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DC BAR Pro Bono Center

UPDATED: Take These Steps to Apply for Paycheck Protection Program Loan Forgiveness

Organizations that received the Paycheck Protection Program (PPP) Loan must follow specific guidelines and complete a separate application to have all or part of the loan forgiven.

Recently, the interim rule on forgiveness was updated to reflect changes in the PPP Flexibility Act. PPP, established by the CARES Act, provides loans to eligible small businesses and nonprofits unable to continue operations as a result of COVID-19 without the funds. PPP rolled out with the promise of forgiveness for borrowers who spent 75 percent of the loan on payroll costs, and the remainder on eligible nonpayroll costs such as rent, utilities, and mortgage interest. The PPP Flexibility Act reduced the required threshold of eligible payroll expenses to 60 percent.

The Application Process

To seek forgiveness, PPP borrowers must first complete a forgiveness application. There are three forgiveness applications: a standard application, an EZ loan forgiveness application, and the one-page application.

The simplified one-page application is available to borrowers that received a PPP loan for $50,000 or less. Borrowers that, when combined with affiliates, received loans totaling $2 million or more are ineligible to use this form. Borrowers otherwise eligible to use the one-page application are exempt from reductions in loan forgiveness based on reductions in full-time equivalent (FTE) employees or salaries or wages. In addition, the application does not require borrowers to show calculations used to determine the loan forgiveness amount. Borrowers are asked to self-certify information provided, including that the forgiveness amount requested was spent on eligible costs and that it is not greater than the PPP loan amount received by the borrower.

The EZ forgiveness application may only be used by borrowers that:

1. Are self-employed, have no employees, and did not include any employee salaries in the PPP loan application; or
2. Did not reduce the salaries or wages of employees by more than 25 percent and did not reduce the number or hours of employees; or
3. Experienced reductions in business activity as a result of health directives related to COVID-19 and did not reduce the salaries or wages of employees by more than 25 percent.

Borrowers who do not satisfy the requirements for the one-page form or any of the three eligibility conditions for the EZ form must complete the standard forgiveness application.

The forgiveness application must then be submitted to the lender. The lender then has up to 60 days to review the application and submit its decision to the Small Business Administration (SBA). When making its decision, the lender must confirm receipt of specified borrower certifications and documentation verifying costs, and double-check the borrower's forgiveness application calculations based on documentation provided. The lender's decision may grant forgiveness approval, partial approval, or denial. Further, if the SBA is currently reviewing the loan, a "denial without prejudice" decision will be issued.

If a request is denied, borrowers have 30 days from receipt of the lender's denial notice to request that the SBA review the decision.

Any portion of the loan that is not forgiven must be repaid within five years for borrowers after the enactment for the PPP Flexibility Act, and within two years for other borrowers unless their lender chooses to extend to five years. There are no prepayment penalties.

Borrowers may submit their forgiveness application before the end of the applicable covered period. However, an employer that submits the application before the end of the covered period loses their opportunity to benefit from safe-harbor provisions allowing the borrower to restore employees and pay by December 31, 2020 without penalty.

Forgiveness Eligible Costs

The interim rules provide additional guidance on both eligible payroll and eligible nonpayroll costs.

Of note, for a borrower to seek forgiveness, eligible payroll costs must be spent within the "covered period" following loan disbursement or an "alternative payroll covered period" beginning on the first day of the borrower's first payroll cycle. Payroll costs are incurred when the employee pay is earned unless an employee does not perform work and remains on payroll, in which case the pay is earned on the day the employee would have worked.

Eligible nonpayroll costs must also be paid during the covered period or incurred during the covered period and paid on or before the next billing date, even if the billing date falls after the covered period. For eligible nonpayroll costs that are partially within the covered period, partial forgiveness is possible.

Eligible payroll costs must comprise at least 60 percent of the forgivable amount, and eligible nonpayroll costs cannot exceed 40 percent of the forgivable amount.

In addition, certain additional expenses are now clearly established as eligible or not eligible costs. Bonuses and hazard pay are eligible payroll expenses, as are salary, wages, and commission payments to furloughed employees. However, advance payments of mortgage interest are not eligible for forgiveness.

For owner-employees and self-employed individuals utilizing the eight-week “covered period,” the maximum forgiveness amount requested can be no more than the lesser of 8/52 of 2019 compensation or $15,385 per person. For owner-employees and self-employed individuals operating under the 24-week “covered period” the maximum forgiveness amount is 2.5/12 of 2019 compensation, up to $20,833. In addition, self-employed individuals cannot count retirement or health insurance contributions.

Forgiveness Reduction

The amount of loan forgiveness is reduced for borrowers who reduced FTE (unless the borrower qualifies for one of the exemption circumstances described below), reduced employee wages, or spent less than 75 percent of the loan on payroll costs.

For borrowers who received an advance under the SBA’s Economic Injury Disaster Loan, PPP forgiveness is reduced by the advance amount.

Borrowers will not be penalized for FTE reductions that are the result of voluntary resignations, for-cause terminations, and if the borrower offers in writing to rehire an employee at the same rate of pay and hours and the employee declines.

In addition, now borrowers will not be penalized for an FTE reduction if they can document they were unable to rehire individuals who were employees on February 15, 2020 and they were unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020. To show this, borrowers should have readily available the written offer to rehire, a written record of the offer's rejection, and a written record of efforts to hire a similarly qualified individual.

Similarly, borrowers will not be penalized for FTE reductions if they document they were unable to resume normal business activity levels due to compliance with HHS, CDC, or OSHA requirements or guidelines in effect between March 1, 2020, and December 31, 2020, related to COVID-19, including compliance with standards for sanitation, social distancing, or other worker or customer safety requirements. Documents required to establish this include copies of applicable COVID-19 requirements or guidance for each business location and relevant borrower financial records.

Full time employees that work 40 hours per week are 1.0 FTE. To calculate FTEs for part-time employees, borrowers have two options. First, they can add up all the part time hours worked and divide by 40. Alternatively, they can choose to use a 0.5 FTE for every part-time worker. The chosen calculation option must be used consistently.

For reductions in employee salary or wages, any reduction at or above 25 percent impacts forgiveness. This calculation is made on a per-employee basis, not aggregate.

Further, borrowers will only have forgiveness reduced once for related actions. For example, a reduction in FTE for an employee would not then again count as a reduction in wages directly connected to the FTE reduction.

Borrowers that seek to avoid a reduction in forgiveness due to pay cuts or FTE reductions have until December 31, 2020 to restore FTEs or salaries and wages.

Additional information for nonprofits and small businesses impacted by the coronavirus pandemic is at the D.C. Bar Pro Bono Center's Coronavirus Legal Resources section at www.probono.center/NPSB.

If you have questions about these programs or other legal issues, feel free to contact us at cedinfo@dcbar.org.

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