CARES Act Passed Providing Forgivable Loans to Maintain Business Continuity in Trying Times (Updated March 27, 2020)

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The "Coronavirus Aid, Relief, and Economic Security Act" or "CARES Act" was signed into law by the president on March 27, 2020. The CARES Act has a number of provisions meant to allow employers to receive forgivable loans to pay business expenses and permit them to maintain continuity of operations to the extent possible in light of other legal restrictions currently in place.

Section 1102 of the CARES Act is entitled the Paycheck Protection Program (the "**PPP**"), administered by the Small Business Administration (the "**SBA**") under its 7 (a) loan guarantee program, pursuant to which employers are able obtain forgivable loans to pay for business expenses including payroll (including health insurance, sick leave, retirement, and other benefits), mortgage interest expenses, rent expenses, and utility expenses (collectively, "**Business Continuity Expenses**"). The principal balance of these loans, if used for Business Continuity Expenses, are forgivable after June 30, 2020.

1. Who is Eligible?

Employers, including the self-employed, independent contractors and sole proprietors, with 500 or fewer employees are eligible for loans under the PPP. Hospitality-based businesses (those whose NAICS code begins with "72") are eligible for the loans so long as they have 500 or fewer employees in any one location. Further, under normal SBA rules, certain relationships between business entities result in the entities being deemed "affiliates" and therefore, combined for SBA purposes. Hospitality-based businesses are not subject to the affiliation rules for the purposes of PPP loans.

2. How Much May be Borrowed?

The amount that may be borrowed under the PPP is generally equal to the lesser of 2.5 times the average monthly payroll expenses for the year 2019, or at the election of the borrower, 2.5 times the average monthly payroll expenses for the period of time from March 1, 2019 to June 30, 2019, or $10,000,000. There is an alternative calculation for seasonal employers.

Payroll costs include the sum of:

a. Salary, wage, commission, or similar compensation;
b. Payment of cash tip or equivalent;
c. Payment for vacation, parental, family, medical, or sick leave;
d. Allowance for dismissal or separation;
e. Payment required for the provisions of group health care benefits, including insurance premiums;
f. Payment of any retirement benefit; or
g. Payment of State or local tax assessed on the compensation of employees.

Payroll costs do not include:

a. The compensation of an individual employee in excess of an annual salary of $100,000, as prorated for the "covered period" (March 1, 2020 to June 30, 2020);
b. Taxes imposed or withheld under chapters 21, 22, or 24 of the Internal Revenue Code during the covered period;
c. Any compensation of an employee whose principal place of business is outside the United States;
d. Qualified sick leave wages for which a credit is allowed under section 7001 of the Families First Coronavirus Response Act (the "**FFCRA**"); or
e. Qualified family leave wages for which a credit is allowed under section 7003 of the FFCRA.

3. What May the Loan be Used for?

Loans made under the PPP may be used by employers to pay payroll costs (as defined above), costs related to the continuation of group health care benefits including insurance premiums, employee salaries, commissions or similar compensations, payment of interest on mortgage obligations incurred prior to March 1, 2020 (but not including prepayments or principal payments), rent expenses, utilities, and interest on any other debt obligations incurred before March 1, 2020.

4. How to Get the Loan?

Employers that wish to obtain a loan under the PPP may go to any existing SBA 7 (a) approved lender, or additional lenders determined by the SBA and the Secretary of the Treasury to have the necessary qualifications to process, close, disburse and service loans made with an SBA guarantee. Employers will be required to self-certify (1) that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the employer; (2) acknowledging that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments; (3) that the employer does not have an application pending for a PPP loan for the same purpose and duplicative of amounts applied for or received

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under a PPP loan; and (4) during the period beginning February 15, 2020 and ending on December 31, 2020, that the employer has not already received amounts under the PPP.

The PPP waives guarantee and other servicing fees, makes inapplicable the requirement that the employer be unable to obtain credit elsewhere, waives personal guarantee requirements, caps the interest rate at 4%, provides complete payment deferment relief (including payment of principal, interest and fees) for not less than 6 months and not more than 1 year, waives prepayment penalties, and does not preclude recipients of economic injury disaster loans for purposes other than payroll costs.

5. Loan Repayment?

So long as the funds from loans issued pursuant to the PPP are used for the purposes listed above, the principal balance is eligible for loan forgiveness. To apply for loan forgiveness, employers will need to deliver the following documentation to the lender:

a. Documentation verifying the number of full-time equivalent ("**FTE**") employees on payroll and pay rates for the period of January 1, 2020 to June 30, 2020 (including payroll tax filings);
b. Documentation confirming rent, utilities or mortgage interest payment amounts;
c. Certification from the employer confirming the truth of the documentation; and
d. Any other documentation the SBA may request.

If employers use the funds appropriately and provide the correct documentation, the principal balance (but not the interest) will be forgiven. This forgiven debt will be treated as cancellation of indebtedness income **except** that it will not be included in the employer's gross income.

6. Limitations on Forgiveness?

The purpose of PPP loans is to maintain business continuity, and especially, maintain payrolls. In the event that an employer reduces its headcount during the period of covered period, the amount of principal eligible for forgiveness will be reduced. Further, in the event that an employer has already laid off employees prior to the enactment of the CARES Act, that employer will have to rehire its employees or otherwise close the gap between its headcount on February 15, 2020 and its headcount on the date that is 30 days after the enactment of the CARES Act. This rehiring must occur no later than June 30, 2020.

Further, any reduction in compensation to employees in excess of 25% of the employees' compensation on February 15, 2020, shall also lead to a reduction in the amount of principal eligible for forgiveness. However, employees making more than $100,000 may have their salaries reduced by more than 25% and not have such reduction counted against the amount the employer is entitled to forgive.