NEW LEGISLATION GIVES EMPLOYERS
MORE FLEXIBILITY WITH PPP LOANS
June 5, 2020

The Paycheck Protection Program Flexibility Act of 2020 (the "Act") was signed into law this week, making significant changes to the Paycheck Protection Program (PPP). Borrowers have been provided more options and time under the Act.

Borrowers now have additional time to spend PPP loan proceeds for payroll costs and other qualifying expenses. Borrowers may now spend PPP loan proceeds over 24 weeks (rather than 8 weeks) from receipt. Previously, borrowers were required to spend the loan proceeds by June 30, 2020, or potentially lose loan forgiveness with respect to the unspent funds. That deadline has been moved to December 31, 2020.

Borrowers now have more flexibility in how PPP loan proceeds can be spent. Previously, the PPP required that 75% of the loan proceeds needed to be used for payroll costs. The Act reduced that requirement to 60%.

The Act also gives borrowers until December 31, 2020 to return to normal operations in order to avoid proportional reductions to loan forgiveness.

The Act provides additional rules regarding loan forgiveness, repayment deferral, loan term and payroll tax deferral, each of which are described in the table below.

Please contact a Moss & Barnett attorney if you have any questions.

| Topic | Initial PPP Requirement | Revised PPP Requirement |
|---|---|---|
| **Use of Loan Proceeds** – Covered Period | Loan proceeds needed to be used by June 30, 2020. | Loan proceeds need to be used by December 31, 2020. |
| **Loan Forgiveness** – Covered Period | Funds spent during the 8-week period following receipt of the loan were eligible for loan forgiveness. | Funds spent during the 24-week period following receipt of the loan (but not to extend past December 31, 2020) are eligible for loan forgiveness.<br><br>Borrowers that received loans prior to the date of the Act can elect for the shorter 8-week covered period. |
| **Loan Forgiveness** – Exception to Headcount Reduction Based on Return to Normal Headcount | Employers had until June 30, 2020 to return to normal headcount and avoid the headcount reduction to loan forgiveness. | Employers have until December 31, 2020 to return to normal headcount and avoid the headcount reduction to loan forgiveness. |
| **Loan Forgiveness** – Exception to Salary and Wage Reduction Based on Return to Normal Salary and Wages | Employers had until June 30, 2020 to return to normal salary or wages and avoid the salary or wage reduction to loan forgiveness. | Employers have until December 31, 2020 to return to normal salary or wages and avoid the salary or wage reduction to loan forgiveness. |
| **Loan Forgiveness** – Exception to Headcount Reduction Based on Inability to Rehire | Department of Treasury rules provided an employer that made good faith, documented offers to rehire individuals at the same wage and salary would not be subject to the headcount reduction to loan forgiveness if those offers were rejected. | The Act adopts a similar rule about inability to rehire and adds an exception for businesses that are not able to return to normal headcount due to compliance with requirements or guidance issued by federal agencies related to COVID-19. |

| **Topic** | **Initial PPP Requirement** | **Revised PPP Requirement** |
|---|---|---|
| **Loan Forgiveness** – Maximum Amount of Non-Payroll Costs<br><br>75% / 25% Rule<br>v.<br>60% / 40% Rule | Department of Treasury rules stated that at least 75% of the amount of loan forgiveness needed to be for payroll costs. | Act requires at least 60% of the loan must be used for payroll costs in order to obtain forgiveness.<br><br>*Note: The Act appears to require borrowers to use at least 60% of the loan for payroll costs or no forgiveness is possible. For example, if a borrower had a $1 million loan and used $500,000 for payroll costs and did not use the remainder, the borrower would not be eligible for forgiveness. This appears to be a drafting error and it is unclear if it will be fixed.*<br><br>*It is also not clear at this time what the Department of Treasury will do with its existing rule that states at least 75% of loan proceeds must be spend on payroll costs, which is an independent requirement.* |
| **Loan Term** | PPP loans (i.e. the amount not forgiven) had a two-year maturity pursuant to rules issued by the Department of Treasury. | For loans made after the date of the Act, the maturity is to be at least 5 years and not more than 10 years.<br><br>Language in the Act could be interpreted as encouraging lenders to conform loans made prior to the date of the Act with the new standard. |
| **Payment Deferral** | Payment deferral for not less than 6 months and not more than 1 year. | Payment deferral is mandatory until loan forgiveness determined, or if borrower does not request forgiveness, 10 months after the end of the loan forgiveness covered period. |
| **Payroll Tax Deferral** Employer Portion of Social Security Taxes | Borrowers whose PPP loans are forgiven are not eligible for the deferral of the employer's portion of Social Security taxes provided by the CARES Act | Borrowers whose PPP loans are forgiven can defer the employer's portion of Social Security taxes provided by the CARES Act |