



CLIENT ALERT BUSINESS/CORPORATE/TAX

Important Updates and Clarifications on the PPP Program as of April 7, 2020

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During the last several days, the SBA and the Treasury Department published guidance documents in the effort to clarify certain aspects of the Paycheck Protection Program loans and the application process. We have attempted to synthesize the most important aspects of these guidance documents for those of you who have not yet applied for a PPP loan and those of you who still have an opportunity to amend their PPP application.

For background, we suggest that you review our previous advisories on the PPP Program. You can find these and other important materials on the Coronavirus Resources section of our website, [HERE](#).

- As explained in prior advisories, when you calculate your average monthly payroll – the key factor in determining how much you can borrow – you are to count only the first \$100,000 of an employee’s “compensation,” and the rest is excluded. There has been substantial confusion about what is included in “compensation” for this purpose.

The latest guidance clarifies this point: “compensation” means the cash wages (like salary) actually paid to the employee - in other words, cash wages in excess of \$100,000 are not to be counted as part of your payroll calculation, but all of the other allowable elements of compensation *can* be counted in that calculation, such as health insurance, paid vacation, 401K match, and so on, as explained in prior advisories. This interpretation will substantially increase the amount that can be borrowed by employers with employees who earn more than \$100,000.

- There has been confusion over whether you can include federal withholding and federal payroll taxes in the calculation of your average monthly payroll. According to the latest guidance, you *can* include federal withholding and the employee share of FICA. That too can substantially increase the amount you can borrow. But a word of caution: Can you borrow money to pay these federal taxes, and then have that obligation forgiven? That would mean that the federal government would be paying your tax obligations with its money. We expect further guidance to clarify this issue, and you should keep this potential restriction on the forgiveness amount in mind when you are calculating how much to borrow.

- We know that employers are to determine their average monthly payroll based on 12 months of prior payroll, but the CARES Act, the SBA, the Treasury, and various lenders have provided conflicting instructions: should employers use the immediately prior 12 months, or calendar 2019? The latest guidance allows you to use either.
- The amount of the PPP loan forgiveness is determined by how much you spend on payroll, rent/mortgage interest, and utilities in the 8 weeks after you receive the loan – and until recently that was just about all we knew about how the forgiveness will be calculated. *The SBA just added another, very important factor:* for forgiveness purposes, it has taken the position that at least 75% of the PPP loan proceeds must be spent on payroll. If your business is high rent/low payroll, you should factor into your decision-making that the forgiveness amount may be reduced below what you had anticipated. More guidance is certain to emerge on how the forgiveness amount will be determined.
- There has been confusion over which businesses are eligible for a PPP loan. Some have interpreted the CARES Act to provide that only employers with 500 or fewer employees (with exceptions in the hotel and food industry) were eligible. The most recent guidance, however, states that businesses with more than 500 employees can be eligible if they satisfy certain SBA statutory and regulatory requirements pertaining to number of employees and revenue. This gets complicated. Feel free to contact us if you think this might apply to your business.

Stay tuned. As we continue to learn, what's true today may not be true tomorrow.

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The Wisler Pearlstine team of business attorneys is ready to address your COVID-19 questions and concerns. Please contact any of us at 610.825.8400 you have concerns about the impact of COVID-19 in the workplace.

This article represents our best effort to assemble accurate information on an accelerated basis. However, the subject is complex, and many details have been summarized or omitted in the interest of focusing on key points. In addition, the law and the guidance issued by the government is constantly changing. You should not rely on the accuracy or completeness of this information for your business and personal decisions but, rather, should seek updated, personalized legal advice as needed.

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