PPP FLEX ACT: NEW INFORMATION

Last Wednesday, June 3, the Senate passed by unanimous consent the Paycheck Protection Program Flexibility Act, which had previously passed the House on a 417-1 vote. The Act became Law officially on Friday, June 5. The legislation modifies the original requirements with hopes of making loan forgiveness more flexible and, therefore, more attainable. And, so far, it appears that may be the case.

Questions

Following a review of the Act last week, we had some questions that we hoped would be addressed in the coming days. For some of these, there have been answers.

1. 75/25 ratio between payroll costs and non-payroll costs has been changed to 60/40. Will the 60% be a required threshold to receive any forgiveness?

   In an Interim Final Rule released Wednesday, June 10 by the SBA, it was confirmed that borrowers that use less than 60% of their PPP loan amount for payroll costs during the forgiveness covered period will still be eligible for partial loan forgiveness. This is consistent with the way in which the 75/25 ratio had been applied.

2. If an employer elects to use the 24-week period, are they required to wait until the end of that period to apply for forgiveness? And, if so, will they be held to the standards for FTE count and Salary/Hourly Wage averages throughout the entire 24-week period?

   Based on testimony Wednesday at a hearing in front of Congress, it was announced by Secretary Mnuchin that borrowers can apply for forgiveness as soon as they have exhausted loan funds and do not need to wait a full 24 weeks. We have not yet seen specific guidance on this but it appears you may be able to extend your Covered Period beyond the original 8 Weeks for only as long as it takes for costs to equal the Loan Amount. We will keep you posted.

3. The 8-week max compensation was $15,385 which was $100,000 over 8 weeks. For a 24-week period, does that mean that the new max will be $100,000 prorated over that time frame or $46,153?

   We have not heard any comments about this possible change. However, given the flexibility in extending beyond the original 8-Week Covered Period on an as needed basis, described in 2. above, it would seem unlikely that a change in the max compensation will take place since the number of weeks or pay periods over which the prorated amount would apply is a moving target.

4. The Act provides for some relief for FTE count but it is conditioned upon meeting 1 of 2 criteria. We believe there is need for some clarity for how exactly these criteria can be met

given a wide array of employer circumstances. The language for the relief says a borrower would not be penalized for reductions in staff if it can document either of the following as of December 31, 2020:

- *that the borrower was unable to rehire previously laid off workers or similarly qualified workers as replacements; or*
- *that the borrower is unable to return to the same level of business activity (as existed on February 15) due to compliance with governmental requirements or guidance related to social distancing, sanitation standards or any other worker or customer safety requirements related to COVID-19.*

We have not seen further clarification on these conditions.

5. We've seen mixed messages about exactly how the payroll tax will work. In one summary we saw a 'credit' but cannot yet confirm that. How will the payroll tax deferral work? Also, will the deferral now be available for PPP employers who have already received Loan Forgiveness?

   Employers may voluntarily defer their portion of FICA Taxes through December 31, 2020. Half of the amount of the deferral balance will be due by December 31, 2021 and the remaining balance by December 31, 2022. No interest will be charged on the balance owed. Previously, borrowers of PPP loans were required to stop their deferrals once they received confirmation of full or partial loan forgiveness. Now, the Flex Act allows borrowers to continue the deferrals even after loan forgiveness has been obtained. There is no credit attached to this provision.

What to do next

We continue to believe that the best action right now is to continue monitoring your expenses, build your file and allow some time to go by before submitting your application for forgiveness.

Statistics indicate that 30% of PPP loans will hit their 8-week point as of June 14. Since around 4.5 million employers took advantage of the loans, that means up to 1.35 million could begin the Forgiveness Process as early as this week.

The deadline to complete the application is 10 months beyond the end of your Covered Period. Even if you elect to use your original 8-week period and had an ending date as early June 2, you still have until April 2021 to apply. We think there is merit to taking some time to develop your application strategy.

There will be no principle or interest payments due and no loan repayment for 10 months, there is no pressing cash flow burden that depends on the speed with which you receive forgiveness. Also, unlike the initial loan application process, which had a limited amount of resources when it first rolled out and was on a "first come, first serve" basis, loan forgiveness is now a statutory provision available to you as long as you meet all the requirements to your lender's satisfaction. In other words, your loan forgiveness is not at risk now simply based on the volume of borrowers who may apply before you.

The banks will be seeing a number of situations for which there is little or no guidance and they will have to be working through their decision making process. Possibly, they will make requests to SBA for further guidance. We believe you will benefit by allowing this process to take place before you submit your own application.

It's likely that the banks will hone their processes, develop protocols and become more efficient as they process a quantity of loans. Plus, that gives you time to make some key decisions such the covered period election, shore up any shortfalls in spending and address any deductions resulting from FTE counts and/or Salary/Hourly Wage comparisons.

The goal for the loan forgiveness application process should be to attain maximum forgiveness and we've now all been given the "gift of time" to get it right. These recent rulings regarding the amount of flexibility you will have only reinforce the idea of allowing time to help you.

This may be a good opportunity for you to work with your CPA, Lender or Payroll Provider to produce a "trial" Loan Forgiveness Application. This is also the time to be gathering your documentation into your PPP file.

If you have a deficit in your FTE count, consider reviewing your lookback period roster and compare to your current employee roster. Determine if there were employees who chose not to return to work, resigned or who were terminated for cause. Take time now, while you have a clear memory of what took place, to document the circumstances. If there was a written notice, copy it for the file. If it was verbal, describe what took place. If someone just didn't show up, document that. Any employees who meet this description are allowed to be added back to your FTE count and help reduce your deficit.

If you have other situations that are not defined by the law or subsequent SBA guidance, document those as well so you can communicate with your lender as needed. For example, if there was a disability or a death that has prevented someone from working for you, that is clearly beyond your control. If you sold a division and the employees who worked there were transferred out of your employment, document that. While there is no assurance that those will count as FTE Exceptions, at least you should be able to have the discussion with your lender.

Regarding the forgiveness reduction for Salary/Hourly Wage Comparison, there can be many nuanced situations that are not yet addressed by SBA. For example, assume you had an employee, Mary, who was out on disability during the first part of the loan covered period, but returned to work in time to receive 3 pay checks.

You still may not have a reduction for her FTE count, but now that she is back, she is going to be included as a current employee and it will appear as though her wages were short as compared the 1st Quarter 2020 Lookback Period.

We think it's reasonable to only compare her current wages that she actually received to a similar time frame and average in the Lookback Period. But this has not yet been addressed in guidance or regulations. Short of any new guidance, we believe this will be part of your discussion with your lender. It will be important to document exactly what took place including dates she was out, compensation and time frame she was paid, copies of any claim notices, documentation from the employee plus email correspondence that may have taken place.

In the long run, lenders are going to have to make some judgement calls and we believe the SBA has given them the latitude to do that.

Now is the time to be building your case and your file. There will be plenty of time to submit for your Loan Forgiveness. Don't hurry that at this point. We're all in uncharted territory so strategy and thought seem to be more valuable than expedience at this point.

If you have thoughts, questions or concerns about any of this, please feel welcome to reach out.

For More Information

For more information or assistance from our team, please contact us at **210–495–8474**, toll-free at **1–888–757–2104**, or **Info@BFGonline.com**.

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