



# PPP

## **PAYCHECK PROTECTION PLAN**

IN PLAIN ENGLISH





## MEMORANDUM

FROM: Antonia Roybal, Antonia@roybalmacklaw.com

RE: PPP Interim Final Rule SBA-2020-015

DATE: April 18, 2020

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On April 15, 2020, the SBA published the interim final rules and regulations for the Paycheck Protection Program (“PPP”) in Federal Register Vol. 85, No. 73. Docket numbered SBA-2020-015.

This memorandum is prepared as a plain English guide to the PPP program.

The interim rule is effective April 15, 2020. The applicable trigger dates in the program are February 15, 2020 through June 30, 2020.

The advice outlined herein is based upon the letter of the CARES Act and the SBA Interim Final Rules. The SBA has not released further guidance on loan forgiveness. None of these Acts or rules have been interpreted by the Courts.

### I. WHAT QUALIFIES AS “PAYROLL COSTS?”

Payroll costs are defined in section 2f of the interim final rule. Payroll costs consist of compensation to employees (whose principal place of residence is the United States), broken down as follows:

- Salary;
- Wages;
- Commissions, or similar compensation;
- Cash tips or the equivalent (based on employer records of past tips or, in the absence of such records, a reasonable, good-faith employer estimate of such tips);
- Payment for vacation, parental, family, medical, or sick leave, except leave where a credit is taken per FFCRA (the act mandating paid leave);
- Allowance for separation or dismissal;
- Payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement;
- Payment of state and local taxes assessed on compensation of employees.

## II. WHAT IS EXPRESSLY EXCLUDED FROM THE DEFINITION OF PAYROLL COSTS?

The Act expressly excludes the following:

- Any compensation of an employee whose principal place of residence is outside of the United States;
- The compensation of an individual employee in excess of an annual salary of \$100,000, prorated as necessary, this means that the first \$100,000.00 qualifies as a payroll cost;
- Federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020, including the employee's and employer's share of FICA (Federal Insurance Contributions Act) and Railroad Retirement Act taxes, and income taxes required to be withheld from employees; and
- Qualified sick and family leave wages for which a credit is allowed under sections 7001 and 7003 of the Families First Coronavirus Response Act (Pub. L. 116–127).
- Monies paid to independent contractors do not count for purposes of PPP loans, because independent contractors have the ability to apply for a PPP loan.

## III. HOW CAN PPP LOANS BE USED?

The proceeds of a PPP loan are to be used for:

- Payroll costs (as defined in the Act and in 2.f.);
- Costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;
- Mortgage interest payments (but not mortgage prepayments or principal payments). The term *mortgage* is generally understood as a loan secured by specifically identified collateral. The collateral is often real property but can also be personal property and even intangible property. The mortgage had to be in effect prior to February 15, 2020.
- Rent payments. Nothing in the CARES Act appears to disqualify rent paid to a related person, provided that the lease for the property was in force before February 15. It is unclear how the SBA will treat late payment of past-due rent or prepayments of future rent. The lease had to be in effect prior to February 15, 2020.
- Utility payments. The CARES Act limits utilities to electricity, gas, water, transportation, telephone or internet access for which service began before February 15. (CARES Act § 1106(b)(4).) The utilities had to be turned on prior to February 15, 2020.
- Interest payments on any other debt obligations that were incurred before February 15, 2020;



At least 75 percent of the PPP loan proceeds shall be used for payroll costs. For purposes of determining the percentage of use of proceeds for payroll costs, the amount of any EIDL refinanced will be included. For purposes of loan forgiveness, however, the borrower will have to document the proceeds used for payroll costs in order to determine the amount of forgiveness.

#### **IV. WHAT HAPPENS IF PPP LOAN FUNDS ARE MISUSED?**

If you use PPP funds for unauthorized purposes, the SBA will direct you to repay those amounts. If you knowingly use the funds for unauthorized purposes, you will be subject to additional liability such as charges for fraud. If one of your shareholders, members, or partners uses PPP funds for unauthorized purposes, SBA will have recourse against the shareholder, member, or partner for the unauthorized use.

#### **V. CAN MY PPP LOAN BE FORGIVEN IN WHOLE OR IN PART?**

The PPP loan can be forgiven in whole. The borrower has to use 75 percent of the loan for payroll purposes. The borrower has to use the remaining 25 percent of the loan for authorized purposes as outlined. The amount of loan forgiveness can be up to the full principal amount of the loan and any accrued interest. That is, the borrower will not be responsible for any loan payment if the borrower uses all of the loan proceeds for forgivable purposes and employee and compensation levels are maintained.

The actual amount of loan forgiveness will depend, in part, on the total amount of payroll costs, payments of interest on mortgage obligations incurred before February 15, 2020, rent payments on leases dated before February 15, 2020, and utility payments under service agreements dated before February 15, 2020, over the eight-week period following the date of the loan. However, not more than 25 percent of the loan forgiveness amount may be attributable to non-payroll costs. The SBA will issue additional guidance on loan forgiveness.

#### **VI. WHAT ARE THE BEST PRACTICES TO PROTECT MYSELF FROM LIABILITY?**

Loan forgiveness will be provided for the sum of documented payroll costs, covered mortgage interest payments, covered rent payments, and covered utilities. As explained above, not more than 25 percent of the forgiven amount may be for non-payroll costs.

- Make sure that your employee headcount is returned to its normal level prior to June 30, 2020.
- Delay suspending contributions to retirement plans until after the 8-week loan period. Talk to your plan administrator to make sure that suspending plan contributions will not result in a plan audit. In many instances it is better for employees to voluntarily suspend their own contributions than for the company to stop the plan contributions.
- Hire a professional payroll company to track expenditures.
- Deposit your PPP proceeds into a separate bank account and use that account solely for authorized purposes. Do not withdraw cash from the account.
- For any contracts paid with the proceeds, such as leases, mortgages, etc, compile the contracts into one place to show that the contract origination date was prior to February 15, 2020.

- For any utilities, keep records of each expenditure. If you do autopay or have electronic billing, make sure to get the actual statement and get a ledger from the utility company showing payments beginning in January 2020 through June 2020.

## **VII. WHAT IS THE CAP ON LOAN FORGIVENESS?**

- Forgiveness is Capped at PPP Loan Amount. The amount forgiven cannot exceed the principal amount of the PPP loan. (CARES Act § 1106(d)(1).) This likely means that every borrower must pay at least two months of interest (computed at 1 percent per annum) even if the loan is forgiven immediately after the Eight-Week Period, even though the interest is deferred for the first six months of the loan. It also avoids questions that could arise when the forgivable amount exceeds the principal amount of the loan.

## **VIII. HOW IS THE REDUCTION IN EMPLOYEES CALCULATED?**

- The forgivable amount is reduced if there is a reduction in the number of employees. (CARES Act § 1106(d)(2).)
- The reduced forgivable amount equals the result of multiplying the sum of the Covered Costs by the ratio of (1) the average number of full-time equivalent employees during the Eight-Week Period to (2) at borrower's election (a) the average number of full-time equivalent employees from February 15, 2019 to June 30, 2019 or (b) the average number of full-time equivalent employees from January 1, 2020 to February 29, 2020. The CARES Act appears to apply this reduction to the sum of all Covered Costs, before taking into account the absolute cap (i.e., the PPP loan amount). It thus appears possible that this reduction would not impact a business with sufficient Covered Costs.
- The forgivable amount is reduced by an amount related to a reduction in salary (the Salary Reduction Amount). (CARES Act § 1106(d)(3).) The CARES Act requires businesses to calculate the Salary Reduction Amount, if any, for each employee who received, during any single pay period in 2019, wages or salary of \$100,000 or less on an annualized basis. (CARES Act § 1106(d)(3)(B).) Reduction in wages or salaries for those who make more than \$100,000 has no detrimental impact on the forgiveness computation. It also means that there is no reduction related to employees who did not work for the business in 2019.
- The Salary Reduction Amount equals the excess, if any, of the reduction during the Eight-Week Period over 25 percent of the total salary or wages of the employee during the most recent full quarter during which the employee was employed before the Eight-Week Period — the first quarter of 2020 for PPP loans received in the second quarter of 2020. (CARES Act § 1106(d)(2)(A).) Accordingly, a business potentially could reduce wages by about 40 percent without having a Salary Reduction Amount.
  - For example, an employee earning a salary of \$52,000 per year would have received \$13,000 in the first quarter of 2020. That employee also normally would have received \$8,000 during the Eight-Week Period. The employer would have a Salary Reduction Amount only to the extent that the reduction during the Eight-Week Period exceeded \$3,250

(25 percent of \$13,000). Therefore, the employer could avoid reduction in forgiveness so long as the employer doesn't reduce the employee's salary below \$4,750 (\$8,000-\$3,250), or \$593.75 per week. Such salary reduction represents a decrease of a little over 40 percent, without triggering any Salary Reduction Amount.

- Despite this rule, reducing salaries could make it difficult to achieve complete loan forgiveness given the 75-25 split required by the SBA. We also would not be surprised if the SBA interprets the CARES Act in a manner that does not allow such large salary reductions.

## IX. WHAT IS THE IMPACT ON REHIRING?

- The forgiveness amount is “determined without regard” to reductions in forgiveness resulting from a reduction in the number of employees or a reduction in salary, as applicable, during the Eight-Week Period, if the employer **ELIMINATES** the headcount/salary reduction by June 30, 2020. (CARES Act § 1106(d)(5).)
  - Technically, this rule would allow an employer that fires all employees to avoid a reduction in forgiveness if the employer hires everyone back at original pay for only one day (June 30). The SBA may provide rules to prevent such planning; however, the current law and rules show no such prohibition.

## X. YOU MUST MAINTAIN THE NUMBER OF EMPLOYEES ON YOUR PAYROLL.

Here is the calculation you can use to determine if you've met this requirement:

First, determine the average number of full-time equivalent employees you had for:

- The 8-week period following your initial loan disbursement, (**A**)
- February 15, 2019 to June 30, 2019, (**B1**)
- and January 1, 2020 to February 29, 2020. (**B2**)

Take **A** and divide that by **B1**. Do the same with **B2**. Take the largest number you obtain. If you're a seasonal employer, you must divide by **B1**.

- If you get a number equal to or larger than 1, you successfully maintained your headcount and meet this requirement.
- If you get a number smaller than 1, you did not maintain your headcount and your forgivable expenses will be reduced proportionately.

## XI. HOW CAN I PLAN FOR LOAN FORGIVENESS?

The attached spreadsheet will help with calculations. The spreadsheet will be updated as additional guidance is received.



## **XII. HOW DO I REQUEST LOAN FORGIVENESS?**

You can submit a request to the lender that is servicing the loan. The request will include documents that verify the number of full-time equivalent employees and pay rates, as well as the payments on eligible mortgage, lease, and utility obligations. You must certify that the documents are true and that you used the forgiveness amount to keep employees and make eligible mortgage interest, rent, and utility payments. The lender must make a decision on the forgiveness within 60 days.