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Lawmakers May Not Have Abandoned Small Businesses After All – The Paycheck Protection Program Flexibility Act of 2020 May Be Just What the Doctor Ordered

By Larry Brant on 5.28.20 | Posted in Federal Law, Legislation, Tax Planning

As I previously reported, the Paycheck Protection Program ("PPP") was touted as providing emergency assistance (i.e., a lifeline) to restaurants and other businesses ordered to shut their doors (e.g., dental offices, bars, hair salons, fitness clubs, yoga studios, shopping malls and movie theatres). The owners of these businesses thought the availability of a forgivable loan equal to two-and-one-half times their monthly payroll costs could be exactly what the doctor ordered. The loan, if forgiven, could keep these business afloat and allow them to retain their trained and skilled workforces once they were allowed to reopen. Unfortunately, that hypothesis is severely flawed.

Under the PPP, in order for a borrower to be eligible for forgiveness, the loan proceeds must be used for payroll costs (75 percent), and rent and utilities (25 percent) within eight weeks following the date of the loan. If a borrower's business is shut down due to an executive order of the governor for most, if not all, of the eight-week period, how can the borrower use the loan proceeds that indisputably are needed to reopen and maintain the workforce? That circumstance was clearly not contemplated by Congress when it passed the CARES Act.

The options for borrowers in this predicament are limited, namely: (i) repay the loan now and permanently close the business and layoff the workers; or (ii) reopen the business when allowed, but be faced with the repayment of the loan. For many businesses, the latter option will not end well. While the interest rate on the loan is only one percent and the first six months of payments are deferred, the vast majority of these businesses will not be able to repay the loan over the remaining 18 months of the two-year amortization schedule. These businesses are already severely impaired by the COVID-19 pandemic. The repayment obligation of their PPP loan will be the nail in the coffin.

The CARES Act allowed the SBA to make the loans repayable over a period of up to 10 years. Why it chose to require repayment over a two year period is anyone's guess. One solution would be for the SBA to extend the loan repayment period for businesses shut down during the pandemic to something more realistic (e.g., 10 years). This solution would at least give these businesses a fighting chance at survival and help preserve jobs in a time when unemployment is at a record high.

The better solution, however, would be to move the start of the eight-week period to the date the businesses are allowed to fully re-open. This solution, in terms of eligibility for loan forgiveness, would put affected businesses on a more even playing field with other businesses.

The SBA is aware of the dreadful situation that borrowers subject to shutdown orders face. It has, however, taken no action to cure the problem to date. Additionally, U.S. Secretary of the Treasury, Steven Mnuchin, is aware of the issue and has expressed sympathy to these businesses. However, he kicked the can down the road, deferring the issue to lawmakers.

Today, the U.S. House of Representatives voted 417 to 1, passing the Paycheck Protection Program Flexibility Act ("PPPFA"). The PPPFA, jointly introduced in the House by Representative Chip Roy, a Republican from Texas and Representative Dean Phillips, a Democrat from Minnesota, may be just what the doctored ordered. The PPPFA (as passed by the House):

- **Extends the eight-week period in which borrowers must spend their PPP loan funds in order to be considered in the loan forgiveness computation to 24 weeks for most borrowers**.
- **Changes the loan proceeds use formula of 75 percent payroll/25 percent rent and utilities rule to 60 percent payroll/40 percent rent and utilities.**
- **Allows borrowers that receive loan forgiveness to potentially defer payroll taxes.**
- **Loosens up the requirement that borrowers must rehire employees by June 30, 2020, and potentially extends the deadline to December 31, 2020.**
- **Extends the two-year repayment requirement for loan proceeds not forgiven to a minimum of five years.**

Indeed, the PPPFA, may be just what the doctor ordered to cure the ills facing small businesses shut down by government orders. House Bill 6886 is going to be introduced in the U.S. Senate early next week. Hopefully, the Senate will promptly pass the bill, and it will be sent to President Trump's desk for signature.

Stay tuned!

Tags: CARES Act, Coronavirus, COVID-19, employers, forgivable loans, Paycheck Protection Program, Paycheck Protection Program Flexibility Act of 2020, payroll costs, small business, Taxpayer, U.S. House of Representatives, U.S. Senate