

SBA Further Clarifies PPP Forgiveness Rules and Procedures

The U.S. Small Business Association (SBA) issued new guidance on June 22, 2020, providing further clarity to the Paycheck Protection Program (PPP) loan forgiveness process. For comprehensive information about the PPP Forgiveness Application, visit [here](#). For information pertaining to the passing of the PPP Flexibility Act, visit [here](#). For subsequent SBA guidance relating to the PPP Flexibility Act, visit [here](#).

Below are the key takeaways from this new guidance:

Borrowers May Submit Forgiveness Application Before End of Covered Period, But Questions Remain

The SBA confirmed that a borrower may apply for forgiveness before the end of the 8-week or 24-week period covered period if the borrower has used all of the loan proceeds for which the borrower is requesting forgiveness. However, if the borrower applies for forgiveness before the end of the covered period and has reduced any employee's salaries or wages in excess of 25%, the borrower must account for the excess salary reduction for the full 8-week or 24-week covered period.

It is unclear whether borrowers must account for potential reductions in future headcounts during the remainder of the covered period should they decide to apply for forgiveness early. It is also unclear whether there will be a lookback to determine if a borrower's full-time equivalent (FTE) headcounts were in fact maintained. Lastly, it is uncertain what the penalties would be if the estimated future FTE counts end up being different from what was reported on the application for forgiveness.

FTE Headcounts Exception For HHS, OSHA or CDC COVID-19 Guidance or Requirements Includes State and Local Shutdown Orders

The PPP Flexibility Act established a forgiveness reduction exception to reductions in FTE headcounts where borrowers are able to document an inability to return to the same level of business activity as compared to February 15, 2020 due to compliance with requirements established or guidance issued by HHS, OSHA or CDC.

The SBA has confirmed in the newly issued guidance that this FTE reduction exception also applies to borrowers acting pursuant to state and local shutdown orders. Because a significant amount of the reduction in business activity is the result of state and local government shutdown orders that are based in part on guidance from HHS, OSHA and CDC, the SBA stated that "direct or indirect" compliance with these agencies was adequate to meet this exemption.

To rely on this exemption, borrowers must maintain documentation, including copies of applicable federal agency COVID-19 Requirements or guidance or state or local shutdown orders, for each business location and relevant borrower financial records. For example, restaurants located in New York State may rely on New York Executive Order 202.03 where Gov. Andrew Cuomo ordered the closing of restaurants.

Previous De Minimis Exceptions Partially Superseded; FTE Headcounts Exception for Employees Who Reject an Offer of Rehire Must Include Documented Efforts to Hire a Similarly Qualified Individual

As discussed in our previous [information memo](#), there is an FTE headcount reduction exemption for employees who are given an offer of rehire and who subsequently deny that offer.

However, in this recent guidance, the SBA has expanded this requirement and states that the documentation that borrowers should maintain to show compliance with this exemption include, but are not limited to, the written offer to rehire an individual, a written record of the offer's rejection, and *a written record of efforts to hire a similarly qualified individual*. As such, borrowers must attempt to fill the position with another qualified person and document such efforts before qualifying for this exemption and memorialize these efforts in writing.

The de minimis exception related to reductions in hours requested by the employee has not been superseded by the recent guidance. However, questions remain regarding if employers are required to document their attempts to hire similarly qualified individuals in the cases of employee resignations, retirements, and for-cause terminations.

SBA Reiterates That It Can Review All Applications, and Borrowers Not Originally Eligible for the PPP May Not Obtain Forgiveness

The PPP forgiveness process is designed so that the lender will review the application and make a decision regarding loan forgiveness. The lender then issues its decision to the SBA.

The guidance reiterates that if the SBA determines in the course of its review of the lender's decision that the borrower was ineligible for the PPP loan based on the provisions of the CARES Act, SBA rules or guidance available at the time of the borrower's loan application, or the terms of the borrower's PPP loan application (for example, because the borrower lacked an adequate basis for the certifications that it made in its PPP loan application), then the loan will not be eligible for loan forgiveness.

The attorneys at Bond, Schoeneck & King can help by answering your questions regarding the changes to the PPP and how it effects your business. Please contact [Jeffrey B. Scheer](#), any of the [attorneys](#) in the [Business and Transactions practice](#), or the attorney at the firm with whom you are regularly in contact.



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