

## **SBA on PPP Loan Forgiveness**

On May 22, 2020, the Small Business Administration (SBA) in consultation with Treasury released an Interim Final Rule addressing PPP loan forgiveness. This long-awaited guidance provides some clarity to questions that had been raised about how PPP loan forgiveness would be treated by the SBA.

### ***General Process for PPP Loan Forgiveness***

To receive loan forgiveness, a borrower must complete and submit a Loan Forgiveness Application Form (SBA Form 3508 or an equivalent form from the lender) to its lender. The lender will, in general, review the application and make a decision within sixty (60) days. If a lender determines that the borrower was ineligible for its PPP loan, the loan will not be eligible for forgiveness.

### ***Timing for Payroll Costs***

In general “payroll costs” paid or incurred during the eight consecutive weeks (56 days) after the disbursement of the PPP loan, which is also known as the “covered period”, are eligible to be forgiven. Payroll costs are incurred the date the employee earns the pay, and are paid the date checks are distributed or an ACH credit transaction is initiated. There is a limited exception to the “paid and incurred” rule; payroll costs incurred during the borrower’s last pay period of the covered period are eligible for forgiveness if paid on or before the next regular payroll date.

Borrowers with bi-weekly (every two weeks) or more frequent payroll periods may, only with respect to the computation of payroll costs, use an “alternative payroll covered period”, which begins on the first day of the first payroll cycle in the covered period and continues for the following eight weeks.

### ***Bonuses and Hazard Pay***

One question that has arisen is whether an employer may make either hazard pay or retention bonuses to workers, and the extent to which payment to furloughed workers are eligible for forgiveness. The SBA has affirmed that an employer may indeed make hazard payments, bonuses, and payments to furloughed workers and receive loan forgiveness.

### ***Owner-Employee and Self-Employed Individual Caps***

The SBA has reiterated that the amount of loan forgiveness for owner-employees and self-employed individuals’ payroll compensation can be no more than the lesser of 8/52 of 2019 compensation or \$15,385. Owner-employees are capped by the amount of their 2019 employee cash compensation and employer retirement and health care contributions made on their behalf. Schedule C filers are capped by the amount of their owner compensation replacement, calculated based on 2019 net profit as described in prior guidance. General partners are capped by the amount of their 2019 net earnings from self-employment (reduced by claimed section 179 expense deduction, unreimbursed partnership expenses, and depletion from oil and gas

properties) multiplied by 0.9235. No additional forgiveness is provided for retirement or health insurance contributions for self-employed individuals, including Schedule C filers and general partners, as such expenses are paid out of their net self-employment income.

### ***Additional Guidance Regarding Nonpayroll Costs***

Nonpayroll costs (rent payments for personal and real property, interest on a secured obligation, and utility payments) are periodic costs. Depending on the due date of payment and the timing of the covered period, there was some question about situations where costs were incurred during the covered period, but not paid. The SBA clarified that nonpayroll costs that are incurred during the covered period and paid on or before the next regular billing date, even if the billing date is after the covered period, are eligible for loan forgiveness (for the portion of the billed amount that was within the covered period). The SBA also clarified that advance payments on secured obligations are not eligible for loan forgiveness, as they are statutorily excluded “prepayments.”

### ***Reductions to Loan Forgiveness Amounts (Bona-Fide Written Offers to Rehire)***

If a borrower laid-off or reduced the hours of an employee, it is likely that decision would impact the ability of that borrower to receive loan forgiveness. However, the SBA and Treasury have developed a regulatory safe harbor where a borrower makes a written offer to rehire an employee who has been laid off, or who has had his or her hours reduced.

The borrower must:

- make a good-faith written offer to rehire such employee or if applicable restore the reduced hours of such employee during the covered period
- the offer must be for the same salary or wages and same number of hours as earned by the employee in the last pay period prior to the separation or reduction in hours
- the employee must reject the offer
- the borrower must maintain records documenting the offer and its rejection, and
- the borrower must inform the applicable state unemployment insurance office of such rejection within 30 days of the employee’s rejection.

### ***Reductions to Loan Forgiveness (Reduction in Full Time Equivalent Employees)***

Section 1106 (d)(2) of the CARES Act requires that the loan forgiveness amount be reduced by the same percentage as the percent reduction in full time equivalent (FTE) employees during the covered period. In order to make this calculation, the borrower selects a reference period of either February 15, 2019 through June 30, 2019, or January 1, 2020 through February 29, 2020 (the “reference period”). If the average number of FTE employees during the covered period is less than during the reference period, the total eligible expenses available for forgiveness is reduced proportionately by the percentage reduction of FTE employees.

The SBA's guidance also further details the term “full time equivalent” (FTE) employees, which are employees who work 40 hours or more on average each week. The SBA's clarified that the hours of employees who work less than 40 hours are calculated as proportion of a single FTE employee and aggregated. In order to calculate this amount, borrower must divide the average number of hours paid for each employee per week by 40 capping this quotient at 1. With respect to employees who are paid for less than 40 hours per week, borrowers may either calculate the

average numbers of hours a part-time employee was paid per week during the covered period or may elect to use a full time equivalency of 0.5 for each part-time employee. Either method must be applied consistently to all part-time employees for the covered period.

### ***Reduction Loan Forgiveness (Reduction in Salary or Wages)***

Under the CARES Act, a reduction in an employee's salary or wages in excess of 25% will generally result in a reduction in the loan forgiveness amount, unless an exemption applies. Specifically, with respect to each new employee in the year 2020 and each existing employee who is not paid more than an annualized equivalent of \$100,000 in any pay period in 2019, the borrower must reduce the total forgiveness amount by the dollar amount of the salary or wage reductions that are in excess of 25% of the base salary or wages between January 1, 2020 and March 31, 2020.

The SBA's guidance gives the following example:

A full time employee's weekly salary is reduced from \$1,000 per week from January 1, 2020 to March 31, 2020, to \$700 per week during the covered period. Employee continues to work on a full time basis. The first \$250 (25% of \$1,000) is exempted from this reduction. Borrowers seeking forgiveness would list \$400 as a salary/hourly wage reduction for the employee, which is the extra \$50 weekly reduction multiplied by eight weeks.

### ***Accounting For Reductions in Number of Employees Relative to Reductions in Salaries***

The SBA's guidance includes a section that insures that borrowers are not doubly penalized with both the salary and wage reductions as well as the decline in FTE reduction. The SBA has stated that the salaries/wage reduction applies only to the portion of the declining employee's salary and wages that is not attributable to the FTE reduction. The SBA gives an example of an hourly wage employee working 40 hours per week during the reference period whose hours are reduced to 20 hours per week during the covered period. There was no change to the employee's hourly wage during the covered period. Since the hourly wage did not change, according to the SBA, the reduction in the employee's total wages is entirely attributable to the FTE employee reduction and the borrower is not required to conduct a salary wage reduction calculation of that employee.

### ***Restorations Made to Employees' Salaries and Wages or FTE Employees***

Borrowers should note that Section 1106(d)(5) of the CARES Act provides that if certain employees' salaries and wages were reduced between February 15, 2020 and April 26, 2020, but the borrower eliminates those reductions by June 30, 2020, or earlier, the borrower is exempt from any reduction in loan forgiveness amount that would otherwise be required due to reductions in salaries and wages. Similarly, if any reductions in FTE employees is eliminated by June 30, 2020 or earlier, the borrower is exempt from any reduction in loan forgiveness that would otherwise be required due to reductions in FTE of employees.

## ***Loan Forgiveness Reduction Exemption Termination for Cause and Voluntary Resignations***

As the SBA previously indicated, when an employee of the borrower is fired for cause, voluntarily resigns, or voluntarily requests a reduced schedule during the covered period, the borrower may count such employee at the same full time equivalency level before the FTE reduction event when calculating any FTE employee reduction penalty.

[You can read this Interim Final Rule here.](#)

### **Contact Us**

Fraser Stryker's business attorneys are here to help:



**Mark L. Brasee**

[mbrasee@fraserstryker.com](mailto:mbrasee@fraserstryker.com)

(402) 978-5306



**Neil P. Hassler**

[nhassler@fraserstryker.com](mailto:nhassler@fraserstryker.com)

(402) 978-5374

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