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Treasury Issues Interim Final Rule on PPP Loan Forgiveness

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On Friday May 22nd, the Department of the Treasury issued the Interim Final Rule on loan forgiveness under the Paycheck Protection Program (PPP). The Small Business Administration (SBA) issued the Paycheck Protection Program (PPP) Loan Forgiveness Application on Friday May 15th. PPP loan recipients have long awaited details on how forgiveness under the program is calculated.

Under the PPP, an amount up to the full principal and accrued interest of the loan may be forgiven if the loan recipient utilized the funds for certain qualifying expenses during the covered period. Qualifying expenses are: (1) payroll costs; (2) interest payments on any business mortgage obligation on real or personal property that was incurred before February 15, 2020 (but not any prepayment or payment of principal); (3) payments on business rent obligations on real or personal property under a lease agreement in force before February 15, 2020; and (4) business utility payments for the distribution of electricity, gas, water, transportation, telephone, or internet access for which service began before February 15, 2020.

The covered period is the 8 weeks (56 days) commencing on the day the loan proceeds are disbursed or an alternate period beginning on the first day of the first pay period following the date the loan is disbursed. Only amounts spent for qualifying expenses may be forgiven and no more than 25% of the loan may be used for non-payroll costs. As an example, a business that spent 50% of the loan on rent and utilities would not qualify for full forgiveness. Forgiveness can also be reduced for certain reductions in headcount and/or compensation.

These basic standards were largely in place when the program was rolled out. However, employers were left with questions, many of which have now been addressed in the interim final rule. Some highlights include:

- Compensation to owners is firmly capped at 2/13 of their 2019 income or $15,385, whichever is less. Any additional payments to an owner will be excluded.
- Health and retirement benefits for owners are completely excluded from qualifying payroll costs.
- Eligible compensation to any single employee is capped at $15,385, any amounts in excess of this are not forgivable, regardless of how it is derived.
- There is no comparable cap on health insurance or retirement costs for employees, they simply must be incurred during the covered period.
- Headcount reduction calculations are based on a comparison of Full Time Equivalent (FTE) employees during the covered period to a reference period. Non seasonal employers may choose a reference period of January 1, 2020 through February 29, 2020 or February 15, 2019 through June 30, 2019.

- FTE calculations use a "full time" definition of 40 hours per week which stands in contrast to the 30 hours per week used for Affordable Care Act (ACA) purposes.
- Employees who are offered reemployment and refuse to return can be excluded from FTE calculations.
- Employees who resign or are fired for cause can also be excluded from FTE calculations.
- Wage reductions in excess of 25% result in a dollar-for-dollar reduction in loan forgiveness.
- Where an employee's compensation has been reduced as a result of working fewer hours, the reduction is taken into account under the FTE calculation, so long as the hourly rate of pay was not reduced by more than 25%. The employer is not double penalized.
- Forgiveness reductions are proportional. This has actually been one of the most common questions we've received, with employers concerned that one small mistake could jeopardize all forgiveness.

While the long-awaited guidance is appreciated, we would be remiss if we didn't mention that this is likely not the final word on PPP forgiveness. Legislation is pending in both the House and the Senate that would make substantive changes to the program. The House bill would eliminate the requirement that 75% of loan proceeds be used for payroll costs and extend the covered period to 24 weeks instead of the current 8. A similar bill in the Senate would extend the covered period to 16 weeks. The House bill also extends repayment terms for amounts which are not forgiven and makes PPP recipients eligible for tax benefits they would otherwise not receive. Both bills enjoy bipartisan support and the White House has indicated openness to at least some of the provisions.

Some businesses, concerned about accruing new debt, have avoided the program due to the forgiveness requirements and two-year repayment terms. At present, funds remain available and processing times are greatly reduced. Last week a client applied through PayPal and received funding within 48 hours. If some of the less favorable provisions are modified, businesses who have delayed applying may need to move quickly.

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