

WELCOME

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A wider lens on workplace law



Paycheck Protection Program Update

As of 28 April 2020

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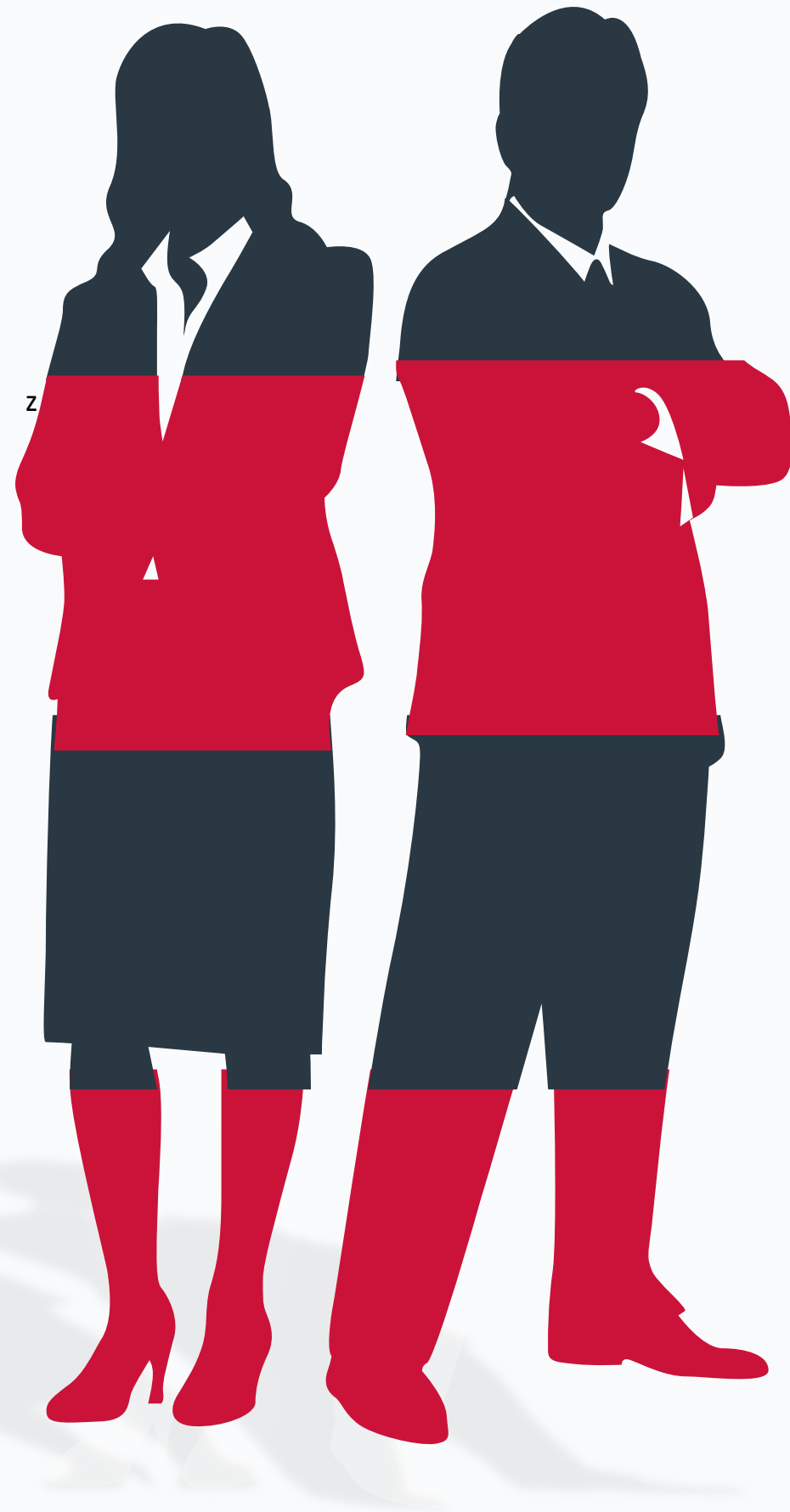


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AGENDA



- ✓ Paycheck Protection Program and Health Care Enhancement Act
- ✓ Guidance from SBA and Department of Treasury
- ✓ Key questions that remain outstanding
- ✓ Best Practices for PPP Borrowers
- ✓ Questions

PPP Overview

- Featured relief program in CARES Act, enacted 3/27/20
- Originally \$349B loan program enabling financial institutions to make forgivable SBA loans to small businesses and other eligible borrowers
- CARES Act also created \$10B grant program under EIDL, operated directly by SBA
- By 4/17/20, both PPP and EIDL grant program had exhausted these initial appropriations

Paycheck Protection Program and Health Care Enhancement Act

- Enacted 4/24/20
- Appropriates additional \$310B for PPP loans
 - \$60B of this amount earmarked for smaller lending institutions, including community development financial institutions, minority depository institutions and credit unions
 - SBA resumed accepting PPP loan applications at on 4/27
 - Approved lenders to resume processing applications previously submitted, as well as new applications, and to resume disbursing funds
- Appropriates additional \$10M for EIDL grants

SBA—PPP Interim Final Rules

- Intent of CARES Act is that SBA provide relief to small businesses expeditiously during temporary period of economic dislocation caused by the coronavirus
 - Delegates authority to lenders
 - Streamlines requirements of regular Section 7(a) lending program
- Recognizes the Act's “overarching purpose” of keeping workers paid and employed

SBA—PPP Interim Final Rules, cont.

- Not more than 25% of loan forgiveness amount may be attributable to non-payroll costs
- At least 75% of PPP loan proceeds (the equivalent to 8 weeks of payroll) must be used for payroll costs
 - Under the section entitled, “How can PPP loans be used?”
 - Appears to apply regardless of loan forgiveness
- If PPP loan funds are misused, SBA will require repayment
- Borrowers who knowingly use the funds for unauthorized purposes will be subject to additional liability such as charges for fraud

SBA—PPP Interim Final Rules, cont.

- If you received EIDL loan from 1/31/20—4/3/20, you can still apply for PPP loan
- If EIDL loan was used for payroll costs, PPP loan must be used to refinance EIDL loan (and amount of EIDL loan counts toward percentage of proceeds used toward payroll)
- Proceeds from EIDL advance (up to \$10,000) will be deducted from loan forgiveness amount on PPP loan

SBA Guidance—PPP Loans FAQs

- Definition of “payroll costs”
 - Computed on “gross” basis, without regard to federal taxes imposed/withheld (but employer’s share of payroll taxes are excluded)
 - Includes costs for employee vacation, parental, family, medical and sick leave (except qualified leave for which payroll tax credit allowed under FFCRA)
 - Payments to independent contractors/sole proprietors should not be included
 - Exclusion of compensation in excess of \$100,000 annual salary applies only to cash compensation—not to non-cash benefits
- May use payroll costs for previous 12 months or calendar year 2019 to determine maximum loan amount (special rules apply to seasonal businesses or applicants not in business from 2/15/19 – 6/30/19)

SBA Guidance—PPP Loans FAQs, cont.

- Borrowers/lenders may rely on the laws, rules and guidance available at the time of a previous loan application
- PPP requires certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant”
 - Must be made in good faith, taking into account current business activity and access to other source of liquidity
 - Unlikely that public company with substantial market value/access to capital markets will be able to make certification in good faith and should be prepared to demonstrate to SBA, upon request, basis for certification
 - If you applied before 4/23/20 and repay loan in full by 5/7/20, you will be deemed by SBA to have made the required certification in good faith

SBA Guidance—FAQs—Calculating Maximum Loan Amounts

- Based on types of business entities:
 - Self-employed, with no employees
 - Self-employed, with employees
 - Partnerships
 - S corporations and C corporations
- LLC owners should follow instructions related to their filing situations, e.g., whether they file as sole proprietor, partnership, or corporation

Loan forgiveness

- **How much of my loan will be forgiven?** Up to the full principal amount of the loan and any accrued interest.
- You will owe money when your loan is due if you use the loan amount for anything other than payroll costs, mortgage interest, rent, and utilities payments over the 8 weeks after first disbursement of loan proceeds.
 - Not more than 25% of the forgiven amount may be for non-payroll costs
 - Any EIDL advance will be deducted from forgiveness amount
- You will also owe money if you do not maintain your staff and payroll.
 - Number of Staff: Your loan forgiveness will be reduced if you decrease your full-time employee headcount.
 - Level of Payroll: Your loan forgiveness will also be reduced if you decrease salaries and wages by more than 25% for any employee that made less than \$100,000 annualized in 2019.
- Re-Hiring: You have until June 30, 2020 to restore your full-time employment and salary levels for changes made between 2/15/20—4/26/20.

Loan forgiveness

- **How can I request loan forgiveness?** You can submit a request to the lender that is servicing the loan. Required documentation will include:
 - Documents verifying the number of FTE equivalent employees on payroll and pay rates for relevant time periods
 - Payroll tax filings reported to the IRS, and
 - State income, payroll, and unemployment insurance filings
 - Documentation, including cancelled checks, payment receipts, transcripts of accounts, or other documents verifying payments on covered mortgage interest obligations, lease obligations, and utility payments
- You must certify that the documents are true and that you used the forgiveness amount to keep employees and make eligible mortgage interest, rent, and utility payments
- The lender must make a decision on the forgiveness within 60 days

Loan forgiveness

- **What terms apply to any loan amount that is not forgiven?** The principal amount of the PPP loan and any accrued interest that is not forgiven will continue as a loan on its original terms, including:
 - Maturity date of two years from disbursement
 - Payments deferred for six months (although interest accrues)
 - Interest rate of 1% per annum
 - No prepayment penalty (prior notice of prepayment may be required If loan has been sold on secondary market)

Loan forgiveness

- **How will PPP loan forgiveness be treated for tax purposes?** The CARES Act provides:
 - Forgiven amount of a PPP loan will be considered a cancelled indebtedness
 - For purposes of the Internal Revenue Code, any amount which (but for this subsection) would be includible in a borrower's gross income by reason of forgiveness shall be excluded from gross income
- State tax treatment of loan forgiveness may vary depending on whether state laws incorporate provisions that automatically bring their tax codes into conformity with IRC

Key PPP questions remain unanswered

- Will the **8-week period be extended or modified** to account for businesses closed due to stay at home orders or for other reasons?
- What does the phrase “**costs incurred and payments made**” mean?
 - Must a cost be incurred **and** paid during the 8-week period to be eligible for loan forgiveness?
 - Are costs eligible for forgiveness if they are (i) incurred prior to and paid during the covered period or (ii) incurred during and paid after the covered period?
- How is “**rent**” defined?
 - Does this include common area maintenance or other fees included in lease agreements?
 - Is “rent” limited to the lease of real property?

Key PPP questions remain unanswered

- What is a “**full-time equivalent**” employee? How will furloughed employees, employees on reduced schedule, employees on paid leave, or employees who have voluntarily resigned or refuse to come back to work be treated?
- May the borrower **deduct from taxable income the business expenses** that were funded by the forgiven loan?
- The CARES Act stated that, no later than 30 days after its enactment, the SBA was to provide **guidance and regulations regarding the loan forgiveness provisions**. The Interim Final Rule reiterated that additional guidance on loan forgiveness will be forthcoming. Will further guidance be provided and, if so, when?

Best practices for PPP borrowers

- Carefully review the required certifications and ensure each element passes the “good faith” standard
 - Focus on how the current economic uncertainty makes the loan request necessary to support ongoing operations given your:
 - Current business activity
 - Access to other liquidity
 - Document your good faith basis for making each of the required certifications
- Consider returning funds by May 8th if circumstances no longer justify

Best practices for PPP borrowers, cont.

- Keep detailed records documenting use of PPP proceeds beginning on day one of the 8-week covered period (after disbursement)
 - Insist on receipts
 - Create organized system for document storage
- Establish tracking system to record use of PPP proceeds
 - Track payroll and other costs based on both costs incurred and costs paid
- Communicate with your lender to be sure you understand:
 - Expected loan forgiveness amount
 - Process for applying for loan forgiveness

Best practices for PPP borrowers, cont.

- Consider depositing PPP loan proceeds in separate bank account
- Be mindful of allowable uses of PPP loan proceeds even if you don't intend to seek loan forgiveness
- Designate one or more employees who'll be responsible for tracking and documenting use of PPP proceeds
- Ensure the designated personnel are properly trained on CARES Act and lender requirements
- Consult with your accountants and tax advisors on PPP implications
- Stay tuned for additional guidance from SBA and IRS

