

The Paycheck Protection Program Flexibility Act of 2020 has Major Implications for Employers

Related Practices

COVID-19 Task Force

By Peabody & Arnold on June 16, 2020

As discussed in our previous post entitled [Overview of the CARES Act for Employers](#), dated April 20, 2020, the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) was enacted by the federal government to provide financial assistance and relief to eligible employers and employees. A cornerstone of the CARES Act is the Paycheck Protection Program (PPP), which authorizes the Small Business Administration (SBA) to provide forgivable loans to eligible businesses across the United States.

After drawing months of criticism about the difficulties businesses faced in complying with the CARES Act, on June 5, 2020, the [Paycheck Program Flexibility Act of 2020](#) (Flexibility Act) was enacted to address some of the issues with the PPP. Specifically, the Flexibility Act amends the CARES Act by relaxing and extending the eligibility criteria for forgiveness under the PPP. Below is a brief overview of some of the key changes the Flexibility Act makes to the PPP that employers should consider.

Extension of PPP Deadlines

Application Deadline

The CARES Act required borrowers to apply for PPP loans by June 30, 2020. The Flexibility Act extends this deadline to December 31, 2020.

Maturity Date

The Flexibility Act also extends the maturity date for all PPP loans issued on or after June 5, 2020 from two years to five years. Although this does not automatically apply retroactively to PPP loans issued before June 5, 2020, borrowers who received PPP loans before June 5, 2020 may negotiate extensions of their maturity dates with their lenders.

Covered Period for Loan Forgiveness

Initially, the amount of PPP loan forgiveness a borrower would be entitled to under the CARES Act was based on the borrower's payment of eligible expenses during the eight-week period after the origination of the PPP loan (the Covered Period). The Flexibility Act extends the Covered Period to twenty-four weeks, which allows borrowers more time to incur and pay eligible expenses. If, however, the twenty-four week Covered Period would extend beyond December 31, 2020, then the amount of forgiveness will be calculated based on the borrower's use of PPP loan funds during time period between the date when the borrower receives the PPP loan funds and December 31, 2020.

Reduced Spending Threshold for Forgiveness

One of the most significant aspects of the Flexibility Act is that it reduces the amount of the PPP loan that employers are required to spend on payroll costs in order to qualify for forgiveness. Under the CARES Act, in order for employers to qualify for loan forgiveness, seventy-five percent of the borrowed amount needed to be spent on payroll costs, payments of interest on covered mortgage obligations, rent and utility costs. The Flexibility Act reduces that amount, requiring borrowers spend at least sixty percent of the loan funds on payroll costs, while the remaining forty percent can be spent on other eligible non-payroll costs.

On June 8, 2020, the U.S. Treasury Secretary Steven T. Mnuchin and SBA Administrator Jovita Carranza issued a [joint statement](#) notifying borrowers that under the Flexibility Act, borrowers who use less than sixty percent of the PPP loan funds during the Covered Period will nevertheless be eligible for a partial loan forgiveness.

New Exemptions from Forgiveness Reductions

Under the CARES Act, if there is a reduction to the average number of full-time equivalent employees (FTEs) as compared to the previous year, then the amount of a borrower's forgiveness for its PPP loan will be reduced proportionately. Likewise, the amount of forgiveness will be reduced proportionately if an employer reduces the salaries and wages of employees who made less than \$100,000 in 2019 by more than twenty-five percent. However, there is a safe-harbor provision under which borrowers can avoid having their loan forgiveness amount reduced for either of these reasons if, by June 30, 2020, they can restore their number of FTEs or salaries and wages to the same amounts as under the previous year. The Flexibility Act has extended this safe-harbor period from June 30, 2020 to December 31, 2020.

Additionally, existing SBA regulatory guidance sets forth exemptions to reductions of loan forgiveness for borrowers. Specifically, borrowers may be exempt from reductions of loan forgiveness if they document a good faith, written offer to rehire a former employee at the same hours and wages, which the employee rejected, or if an employee was fired for cause, voluntarily resigned, or voluntarily requested and received a reduction in hours.

The Flexibility Act sets forth two additional exemptions to reductions of loan forgiveness if the borrower's loss of FTEs is documented and attributable to either:

- (1) the borrower's inability to rehire prior employees who were employed February 15, 2020, or similarly qualified employees by December 31, 2020; or
- (2) the borrower's inability to return to the same level of business activity before February 15, 2020, due to compliance with worker and customer social distancing, sanitation, or safety guidance or requirements issued by the Department of Health and Human Services (HHS), the Centers for Disease Control and Prevention (CDC) or Occupational Safety and Health Administration (OSHA) between March 1, 2020 and December 31, 2020.

Further Information

As this post illustrates, the Flexibility Act provides necessary guidance for employers to follow in order to qualify for forgiveness of their PPP loans under the CARES Act. We anticipate further regulatory guidance

to be issued by the SBA and the U.S. Treasury Department. This post is not a substitute for legal advice. Employers are encouraged to contact a member of Peabody & Arnold's Employment Law and Litigation Practice Group for further information about the Flexibility Act and its impact on PPP loans.