CLIENT ALERT: PPP Flexibility Act Brings Loan Forgiveness Changes

On June 5, 2020, President Trump signed into law the Paycheck Protection Program Flexibility Act of 2020 (the "PPPFA" or "Act"). The PPPFA – as its name suggests – offers greater flexibility for employers receiving loans under the CARES Act's Paycheck Protection Program ("PPP") by extending time frames, expanding exemptions and modifying other PPP terms affecting potential loan forgiveness and repayment. Key provisions of the PPPFA are:

Extended "Covered Period" for Using Loan Proceeds

Under the PPP, borrowers needed to spend PPP loan proceeds on approved expenses within a period of eight weeks to potentially qualify for loan forgiveness. The PPPFA expands this period so that borrowers may now spend their PPP loan funds (a) over a period of 24 weeks from the origination of the loan, or (b) by December 31, 2020, whichever is earlier. Borrowers are, of course, still free to use the original eight-week covered loan period in the PPP or "alternative payroll covered period" provided in the SBA loan forgiveness guidance. (A link to the earlier client alert discussing SBA loan forgiveness guidance appears here.)

Reduced Percentage of Loan to be Spent on Payroll for Forgiveness

The PPPFA states that 60 percent of PPP loan proceeds need to be spent on payroll costs in order for a borrower to obtain forgiveness (leaving 40 percent which can be spent on qualifying non-payroll expenses). This is a reduction from the 75 percent/25 percent split which had come from U.S. Small Business Administration (SBA) guidance, and should give employers some welcome flexibility to spend a greater amount of loan proceeds on rent, mortgage payments, and other qualifying non-payroll expenses. Employers should note, though, that the language of the PPPFA indicates that if an employer does not spend 60 percent of loan proceeds on payroll costs, it will not be eligible for forgiveness of any portion of the loan. As there have been questions as to whether such a significant change from the PPP was intended, MBJ will continue to monitor future developments in this area.

Expanded Exemptions from Loan Forgiveness Requirements

The PPP provided that an employer who had experienced a reduction in either employee headcount or employee salaries between February 15, 2020 and April 26, 2020 (30 days after enactment of the CARES Act) could receive forgiveness if it eliminated any reduction in headcount and salary by June 30, 2020. The PPPFA extends this June 30 date to December 31, 2020. Employers should not, however, be lulled into thinking that they can simply restore salary levels and headcount in a single stroke on December 31 and achieve full forgiveness. The requirement of spending 60 percent of loan proceeds on payroll will require forethought about restoration of staff levels and timing of payroll costs incurred and paid.

The PPPFA also expands exemptions from the reduction to loan forgiveness corresponding to a reduction in the number of full-time equivalent (FTE) employees. An employer who has experienced a reduction in FTE employees after February 15 will not see a reduction in loan forgiveness based on FTE count if it can in good faith document:

1. that it has been unable to rehire individuals who were employed by the business on February 15, 2020 and also unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020; or
2. that it is unable to return to the same level of business activity at which it was operating before February 15, 2020 due to compliance with requirements or guidance from the U.S. Secretary of

Health and Human Services, CDC or OSHA between March 1 and December 31 relating to standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.

Five-Year Repayment Period for New Loans

For PPP loans made on or after the effective date of the PPPFA (June 5), borrowers will have a period of at least five years to pay off the portion of any loan which is not forgiven. For loans made before the PPPFA effective date, lenders and borrowers may, but are not required to, mutually agree to modify the terms of an existing loan to include a minimum five-year period for repayment of any unforgiven amounts.

Extension of Loan Deferral Period

The PPPFA also expands the six-month loan deferral period created by the PPP. Repayment of a PPP loan (including principal, interest and fees) is now deferred until after the SBA has determined the borrower's loan forgiveness amount and remitted that amount to the lender. For borrowers who do not apply for forgiveness within 10 months after the last day of the covered period, repayment of the loan begins at the expiration of that 10-month window.

Finally, in addition to the above, the PPPFA allows recipients of PPP loans to participate in the deferral of certain payroll taxes as provided by the CARES Act, which PPP borrowers had previously not been eligible to do.

The changing landscape of PPP guidance is only one of the many challenges employers face as businesses reopen and a greater number of employees return to work. Employers should consult their MBJ attorneys for assistance as legal concerns arise in workplaces in the COVD-19 era.

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