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PPP LOANS – FLEXIBILITY AMENDMENT

The federal government enacted Coronavirus Aid, Relief, and Economic Security Act (CARES Act), which is designed to provide financial relief to American businesses in response to the economic fallout from the efforts to stem the coronavirus (COVID-19) pandemic. One of the core pieces of the CARES Act is the provision of hundreds of billions of dollars for small businesses through federally-backed loans under an expanded Small Business Administration (SBA) through a Section 7(a) loan guaranty program called the Paycheck Protection Program (PPP Loans).

Small businesses have struggled to meet the parameters of the spending and forgiveness provisions of the PPP Loans. In response, as of June 5, 2020, President Trump signed into law the Paycheck Protection Program Flexibility Act of 2020 (the "Flexibility Act").

PPP Loan Maturity

PPP Loan proceeds that are not forgiven continue to be treated as a loan from the SBA. Prior to the Flexibility Act, the maturity for these loans was two years. Under the Flexibility Act, the term of the PPP Loans has been extended to five years.

Covered Period – Defined

A key to understanding the operation of the PPP Loan programs is defining the "covered period". For purposes of PPP Loans, there are two definitions of "covered period": (1) for loan qualification and (2) for loan forgiveness. In both cases, the definition of "covered period" has been extended.

The Flexibility Act extends the covered period for loan qualification from June 30, 2020 to December 31, 2020. This has three key impacts.

- First, the time to apply for loans is extended through the remainder of the calendar year.
- Second, the period for remaining a small business is also extended. To qualify for a PPP Loan, a business must have less than 500 employees during the covered period. This new rule extends the period for which an employer cannot exceed 500 employees.
- Finally, the period to expend the funds, whether as forgivable expenditures, or otherwise, is extended through the remainder of the calendar year.

With respect to loan forgiveness, the covered period operates to limit the testing period for forgivable expenditures. Only expenditures made during the covered period may be forgiven. The Flexibility Act extends this period from 8 weeks after the date of the PPP Loan to 24 weeks following the loan (or, if earlier, December 31, 2020).

PPP Loan Forgiveness – FTEs

The Flexibility Act provides additional relief for businesses with respect to forgiveness. The FTE ratio reduction is ignored to the extent that an employer is unable to both rehire the former employees or hire qualified replacements by December 31, 2020.

Alternatively, the FTE reduction is ignored if the employer cannot, by operation of restrictions placed on the business (such as social distancing), get back up to pre-pandemic level of operations. For this alternative, the employer must be able to document an inability to return to the same level of business activity prior to February 15, 2020 due to compliance with requirements established, or guidance issued, by Health and Human Services, the Centers for Disease Control, or the Occupational Safety and Health Administration during the period beginning on March 1, 2020, and ending December 31, 2020 related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19.

A second impact for the extension of the covered period for purposes of the forgiveness is that the testing of the FTE ratio ends on the last day of the covered period. The Flexibility Act does allow for employers to elect the 8-week period. This election would apply to shorten the spending, but it would also operate to allow for FTE testing on the date most current PPP Loan participants are expecting.

PPP Loan Forgiveness – Payroll Costs

PPP Loans had a requirement that 75% of loan proceeds be used to pay payroll costs. Any expenditures above this threshold could not be forgiven. However, the Flexibility Act reduces this requirement to 60% of the proceeds. This will allow employers to use more funds to pay rents and utilities during the extended 24-week covered period.

PPP Loan – Deferral

PPP Loan repayment was to begin 6 months after the loan for any unforgiven amounts. Because of the extension of the covered period, the deferral for repayment has been extended to no earlier than the processing of the forgiveness application.

Payroll Tax Deferral

The CARES Act provided for an alternative to the PPP Loans. This alternative was a deferral of payment of employment taxes. This was not available for participants in the PPP Loan program. However, the Flexibility Act does allow PPP Loan participants to defer employment taxes.

The CARES Act allows taxpayers to defer paying the employer portion of certain payroll taxes through the end of 2020. Thus, notwithstanding any other provision of law, the payment for applicable employment taxes for the "payroll tax deferral period" will not be due before the "applicable date."

For the purpose of this deferral, the term "payroll tax deferral period" means the period beginning on March 27, 2020 and ending before January 1, 2021, and the term "applicable date" means: (a) December 31, 2021, with respect to 50% of the amounts to which the deferral of employment taxes and self-employment taxes, as the case may be, apply, and (b) December 31, 2022, with respect to the remaining 50% of those amounts.

Whiteman Osterman & Hanna LLP can assist with these issues and more, as you and your business work to navigate the novel and difficult decisions arising from the COVID-19 pandemic. For assistance with the PPP Flexibility Act, please contact Scott Shimick – 518.487.7678 – SShimick@woh.com.