

**MEMORANDUM**

DATE: May 19, 2020

RE: SBA Guidance regarding PPP Loan Forgiveness

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We have all been eagerly awaiting guidance from the SBA on various PPP Loan forgiveness questions, and we now have that in the form of the loan forgiveness application (available [here](#)). As with much of the SBA guidance, the application answers some questions, leaves other questions open, and raises a few new ones.

**Highlights of the Application**

**1. Costs Incurred Now and Payments Made Later.**

The CARES Act states that loan forgiveness is available for permitted “costs incurred and payments made” during the 8-week period after loan origination. What does “costs incurred and payments made” mean?

It turns out that it means “costs incurred” or “payments made” (i.e., these are two separate categories). “Payments made” are the amounts paid during the covered period.

For costs incurred, you may include them if they are actually paid in the next scheduled payment cycle. For example, payroll costs that are incurred but not paid during the 8-week period are eligible for forgiveness if they are paid on or before the next regular payroll date. The same goes for non-payroll costs incurred during the covered period, but not paid until the next billing date.

Bear in mind that you may not double up expenses, i.e., if a cost was both incurred and paid in a period, you get to count it only once.

**2. Costs Incurred Earlier and Payments Made Now.**

Do you get forgiveness for eligible costs paid during the covered period, even if they were incurred before the covered period (even last year)?

Under the definition of eligible payroll costs, some payroll incurred before the covered period and paid during the covered period counts towards forgiveness, but the section does not mention how to account for employee benefits. In addition, the application simply states that non-payroll costs paid during the covered period count towards forgiveness (up to the 25% limitation). None of this gives a satisfying answer as to how far back you can go, but, read literally, because payments made

during the covered period count toward forgiveness, they arguably count, no matter when incurred. We hope for additional guidance on this.

### **3. Costs Paid Earlier and Incurred During the Covered Period.**

Do you get forgiveness for costs paid before the covered period but that are either not incurred or partially incurred during the covered period? For example, if you paid rent on April 1, and received your loan on April 16, do you get to include half of April rent as “incurred” during the covered period and count it toward forgiveness?

While the issue is not directly addressed, it appears that payments made before the covered period but incurred (i.e., accrued) in part during the covered period are not eligible for forgiveness. That is because costs incurred count toward forgiveness if they are “paid on or before the next regular billing date, even if the billing date is after” the covered period. It is possible to interpret the sentence to allow the practice, but we believe that interpretation is strained. We hope for additional guidance on this.

### **4. Payroll Periods.**

What if your payroll period doesn’t match up with the 8-week covered period?

Employers with biweekly or more frequent payroll periods are allowed to use an alternative 8-week period for calculating payroll costs only. Under this alternative, the 8-week covered period for payroll only begins with the first payroll day of the first pay period following the disbursement. All other costs are still determined using the 8-week period from loan origination.

### **5. FTE Calculation.**

Loan forgiveness is reduced if your average monthly number of FTEs during the 8-week covered period is less than your average monthly number of FTEs compared to either (a) February 15- June 30, 2019 or (b) January 1-February 29, 2020. How do you calculate FTEs to determine if your loan forgiveness is partially reduced?

FTEs are calculated based on a 40-hour workweek. For each employee, you will calculate the average number of hours paid per week divided by 40, rounded to the nearest tenth. Alternatively, you may calculate each employee at or above 40 hours as 1.0 FTE, and all others as 0.5 FTE.

### **6. FTE Reductions.**

For the FTE calculations, are you required to include all employees who no longer work for you?

No. None of the following employees count against you as a reduction in FTEs: employees who voluntarily resigned, voluntarily requested and received a reduction of hours, were fired for cause, or to whom you made a good-faith written offer to rehire that was rejected by the employee. Even though not stated, we would hope that an employee who died also would not count against you because it was outside your control.

We are not sure how to count employees who were required to stay at home (for example, because they have COVID-19, had children at home, etc.). Maybe these employees count as employees that “voluntarily requested and received a reduction of hours.”

### **7. Wage Reductions.**

Loan forgiveness is reduced if you reduced employee compensation (for employees earning less than \$100,000/year) by more than 25% during the covered period as compared to January 1 through March 31, 2020. How do you compare an 8-week period with a three-month period?

Use the average annual salary or wage.

### **8. Cure for Reduction in FTEs or Wages.**

If you had a reduction in FTEs or a reduction of more than 25% in wages between February 15-April 26, 2020, you can cure the reduction of loan forgiveness by restoring the FTE or wage reduction. Can you get a partial cure?

No, you must fully restore the FTE or wages for a “full” cure; otherwise you do not receive any cure.

**NOTE:** If you did not have a reduction in FTE or wages between February 15-April 26, 2020, you are not eligible for any cure, even if you restored FTE or wages reduced before February 15, 2020 or after April 26, 2020. While the SBA seems to be carefully following the statutory language, we are not sure why, on a policy level, this is so strict.

### **9. Rent.**

Does “rent” include amounts paid under personal property (i.e., equipment) leases?

Yes.

### **10. Prepayment of Expenses.**

Can you prepay expenses?

The application tracks the statutory language in prohibiting prepayment of mortgage interest, but does not address prepayment of any other expense. While positive guidance would be better, because they do not specifically prohibit prepayment of other expenses, it is arguably allowable. Of course, the 25% cap on nonpayroll expenses may make this question largely theoretical.

### **11. Bonuses or Hazard Pay.**

Can you pay a bonus or hazard pay to employees and still include that as payroll?

That specific issue is not addressed in the application, but the language continues to be broad and would seem to include any such payments, subject to the \$100,000 annualized salary cap.

## **12. Owner Benefits.**

Will you receive forgiveness on “employee” benefits (e.g., health insurance premiums, defined contribution plan payments, etc.) for shareholders, partners or sole proprietors?

One Interim Rule stated that benefits for “owners” are not included within the definition of payroll for forgiveness, and the structure of the loan forgiveness application suggests that payments for these benefits are not eligible for forgiveness.

## **13. Documentation for Loan Forgiveness.**

What documentation do you need to provide when you apply for loan forgiveness?

Page 10 of the application provides a long list of required and recommended documentation. Documentation needs to be retained for 6 years after the date of loan forgiveness or repayment.

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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