May 18, 2020

COVID-19 Paycheck Protection Program Loan Forgiveness Application Released

On Friday, May 15, the Small Business Administration (SBA) released the Paycheck Protection Program (PPP) Loan Forgiveness Application (Application). The Application provides borrowers with the process to apply for the forgiveness of the eligible portion of their PPP loans at the end of the covered period. If approved, borrowers will not be required to pay back the eligible portion of their PPP loans.

The Application provides the borrower with the methodology to calculate the amount eligible for forgiveness. The following are some highlights based on the initial release of the Application. Note that we expect further guidance to be released by the SBA, which may modify some of the initial analysis.

- The SBA introduced the concept of an Alternative Payroll Covered Period. Rather than calculate payroll costs from the beginning of the covered period (which begins on the PPP loan disbursement date), borrowers with a biweekly or more frequent payroll schedule have the option to calculate payroll costs using the eight-week period that begins on the first day of the pay period following the PPP loan disbursement date. This will ease the borrower's administrative burden by not requiring the borrower to calculate partial pay periods.
- The SBA has appeared to expand the time period of payroll costs that are eligible for forgiveness. Payroll costs that are either (i) paid during the covered period or (ii) incurred during the covered period are now eligible for forgiveness. This appears to allow an employer who **incurred** (but didn't pay) payroll costs in the pay period prior to the covered period and then paid these payroll costs during the covered period to have those payroll costs forgiven. In addition, payroll costs **incurred** during the covered period but paid on or before the next regular payroll date are eligible for forgiveness as well. The ability to treat payroll costs incurred prior to the covered period (but paid during the covered period) as forgivable expenses potentially allows borrowers to have more than eight weeks of payroll costs included in their forgiveness calculations.
- Nonpayroll costs (covered mortgage obligations, covered rent obligations and covered utility payments) that are either (i) paid during the covered period or (ii) incurred during the covered period are eligible for forgiveness. This implies that nonpayroll costs that are **incurred prior to** the covered period and **paid during** the covered period are forgivable. In addition, eligible nonpayroll costs incurred during the covered period and paid on or before the next regular billing date, even if that date is after the covered period, are eligible for forgiveness. Similar to the treatment of payroll costs, this means that more than eight weeks of nonpayroll costs could possibly be included in forgiveness calculations.
- The Application clearly excludes prepayments of business mortgage interest. However, consistent with the CARES Act, the Application does not exclude from forgiveness prepayments of business rent or lease payments for real and tangible property or business utility payments. This indicates that prepayments of lease payments and utility payments (but not mortgage interest) **can** be submitted for forgiveness.
- The SBA reiterated that only 25 percent of the forgiveness amount can be nonpayroll costs and at least 75 percent must be payroll costs. The SBA clarified through the Application that the 25 percent limitation is based on the amount being requested for forgiveness after any reductions associated with the reduced salary or full-time equivalent employees "penalties."

- Compensation paid to owner-employees, self-employed individuals and general partners **cannot** exceed eight weeks' worth of 2019 compensation for that person, which also remains subject to the $15,385 cap (the equivalent of $100,000 annually). The Application does not specify whether the reference to 2019 compensation is to the average compensation per week for that year, or to some other reference period during 2019.

We expect the SBA to issue additional regulations and guidance to further assist borrowers and to advise lenders of their responsibilities. Changes to the Application and its instructions may also be forthcoming. Therefore, borrowers may want to seek legal guidance prior to submitting their loan forgiveness application.

For more Day Pitney alerts and articles related to the impact of COVID-19, as well as information from other reliable sources, please visit our COVID-19 Resource Center.

COVID-19 DISCLAIMER: As you are aware, as a result of the COVID-19 pandemic, things are changing quickly and the effect, enforceability and interpretation of laws may be affected by future events. The material set forth in this document is not an unequivocal statement of law, but instead represents our best interpretation of where things stand as of the date of first publication. We have not attempted to address the potential impacts of all local, state and federal orders that may have been issued in response to the COVID-19 pandemic.

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