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CARES ACT UPDATE

Is It Better To Ask For Forgiveness? SBA Issues Forgiveness Calculation Form

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On May 15, 2020 the Small Business Administration (“SBA”) published the form borrowers will use when they apply for forgiveness of their PPP loan. It is attached to this email. The SBA did *not* issue regulations; it has promised to do so in the future. For now we know the basic framework and some, but not all, questions have been addressed.

The “PPP Loan Forgiveness Calculation Form” is only 2 pages, but preceded by 2 pages of instructions. However in addition there is a 1-page “Schedule A”, which has 2 pages of instructions, a 1-page Schedule A worksheet, and a list of required and optional documentation.

Highlights:

- FTE is defined based on a 40-hour workweek. All hours worked are added and divided by 40 with the option to count all employees who work 40 hours or more as “1” and every other employee as “.5.”

- The covered period is the 56 days starting on the day the loan was disbursed; however a borrower who pays biweekly or more frequently may use the eight-week (56-day) period that begins on the first day of their first pay period following their PPP Loan Disbursement Date (the “Alternative Payroll Covered Period”).

“Payroll costs are considered paid on the day that paychecks are distributed or the Borrower originates an ACH credit transaction. Payroll costs are considered incurred on the day that the employee’s pay is earned.”

- Payroll costs incurred during the 8 weeks or Alternative Payroll Period are eligible for inclusion in the forgiveness calculation if paid on or before the next regular payroll date. Only count payroll costs accrued and paid once. You will get to claim only 8 weeks of payroll costs regardless of which method you elect to use.

- For payments to owners, self-employed individuals or partners, Schedule A simply requests the amount paid to them capped at \$15,385 or the 8-week equivalent of their 2019 compensation, whichever is lower. That amount then becomes part of Payroll Costs. They may have a different pay cycle than employees and it is not clear if the SBA will require that all payments to them must be made within the 56 days from the date the loan is disbursed.

- The 25% limitation on using the loan for non-payroll costs remains although the SBA's Inspector General noted that was not in the CARES Act, and may negatively impact the ability to obtain forgiveness. However that is applied to the "modified total" of the loan, which is the amount that can be forgiven after being reduced for reductions in FTE count or wage reductions greater than 25%.

- When comparing your FTE count in the covered period to the pre-PPP period, you can exclude employees who rejected a good faith written offer to be rehired, and you can exclude any employees who were fired for cause, or voluntarily resigned, or voluntarily requested a reduction in hours during the covered period or alternative payroll period. That is new and more favorable to borrowers.

- The June 30, 2020 safe harbor for restoration of FTE count and/or pay reductions greater than 25% remains with this notation for the FTE restoration: "the Borrower then restored its FTE employee levels by not later than June 30, 2020 to its FTE employee levels in the Borrower's pay period that included February 15, 2020."

- For non-payroll costs, e.g. rent, they "must be paid during the Covered Period or incurred during the Covered Period and paid on or before the next regular billing date, even if the billing date is after the Covered Period."

- Rent and lease payments include "business rent or lease payments pursuant to lease agreements for real or personal property in force before February 15, 2020 ("business rent or lease payments"). On its face this includes equipment leases.

- There are substantial documentation requirements.

- There is no additional guidance on the certification requirement for the loan, however there is a box to be checked if the loan was in excess of \$2 million: "If Borrower (together with affiliates, if applicable) received PPP loans in excess of \$2 million, check here:

How will the SBA determine if my loan will be forgiven?

The basic mathematical formula is: Loan amount less payroll costs (subject to a cap of \$15,385 per person during the 8 weeks) less mortgage/rent payment, less utility payments. If you did not reduce your FTE count in the covered period (average weekly FTEs in the covered period) you can skip many of the calculations. Likewise, if you have not reduced wages or salaries by more than 25% you avoid a number of calculations.

“Full-Time Equivalency (FTE) Reduction Calculation. If you have not reduced the number of employees or the average paid hours of your employees between January 1, 2020 and the end of the Covered Period, check here , skip lines 11 and 12 and enter 1.0 on line 13.”

To maximize forgiveness, you want the average weekly number of FTEs in the covered period to be the same or greater than the number of FTEs in the period you have chosen as your pre-PPP FTE period. Again, you have until June 30, 2020 to restore the number of FTEs to the number in the pay period that included February 15, 2020.

If you reduced wages or salaries for employees earning less than \$100,000 per year by greater than 25% during the covered period compared to the period January 1, 2020 to March 31, 2020, you have until June 30, 2020 to restore them. Again, no guidance is provided on what that means other than “Enter the average annual salary or hourly wage as of June 30, 2020.”

The basic formula remains; the borrower gets to seek forgiveness for eight weeks of payroll costs, wages/salaries/cash tips, contributions for health insurance, contributions to retirement plans, state and local taxes (in Hawaii that is unemployment taxes), payments to owners/partners, subject to reductions for unrestored decreases in FTEs or salary reductions greater than 25%. The reduction calculation is done first to determine the maximum forgiveness amount; 25% of that amount may be used for non-payroll costs.

The SBA will be issuing regulations and further guidance on forgiveness. There are still unanswered questions regarding what does it mean to restore the FTE count or to restore wage reductions. It is clear, however, that precise and comprehensive documentation will be required.

Remember: you can defer the employer’s share of FICA into 2021 and 2022 provided your loan has not been forgiven. This allows borrowers to defer the 1st and 2nd quarter FICA for 2020.

Finally, do not get too encouraged or discouraged by the SBA’s Calculation Form. There is still active discussion of modifying the 25% limit on non-payroll costs and possibly extending the repayment period for unforgiven amounts from 2 years to 5 years. As we have seen before, the rules keep changing.