

June 4, 2020

PPP Flexibility Bill

The CARES Act created the Paycheck Protection Program (“PPP”), which amended the Small Business Act (“SBA”) to provide short term loans to companies with fewer than 500 employees and other companies (such as those in the restaurant and hospitality industry). Such loans may be eligible for full forgiveness if used for payroll and other business expenses and all other statutory requirements are met. The SBA continues to issue guidance on a rolling basis, which can impact a company’s eligibility for the loan, use of the loan, and the level of forgiveness.

On June 3, 2020, the U.S. Senate unanimously approved a bill called the Paycheck Protection Flexibility Act, H.R., 7010, which makes it easier for recipients of the PPP to qualify for forgiveness. The bill was previously [approved](#) by the U.S. House of Representatives by a 417 to 1 vote. Before becoming law, the bill must be signed into law by the President. The bill provides for the following amendments to the PPP:

- **Extension of Covered Loan Period.** The amendment extends the covered period for forgiveness from eight weeks to 24 weeks, or December 31, 2020, whichever is earlier (but gives the borrower the option to choose the eight-week period if the borrower received the loan prior to the enactment of the amendment). This will allow borrowers more time to spend the loan proceeds which especially helps businesses that are still closed or partially closed. Such businesses were previously forced to spend the loan proceeds in the first eight weeks on employees who were not performing work in order to have the loan fully forgiven. It remains to be seen how this will impact the \$100,000 pro-rated cap per employee. Previously, for purposes of forgiveness, companies were limited to paying employees \$15,384.61 for the eight-week period (\$100,000 pro-rated). Now, if SBA applies the pro-rated cap to the 24-week period the limit would equal \$46,153.85 per employee.
- **Extension of Period of Use of the Loan.** The amendment extends the period for allowable uses of the loan from June 30, 2020 to December 31, 2020. While there has not been any direct guidance on this subject, the statute had set June 30, 2020 as the deadline for borrowers to use the disbursed PPP funds, whether within or outside of the covered loan period. While the statute did not address what happens if any of the PPP funds were used after June 30, 2020, the amendment also does not address what happens if PPP funds are spent after December 31, 2020.
- **75 Percent Requirement Becomes the 60 Percent Requirement.** The amendment changes the requirement that 75 percent of the amount forgiven must be on payroll costs to 60 percent. This will give borrowers more freedom and flexibility to spend the money on non-payroll costs such as mortgage interest, rent and utilities, and not put pressure on borrowers to stretch to meet the 75 percent requirement.
- **New Exceptions.** The amendment adds the following new exemption based on employee availability:
 1. During the period beginning on February 15, 2020, and ending on December 31, 2020, the amount of loan forgiveness shall be determined without regard to a proportional reduction in the number of full-time equivalent employees if an eligible

recipient, in good faith, is able to document: (i) an inability to rehire individuals who were employees of the eligible recipient on February 15, 2020; and (ii) an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020.

2. The exemption also applies if the borrower, in good faith, is able to document an inability to return to the same level of business activity as such business was operating at or before February 15, 2020, due to compliance with requirements established or guidance issued 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 during the period beginning on March 1, 2020, and ending December 31, 2020, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.
- **Extension of Safe Harbor Date.** The amendment changes the safe harbor period for rehires from June 30, 2020 to December 31, 2020. This will give businesses who are still closed or partially closed more time to bring back furloughed or laid off employees.
 - **Extension of Maturity Date.** The maturity date of the loan has been extended from two years to five years.
 - **Extension of Deferral Period.** The deferral period has been extended from six months to the date on which the amount of forgiveness is determined or 10 months after the last day of the covered period if the borrower fails to apply for forgiveness within 10 months.