PPP Flexibility Act of 2020 Signed into Law

Legal Alert

June 5, 2020

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Congress has passed, and the President has signed into law, the PPP Flexibility Act of 2020 (the "Flexibility Act"). The Flexibility Act is designed to provide employers/borrowers who received, or will receive, loans under the Paycheck Protection Program with some additional time to use those funds and have their loans forgiven. Undoubtedly, this will be helpful to many such employers/borrowers, especially those who have not yet been able to reopen and/or have not been able to resume full-time operations. However, as with the Paycheck Protection Program ("PPP") itself, the Flexibility Act raises questions that will require future regulations and/or guidance to answer.

Here is a quick summary of the most important provisions of the Flexibility Act and some of its unanswered questions:

1. The "covered period" of a loan is extended from eight to 24 weeks, so the borrower has 24 weeks to use the loan proceeds for covered expenses. The borrower does have the ability to elect to have the covered period of the loan remain at eight weeks.
2. In the event that the borrower does not have 100% of its loan forgiven, it may be able to get its lender to agree to extend the term of the loan from two years to five years. The term is a minimum of five years for loans made after the date of enactment of the Flexibility Act. However, the lender and the borrower can agree to extend the term of loans made before that date, but it's not mandatory.
3. The June 30th date for the FTE employee and wage reduction safe harbors is replaced with December 31st. The actual language of the safe harbor requires that "not later than December 31, 2020" the eligible employer borrower eliminated the FTE employee or the wage reduction. As with the original language, this is a concern. Does it mean that if the borrower meets the safe harbor at any time until December 31st it can qualify for 100% forgiveness? What if it meets the requirement on July 15th but then it doesn't meet it on August 1st?
4. The Flexibility Act says that a borrower can still qualify for forgiveness without the FTE headcount reduction if it can "document an inability to return to the same level of business activity as such business was operating at before February 15, 2020, due to compliance with requirements established or guidance issued by" HHS, CDC or OSHA during the period March 1 – December 31, 2020 related to social distancing, among other things. While some borrowers will clearly be able to meet this requirement, for others, this introduces a certain amount of subjectivity that could make reliance on this provision a bit risky.
5. To receive forgiveness, 40% (rather than 25%) of the loan proceeds can now be used for non-payroll costs. This will be helpful for those borrowers who have rent, mortgage interest and utilities to pay but have not been able to fully reopen.

6. The date of the first repayment of any portion of the loan that is not forgiven can be extended until the date that SBA remits to the lender the amount that is forgiven. That's longer than the original six months and is likely to be about 10 months.
7. Payroll taxes can be deferred even if there is loan forgiveness. This is a reversal of a provision of the original PPP. It provides a deferral of tax, not a reduction or elimination, and adds some complexity, but it may be worth considering if cash flow is a serious problem.

If a borrower/employer cannot use the full amount of its loan in its original eight week covered period, then certainly it should not elect to keep the original eight week covered period but rather keep the loan outstanding for up to the 24 weeks, making sure to use at least 60 percent on payroll expenses. However, if a borrower/employer <u>can</u> use the full loan amount in eight weeks, it might opt for certainty by electing to keep its eight week covered period, particularly if it can qualify for the FTE and/or wage/salary reduction safe harbors by June 30th. For those who received their PPP loan in late April, unfortunately we may not get any further guidance on the safe harbors before the 8-week election decision will have been made.

We are available to help you in your planning for the use of PPP loan proceeds to maximize the forgiveness available under the Paycheck Protection Program.

For more information on the contents of this alert, please contact Steve Greenberg, Tami Bogutz Steinberg, Alan Zuckerman, or any member of our Taxation Practice Group.

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