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Paycheck Protection Program

Employee Headcount Calculation for Eligibility + Affiliation Limits

Small business concerns impacted by COVID-19 (supply chain disruption, decreased customers, staffing challenges, closure, etc.) are eligible for to apply for loans through the Paycheck Protection Program, as are businesses with 500 employees or fewer.

Businesses defined as “Accommodation and Food Services” (in other words, businesses carrying a NAICS code beginning with 72) are allowed to count each location as a separate business for employee count. Essentially, each location can count as a small business if that location has 500 employees or fewer. Affiliation restrictions are also waived for these businesses and eligible franchises.

In order to determine the 500 employee threshold, all employees, including part-time employees, are counted individually.

Companies that are majority-owned by a private equity sponsor are **not** eligible for PPP loans unless (1) they are in the restaurant or hospitality industries where the CARES Act expressly waived the affiliation

requirement; or (2) they can otherwise pass the affiliation test (i.e., there are 500 or fewer employees in total) when you aggregate the loan applicant with its PE owner and the owner's other portfolio companies. We do not yet have more information about the full-time equivalent calculation.

Loan Terms

The PPP loans mature in two years and have an interest rate of 1%. The loan amount is capped at 2.5 times your average monthly payroll from 2019 or \$10 million, whichever is less. Loan amounts that are not forgiven are subject to the applicable interest rate and maturity period.

Lenders will be required to offer complete deferment relief (including principal and interest) for only the first six months.

Permitted Loan Uses

The PPP covers eligible costs incurred by businesses from February 15, 2020-June 30, 2020, including:

--Payroll costs, including salary, paid leave (except leave already covered by the Families First Coronavirus Response Act), allowance for dismissal or separation, healthcare benefit payments, retirement benefits and the like; and

--Payments on preexisting mortgage, rent, utilities and interest on preexisting debt.

Compensation is capped at a salary of \$100,000 (prorated for the period). All forms of cash compensation paid to employees, including housing stipends or allowances count as payroll costs, are subject to the \$100,000 cap.

At least 75% of the loan must be used for payroll, WHETHER OR NOT a borrower is seeking forgiveness on the loan.

Applying for Forgiveness

The Forgiveness Application is available by [clicking here](#) and the Interim Final Rule on Forgiveness is available by [clicking here](#). Applications for forgiveness are subject to approval from lenders; the SBA has discretion on auditing and verifying forgiveness applications, even those under \$2 million. Please note, the SBA has previously stated that they will not apply the same level of scrutiny to loans under \$2 million. In addition, the loan application asks borrowers to check a box if their loan is above \$2 million.

Certain PPP expenditures are eligible for loan forgiveness. The amount of the loan equal to the sum of payroll costs, interest on pre-existing mortgage, rent, and utilities spent within an eight-week period after the loan disbursement is eligible for forgiveness (see below for how to calculate that eight-week period). At least 75% of the forgiven amount of the loan must go toward payroll. The forgiven amount cannot exceed the principal amount of the loan. The forgiven amount of the loan may also be reduced if certain thresholds for employee headcount and wages are not met. Read on for more.

Non-payroll expenses paid AND expenses incurred during the 8-week forgiveness covered period are eligible for forgiveness. This means that a borrower that takes out a loan on 1 April and pays for March's rent on 15 April will be able to count those expenses toward the non-payroll portion of forgivable costs. Similarly, even though the loan ends at the end of May, the borrower will be able to pay for any May rent incurred during the period but not paid until the next scheduled payment period. This applies to payroll as well, even if borrowers elect the alternate base period for payroll calculations. However, prepayments are NOT eligible for loan forgiveness.

Bonuses and hazard pay are eligible payroll expenses for forgiveness. The SBA expressly allows for "salary, wages, or commission payments to furloughed employees; bonuses; or hazard pay" to be allowable payroll costs for forgiveness, as long as they do not exceed an annual salary of \$100,000, as prorated for the covered period (\$15,385 during the 8-week period).

The "covered period" for forgiven expenses is the 8-week period beginning the date the loan is disbursed. Borrowers can elect an alternate period for the payroll costs. The 8-week forgiveness window for non-payroll costs—the interest on pre-existing mortgage, rent, and utilities—must begin the date the loan is disbursed. Regarding payroll, however, borrowers have a small amount of flexibility on the start of their 8-week forgiveness period: A borrower may elect to have the 8-week window start EITHER on the date of loan disbursement OR on the start of the next occurring payroll period. That is, if a borrower received the loan on April 20, but the next payroll period did not start until April 26, the borrower could have the *payroll* portion of the 8-week window begin on April 26. As a note, the opportunity to elect an alternate 8-week covered period for payroll only applies to borrowers with a biweekly (every two weeks) payroll schedule or one that is more frequent. Borrowers who pay payroll on a monthly basis are ineligible for the alternate payroll covered period.

The 8-week covered period for forgiveness may extend past June 30. Although the SBA has not explicitly stated that the 8-week covered period definitely extends past June 30, the SBA's guidance includes a number of examples that extend into July, making it clear that the June 30 date is not a cutoff for the covered period, though it is still relevant for FTE number and salary calculations.

Borrowers are required to retain or restore a certain number of full-time equivalent (FTE) employees by June 30, 2020. To calculate FTEs for ALL PURPOSES in the Forgiveness Application, calculate the average number of hours worked per week for each employee during the relevant period of time (more on those time periods below). Then the SBA offers two options:

1. For each employee, divide their average weekly hours by 40, rounding up to the nearest tenth, with a maximum of 1. (So in other words, even an employee who averaged 48 hours of work per week would still be calculated as 1 instead of 1.2.) Add up all employee numbers to get the total average FTE number, OR
2. Use a simplified method that counts all employees who averaged 40 or more hours per week as "1" and all others as ".5". Add up all employee numbers to get the total average FTE number.

Borrowers must use one method OR the other to calculate FTEs for ALL PURPOSES in the Forgiveness Application. The simplified method is best if the majority of your employees work at least 20 or more

hours per week. However, if your employees' individual work schedules vary, you may find that the first method yields a more favorable FTE number.

FIRST OPTION FOR CALCULATING FTE REDUCTION: FTE Reduction Safe Harbor on Schedule A of the Forgiveness Application. Schedule A of the Forgiveness Application includes an FTE Reduction Safe Harbor. In order to take advantage of this Safe Harbor, the borrower must meet the following requirements:

1. Have a reduction in average FTE between February 15, 2020 and April 26, 2020 *as compared to* the borrower's FTE number for the pay period that includes February 15, 2020.
2. The borrower is able to restore the number of FTEs by June 30, 2020 to the same number of FTEs that the borrower had during the pay period that includes February 15, 2020.

Borrowers who meet these requirements will not have their loan forgiveness amount reduced due to changes in FTE, and are exempt from having to calculate their FTEs using the second method, described below.

SECOND OPTION FOR CALCULATING FTE REDUCTION: Borrowers who cannot meet the FTE Reduction Safe Harbor requirements must retain a certain number of FTE employees during the covered period of the loan to be eligible for forgiveness. To be eligible for forgiveness, during the covered period beginning the date of loan disbursement or the alternate payroll covered period, borrowers must retain a number of FTE employees at the same level as one of two lookback periods:

1. The average number of FTE employees between February 15, 2019-June 30, 2019, OR
2. The average number of FTE employees from January 1, 2020-February 29, 2020.

The borrower can choose which lookback period to use as a basis for employee retention requirements.

Seasonal employers can choose between three lookback periods:

1. The average number of FTE employees between February 15, 2019-June 30, 2019, OR
2. The average number of FTE employees from January 1, 2020-February 29, 2020, OR
3. The average number of FTE employees for a consecutive 12-week period between May 1, 2019 and September 15, 2019.

If the number of FTEs declines during the covered period relative to the lookback period, the borrower's forgiven amount is reduced by the same percentage.

Any reduction in employee wages or salaries above 25% during the covered period will result in a corresponding dollar amount decrease of the forgiven amount. Borrowers who reduce employee salaries or wages during the covered period by more than 25% compared with the employee's salary or wages from January 1, 2020-March 31, 2020 will also be subject to a reduction of the forgiven amount of the loan. Forgiveness is reduced by the DOLLAR amount that the employees' wages are reduced *over* the allowed 25%. So if, for example, an employee made \$500 per week in the first quarter of 2020 and then earned \$300 per week during the covered period, the forgiven amount of the loan would be reduced by \$75 (25% of \$500 is \$125, so any reduction above \$125 is subtracted from the forgiven

amount of the loan). If the borrower eliminates these reductions by June 30, 2020 or earlier, the borrower is exempt from any reduction in the forgiven amount.

Employees who made over \$100,000 in 2019 are not included in this particular calculation. Tipped workers are included.

Employers can exclude from the calculation of reduced wages any employees whose wages were reduced because the NUMBER of hours they worked per week were reduced, not because the RATE of their wages was reduced. For example, an employee that worked 40 hours per week at \$10 per hour in the first quarter of 2020 but worked 20 hours per week at \$10 per hour during the covered period of the loan is not included in the wage reduction calculation.

FTEs who refuse good-faith offers to return to work can be excluded from the FTE reduction calculations if they meet a five-part test.

An employee that refuses a good-faith offer to return to work will not count against a borrower for purposes of the FTE reduction test for forgiveness. Under the latest guidance, for those employees that the borrower offered to re-hire or increase their hours, the employees' refusal will not count against the borrower as long as the following five conditions are all met:

1. The borrower made a good faith, written offer to rehire such employee (or, if applicable, restore the reduced hours of such employee) during the covered period or the alternative payroll covered period;
2. The offer was for the same salary or wages and same number of hours as earned by such employee in the last pay period prior to the separation or reduction in hours;
3. The offer was rejected by such employee;
4. The borrower has maintained records documenting the offer and its rejection; AND
5. The borrower informed the applicable state unemployment insurance office of such employee's rejected offer of reemployment *within 30 days* of the employee's rejection of the offer.

Loan forgiveness will not be reduced if FTE numbers or wages change due to employee actions.

Certain voluntary actions by employees will also exclude them from FTE reduction calculations and wage reduction calculations. For employees that were fired for cause, voluntarily resigned, or voluntarily requested a schedule reduction, employers can count them at their original FTE level and/or wage before the firing/resignation/schedule reduction occurred. Borrowers are required to maintain records demonstrating that "each such employee was fired for cause, voluntarily resigned, or voluntarily requested a schedule reduction." This information should be available to be furnished upon request.

It is important to note that employers are still subjected to a cap on forgiveness based on actual payroll *spend* during the covered period. That is, even though an FTE employee that refuses a good faith offer to return will not impact the *proportional* reduction based on headcount, the *actual* payroll spend during the covered period must still be 75% of any amount forgiven. Therefore, the reduction in payroll spend due to the employee's failure to return, or other allowed causes for a schedule change, will likely lower the employer's payroll spend during the forgiveness period and therefore lower the overall forgiveness amount.

Lenders may scrutinize borrowers to check that they re-hired the same employees.

The application requires the borrower to list each and every employee who:

1. Was employed by the borrower at any point during the covered period
2. Whether or not that employee was employed by the borrower at any point in 2019.

This suggests that the lenders may scrutinize whether employers hired different employees in 2019 and during the covered period, a potentially challenging issue for employers with high turnover.

Owners and partners are required to detail their salaries separately from employees. For owners and partners, the salary eligible for forgiveness is capped at \$15,384 (or an annual salary of \$100,000) or the 8-week equivalent of their applicable compensation for 2019, whichever is lower. This would prevent an owner from increasing their compensation during the covered period to maximize forgiveness by limiting the amount included in the forgivable amount to 8/52 of the owner's compensation for 2019.

Documentation is required. Borrowers seeking loan forgiveness must provide documentation of payroll and proof of payment for other expenses eligible for forgiveness.

Forgiven loans do not count toward taxable income. Canceled indebtedness resulting from forgiveness will not be included in the borrower's taxable income.

Maximum Loan Calculation

The loan amount is the lesser of 2.5 times the 2019 average monthly payroll expenses (except for seasonal employers, which will use the average 12 week period starting February 15, 2019) OR \$10 million.

In addition, the SBA released a document that describes maximum loan amount calculations for a variety of business types including S Corporations, non-profits and partnerships. That document is available [here](#).

The SBA also announced that it would be [capping the dollar amount](#) that each bank could issue under the PPP lending program at \$60 billion, or 10% of the total amount allocated to the program. This change was intended "to ensure equitable access and system integrity" in the process and follows widespread concerns that smaller companies and lenders were not able to take advantage of the PPP loans.

Certification Requirements

The [borrower application](#) requires borrowers to certify in good faith several conditions of the loan:

--The loan will be used to retain workers and maintain payroll or make mortgage interest payments, lease payments, and utility payments, as specified under the Paycheck Protection Program Rule;

--The business was in operation as of February 15, 2020 and had employees for whom the borrower paid salaries and payroll taxes; or paid independent contractors;

--The loan is necessary because of the uncertainty of economic conditions;

--The borrower does not have an outstanding application for a duplicative loan or an intention to enter into any duplicative loan through 2020.

Businesses will *not* have to prove they cannot get credit elsewhere. Businesses will also not have to require collateral or a personal guarantee.

On May 13, the SBA clarified how a borrowers' good-faith certification concerning the necessity of their PPP loan request will be reviewed. In its answer, the SBA said that all borrowers with 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. The SBA noted that due to the relatively small overall value of these loans and the limited resources of the SBA 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."

For borrowers with loans that exceed \$2 million, the SBA noted it is still entirely possible that a borrower made the attestation of need in good faith.

Further, should the SBA determine in the course of its review that a borrower (of over \$2 million) lacked an adequate basis for the required certification concerning the necessity of the loan request, the SBA will seek repayment for the outstanding loan balance and will inform the lender that the borrower is not eligible for forgiveness. The SBA will not pursue administrative enforcement or referrals to other agencies based on its determination of ineligibility under these circumstances. The determination will also not impact the loan guarantee. Previously, SBA had determined that businesses owned by large companies with adequate sources of liquidity that meet other eligibility requirements for the PPP loans must also comply with the certification requirements of the loan program. Specifically, they must certify in good faith that the current economic uncertainty makes the loan necessary. Businesses with substantial market value and access to capital are unlikely to be able to make this declaration in good faith. However, any business that received a PPP loan prior to April 23 and repaid the loan in full by May 18, 2020 will be considered to have made the good-faith certification.

Intersection with Employee Retention Tax Credit

The IRS [published FAQs on the Employee Retention Tax Credit](#) which includes guidance on the [intersection between the PPP loans](#) and the credit. The FAQs clearly state that an employer is not able to benefit from the tax credit and a PPP loan, regardless of when the loan was taken out. That is, if an employer kept employees on staff in order to claim the credit and then received the PPP loan in a different quarter, the employer would still only be able to benefit from one of the programs, despite no overlap in the benefit time period. Further, if a business is considered affiliated with any other businesses under the SBA test and any one of those affiliated businesses receive a PPP loan, all affiliated businesses are prohibited from receiving the tax credit.

If a business returned its PPP loan by the safe harbor date of May 18, 2020, the business is considered as though it never borrowed the loan and is eligible for the employee retention tax credit.

Eligibility for Other Loans

Borrowers are eligible to receive a PPP and EIDL with some caveats: EIDLs that are used for the same costs as the PPP loans must be refinanced into the PPP loan; the refinanced EIDL then becomes subject to the PPP terms of 1% interest and 2 year maturity, but does not impact the loan amount awarded under the PPP. It is also very likely that 75% of the sum total of the PPP loan and the refinanced EIDL is required to be spent on payroll. EIDL loans that are not used for the same costs as payroll do not need to be refinanced into a PPP loan. The EIDL loan NET the advance must be declared on the PPP application. The EIDL advance is subtracted from the forgiven amount of the PPP loan, regardless of how the advance was spent.

PPP borrowers are permitted to borrow through the Federal Reserve's Main Street Lending Facilities.

List of Authorized Lenders

SBA released a list of participating lenders for the PPP program, which is available [by clicking here](#) or on the [SBA PPP landing page](#).

Economic Injury Disaster Loans

Employee Headcount for Loan Eligibility

Businesses with fewer than 500 employees, cooperatives and ESOPs (Employee Stock Ownership Programs) with fewer than 500 employees, nonprofits, and any individual operating as a sole proprietor or an independent contractor are eligible to apply for an EIDL.

Loan Terms

The loan amount will be based on actual economic injury and company's financial needs with a cap of \$2 million, although exhibitors should be aware that loan recipients are reporting that loan amounts have been capped at \$150,000. The interest rate is 3.75% for small businesses and 2.75% for nonprofits, with an up to 30 year term. The covered period for EIDLs is January 1, 2020-December 31, 2020, although applicants have reported significant delays in loan disbursements.

Permitted EIDL Uses

The loan proceeds may be used for working capital necessary to carry your concern until resumption of normal operations, expenditures necessary to alleviate the specific economic injury, providing paid sick

leave to employees, maintaining payroll, meeting increased costs to obtain materials, making rent or mortgage payments, and repaying obligations that cannot be met due to revenue losses.

For EIDL loans made in response to COVID-19 before December 31, 2020, the SBA must waive any personal guarantee on advances and loans below \$200,000, as well as the requirement that an applicant be in business for the one-year period before the disaster and the “credit elsewhere” requirement.

Emergency Grants

The legislation provides for emergency grants to allow an eligible entity that has applied for an SBA economic injury disaster loan (EIDL) to request an advance on that loan of no more than \$10,000, which the SBA must distribute within three days. The advance may be used towards a number of allowable purposes including payroll, sick leave, increased materials costs and rent and mortgage payments. As implemented, the grant has been reduced to \$1,000 per employee with a maximum of \$10,000.

Applicants would not be required to repay such an advance payment, even if they are subsequently denied an EIDL loan. For PPP borrowers, the grant does not count toward the PPP amount but is subtracted from the forgiven amount, regardless of how the advance is spent.

Application Process

As of May 15, 2020, the EIDL loan and advance application is temporarily halted for all industries except agriculture. Should it reopen, the application is available on the SBA website [here](#).

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