

New Paycheck Protection Loan Rules Provide Some Answers

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Questions about employee bonuses, payments made to owner employees and the Small Business Administration's (SBA) authority to audit Paycheck Protection Program loans (PPP) were answered just before the long Memorial Day weekend. Late on Friday evening, May 22, exactly one week after the SBA released its much anticipated PPP Forgiveness Application, the SBA and the U.S. Department of the Treasury issued two interim final rules (IFR) addressing some of the lingering issues with respect to PPP loan forgiveness.

The first IFR (SBA-2020-0032) is directed toward the loan forgiveness aspect of the Coronavirus Aid, Relief, and Economic Security (CARES) Act. It largely mirrors instructions contained within the PPP forgiveness application, but also cleared up confusion regarding the forgivability of employee bonus and hazard pay (it is forgivable) and the "costs incurred and payments made" language of the CARES Act. The second IFR (SBA-2020-0033) relates to borrower and lender responsibilities regarding applications for loan forgiveness, including the SBA's review of PPP loans. What do employers need to know and what else remains unanswered?

Interim Final Rule On Loan Forgiveness

The most significant aspect of the IFR on loan forgiveness relates to employee bonuses and hazard pay. The IFR confirmed that PPP funds may be used to pay employee bonuses and hazard pay during the Covered (or Alternative Covered) Period and those amounts are eligible for forgiveness. PPP funds may also be used to pay employees who are not performing work – a conundrum for several

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shuttered PPP borrowers who have not been able to operate during the COVID-19 crisis.

Prior to the publication of the loan forgiveness application, whether employers could use PPP funds to pay for services performed prior to the beginning of the covered period was an open question. The IFR also confirms that employers may use PPP funds to pay for wages performed prior to the covered period if they are paid within the covered period. This means that some employers can squeeze another two, or potentially three payroll cycles in the Covered Period to maximize loan forgiveness.

Additionally, non-payroll costs such as rent, utilities and mortgage interest can be paid outside of the eight-week Covered Period so long as those costs are incurred during the covered period and paid on the next regular billing date for the expense. Until the forgiveness application and this IFR, many debated the meaning of “payroll costs paid and payroll costs incurred,” noting that the use of the conjunction “and” led to ambiguity and confusion. The interim final regulation changed this “and” to an “or” putting this ambiguity to rest. Thus, if an employer received the PPP loan the day before payroll, it could use the PPP funds for that payroll even though a small amount of work was performed in the covered period.

And there’s more good news for borrowers concerned about the PPP loan forgiveness reductions, especially for employers who have experienced a reduction in headcount due to no fault of their own. Employees who resign, voluntarily ask for an hours reduction, or are fired for cause during the covered period, will not count as a reduction in the number of employees. However, the IFR states that employers who seek to avoid a forgiveness reduction because an employee refused to return to work must report that refusal to the state unemployment office within 30 days of the rejection.

Second, the IFR clarifies that borrowers will not be doubly penalized for individual wage reductions and full-time equivalent (FTE) reduction for the same employees. The CARES Act provides that a borrower’s loan forgiveness will be reduced if the employer decreases wages beyond 25% or reduced its FTE count. Borrowers were concerned that they would be penalized for both the amount of wage reduction and the drop in FTE headcount.

Instead, the IFR confirms that the wage applies only to the portion of the decline in the employee’s wages that is not attributable to the FTE reduction. In other words, if an employer reduces an employee’s scheduled hours by half, but keeps the hourly rate the same, the borrower would be penalized by .5 FTEs, not both the FTE count and the reduction in hours.

Finally, previous guidance stated that borrowers must use at least 75% of the PPP loan on payroll costs and no more than 25% on non-payroll costs. This new IFR makes clear that the June 30 job and wage restoration safe harbor only eliminates head count and wage forgiveness reductions and does not protect against a reduction for using less than 75% of the PPP funds for payroll costs.



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Interim Final Rule On Loan Review Procedures, Borrower, And Lender Responsibilities

After much back and forth over borrower certification related to necessity and eligibility of PPP loans, the second IFR issued on May 22 states that the SBA may audit *any* loan it chooses to for initial eligibility, correctness of all aspects of the application, the use of the PPP funds, and accuracy of all aspects of the forgiveness application. With the publication of this interim final rule, the SBA has reminded in very strong terms all borrowers that their participation in the PPP program may well be scrutinized regardless of the size of the loan.

The IFR did not provide any additional guidance on deadlines for a borrower to submit its forgiveness application, but did confirm that within 60 days of the forgiveness application, the lender must issue a decision to the SBA regarding the amount of the borrower's PPP loan that is eligible for forgiveness. If a borrower disagrees with the lender's decision, it has 30 days to appeal and request that the SBA review the forgiveness eligibility. Consistent with the forgiveness application instructions, borrowers must maintain all records associated with their PPP loans for six years after the date the loan is forgiven or repaid.

Conclusion

These IFRs are welcome news to employers who have been struggling to get employees back to work and permits employers to reward those employees who come back to work, albeit reluctantly due to fears of contracting COVID-19 or due to the extra \$600 weekly unemployment benefit. Whether those payments take the form of bonuses or hazard pay, raising wages during this period should provide a helpful boost when it comes to hiring and retention.

Likewise, it is welcome news that payments made to furloughed employees are an appropriate use of PPP funds. Prior to this guidance, it was unclear if such payments would be eligible for forgiveness even though many companies have been using them in this manner. While questions remain about what amounts will be forgiven, the interim final rules have solidly answered some very common questions.

Fisher Phillips' SBA Loan Team will continue to monitor the ever-changing COVID-19 situation and provide updates. Make sure you are subscribed to Fisher Phillips' Alert System to get the most up-to-date information.

For further information, contact your Fisher Phillips attorney, or any member of our SBA Loan Task Force. You can also review our FP BEYOND THE CURVE: Post-Pandemic Back-To-Business FAQs For Employers and our FP Resource Center For Employers.



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