Additional Relief And Flexibility Provided To PPP Borrowers By The Paycheck Protection Program Flexibility Act Of 2020

June 05, 2020

(Last updated June 5, 2020)

Today, June 5, 2020, President Trump signed the Paycheck Protection Program Flexibility Act of 2020 (the "Flexibility Act") into law. The text of the Flexibility Act can be found here. As its name implies, the Flexibility Act provides much-needed flexibility to PPP borrowers.

Over the past couple of months, we have heard from numerous clients about their concerns about having to use all of their PPP funds within the limited 8-week period after their funds were received. In many cases, those clients were prohibited by government order from opening their businesses during that period – or were at least severely limited in how "open" they could be – and questioned the logic of having to pay employees to sit at home. Their concerns were amplified by the fact that unemployment benefits had been increased by an additional $600 per week payment funded by the federal government on top of the usual state benefits – boosting the unemployment benefits of some of their laid-off employees to an amount well in excess of what the employee earned previously. Of course, in many cases, this made it difficult to hire employees back once the PPP funds arrived. Congress clearly heard these concerns and others and the Flexibility Act is the result.

WHAT YOU NEED TO KNOW

(1) **Extension of the 8 Week Period for the Forgivable Use of PPP Funds** – The 8 week "covered period" is no more – unless you still want it. The new covered period for the forgivable usage of your PPP funds begins on the date that you received your funds and extends until the earlier of: (i) the expiration of 24 weeks thereafter, or (ii) December 31, 2020. In recognition of the fact that there are some employers who will be able to fully use their PPP funds during the 8 week period established previously, Congress built in a provision that allows those employers to elect to have the 8 week period apply – if they prefer – so that they can submit their forgiveness application at an earlier date.

(2) **Extension of Deadline to Rehire Employees or Restore Compensation Levels** – For those employers who laid-off workers between February 15, 2020 and April 26, 2020 (30 days after the CARES Act was enacted), the "safe harbor" deadline to restore full-time equivalent (FTE) headcount and employee compensation levels was previously June 30, 2020, failing which a reduction in forgiveness for such reduced headcount and/or

compensation levels would be applied. The previous June 30, 2020 deadline is now December 31, 2020. Please keep in mind that the covered period described in point (1) above still applies for forgivable fund usage, but, so long as you can properly spend all of your PPP funds within the now longer period (which should be quite easy for most employers), you won't be required to ramp back up to your full staff and compensation levels until December 31, 2020.

(3) **Relief for Employers with Trouble Rehiring Employees or Who Cannot Restore Prior Business Activity Levels Due to Health Requirements and Guidance** – The Flexibility Act includes a new provision that loan forgiveness will not be impacted by a reduction in FTE headcount if either of the following apply: (i) the employer can document that they weren't able to rehire all of their former employees and were also not able to hire similarly qualified replacement employees by December 31, 2020; or (ii) the employer can document that they were unable to return to the same level of business activity as existed before February 15, 2020 due to compliance with requirements established or guidance issued by the HHS, CDC or OSHA during the period beginning March 1, 2020 and ending December 31, 2020, related to maintenance of standards for sanitation, social distancing, etc. related to COVID-19.

(4) **Relaxation of the 75% Payroll Spending Requirement** – The previous requirement created by the SBA and the Department of Treasury that PPP borrowers needed to spend at least 75% of their PPP funds on payroll costs is gone and has been replaced by a 60% requirement. There is, however, one potentially significant issue that has resulted from the new language. The language now says "(t)o receive loan forgiveness under this section, an eligible recipient shall use at least 60 percent of the covered loan amount for payroll costs . . ." This language creates a potential "cliff" in that it seems to say that no forgiveness will be granted if an employer doesn't meet the 60% payroll cost threshold – unlike the previous language associated with the 75% threshold that only would have resulted in a reduction of forgiveness if the threshold wasn't met. Members of Congress are already pointing this issue out to the SBA and seeking confirmation on whether this seemingly unintended effect can be negated through regulations to be issued by the SBA.

(5) **Extension of the Payment, Interest and Fee Deferral** – The previous 6 month period for deferral of payments, interest, and fees has now been replaced by a deferral of those items until the "date on which the amount of forgiveness determined under Section 1106 of the CARES Act is remitted to the lender." This language begs the question of what happens if a borrower never applies for forgiveness. To close that loophole, the Flexibility Act includes a provision that says that if a borrower fails to apply for forgiveness of a covered loan within 10 months after the last day of the covered period described in point (1) above, such borrower shall make payments of principal, interest, and fees on the loan beginning on the day that is not earlier than 10 months after the last date of the covered period. In other words, Congress has provided a significant deferral on the payment of non-forgiven loan amounts and of interest and fees thereon.

(6) **Exclusion from Payroll Tax Deferrals for PPP Borrowers is Removed** – The CARES Act included a provision that allowed almost all employers to defer the employer's portion of Social Security payroll taxes that would otherwise have been required to have been paid for the period from March 27, 2020 until December 31, 2020, until: (i) December 31, 2021 for the first 50%, and (ii) December 31, 2022 for the balance. However, the CARES Act also included an exclusion that prohibited an employer who was also a PPP borrower from benefiting from that deferral once PPP loan forgiveness was granted (amounts deferred prior to that forgiveness determination could continue to be deferred, but all amounts coming due after that date would not be able to be deferred). The Flexibility Act removes that limitation on PPP borrowers and they can now realize the full benefit of the payroll tax deferral provision regardless of when or if their PPP loan is forgiven. It is important to note that self-employed individuals can also benefit from this deferral provision by deferring 50% of their Social Security payroll tax obligations until the dates provided above.

(7) **Extension of the Repayment Term for PPP Loans . . . Sort of** – All of the provisions of the Flexibility Act discussed above include enacting language that makes it clear that they apply as if included in the CARES Act originally, however, the much-hyped extension of the two-year repayment term for unforgiven PPP loan amounts to a new and improved five-year repayment term isn't what it appears to be at first glance. The five-year repayment term is only applicable to any loan made on or after the enactment of the Flexibility Act (which is today, June 5, 2020). So, the $500B+ in PPP loans previously funded are not guaranteed to have that five-year minimum repayment term. The Flexibility Act does, however, provided that nothing in the Flexibility Act will prevent lenders and borrowers from mutually agreeing to modify the maturity terms of a covered loan to the new minimum term. In other words, Congress didn't want to pull the rug out from under lenders and force them to live with an unanticipated five-year repayment term on previously funded loans but will allow them to agree to an extended repayment term if they desire.

Final Thoughts: The Flexibility Act generally does a good job of living up to its name and is expected to be warmly received by PPP borrowers – and may even trigger additional demand for the remaining $100B+ in allocated PPP funds that haven't yet been funded. If you are one of those employers who have been sitting on the sideline on account of the previous constraints of the program, you may wish to give the PPP another look. For those who have already received their PPP loans, be prepared for additional regulations that will comport the program as previously applied to the new legislation. Among other things, these changes will include revisions to the forgiveness application.

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