alternative covered period allows borrowers with a biweekly or more frequent payroll cycle to calculate payroll costs using the eight-week period that began on the first day of the pay period following the PPP disbursement date. Second, the SBA expanded the period during which payroll costs can be calculated. Payroll costs are eligible for forgiveness if they are either (1) paid during the covered period or the alternative covered period or (2) incurred during the covered period or the alternative covered period and paid on or before the next regular payroll date eligible for loan forgiveness (provided, however, that each is counted only once).
- Bonuses. Hazard pay and bonuses are eligible for loan forgiveness because they constitute a supplement to salary or wages and are thus a similar form of compensation. These payments will be included when determining the employee's total cash compensation, which may not exceed the $15,385 cap for the covered period.
- Owner Employees. The SBA clarified that the amount of loan forgiveness for owner employees or self-employed individuals based on payroll compensation may not exceed the lesser of (1) eight of 52 weeks of the 2019 compensation or (2) the cap of $15,385, which applies in aggregate across all businesses of the owner employee. Additionally, this cap includes retirement and healthcare contributions on behalf of the owner employee.

- Non-Payroll Costs. Non-payroll costs that are either (1) paid during the covered period or (2) incurred during the covered period and paid on or before the next regular billing date are eligible for loan forgiveness. The SBA noted that the 25 percent cap on non-payroll costs will avoid excessive inclusion of non-payroll costs.
- Full-Time-Equivalent Employees (FTEs). The SBA determined that 40 rather than 30 hours is a more accurate reflection of what constitutes full-time employment for most American workers. To calculate FTEs, the borrower must divide the average number of hours paid for each employee per week by 40, capping the quotient at 1.0. The SBA provided a simplified method for calculating FTEs, with an employee working 40 or more hours counted as 1.0 FTE and an employee working fewer than 40 hours counted as 0.5 FTE.
- Reductions in FTE and Salary/Wages. To avoid double penalties, the SBA determined that the salary/wage reduction applies only to the portion of the decrease in the employee salary and wages that is not attributable to the FTE reduction. Therefore, if there is a reduction in the number of hours an employee works per week but there has been no change to the employee's hourly wage during the covered period, the borrower will be required to make a calculation based only on the FTE reduction and not on the salary/wages for that employee.

SBA Review

- What Will Be Reviewed? The SBA clarified that regardless of the size of the PPP loan, the SBA may review any PPP loan at any time. Since the guidance is rapidly evolving, the SBA will look at the rules and guidance available at the time of the borrower's PPP loan application. The SBA will review whether the borrower calculated the loan amount correctly, used the proceeds for allowable uses and is entitled to forgiveness.
- Who Is Responsible? Notably, providing the accurate calculation of the loan forgiveness amount is the responsibility of the borrower, and the borrower is attesting to the accuracy of the information submitted to the lender. It is important for borrowers to retain all PPP-related documentation for six years after the date the loan is forgiven or repaid in full. The borrower must respond to all SBA inquiries.
- What Happens if the SBA Determines the Borrower Is Ineligible? The SBA will direct the lender to deny the loan forgiveness application and also may seek repayment of the outstanding balance or pursue other remedies.
- Appeal. The borrower has 30 days from receiving the notice of decision from the lender to appeal the lender's decision to the SBA. The borrower may also appeal the SBA's determination. The SBA will issue further guidance regarding the appeal process.

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.

Authors



David M. Waizer
Partner

Parsippany, NJ | (973) 966-8089

New York, NY | (212) 297-2439

dwaizer@daypitney.com



Michael W. Kaufman
Partner

Stamford, CT | (203) 977-7421

New York, NY | (212) 297-2470

mkaufman@daypitney.com