

HRW CLIENT ALERT

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SBA Issues Final Rules on Loan Forgiveness and Loan Review Procedures

Important New Requirement: If employee refuses offer to return to work employer must notify unemployment office within 30 days, follow additional steps, to protect loan forgiveness.

On May 22, 2020, the Small Business Administration (“SBA”) released two new interim final rules regarding the application of the Payroll Protection Program (“PPP”):

- 1) The Interim Final Rule on [Loan Forgiveness](#) provides some much needed clarification on what expenses will be eligible for forgiveness under the PPP and what actions may result in reductions in loan forgiveness. This Interim Final Rule on Loan Forgiveness comes a week after the SBA published the [Loan Forgiveness Application](#).
- 2) The Interim Final Rule on [SBA Loan Review Procedures](#) explains how the SBA will conduct reviews of loan eligibility and forgiveness.

1) The Interim Final Rule on Loan Forgiveness

Highlights include:

- **New Obligation with Respect to Loan Forgiveness and an Employee’s Refusal to Return to Work:** [FAQ #40](#), published by the SBA on May 3, 2020, addressed an issue many employers were facing with respect to laid-off employees who were offered the opportunity to be rehired and rejected the offer. Per the FAQ, an employer’s loan forgiveness would not be reduced if the employer made a good faith, written offer of rehire for the same salary/wages and same number of hours, and the employee’s rejection of that offer was documented by the employer. The Interim Final Rule clarified what is required for an employer’s forgiveness to not be reduced under the above-referenced circumstances:
 - i. The borrower made a good faith, written offer to rehire such employee (or, if applicable, restore the reduced hours of such employee) during the covered period or the alternative payroll covered period;
 - ii. The offer was for the same salary or wages earned and same number of hours worked by such employee in the last pay period prior to the separation or reduction in hours;
 - iii. The offer was rejected by such employee;
 - iv. The borrower has maintained records documenting the offer and its rejection; and
 - v. **The borrower informed the applicable state unemployment insurance office of such employee’s rejected offer of reemployment within 30 days of the employee’s rejection of the offer.**

Recipients of PPP loans should note that bullet (v) was not included in FAQ #40 and is a previously unknown requirement to take advantage of this exception to loan forgiveness reduction. According to footnote 4 of the rule, the SBA will publish further information on its website regarding reporting information concerning rejected rehire offers to the state unemployment insurance office.

- **Payroll Costs Incurred or Paid over 8-Week Alternative Payroll Covered Period:**
The Loan Forgiveness Application introduced the concept of the “Alternative Payroll Covered Period” under which a borrower with a biweekly (or more frequent) payroll schedule may elect to calculate eligible payroll costs using the eight-week period that begins on the first day of their first pay period following their PPP Loan Disbursement Date, as opposed to the date of the disbursement. The Interim Final Rule provides that if payroll costs are incurred during the Alternative Payroll Covered Period, but paid after the end of the period, such payroll costs *will be eligible for forgiveness* if they are paid no later than the first regular payroll date thereafter.
- **Bonuses and Hazard Pay are Forgivable Payroll Costs:**
The SBA has determined that if an employee’s total compensation does not exceed \$100,000 on an annualized basis, the employee’s hazard pay and bonuses are eligible for loan forgiveness.
- **Forgiveness of Nonpayroll Costs:**
Nonpayroll costs are eligible for forgiveness if (i) paid during the covered period; or (ii) incurred during the covered period and paid on or before the next regular billing date, even if the billing date is after the covered period. The example provided in the Interim Final Rule illustrates how nonpayroll costs will be treated for purposes of loan forgiveness:

Example: A borrower’s covered period begins on June 1 and ends on July 26. The borrower pays its May and June electricity bill during the covered period and pays its July electricity bill on August 10, which is the next regular billing date. The borrower may seek loan forgiveness for its May and June electricity bills, because they were paid during the covered period. In addition, the borrower may seek loan forgiveness for the portion of its July electricity bill through July 26 (the end of the covered period), because it was incurred during the covered period and paid on the next regular billing date.
- **Definition of Full-Time Equivalent Employee:**
The Interim Final Rule confirmed the definition of full-time equivalent employee (“FTE”) used in the Loan Forgiveness Application, to mean an employee who works 40 hours or more, on average, each week. For purposes of calculating an FTE, employers must divide the average number of hours paid for each employee per week by 40, capping the result at 1.0. An employee paid, for example, for 30 hours per week will be considered to be 0.75 of an FTE. However, an employee paid for more than 40 hours per week will only be considered 1.0 FTE.
- **Determining Reductions in Loan Forgiveness:**
The Interim Final Rule clarifies that reductions in loan forgiveness will not be duplicated when a reduction in wages or salary is caused by a reduction in hours (which ultimately results in a reduction in FTEs). The Interim Final Rule provides the following example:

Example: An hourly wage employee had been working 40 hours per week during the borrower selected reference period (FTE employee of 1.0) and the borrower reduced the employee’s hours to 20 hours per week during the covered period (FTE employee of 0.5). There was no change to the employee’s hourly wage during the covered period. Because the hourly wage did not change, the reduction in the employee’s total wages is entirely attributable to the FTE employee reduction and the borrower is not required to conduct a salary/wage reduction calculation for that employee.

2) The Interim Final Rule on SBA Loan Review Procedures

By way of brief overview, the Interim Final Rule on SBA Loan Review Procedures (“Loan Review Procedures Rule”) addresses the procedures and criteria through which the SBA will review a borrower’s use of a PPP loan and the certifications and representations made by borrowers in association with the loan. Further, the Loan Review Procedures Rule addresses the review process for applications for loan forgiveness and how lenders will process loan forgiveness.

Conclusion

Recipients of PPP loans should closely review the Interim Final Rule on Loan Forgiveness, the Loan Forgiveness Application, and the Interim Final Rule on SBA Loan Review Procedures to ensure they receive the maximum amount of loan forgiveness and are following the proper procedures with respect to their PPP loan.

If you have any questions regarding the new rules or the PPP loan in general, please reach out to any member of HRW's COVID-19 Team:

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