

Questions Regarding Paycheck Protection Program

Are owners of small businesses that are paid more than \$100,000 per year disqualified from forgiveness or is their forgiveness reduced by the amount over \$100,000 annualized wages?

The forgiveness is reduced by the amount over \$100k annualized. You get credit for the first \$100k annualized.

When will SBA perform the audit?

You can expect to be audited upon submitting your application for loan forgiveness, particularly if you borrowed over \$2M.

I have an employee who gets paid a salary of \$96,000.00 plus commission on cases he originates, which in 2019, came to about \$126,000.00. If I reduce his salary by 10 percent and leave his commission as is, will I be able to use PPP funds for him, up to \$100,000 and still get forgiveness? In other words, by reducing his salary by 10 percent, am I risking my eligibility for forgiveness?

You only lose forgiveness if you reduce salary more than 25% or reduce headcount. You are not doing either in this situation. Based upon the text of the statute, employees over the \$100k cap do not subject employers to reduction in forgiveness, regardless of how much their salary is reduced. 15 USC 9005(d)(A) and (B).

For the allocation of loan funding (based off 8 weeks), is it better to hire the same number of FTE at a reduced rate (50%) or keep whatever FTE you can based off of pay no less than 25% reduction?

You just need to spend at least 60% of your loan on forgiveness without cutting salaries of employees paid up to \$100k by more than 25% or reducing headcount. Between the two alternatives you list, you are better off maintaining headcount, because you only lose forgiveness to the extent of salary cuts beyond 25%. However, if you cut headcount, you can replace your employees by December 31, 2020, to avoid reduction in forgiveness.

If you have an FTE making \$50k/year and you pay them out over 24 weeks, do they need to get at least $\$50,000 \times .75 / 52 \text{ weeks} \times 24 \text{ weeks}$? If they are paid out over 4 weeks, do they need to get $\$50k \times .75/52 \text{ weeks} \times 4 \text{ weeks}$?

To obtain full forgiveness, you need to maintain at least 75% wage levels (for employees under \$100k), not reduce headcount (subject to exceptions), and spend at least 60% of the money on payroll.

If there are seasonal employees, is it just based on their weekly salary from 2019 x.75? If so, is there a minimum number of weeks you HAVE to provide salary to them if they would have only been on salary for 3-4 weeks based on seasonal work?

15 USC (d)(2)(A)(ii) provides for seasonal employees. You can base your headcount on the average either during the first two months of 2020 or during February 15, 2019 to June 30, 2019.

Can you please discuss the deduction from forgiveness for EIDL "advances". Specifically, it originally looked like that deduction would only be for those that got an early \$10,000.00 advance. Now it looks like it might mean any amount received from an EIDL loan. Can you tell us which it is?

It is only for the advance, which can be up to \$10,000. The advance does not need to be repaid, and so it is deducted from the forgivable amount of the PPP loan.

Is the 25% salary decrease limit based on salaries during the January to February 2020 period?

If there is money in the company account that covers the 2.5 months of payroll, should we not have applied?

The 25% limit is based upon the salary during the most recent full quarter before the covered period (time after the loan). There is no eligibility criterion based upon whether the company had money on hand to cover salary, other than the certification that the loan was necessary to continue operations.

Are there updated forms for loan forgiveness? The ones the bank gave me are dated May 2020.

You should request updated forms. The forms were updated after the PPPFA was passed on June 5, 2020.

Is there an appeals process if forgiveness is denied?

Yes, the SBA has said that it will promulgate rules on further appeal but has not yet done so. Ultimately, I expect to seek court review for borrowers under the APA or as an affirmative defense in a collection action.

CHASE does not appear to be able to accept application for forgiveness until August!!! Is there some way to apply direct to the SBA for forgiveness? (Or to get CHASE to get on the ball?)

Can you give raises during the 24 weeks?

The lender has 60 days from the receipt of the LFA to issue its decision on that LFA to the SBA. Subject to the benefits and risks of applying early, apply when you are ready. There is no textual prohibition on raises, except for owners. Depending upon the circumstances, providing raises might rebut the certification of need.

PPP loan was obtained before the PPPFA. Borrower elects the 24-week period but spends the funds exclusively on payroll in 15 weeks. Does the borrower have to wait until the end of the 24-week period to apply for forgiveness or can it apply as soon as it uses all the funds?

The borrower can apply for forgiveness as soon as it uses all of the funds.

Are the owners of a closely held C corp limited on their salary?

Yes, the regulations cap the owners to between approximately \$15-\$20k depending on the circumstances.

Is the 24-week period the time that you must spend the money or is it any 8-week period within the 24-week period?

You just need to spend the money by the end of the 24-week period (and ensure that your headcount at the time of application or December 31, 2020, has not been reduced).

If when the loan was given economic times were harder, but after 2.5 months the company is not doing better?

If the company is not doing better after the end of the covered period, it will likely be eligible for loan forgiveness if it has properly used the funds.

How is bonus defined? Client has assisted living business for senior citizens. Client was concerned that employees would leave so client gave employees a bump in salary if they stayed through June. The bump in salary was paid twice; once in April and once in June. Is this considered a bonus?

The regulations allow you to use PPP funds for bonuses and hazard pay, and those amounts are eligible for forgiveness.

Are there two forms for forgiveness application?

There is a regular form and an EZ form. They are not much different.

The forgiveness application wants owners separately listed. We have 10 employees that have stock in the company. Are they "owners"?

The CARES Act and regs do not provide any guidance on this, but the Form appears to contemplate that you should list multiple owners if they exist.

Given the extended time period for spending the PPP funds, our LLC could exhaust the loan funds with payroll either for employees or for member/employees without including both groups. In light of the tax rules, is there any advantage to using member payroll as the basis for forgiveness? We maintained all of our employees at the same comp levels thanks to the PPP loan. (At least so far.)

You can't deduct any expenses on your tax return that were used toward loan forgiveness. Member payroll is subject to a cap on eligibility toward loan forgiveness.

Is there any negative effect of electing to use the 24-week vs the 8-week period?

If you used the money and maintained headcount during the 8 weeks, you may as well call it a day.

Can you count mortgage payments or only mortgage interest?

Just mortgage interest. You cannot count payments of principal toward forgiveness. The purpose of the PPP is to cover the business's overhead, particularly its payroll, not to improve its capital position.

If your bank approves you for forgiveness, how long will it take for the SBA to complete its audit?

The SBA has 90 days to review the application and then pay the lender any forgiveness amount. Nothing in the statute prevents the Government from subjecting your loan or forgiveness to additional scrutiny later and pursuing appropriate remedies.

Should the principals forgo taking a distribution over 24 weeks, if it means there won't be the same number of FTE at the end of 24-week period?

The owners can take wages, up to the caps mentioned above, and credit those amounts toward forgiveness. If they earn over \$100k, they can reduce compensation without limit.

It sounds like loans to sole proprietors will be most likely to be forgiven. Do you agree?

They are certainly the least likely to have a reduction in headcount or salary cut. They still need to meet the certification requirement.

Do you think there is a requirement that revenues be below expenses in order to say the loan is necessary for operations?

There is no such requirement in the statute or the regulations.

Does the loan amount x .6 still apply if your loan proceeds were issued before the modification to 60%?

Yes, previous borrowers get the benefit of the PPPFA. There was never a statutory requirement to spend 75%. That was an agency regulation that is now trumped by statute.

Are there different forms for sole proprietors?

There are no different forms for sole proprietors specifically, but sole proprietors may use the EZ form.

What if you haven't yet seen a decline in revenue but expect to later in the year due to retro quarterly billing cycle? Should you wait to apply until year end?

If you expect a decline and that decline hasn't occurred yet, but you still have reason to think that it will, you probably had a reasonable basis to make the certification. Nothing in the forgiveness application requires any information about a decline in revenue. Obviously, the SBA could come back and ask for this information.

Do you believe Ch 11 debtors should qualify even though the SBA form says no?

No provision in the statute prevents debtors from applying for PPP loans. Unfortunately, the agencies have applied a number of rules that neither appear in the statute nor advance the purposes of the statute. In some cases, they thwart the statute. Debtors obviously need any help they can get to continue operations. At least some recent caselaw establishes that the SBA position is incorrect. See e.g. *Alaska Urological Institute v. SBA*, 20-00086, Doc. 46 (Bankr. D. Alaska June 26, 2020).

Will repaying the loan prevent the creation of claim under the False Claims Act?

Most of the caselaw under other SBA loan programs says that the "claim" is created by the lender when the lender requests indemnity from the government on a defaulted loan. If the loan is repaid, it does not cause an indemnity payment. The FCA plaintiff would then need to argue that any claim arose when the borrower applied for funds. It is unlikely that the government would scrutinize such an application, and the Government's damages would be limited to the subsidized interest and origination costs borne by the Government at the time of origination (though the origination fees can be clawed back from the lender involved in an ineligible loan).

In reviewing affiliation between entities, how deep will an entity owned by another entity be evaluated? Meaning if Company X is owned by Company Z, will an auditor evaluate the owner of Company Z?

I would expect the parent company and all wholly-owned subsidiaries to be deemed affiliated for purposes of the SBA.