

**MEMORANDUM**

DATE: April 20, 2020

RE: Paycheck Protection Program: Loan Forgiveness

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The Paycheck Protection Program (“PPP”) loans authorized by the CARES Act include a unique feature – loan forgiveness. If your business has received a PPP loan, below are some guidelines to help you maximize the loan forgiveness amount.

- **8 Weeks** – You have 8 weeks from the date you receive loan funds to spend the money.

The Act states that loan forgiveness is available for costs incurred and payments made during that 8-week period. Presumably this means that you must pay expenses during the 8-week period that also accrue during the 8-week period. However, there is an open question regarding whether you may pay expenses during the 8-week period that were accrued beforehand or whether you may accrue an obligation to pay expenses during the 8-week period and then pay them afterward. We are awaiting SBA guidance on this issue.

- **Spend 75% on Payroll** – You must spend at least 75% of the money on payroll costs. 75% is a minimum – you may spend more on payroll if you want.

Payroll costs mean: (1) salaries, wages, commissions, or similar compensation; (2) cash tips or equivalent; (3) vacation, parental, family, medical, or sick leave payments (except to the extent a credit for them is allowed under the Families First Coronavirus Response Act); (4) allowances for dismissal or separation; (5) payments (including premiums) for group healthcare benefits; (6) retirement benefit payments; and (7) payment of state or local taxes on employee compensation.

As a reminder, wages of any individual over \$100,000 (annualized) are not eligible for forgiveness, and are not even an eligible PPP loan expense. Because the forgiveness is based on an 8-week period, and not monthly, the amount of forgiveness for wages paid to any such employee is \$15,385.

One open question is whether you can pay bonuses or “hazard pay” to employees in order to reach the 75% minimum or to incentivize furloughed employees receiving unemployment to return to work. Because there is nothing in the CARES Act or the current SBA rules addressing that question, there is nothing at this time that prohibits it.

- **Reductions Affecting Loan Forgiveness** – Remember that laying off employees and reducing wages by more than 25% for employees earning less than \$100,000/year (annualized) can affect loan forgiveness.
- **Reduction in Employees:**

Calculate the average monthly number of FTE employees you will have over the 8-week period. This calculation should be based on FTEs, not simply the number of people employed by your business.

Compare that number to the average monthly number of FTE employees your business had during one of the following periods, whichever is better for you: (1) February 15-June 30, 2019 or (2) January 1-February 29, 2020.

If the number of FTEs over the 8-week period is lower, your loan forgiveness amount will be reduced by the same percentage as the reduction in FTEs.

HOWEVER, any reduction in FTE employees between February 15-April 26 will *not* affect the loan forgiveness amount if you eliminate the reduction in FTEs by June 30. Therefore, if you're going to furlough any (additional) employees, you should do so by April 26 and then rehire them by June 30.

Again, base this calculation on FTEs, not simply the number of people working for you. You can make up for a reduction in 1 FTE employee by hiring 2 half-time employees by June 30.

Open question – What if you don't hire enough employees by June 30 to fully eliminate the reduction? We don't know whether the Act requires full restoration of FTEs in order to "cure" and get full loan forgiveness or if partial restoration of FTEs will still give you a partial "cure" and partial restoration of loan forgiveness. For example, let's say you lay off 3 FTEs and you bring back only 2 FTEs, and your normal average is 10 FTEs. We don't know whether this means you did not cure and so only get 70% forgiveness, or whether you partially cured and so get 90% forgiveness.

Additional open question – If you are a partnership paying partners with a PPP loan, do you include partners in the FTE employee count? We think so, but await further guidance on the issue.

- **Reduction in Wages:**

First, calculate the amount you intend to pay to employees who earn less than \$100,000/year during the 8-week period.

Then, for each employee, compare that amount to their pay during the most recent full quarter in which the employee was paid. For most employees, that will be the first quarter of 2020.

If any employee's pay will be reduced by more than 25%, your loan forgiveness amount will be reduced dollar-for-dollar by the reduction in pay.

HOWEVER, any reduction in pay between February 15-April 26 will not affect the loan forgiveness amount if you eliminate the reduction in pay by June 30.

- **Nonpayroll Expenses** – The other expenses eligible for forgiveness are rent under a lease agreement, utilities, and mortgage interest payments (which cover loans for both real property and personal property), so long as the lease or mortgage was in effect or the utilities were in service before February 15. The Act says that you cannot prepay mortgage interest payments, so we don't know whether you can or cannot prepay rent or utilities. We await SBA guidance on the issue.
- **Allowable Loan Uses** – Some clients have asked whether they can spend PPP loan funds on anything they want if they don't care about loan forgiveness. The answer is no. If you use loan funds for unauthorized purposes, you will have to repay that money (right away, not over the 2-year loan term). Moreover, if you knowingly use the funds for unauthorized purposes, you can be subject to additional liability for fraud.
- **What are Allowable Loan Uses?** – As a reminder, PPP loans may be used for payroll costs, rent for leases that were in effect as of February 15, 2020, mortgage interest payments (from loans for both real and personal property) in effect as of February 15, 2020, utility costs, and interest payments on any other debt obligation incurred before February 15, 2020. At least 75% of the PPP loan proceeds MUST be used for payroll costs. Even though the Act allowed for broader uses, the SBA rules specifically limit the uses to these specific categories. Also remember that interest on other debt obligations is NOT included within loan forgiveness, but each of the other categories is eligible for loan forgiveness.
- **Payroll Tax Credit Eligibility** – Remember, if you receive a PPP loan, you are not eligible for the Employee Retention Payroll Tax Credit provided under the Act; and if you receive any loan forgiveness, you are not eligible to defer payroll withholdings as allowed under the Act.
- **More SBA Rules Forthcoming** – There are many open questions on how loan forgiveness works, and the above touches on only a few of them. The SBA has stated that it will issue specific rules on loan forgiveness, and it has until April 26 to issue them. Those rules likely will change some of the advice above. Unfortunately, many businesses have already received their PPP loans and have started spending the money using their best faith efforts to interpret the rules, so hopefully the guidance will come out soon and allow flexibility.
- **Oregon Corporate Activity Tax** – Those of you in Oregon know that the Oregon Corporate Activity Tax ("CAT") first quarterly payment is still due April 30, 2020. Oregon has not issued any guidance on whether (a) the forgivable portion of the PPP loan counts as "corporate activity" that must be taken into account for CAT payments; and (b) if not, whether the payroll paid with those funds can reduce your CAT payments. The Oregon Department of Revenue has promised guidance soon.

Update regarding PPP Loan Forgiveness  
April 20, 2020

For more information, please contact Katherine Moyer at [kmoyer@hershnerhunter.com](mailto:kmoyer@hershnerhunter.com) or Pablo Valentine at [pvalentine@hershnerhunter.com](mailto:pvalentine@hershnerhunter.com).

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