



Treasury and Small Business Administration Provide Loan Forgiveness Guidance

May 26, 2020

On May 22, 2020, the Department of Treasury and SBA issued Interim Final Rules describing the loan forgiveness process and lenders' and borrowers' responsibilities. The forgiveness feature of the Paycheck Protection Program permits borrowers that meet certain requirements to have up to one hundred percent of their Paycheck Protection Program Loan forgiven tax free. This Interim Final Rule provides additional guidance on several key areas of the Paycheck Protection Program and mirrors changes that were contained in the [Loan Forgiveness Application](#). The Interim Final Rule concerning loan forgiveness is available [here](#) and the Interim Final Rule describing lenders' and borrowers' responsibilities is available [here](#).

Additional Clarification on Payroll Costs Eligible for Forgiveness

In general, payroll costs paid or incurred during the eight consecutive week covered period are eligible for forgiveness (whether the standard "covered period" or the "alternative covered period" introduced by the Loan Forgiveness Application). The Interim Final Rule clarifies when payroll costs are "paid" or "incurred" within each of these covered periods. To highlight:

- For employees who are not performing work but are still on the borrower's payroll, payroll costs are incurred based on the schedule set by the borrower (typically, the day that the employee would have performed work).
- Subject to the \$100,000 compensation cap, as prorated for the covered period, payroll costs can include salary, wages, or commission payments to furloughed employees and bonuses, hazard pay, and additional wages paid to tipped workers.
- Payroll costs are considered "paid" on the day that paychecks are distributed or the borrower originates an ACH credit transaction.
- Payroll costs are generally "incurred" on the date that the employee's pay is earned.
- Payroll costs incurred during the borrower's last pay period of the covered period or the alternative payroll covered period are eligible for forgiveness if paid on or before the next regular payroll date.

Owner-Employee and Self-Employed Individuals Payroll Compensation

The amount of loan forgiveness requested for owner-employees and self-employed individuals' payroll compensation is capped at the lesser of 8/52 of 2019 compensation or \$15,385 per individual in total across all businesses.

Nonpayroll Costs Eligible for Loan Forgiveness

A nonpayroll cost is eligible for forgiveness if it was paid during the covered period or incurred during the covered period and paid on or before the next regular billing date. For example, if a borrower's covered period runs from June 1st until July 26th and it pays its May and June electricity bills during the covered period and its July electricity bill on August 10th, which is the regular billing date, then it may seek loan forgiveness for the May, June, and a portion of its July electricity bills. The loan forgiveness for the July electricity bill would be prorated through the end of the covered period on July 26th.

The Interim Final Rule also clarifies that prepayments of mortgage interest and advance payments of mortgage interest are not eligible for loan forgiveness.

Calculating the Number of Full-Time Equivalent Employees

The Interim Final Rule requires borrowers to calculate the number of full-time equivalent employees based on a 40-hour work week. For purposes of this calculation, borrowers must divide the average number of hours paid for each employee per week by 40, capping this quotient at 1.0. For part-time employees, borrowers may calculate full-time equivalency either by using the average number of hours the part-time employee was paid per week; or using a full-time equivalency of 0.5 for each part-time employee. Borrowers may select only one of these two methods, and must apply that method consistently to all part-time employees.

Employees Rejecting Offer of Rehire or Restoration and Loan Forgiveness

The CARES Act requires certain reductions in a borrower's loan forgiveness amount based on reductions in full-time equivalent employees or in employee salary and wages during the covered period, subject to an exemption for borrowers who have rehired employees and restored salary and wage levels by June 30, 2020. In addition to employees that have rejected an offer to rehire, the SBA now permits the borrower to exclude the following from the reduction in full-time equivalent employees:

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 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 with 30 days of the employee's rejection of the offer.

The Interim Final Rule states that further information regarding how borrowers will report information concerning rejected rehire offers to state unemployment insurance offices.

SBA Review of Paycheck Protection Program Loan Files

In addition to its previous statements that the SBA intends to audit loan files for all loans in excess of \$2,000,000, the SBA affirms its ability to review loan files, regardless of loan amount, as it deems necessary. If the SBA determines that review of a loan file is appropriate, it will notify the lender who then must notify the borrower within five business days. Within that five business day window, the lender is also responsible for transmitting the borrower's initial application, the application for forgiveness, the executed promissory note, a signed and certified account transcript, all supporting documentation, and any other documents relating to the loan requested by the SBA.

If the SBA determines that a borrower was ineligible for the PPP loan during its review then the lender will not be eligible for a processing fee. In addition, if the SBA determines that a borrower was ineligible to receive a Paycheck Protection Program Loan within one year after the disbursement date then the SBA will seek repayment of the processing fee from the lender.

UKS will continue to monitor this developing issue and provide updates as necessary. The UKS Covid-19 Response Team is standing by, ready to help you and your business with questions or concerns regarding a wide range of legal issues relating to the Covid-19 pandemic. For further information on the Paycheck Protection Program, please contact Attorney [John F. \(Jef\) Wolter](#), Attorney [Gregg J. Lallier](#), or Attorney [John J. Alissi](#).

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Udike, Kelly & Spellacy, PC would like to thank associate [Michael J. Paciorek](#) for his contributions to this client alert.

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