VORYS

MEMBER BRIEFING

FAQs ON PAYCHECK PROTECTION PROGRAM LOAN FORGIVENESS ISSUES

Recently, many small businesses that applied for the Paycheck Protection Program ("PPP") loans have started to receive their loan approvals, and more importantly, disbursement of funds for the loan. This includes a number of OPRA members. As a result, we and the OPRA staff have begun seeing questions about the use of PPP loan funds.

On April 27, 2020, we, along with the OPRA staff, created FAQs on Paycheck Protection Program Loan Forgiveness Issues ("First FAQs"). Since the First FAQs, the Small Business Administration ("SBA") released additional PPP guidance, including the form Loan Forgiveness Application for PPP borrowers, which can be found here. Because of these new developments, questions have started to arise regarding the updated guidance. This FAQ includes answers to questions and clarifications that have come up.

While the specific application of the PPP forgiveness criteria will differ depending on a provider's unique circumstances, some general principles are applicable across-the-board. We have prepared this FAQ in an effort to address the questions we are seeing, or believe it is likely the provider community may have, in light of the SBA's Loan Forgiveness Application for PPP loans.

As in all situations of this type, it is important for providers to seek out qualified legal counsel for advice on their unique circumstances. In addition, we note that the SBA has continuously updated the rules and guidance related to the PPP. So, please monitor the SBA website for that guidance as it could add to, or change, the answers below.

CAN YOU USE PPP FUNDS TO PAY FOR PERSONAL PROTECTIVE EQUIPMENT ("PPE")?

No. Providers must only use the PPP loan proceeds to pay for:

Payroll costs, including benefits;

Rent, under lease agreements in force prior to 2/15/20;

Mortgage ***interest***, if the loan was prior to 2/15/20;

Utilities, if the service began prior to 2/15/20; and

Interest payments on any other debt obligations that were incurred prior to 2/15/20.*

> *__Note__ that while interest payments on debt obligations incurred prior to 2/15/20 are ***allowable*** uses under the PPP, payments for these purposes are ***not eligible to be forgiven***.

Providers who are also recipients of an EIDL program loan may also use the proceeds of a PPP loan to refinance the EIDL loan if the EIDL was obtained between 1/31/20 and 4/3/20. If a provider obtained an EIDL during this time and used it for payroll costs, it ***must*** be refinanced by the PPP.

PPE costs are ***not*** allowable uses of PPP funds.

WHAT TIMEFRAME DO I HAVE TO SPEND THE PPP FUNDS IN ORDER FOR THEM TO BE FORGIVEN?

For most borrowers, the PPP funds must be spent within the first eight weeks following the first disbursement of the loan in order to be eligible for forgiveness (the "Covered Period"). The Loan Forgiveness Application provides an alternative payroll covered period for borrowers with a ***biweekly (or more frequent)*** payroll schedule. These borrowers may elect to calculate eligible payroll costs during the eight week period that begins on the first day of their first pay period following the disbursement of their PPP funds (the "Alternative Period").

CAN THE PPP FUNDS BE USED TO PAY WORKERS EVEN IF, DUE TO GOVERNMENTAL ORDERS, THEY ARE NOT ABLE TO WORK DURING THE COVERED PERIOD (OR ALTERNATIVE PERIOD)?

Yes. One of the main purposes of the PPP is to retain employees. The PPP funds can be used to keep employees on payroll while they are unable to work due to governmental orders so that the business can retain these employees until the business is able to reopen and the employees are able to work again. Thus, employers may use PPP funds to pay employees to not work.

MY AGENCY EMPLOYS SOME INDIVIDUALS AT SUBMINIMUM WAGE PURSUANT TO A SECTION 14(C) CERTIFICATE. CAN I STILL PAY THOSE INDIVIDUALS EVEN IF THEY ARE NOT WORKING?

Yes. Continuing the pay of employees working under a provider's Section 14(c) certificate also should not create a wage/hour compliance issue. It is important to note, however, that a provider must still comply with their usual obligations, including but not limited to:

- Seek renewal of the Section 14(c) certificate in a timely manner;
- Review the wage rates of Section 14(c) employees paid on an hourly basis at least once every six months; and
- Adjust the wages of all Section 14(c) employees at least once per year to reflect changes in the prevailing wages paid to experienced individuals not disabled for the work to be performed who are employed in the same locality for essentially the same type of work.

The Department of Labor is also looking at compliance with the Workforce Innovation and Opportunity Act ("WIOA") generally, and so providers should ensure they are following those requirements as well.

IS THE TIME A SECTION 14(C) EMPLOYEE SPENDS ON FURLOUGH OR LAYOFF COUNTED IN THE 6- AND 12-MONTH PERIODS REFERENCED IN THE QUESTION ABOVE?

While there is no specific regulatory guidance, the conservative approach is "yes."

HOW DO I KNOW WHICH PAYROLL COSTS FALL WITHIN THE COVERED PERIOD (OR ALTERNATIVE PERIOD)?

The Loan Forgiveness Application states that payroll costs that are eligible for forgiveness are those ***incurred and paid*** during the Covered Period (or Alternative Period). Payroll costs are considered paid on the day that paychecks are distributed or the borrower originates an ACH credit transaction. Payroll costs are considered incurred on the day that the employee's pay is earned. The Loan Forgiveness Application also provides that payroll costs incurred but not paid during the borrower's last pay period of the Covered Period (or Alternative Period) are eligible for forgiveness if paid on or before the next regular payroll date, otherwise, payroll costs must be paid during the Covered Period (or Alternative Period).

IF I AM ELIGIBLE TO USE THE ALTERNATIVE PERIOD, DOES THIS TIMEFRAME APPLY TO NON-PAYROLL COSTS ELIGIBLE FOR FORGIVENESS AS WELL?

No. Any non-payroll costs that are eligible for forgiveness must be paid during the Covered Period or 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. The Loan Forgiveness Application does not apply the Alternative Period to non-payroll costs.

HOW DO I CALCULATE THE NUMBER OF FULL-TIME EQUIVALENT ("FTE") EMPLOYEES FOR PURPOSES OF POTENTIAL FORGIVENESS REDUCTIONS?

A PPP borrower may have their loan forgiveness amounts reduced if they reduce the amount of FTE employees during the Covered Period (or Alternative Period). One of the open questions when OPRA distributed the First FAQs was how to determine an "FTE." We now have an answer.

The Loan Forgiveness Application states that for purposes of potential forgiveness reductions, the borrower must calculate the average full-time equivalency during the Covered Period (or Alternative Period) for each employee. To calculate, borrowers must, for each employee, enter the average number of hours paid per week, divide by 40, and round the total to the nearest tenth (with the maximum being 1.0). Alternatively, borrowers may elect to calculate an FTE using a simplified method that assigns a 1.0 for employees who work 40 hours or more per week and 0.5 for employees who work fewer hours per week.

ARE THERE ANY EXCEPTIONS TO THE FTE EMPLOYEE LOAN FORGIVENESS REDUCTION?

Yes. The Loan Forgiveness Application states that any employee reductions in the following cases ***will not*** reduce the borrower's loan forgiveness: (1) any positions for which the borrower made a good-faith, written offer to rehire an employee during the Covered Period (or Alternative Period) which was rejected by the employee; and (2) any employees who during the Covered Period (or Alternative Period) (a) were fired for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction of their hours.

CAN I REVERSE THE FTE EMPLOYEE LOAN FORGIVENESS REDUCTION IF I REHIRE EMPLOYEES?

Yes. The Loan Forgiveness Application specifically notes that a borrower is exempt from the reduction in loan forgiveness based on FTE employee levels if ***both*** of the following conditions are met: (1) the borrower reduced its FTE employee levels in the period beginning February 15, 2020, and ending April 26, 2020; and (2) the borrower then restored its FTE employee levels by not later than June 30, 2020 to its FTE employee levels in the borrower's pay period that included February 15, 2020.

WHERE CAN MY AGENCY FIND MORE INFORMATION AND RESOURCES ABOUT COVID-19-RELATED ISSUES?

Any provider looking for information about the business, employment, or regulatory aspects of this disease is welcome to visit www.vorys.com/coronavirus and sign-up for our weekly webinars addressing a variety of legal issues arising out of this pandemic.

Contacts

Nelson D. Cary
ndcary@vorys.com
614.464.6396

Suzanne J. Scrutton
sjscrutton@vorys.com
614.464.8313

Cauley P. Simmons
cpsimmons@vorys.com
216.479.6127

This alert is for general information purposes and should not be regarded as legal advice. As always, please let us know if you want more information or have questions about how these developments apply to your situation.