



News & Types: Client Advisories

# Paycheck Protection Program Flexibility Act of 2020

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## EXECUTIVE SUMMARY

The Paycheck Protection Program Flexibility Act of 2020 (“Flexibility Act”) was signed into law by President Trump on June 5, 2020. The Act provides much needed flexibility that will likely increase the amount of loan forgiveness for businesses that receive Paycheck Protection Program (“PPP”) loans.

The CARES Act authorizes PPP loan availability for certain small businesses (those that typically do not employ more than 500 employees) between March 1, 2020 and December 31, 2020. The Act modifies the CARES Act as follows:

- Even though the CARES Act allowed loan maturity to be up to 10 years, the Small Business Administration (“SBA”) set PPP loan maturity dates at 2 years. The Flexibility Act changed the maturity dates for new PPP loans to 5 years, instead of 2 years. For PPP loans that already have been received, the maturity date can be extended to up to 5 years if the lender agrees to the extension. The interest rate is still 1%.
- The “covered period” for PPP loan forgiveness is extended to a date that is the earlier of: (1) 24 weeks after the PPP loan funds are received, or (2) December 31, 2020, instead of the prior 8-week period from the origination date of the loan. Borrowers may still use the 8-week period if they prefer.
- Prior to the Flexibility Act, the CARES Act required a reduction in the amount of loan forgiveness if: (1) there was a reduction of full-time equivalent (“FTE”) employees compared to pre-Covid-19 levels, or (2) there was a reduction in wages or salary by more than 25% for 1 or more employees, unless the number of FTE employees and wages were restored to pre-COVID-19 levels by June 30, 2020. The Flexibility Act changed the deadline to rehire FTE employees and restore wages to February 15, 2020 levels to December 31, 2020, instead of June 30, 2020.
- The Flexibility Act also provides an exemption from PPP loan forgiveness if the borrower can document, in good faith, that: (1) the borrower is not able to rehire individuals that were FTE employees of the borrower on February 15, 2020, and (2) the borrower is not able to hire similarly qualified employees for unfilled positions on or before December 31, 2020.
- In addition, the Flexibility Act provides an exemption with respect to a proportional reduction in the number of FTE employees if the borrower can document, in good faith, that its business is unable “to return to the

same level of business activity as such business was operating at before February 15, 2020, due to compliance with requirements established or guidance issued by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention, or the Occupational Safety and Health Administration during the period beginning on March 1, 2020, and ending December 31, 2020, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19.”

- PPP loan forgiveness is completely eliminated unless a borrower uses at least 60% of the PPP loan for payroll costs. The good news is that this reduces the threshold from the previous 75% payroll cost limit established by the SBA Interim Final Rule 1, and permits 40% to be used for mortgage interest payments, covered rent obligations or any covered utility payments. However, the bad news is that the Flexibility Act, as drafted, created an absolute bar to forgiveness if a borrower does not use at least 60% for payroll costs. There is some discussion indicating that this absolute bar to loan forgiveness is a drafting error and may be revised to be a sliding scale similar to one in the SBA Interim Final Rule 1 that reduced but did not eliminate loan forgiveness amounts when the prior 75% threshold was not met.
- Deferral of PPP loan repayment is now “until the date on which the amount of forgiveness determined under section 1106 of the CARES Act is remitted to the lender.”
- Borrowers must file for PPP loan forgiveness within 10 months after the last day of the “covered period” or forgiveness is essentially barred and the full amount of the loan, principal, interest and fees, must be paid to the Lender when due under the PPP loan.
- Other great news: the Flexibility Act deleted the provision of the CARES Act that prohibited borrowers that received PPP loans from the payroll tax deferral portion of the CARES Act. Thus, PPP loan borrowers may now defer the payment of applicable employment taxes with 50% being due December 31, 2021 and the remainder due December 31, 2022.

Please contact Jennifer R. Watson or a member of the Corporate, Finance and Acquisitions Group with any questions regarding PPP loans.