

The SBA Issues Forgiveness Application and Guidance for the Paycheck Protection Program: What Employers Need to Know

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On Friday, May 15, 2020, the Small Business Administration, in consultation with the U.S. Department of the Treasury, released the Paycheck Protection Program (PPP) Loan Forgiveness Application. The application is accompanied by instructions on how to complete the application. Together, the application and the instructions answer a number of ambiguities about whether and how an employer will be able to receive forgiveness of all or a portion of a loan received under the PPP.

- If the employer pays wages on a bi-weekly schedule, the employer may calculate payroll costs over an “alternative” 8 week period that begins on the first day of the first payroll period that starts after the employer’s receipt of the loan proceeds. The SBA gives the example that if an employer receives the loan on Monday, April 20, and the first day of its first pay period following that date is Sunday, April 26, the first day of the alternative period is April 26 and the last day is Saturday, June 20.
- Otherwise, the 8 week period begins on the date the employer receives the initial loan disbursement.
- Even if the employer elects the alternative 8 week period for payroll costs, the 8 week period for eligible non-payroll expenses (rent, mortgage payments and utilities) begins on the date the employer receives the loan proceeds.
- A condition of forgiveness is that the employer spend no less than 75% of the funds expended in the entirety of the covered period, regardless of whether the employer elects the alternative payroll period.
- Cash payroll costs are the gross amount paid to employees, without reduction for employee income tax withholding, FICA contributions or employee retirement or health plan contributions.
- An employer is eligible for forgiveness for the “payroll costs paid and payroll costs incurred” within the 8 week covered period (or the alternative payroll covered period).
 - Payroll costs are “paid” on the date that the employees receive a check or the employer initiates an ACH credit transfer.
 - Payroll costs are incurred on the day the employee’s pay is earned.
 - Payroll costs incurred during the 8 week covered period (or that alternative payroll covered period) are eligible for forgiveness if paid on or before the next regular payroll date after the costs are incurred, but otherwise payroll costs must be paid during the 8 week period (or the alternative covered period).
 - An employer that pays its employees semi-monthly cannot elect the alternative covered period. The question then arises: How does the employer calculate payroll costs if the payroll costs incurred and the payroll cost paid do not correspond neatly to the 8 week period? It appears that the rule is disjunctive and that an employer may claim payroll costs that are paid in the 8 week covered period even if a portion of those payroll costs were incurred prior to the start of the 8 week covered period. Similarly, an employer should be able to include all amounts incurred at the end of the 8 week covered period, even if paid outside the 8 week period, provided the amounts are paid on the next payroll period.
 - The application specifically states that an employer may not double count payroll costs incurred and payroll costs paid, which reinforces the conclusion above that the payroll costs paid in the 8 week period, but incurred prior to the 8 week period, may be included as payroll costs.
 - That said, the SBA has stated that no employee can be credited for payroll costs that exceed \$100,000 in cash compensation calculated on annualized basis. Accordingly, there is a hard cap that no employee may exceed \$15,385 in cash compensation during the 8 week period.
 - Payroll costs also include amounts paid to owner employees, self-employed individuals or general partners, provided such amounts are subject to the \$15,385 cap.
- Payroll costs includes the employer’s contributions for employee health insurance, retirement plans, and state and local taxes (including unemployment insurance tax), but is limited to the amounts paid by the employer during the covered period. As noted above, amounts withheld from an employee’s compensation are not included in these amounts.

- To be eligible for forgiveness, non-payroll costs must be paid during the 8 week period beginning on receipt of the loan, or incurred during the 8 week period and paid on or before the next regular billing date, even if the billing date is after the end of the 8 week period. Again, the implication is that costs incurred prior to the start of the 8 week covered period, but paid during that period are eligible for forgiveness.
- The employer's eligibility for forgiveness is reduced by a percentage calculated as the number of Full Time Equivalent ("FTE") employees employed during the 8-week covered period (or the alternative period) over the FTE employees employed over the period between February 15, 2019 and June 30, 2019 or between January 1, 2020 and February 29, 2020, whichever period results in the lower number of FTE employees. The resulting ratio cannot exceed 1.
 - To calculate FTE employees, the employer is required to enter the average number of hours paid per week, divide by 40, and round the result to the nearest tenth. The maximum for each employee is capped at 1.0.
 - While not explicit, this seems to suggest that any employee who is paid during a relevant pay period is included even if the employee was paid for non-working hours, as if the employee continued to work during those hours (i.e., as a result of paid sick, vacation or other paid leave). Employees on unpaid leave would not be included in the calculation.
 - An employer may use 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.
 - The number of FTE employees is calculated for each payroll period, and then averaged for each month, and then averaged for the 8 week covered period (or alternative covered period) and for the reference period.
 - A key point here is that while the employer provides a schedule of the employees employed during the 8 week covered period (or alternative covered period), **there is no requirement that the employer hire the same employees who were previously employed.** The reduction calculation is done purely based on a comparison of the number of FTE employees, not a comparison of the individual employees employed.
 - Employers are also held harmless on the reduction in forgiveness if during the 8 week covered period (or alternative covered period) an employee (i) refuses to come back to work, (ii) quits voluntarily or (iii) is terminated for "cause".
 - Employees who fall into one of these categories are treated as continuing to be employed by the employer until the employer hires a replacement employee.
 - An employer has to be able to document that it made a bona fide offer to return an employee to his or her original position at their original salary or hourly rate and that the employee declined the offer to return.
 - An employer has to be able to document that an employee voluntarily quit.
 - "Cause" is not defined. We believe, however, that cause would be sufficient misconduct such that the employee would not be eligible for unemployment insurance. Misconduct is a high bar and is not simply an employee's poor work performance.
 - Notwithstanding the above deductions based on FTE employees and for reductions in wages in excess of 25% as compared to January 1 and March 31, 2020, no reduction in the forgiveness amount is applied if the employer reduced its FTE employee levels in the period beginning February 15 and ending April 26, 2020 and the employer then restored its FTE employee levels by not later than June 30, 2020 to same level in the employer's pay period that included February 15, 2020.
- In addition to the FTE employee reduction, the loan forgiveness amount is reduced by the amount that an employee's salary or hourly wages for the 8 week covered period (or alternative covered period) were less than 75% of the employee's average wages between January 1, 2020 and March 31, 2020.
 - The employer is required to subtract the average salary or hourly wage paid during the 8 week covered period (or the alternative period) from 75% of the average salary or hourly wage paid between January 1 and March 31, 2020 and determine the total differential that was not paid during the covered period. This amount is deducted dollar for dollar from the otherwise forgivable amount.
 - Like the FTE employee reduction, there is a safe harbor that enables an employer to avoid the deduction based on a reduction in wages. If an employee's average salary or hourly wage on February 15, 2020 was not reduced between February 15 and April 26, 2020, or if the average salary or wage on June 30, 2020 is at least equal to the average salary or wage on February 15, 2020, then no reduction is required even if the salary was reduced by more than 25% for some period after February 15, 2020.
- The application identifies in detail the documents an employer is required to submit in connection with its loan forgiveness application and documents the employer is required to retain as back up for its application. An employer is required to retain all of the forgoing documents related to its calculation of forgiveness under the PPP for six years after the later of the date the loan is forgiven or repaid in full.

This is only a summary of what are by nature complex and highly individualized circumstances for each employer that borrowed under the PPP. We encourage you to reach out to your Mintz attorney for advice on how the above rules apply to your situation.

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