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LEGAL ALERT

# Congress Passes Major Changes to Paycheck Protection Program

**IN BRIEF**

On June 4, 2020, Congress passed into law the Paycheck Protection Program Flexibility Act, which makes sweeping changes to the widely popular Paycheck Protection Program ("PPP") through which businesses and organizations with 500 or fewer employees can access potentially forgivable SBA-guaranteed loans to cover payroll and certain business expenses. The PPP Flexibility Act, signed into law on June 5, relaxes certain requirements of the PPP loans that were previously included in the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") and in later guidance that came from the Treasury Department and the Small Business Administration ("SBA").

## Key Takeaways From the PPP Flexibility Act:

**8-Week Loan Period Extended to 24 Weeks.** As many businesses have found that they have remaining unexpended funds at the end of their 8-week loan period when they can make forgivable expenditures, Congress has expanded the covered period to allow funds to be expended for up to 24 weeks after the loan originates (though no later than December 31, 2020). This does not change the amount of loan proceeds available, just the time that is

given to make forgivable expenses. Borrowers can still choose to apply for forgiveness after the original 8-week period.

**Loan Repayment Period Extended from 2 Years to 5 Years.** As the global pandemic continues and the economic fallout extends, Congress has extended the repayment period, but it keeps the interest rate at 1%.

**Forgiveness Reductions Changed to Account for Difficulties in Rehiring.** The PPP Flexibility Act makes two changes to the penalty reductions applicable to otherwise forgivable expended funds as a result of a decrease in the number of full-time equivalent employees (referred to occasionally in prior alerts as the "headcount" reduction) or the wages of employees, during the covered period of the loan, compared to a "pre-COVID-19" period:

- **Time to Rehire Employees and Restore Wages Without Forgiveness Penalty Is Extended from June 30 to December 31.** Following the passage of the CARES Act, businesses that were hardest hit and had to make substantial layoffs quickly found that compliance with those sections of the PPP that exempted them from forgiveness penalties would be difficult, if not impossible. The PPP Flexibility Act lessens the burden of some of the most stringent requirements and allows funds to remain eligible for forgiveness if the borrower is able to rehire employees, to hire similarly qualified employees, or restore wages on or before December 31 (previously June 30).

- **Forgiveness Penalty Eliminated if Business Can Document It Cannot Return to the Same Level of Business Activity Due to COVID-19.** Good news to the restaurant and hospitality industry, and other sectors that have been hardest hit by COVID-19. In the PPP Flexibility Act, Congress clarifies that forgiveness will be determined without regard to the headcount penalty if your business is able to document in good faith that it is unable to return to the same level of business activity as prior to February 15, 2020, due to compliance with public health guidance or requirements from the CDC, OSHA, or DHHS, relating to sanitation, social distancing, or worker or customer safety requirements during the period between

March 1 December 31. Additionally, borrowers are exempted from the headcount penalty if they are able to document both (1) an inability to rehire employees who were employed as of February 15, and (2) an inability to hire similarly qualified employees for unfilled positions on or before December 31.

**Requirement to Spend 75% of Loan on Payroll Costs Relaxed to 60%.** In response to criticism regarding the requirement that borrowers must spend at least 75% of the loan proceeds on payroll costs, Congress has reduced this threshold to 60% of the total loan proceeds; however, the 60% requirement is now a "cliff" meaning that if you fail to spend at least 60% of the loan proceeds on "payroll costs," as defined in the CARES Act then none of the loan amount will be forgiven. While the bill was on the Senate floor, some lawmakers, including Senator Collins, indicated the "cliff" may be amended—stay tuned.

**Payroll Tax Deferral Now Available for Businesses That Take PPP Loans.** The CARES Act also provided a payroll tax deferral, extending the deadline for the employer portion of social security or FICA taxes (6.2%), and certain railroad retirement taxes from March 27, 2020 through December 31, 2020. Under the extended deadlines, the first 50% is due no later than December 31, 2021, and the remaining 50% is due on December 31, 2022. Although the CARES Act indicated that was not available for any entity that also took a PPP loan, the PPP Flexibility Act now allows businesses and organizations to take advantage of both.

**Loan Deferral Period Extended to Up to 11 Months.** The PPP Flexibility Act provides that a borrower does not have to make a payment until a forgiveness determination is granted by the SBA. Currently, your lender must process the loan forgiveness application within 60 days and make its determination, and the SBA has 90 days to review and approve that determination. Combined with the new 24-week loan period, this gives borrowers up to 11 months (depending on when forgiveness is determined) before it is obligated to begin repaying loan principal and interest amounts.

## Bottom Line

This body of legislation is rapidly changing as Congress and the SBA work to provide quick and substantial relief to offset some of the economic impacts of the novel coronavirus,

COVID-19 pandemic. And, as of the date of this alert, approximately $120 billion dollars remained in the second tranche of Paycheck Protection Program available funds for those organizations who have not yet received one.