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A LIMITED LIABILITY LAW PARTNERSHIP

Labor and Employment Law

CARES ACT UPDATE

Good Faith Certification Explained-In Part

May 13, 2020 at 9:00 a.m.

The Small Business Administration (SBA) issued further guidance on the good faith certification requirement in advance of the May 14, 2020 safe harbor deadline to return loan proceeds for any borrower who was not entitled to them. In summary, borrowers with loans below \$2,000,000.00 in principal will be “deemed to have made the required certification concerning the necessity of the loan request in good faith.” In other words, the SBA will not question the necessity for the loan.

For loans greater than \$2,000,000.00, the SBA is not automatically finding that the certification was not made in good faith. “Importantly, borrowers with loans greater than \$2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance.”

As the SBA announced previously, forgiveness requests for loans greater than \$2,000,000.00 will be reviewed by the SBA. However, today the SBA announced that if upon review it determines that the borrower was not eligible for the loan, and upon that notification the borrower repays the loan, no further action will be taken. Borrowers who elect not to return their loan by May 14 but do so after the SBA determines they were not eligible, are not at risk for prosecution.

If your loan was greater than \$2,000,000.00, be prepared for SBA scrutiny of the certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” That is a low threshold, and the uncertainty was at the time of the application.

The full text of Question 46 is set forth below. And for those who are wondering about the forgiveness standards, there are no developments from the SBA. The House may pass legislation this week that addresses the SBA’s guidance that no more than 25% of the loan can be used for non-payroll costs and that if expenses are paid with the loan they are not deductible.

It’s not over yet.

46. Question: How will SBA review borrowers' required good-faith certification concerning the necessity of their loan request?

Answer: When submitting a PPP application, all borrowers must certify in good faith that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA’s review of PPP loans with respect to this issue: Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than \$2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith. SBA has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns. Importantly, borrowers with loans greater than \$2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance. SBA has previously stated that all PPP loans in excess of \$2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request. SBA’s determination concerning the certification regarding the necessity of the loan request will not affect SBA’s loan guarantee.