

INTERPRETING NEW GUIDANCE FROM THE SBA

Since the Paycheck Protection Program (“PPP”) was announced in late March as part of the hastily drafted and passed CARES Act, many questions surfaced about how businesses would be eligible for PPP loan forgiveness. Last week, the SBA provided updates to its PPP FAQs and also released the form application for PPP loan forgiveness (“Application”). Both the FAQs and the Application itself provide business-friendly guidance and policy insight that should help calm the nerves of many business owners.

What if my pay periods do not line up with my ‘covered period’?

In both the CARES Act and preliminary guidance offered by the SBA, the ‘covered period’ (i.e., the period during which payroll and certain other expenses were eligible for forgiveness) was the eight-week period starting on the day PPP loan funds were disbursed to the borrower. For many borrowers, this meant their covered period might start on a Wednesday and end on a Tuesday – but their payroll started on Monday of each week, or every other week. It seemed impossible for businesses to fully capture the payroll actually paid during the covered period.

Fortunately, the SBA recognized this issue and the Application describes a new concept: the Alternative Payroll Covered Period (“APCP”). The APCP moves the start date of the covered period to coincide with the start of the payroll period *immediately following* the date on which the PPP loan funds were disbursed to the borrower. Additionally, the SBA recognized that many employers pay in arrears and has specifically allowed payroll costs incurred in the APCP but paid in the ordinary course right after the APCP to be included in the forgiveness calculation.

How do you determine full-time equivalency (FTE)?

The backdrop for this question is the FTE forgiveness reduction calculation, which lowers the amount of the loan that can be forgiven if a business has reduced its workforce in comparison to its workforce during one of the two FTE Test Periods (2/15/19 – 6/30/19 or 1/1/20 – 2/29/20). While the concept is easy to grasp, there are many ways that a business could measure its FTEs (e.g., working more than 30 hours may be considered an FTE because the employee qualifies for health insurance benefits; some businesses do not pay for lunch breaks, but instead assume a 37.5 hour workweek to be full-time).

Quoting directly from the Application: “For each employee, enter the average number of hours paid per week, divide by 40, and round the total to the nearest tenth. The maximum for each employee is capped at 1.0. 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 may be used at the election of the Borrower.”

For many businesses, the “simplified method” will result in a more forgiving calculation for the FTE test, since a business could have previously treated employees as being full-time with a 37.5 or even 35 hour work week during the FTE Test Period, but reduced the workweek to 30 or even 20 hours during the covered period. Using the simplified method, this employee would count as a 0.5 FTE in each period.

Additionally, if an employee regularly worked more than 40 hours a week during the FTE Test Period but only worked 40 hours per week in the covered period, that employee counts as the same FTE for each period, meaning there is no reduction in loan forgiveness with respect to that employee.

Finally, based on the rounding to the nearest one-tenth, a de minimis reduction in hours from 40 to 38 per week will not result in a lower FTE calculation.

How do you measure whether an employee's salary or wages were reduced by more than 25%?

This may be the area that was causing the most angst among business owners, since it seemed mathematically impossible to not have reduced compensation by at least 25% if you were comparing compensation in the first quarter of 2020 (13 weeks) to the covered period (8 weeks). Fortunately, the SBA has opted to focus only on either the annualized salary (for exempt employees) or the average hourly wage (for non-exempt employees). Also, with respect to the salaried employees making over \$100,000 per year during the first quarter, as long as the annualized salary remains above \$100,000 during the covered period, then any reduction in salary is not considered a reduction under this test.

What if an employee was terminated for "cause"?

The Application states that any employee "fired for cause" *during* the covered period "do[es] not reduce the Borrower's loan forgiveness." Oddly, this could mean that an employee that was fired for cause *prior* to the covered period would still count as a missing FTE during the covered period.

What about those employees that were temporarily furloughed or laid-off, but now refuse to return to work?

Both the Application and the Question 40 of the FAQs provide that for any employee the business has offered to re-employ that individual in writing, and the employee (for whatever reason) refuses to accept re-employment, this will not reduce the loan forgiveness amount.

What about employees that voluntarily quit or have asked to have their hours reduced?

The Application treats these employees the same as those fired for cause. As long as the employee took this action during the covered period, there is no reduction in the loan forgiveness amount.

I've heard about June 30th - Is that date still important?

Yes. The Application specifies that June 30th is a critical date in the FTE Reduction Safe Harbor. From the Application: "A safe harbor under applicable law and regulation exempts certain borrowers from the loan forgiveness reduction based on FTE employee levels. Specifically, the Borrower is exempt from the reduction in loan forgiveness based on FTE employees described above if both of the following conditions are met: (1) the Borrower reduced its FTE employee levels in the period beginning February 15, 2020, and ending April 26, 2020; and (2) the Borrower then restored its FTE employee levels by not later than June 30, 2020 to its FTE employee levels in the Borrower's pay period that included February 15, 2020."

The Application also uses June 30th as a secondary testing date under the Salary/Hourly Wage Reduction test.

What records will I need to submit with my Application?

As expected, the documentation that must be included is narrowly focused on the expenses included in the forgiveness amount and are set forth in detail on Page 10 of the Application. In addition to the records that must be submitted with the Application, the business needs to keep other records that support the statements in the Application for six years after the date the PPP loan is either forgiven or paid in full.



Scott Foster

✉ sfoster@bulkley.com
☎ 413-272-6258



Mark Cress

✉ mcress@bulkley.com
☎ 413-272-6255



Ryan Barry

✉ rbarry@bulkley.com
☎ 413-272-6264



Sarah Willey

✉ swilley@bulkley.com
☎ 413-272-6228