MEMORANDUM

DATE: May 27, 2020

RE: Interim Rules on Loan Forgiveness

On May 22, 2020, the SBA released new interim rules on loan forgiveness, just in time for some holiday weekend reading. Many of the rules simply backstop the loan forgiveness application, but they have shed light on a few other questions. We will hit the highlights below, but won't duplicate answers we learned from the loan forgiveness application (see our previous article here), except for some fundamentally important ones.

Loan forgiveness is available for "costs incurred and payments made" during the 8-week period after loan origination (the covered period). What does "costs incurred and payments made" actually mean?

This phrase should be read in the disjunctive and refers to two separate categories. In other words, it means "costs incurred OR payments made" during the covered period.

- Costs incurred during the covered period may be included in loan forgiveness as long as they are paid on the next regular payment date. The rules specify that payroll costs are incurred on the day that an employee works, but it remains unclear whether you can include Saturdays and Sundays for salaried workers if they don't actually work those days. Non-payroll costs should be prorated. For example, if your covered period ends on July 26, you can obtain loan forgiveness for utility costs through July 26 as long as the bill is paid on the next payment date, even if the payment date is after July 26. However, we don't know whether the same rule applies to certain prepaid costs, such as the employer's share of a health insurance premium paid before the covered period but covering a portion of the covered period.

- It is harder to determine which "payments made" can be included in loan forgiveness. We know that the entire first payroll payment in the covered period can be included in forgiveness, even if that payroll includes hours worked before the covered period. Unfortunately, we don't know much more. For example, can the employer's contribution to a retirement plan paid during the covered period, but covering previous months, count toward forgiveness? What about a prepayment of rent for months occurring after the covered period?

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Can you pay employees for more days or hours than they actually worked? Can you pay furloughed employees?

Yes, you can pay employees not to work, and those payments are available for forgiveness, but are not to exceed $100K on an annualized basis.

Can you pay bonuses to employees?

Yes, bonuses and hazard pay count as payroll costs eligible for forgiveness. However, an employee's total compensation during the covered period may not exceed $100K on an annualized basis. It is unclear whether you include the bonus in the annualization calculation, although we assume you do not. For example, if an employee's compensation during the covered period is $14,400, then their annualized compensation would be $93,600, so you can pay them a bonus of up to $6,400 during the covered period, which would be included in forgiveness.

Are payments to a business owner eligible for forgiveness?

Yes, compensation paid to a business owner is eligible for forgiveness at the lesser of (a) $15,385 or (b) 8/52 of their 2019 net profit or earnings from self-employment. No additional forgiveness is available for retirement plan or health insurance contributions for business owners. It is unclear how this applies to folks who were self-employed for only part of 2019. It would be reasonable to assume your 2019 self-employment amount could be annualized, as the rules provide for in other areas, but there is no guidance on this issue.

Can I still get loan forgiveness if my covered period expires after June 30, 2020?

Yes, expenses after June 30, 2020 are still eligible for forgiveness as long as they are incurred or paid within your 8-week covered period.

Loan forgiveness is reduced if your FTEs are reduced during the covered period as compared to one of two measuring periods. Does that apply to employees who were laid off and now don't want to come back to work?

No, those employees don't count against you. We now have more detail on offers to rehire:

- You must make a good faith, written offer to rehire the employee during the covered period.
- The offer must be for the same salary or wages and the same number of hours that the employee was earning in the last pay period before they were laid off or their hours were reduced.
- The employee must reject the offer.
- You must maintain records documenting the offer and its rejection.
- You must inform the state unemployment insurance office of the rejected offer of employment within 30 days after the rejection.

How do you calculate FTEs for the covered period?

FTE is calculated on the basis of a 40-hour work week. Employees who were paid for 40 or more hours per week count as 1.0 FTE. For employees who were paid for fewer hours, you may choose one of two calculation methods: either (a) divide the average number of hours worked by 40, rounded to the nearest tenth; or (b) use a simplified method where any employee who was paid for fewer than 40 hours per week counts as 0.5 FTE. You must choose one FTE calculation method and apply it across the board; you can't apply different methods to different employees.

Is my loan forgiveness reduced if I both reduced an employee's hours and also reduced their wages by more than 25%?

Yes, but a reduction in hours should not count as a reduction in wages. The rules clarify these are two different scenarios that should be evaluated separately.

In order to avoid a reduction in loan forgiveness, do I need to both restore all FTEs reduced during the safe harbor period (i.e., February 15 through April 26) by June 30, 2020 and also restore all wages reduced during the safe harbor period by more than 25% by June 30, 2020?

No, the rules have separated these situations into two categories. If you restore FTEs reduced during the safe harbor period by June 30, 2020, your loan forgiveness will not be reduced by reductions in FTEs. If you restore wages reduced by more than 25% during the safe harbor period by June 30, 2020, your loan forgiveness will not be reduced by wage reductions. However, bear in mind that you must *fully* restore FTEs or wages in order to avoid a reduction in loan forgiveness.

For more information, please contact Katherine Moyer at kmoyer@hershnerhunhter.com or Pablo Valentine at pvalentine@hershnerhunter.com.

This summary provides general information and should not be construed as legal advice or a legal opinion on any specific facts or circumstances. If you have specific legal questions, you are urged to consult with your attorney concerning your own situation.