

Alert | Health Emergency Preparedness Task Force: COVID-19 Economic Stimulus



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PPP Loan Forgiveness: What the Latest Guidance Means for You

On May 22, the Small Business Administration and the Treasury Department released its latest guidance in the form of two interim final rules on loan forgiveness: “[Business Loan Program Temporary Changes; Paycheck Protection Program – Requirements – Loan Forgiveness](#)” and “[Business Loan Program Temporary Changes; Paycheck Protection Program – SBA Loan Review Procedures and Related Borrower and Lender Responsibilities](#).” This, coupled with Treasury’s recent [Loan Forgiveness Application](#) gives borrowers seeking forgiveness of their Paycheck Protection Program loans a better understanding of the process, subject to future regulatory or legislative changes.

Forgivable Uses of PPP Loans

The forgivable uses are:

- You must spend at least 75% of the forgivable amount of your PPP loan on **payroll costs**
- Payroll costs for U.S.-resident employees, consist of
 - Salary, wage, commission or similar compensation (up to \$100,000 per employee)
 - Cash tips or equivalent

- Payment for vacation, parental, family, medical, or sick leave (other than qualified family or sick leave wages for which a credit is allowed under Sections 7001 or 7003 of the Families First Coronavirus Response Act) Allowance for dismissal or separation
- Payment required for the provision of group health care benefits, including insurance premiums
- Payment of any retirement benefit
- Payment of state or local tax assessed on the compensation of employees
- You may not spend more than 25% of the forgivable amount of your PPP loan on **nonpayroll costs**, consisting of:
 - Payment of interest on a business mortgage obligation for real or personal property entered into prior to Feb. 15, 2020 (but not on principal prepayments or payment of principal),
 - Payments on business rent obligations on real or personal property under a lease agreement in force prior to Feb. 15, 2020
 - Business utility payments (for which service commenced prior to Feb. 15, 2020, consisting of:
 - Electricity
 - Gas
 - Water
 - Transportation (waste removal)
 - Telephone
 - Internet access

Loan Forgiveness Process Generally

A borrower must complete and submit the Loan Forgiveness Application (or its lender’s equivalent) to its lender or the lender servicing its loan. Bear in mind that your PPP loan may have been sold to another SBA lender, although your original lender may still be the servicer on the loan. The lender is generally the entity making a determination on your loan forgiveness and has 60 days from the receipt of a complete application to issue a decision to the SBA. The SBA has 90 days from the date or receipt of the complete loan forgiveness application from the lender, subject to any review of the loan or application, to remit the forgiveness amount to your lender.

The documentation a borrower must submit with its Loan Forgiveness Application, or alternatively maintain and make available on request, is set forth in the Loan Forgiveness Application.

What Issues Are Among Those SBA Will Consider for Lender-Reviewed Loans?

- Was the borrower ineligible for the PPP loan under the CARES Act, SBA rules, or guidance available at the time of the borrower’s PPP application?
- Was the borrower ineligible under the terms of its application (for example, lacked an adequate basis for the certifications it made)?

What Happens if the SBA Determines All or a Part of a Loan Should Not Be Forgiven?

The remaining balance plus accrued interest must be repaid before the two year maturity date (from the date of the loan).

What Loans Will the SBA Review?

The SBA may review any PPP loan, as the SBA Administrator deems appropriate, and all borrower's must retain their PPP documentation for six years after the date the loan is forgiven or paid in full. Borrowers should be prepared to permit authorized representatives of the SBA, including representatives of the Office of Inspector General, to access such files upon request.

What Issues are Among Those SBA Will Consider in its Own Review?

- Borrower eligibility, based on the CARES Act, the rules and guidance available at the time of the borrower's PPP loan application, and the terms of the borrower's loan application. These include, but are not limited to:
 - ineligible businesses under 13 C.F.R. § 121.110 (as modified and clarified by the PPP Interim Final Rules)
 - affiliation status under 13 C.F.R. § 121.301(f)
 - the information, certifications, and representations on the Borrower Application Form and Loan Forgiveness Application Form
 - loan amounts and use of proceeds (i.e., only allowable uses under the CARES Act)
 - loan forgiveness amounts

What Happens if the SBA Believes There Is an Issue with My Loan?

The SBA or the lender will contact the borrower for additional information. Failure to respond to these requests may result in a determination that the borrower was not eligible for the loan or forgiveness. If the SBA ultimately determines that the borrower is ineligible, loan forgiveness will not be available. The SBA intends to publish separate guidance regarding an appeal process.

Technical Forgiveness Questions

What Happens if I Received My PPP Loan in the Middle of a Pay Period?

Borrowers may seek forgiveness within eight consecutive weeks (56 days) beginning on either:

- the date of disbursement of the PPP loan by the lender, or
- the first date of the first payroll cycle in the covered period (the "alternative payroll covered period")

Payroll costs incurred during the borrower's last pay period during the covered period or alternative payroll covered period are eligible for forgiveness if paid on the next regular payroll date. Borrowers may make this election on the Loan Forgiveness Application.

May I Pay My Employees Hazard Pay, Commissions, or Other Bonuses and Have Those Count as Payroll Costs?

Yes, as long as the salary, wages, hazard pay and bonuses do not exceed \$100,000 on an annualized basis over the covered period (or alternative payroll covered period). This includes any cash compensation paid to a furloughed employee.

What About Owner-Employees and Self-Employed Individuals?

Compensation for owner-employees and self-employed individuals is capped as follows:

- The lesser of 8/52 of 2019 compensation or \$15,385 per individual in total across all businesses,
- Schedule C filers (under the Internal Revenue Code) are capped by the amount of their owner compensation replacement, calculated on the basis of 2019 net profit.
- General partners are capped by the amount of their 2019 net earnings from self-employment (reduced by claimed Section 179 expense deductions under the Internal Revenue Code, unreimbursed partnership expenses, and depletion from oil and gas properties) multiplied by 0.9235.

No additional forgiveness is provided for retirement or health insurance contributions for self-employed individuals, including Schedule C filers and general partners.

What Happens if I Receive a Bill for a Nonpayroll Cost During the Covered Period or After the Covered Period?

- Any bill paid for a nonpayroll cost during the covered period is eligible, and
- Any amounts incurred for nonpayroll costs during the covered period are eligible so long as you pay them on or before the next regular billing date.
- You may not, however, make any advance mortgage payments, as these are forbidden by the CARES Act.

What Might Reduce My Loan Forgiveness?

Your forgiveness amount may be reduced as follows:

- If, during the eight-week period (or alternative payroll covered period) from when you receive your first installment of your PPP loan, your full-time equivalent (FTE) count is lower than:
 - your average FTE count during the period Feb. 15, 2019 through June 30, 2019,
 - your average FTE count during the period Jan. 1, 2020 through Feb. 29, 2020, or
 - If you are a seasonal employer, the two preceding months or a consecutive 12-week period between May 1, 2019, and Sept. 15, 2019

then your forgiveness may be adversely impacted.

How do I Calculate Average FTEs during the Covered Period or Alternative Payroll Covered Period?

- For each employee, enter the average number of hours paid per week, divide by 40, and round the total to the nearest tenth (but not > 1.0)
- Borrowers can choose 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

Are There Circumstances When Forgiveness is Not Adversely Affected by Lower FTEs?

Yes.

- FTE count is not reduced for borrowers who
 - made a good faith, written offer to rehire (or restore the hours of) an employee during the covered period or the alternative payroll covered period,
 - the offer was for the same salary or wages and same number of hours as earned by the employee during the last pay period before the separation or hours reduction,
 - the offer was rejected by the employee,
 - the borrower has maintained records documenting the offer and rejection, and
 - the borrower informed the applicable state unemployment insurance office of such employee’s rejected offer of reemployment within 30 days of such rejection (further information regarding this reporting requirement will be made available on the SBA’s website).
- The Loan Forgiveness Application also does not reduce FTE count by:
 - Employees fired for cause during the covered period (or alternative)
 - Employees who voluntarily left employment during the covered period (or alternative), or
 - Employees who voluntarily reduced their hours
- Section 1106(d)(5) does not reduce the FTE count for any employee who was furloughed, terminated or has his or her hours reduced during the period between Feb. 15, 2020, and April 26, 2020, and who was restored to their position or hour by not later than June 30.
- For employees who made less than \$100,000 in 2019, if a borrower reduced salaries by more than 25% (as compared to Jan. 1, 2020, to March 31, 2020), during the period Feb. 15, 2020, to April 26, 2020, your forgiveness may be reduced by the amount of salary reduction on a dollar-for-dollar basis in excess of 25%, unless the salary is restored by June 30, 2020. The salary reduction provision will not be used to “double count” FTE reductions, however. This basis for forgiveness reduction will be used only if there was no corresponding FTE reduction for that employee.

The foregoing analysis and summary reflects guidance issued by the Treasury Department through May 26, 2020. Additional guidance may be issued that materially alters the information set out in this GT Alert. Interested parties should review any updated guidance posted on the [Treasury’s website](#) and consult with counsel prior to submitting their application for forgiveness.

For more information and updates on the developing situation, visit [GT’s Health Emergency Preparedness Task Force: Coronavirus Disease 2019](#) or [GT’s COVID-19 Economic Stimulus Team](#).

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