CLIENT ALERT: PPP Loan Forgiveness Application and Guidance Issued by SBA

The U.S. Small Business Administration has provided new guidance on forgiveness of loans received through the CARES Act's Paycheck Protection Program ("PPP"). On Friday, May 15, 2020, the SBA released an 11-Page Application for businesses seeking forgiveness of PPP loans. The application form, which contains both worksheets for calculating forgiveness and instructions on how amounts are to be determined, answers a number of questions about payroll costs, full-time equivalent employee count and other issues which have challenged employers receiving PPP funds.

Under the much-publicized PPP, loans are eligible for complete forgiveness if the employer meets certain criteria. The loan can be completely forgiven if the borrower uses at least 75% of the loan funds over the eight-week period following receipt of the loan proceeds to cover payroll expenses (as defined in the CARES Act) and uses the remaining 25% of the loan funds on other eligible business expenses under the CARES Act (i.e., rent, utilities, mortgage interest and other approved expenses). MBJ's original client alert on the CARES Act provides additional details on the payroll and other costs that may be eligible for forgiveness under the PPP. Now, roughly five weeks after the PPP program was first launched, the SBA has published its PPP loan forgiveness application which includes additional guidance on key points including calculation of the eight-week period, which payroll costs can be counted and what documents are needed for loan forgiveness.

Payroll Costs Paid and Payroll Costs Incurred

One of the questions for PPP borrowers has been whether a borrower's payroll costs were required to be incurred, paid out, or both during the eight-week "covered loan period" in order to remain eligible for loan forgiveness. In the loan forgiveness application, the SBA clarified that payroll costs will be eligible for loan forgiveness if the costs are **paid** or **incurred** during the eight-week "covered loan period" (or "alternative payroll covered period" discussed below).

- Payroll costs **"paid"** during the eight-week period are considered "paid" on the day that paychecks are distributed or the borrower originates an ACH credit transaction (i.e., originates payment to employees via direct deposit);
- Payroll costs **"incurred"** during the eight-week period are considered "incurred" on the day that the employee's pay is earned.

The SBA further clarified that payroll costs that are incurred, but not paid, during the borrower's last payroll period within the "covered loan period" will remain eligible for loan forgiveness so long as the payroll costs are paid on or before the borrower's next regular payroll date.

Timing and Application of the Eight-Week Period

In the loan forgiveness application, the SBA also clarified how employers can determine the eight-week "covered loan period" in which they need to use their PPP loan funds, including providing the option of an “alternative payroll covered period.” At the election of the borrower, businesses with weekly or bi-weekly payroll cycles may calculate their eligible payroll costs beginning with the first pay period **after** they receive their PPP funds, rather than beginning on the first day that the PPP funds were disbursed. This clarification could provide some much-needed flexibility to businesses that received PPP loan funds in the middle of a regular payroll period.

Full-Time Equivalent Employee Safe Harbor

As detailed in MBJ’s initial client alert on the CARES Act, one reason a borrower’s loan forgiveness amount can be reduced is a drop in the number of full-time equivalent employees over the eight-week covered loan period as compared to the employer’s chosen look-back period. The SBA’s guidance provides that borrowers can avoid having their loan forgiveness reduced as a result of a decrease in the number of full-time equivalent employees on the payroll, if:

1. one or more employees was terminated or laid off, and the employer made a good-faith written offer to rehire the employee[s] during the covered loan period or the alternative payroll covered period which was rejected by the employee[s]; or
2. the employee was fired for cause, voluntarily resigned, or voluntarily requested a reduction in hours.

Based on the above guidance, a borrower who would otherwise face a reduction in its loan forgiveness amount as a consequence of a reduction in the number of full-time equivalent employees on its payroll can avoid that consequence if the reduction was a result of one of the two circumstances described above.

Recordkeeping Requirements

The SBA’s guidance also sets out the types of records that borrowers are required to submit to their lender in order to obtain loan forgiveness. While employers should review the recordkeeping requirements closely, in general, borrowers must submit (1) documentation verifying the eligible cash compensation and non-cash benefit payments from the covered loan period or the alternative payroll covered period, (2) documentation showing the average number of full-time equivalent employees employed by the borrower during their chosen reference period, and (3) documentation verifying the existence of certain business expenses/obligations prior to February 15, 2020, and eligible payments related to those obligations from the covered loan period.

The guidance also outlines certain other documents that borrowers are required to retain, but not submit. PPP loan recipients are required to retain, for a period of six years after the date the loan is forgiven or repaid in full (1) all records relating to the borrower’s PPP loan, including documentation submitted with its PPP loan application, (2) documentation supporting the borrower’s certifications as to the necessity of the loan request and its eligibility for a PPP loan, (3) documentation necessary to support the borrower’s loan forgiveness application, and (4) documentation demonstrating the borrower’s material compliance with PPP requirements. The application further requires that borrowers permit the SBA and the Office of the Inspector General to inspect these documents upon request.

Given the evolving nature of guidance on the PPP program, it is possible that provisions governing loan forgiveness will see further modifications in the coming weeks. MBJ will continue to monitor updates to the CARES Act and PPP program. Employers should consult their MBJ attorney for questions about these and other matters as re-opening efforts unfold.

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