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Congress Acts to Provide More Time and Additional Flexibility for PPP Borrowers – June 9 Update

New legislation signed into law on June 5 makes a number of changes to the popular Paycheck Protection Program ("PPP") loans for small businesses. The PPP Flexibility Act provides new flexibility for borrowers and will make forgiveness of the PPP loans easier to attain.

Among the major changes are an extension of the eight-week period in which loan proceeds could originally be used and a relaxation of the "75-percent rule" that limited the amount of non-payroll costs that could be forgiven.

Here are the key changes that became law as a result of the legislation:

- The original eight-week timeframe is extended to 24 weeks for borrowers who need more time to make full use of the funds.
    - Borrowers may choose to use the original eight-week period if they prefer.
    - The amount of funding does not increase, only the period of time during which it can be used.
    - Additional guidance will be required to determine the impact of the legislation on other calculations that were dependent on the original eight-week time period (such as the appropriate proration of the $100,000 cap on forgivable wage and salary compensation).
- The requirement that 75 percent of the forgiveness amount be spent on payroll costs is relaxed to 60 percent.
    - Borrowers have greater flexibility to allocate PPP funds between payroll and non-payroll costs.
    - Since the payroll cost requirement is spread over 24 weeks, most borrowers should be able to plan for a methodology to meet the new "60-percent test."
    - Although the language of the legislation states that no forgiveness is allowed if the new "60-percent test" is not met, congressional leaders have indicated that the language is a drafting error that will be corrected in future legislation. The intent is that the "60-percent test" will apply to the forgiveness amount and not the loan amount.
        - On June 8, the U.S. Treasury Department and the Small Business Administration released a joint statement abolishing the 60% cliff. This means that if a borrower spends less than 60% of the PPP loan amount for expenses that otherwise would be forgivable for payroll, state payroll taxes, group health insurance and retirement plans during the 8-week or 24-week testing period, then that borrower will get some forgiveness, rather than no forgiveness.

- Restoration of workforce and compensation to pre-pandemic levels can now extend to December 31 without penalty.
    - The prior "safe harbors" provided that if a borrower restored its workforce ("FTE") and compensation to pre-pandemic (February 15) levels by June 30, then it would not face a penalty to its forgiveness calculation.
    - The new rule is that the full restoration does not need to occur until December 31 to avoid the adjustment penalty.
- In addition, two new "safe harbors" are added to avoid penalties resulting from the FTE adjustment.
    - Borrowers will not be penalized if:
        - they could not find qualified employees after a good-faith search; or
        - they were unable to restore business operations to pre-pandemic levels due to COVID-related operating restrictions.
    - The most recent guidance also provides that borrowers will not be penalized under both the FTE and compensation adjustments for the same reduction in workforce.
- Borrowers of new loans (on or after June 5) will have five years to repay any non-forgiven amounts rather than two and lenders are permitted by mutual agreement to extend existing loans from two years to five.
- Deferral of loan payments will extend until the lender receives the determination of the forgiveness amount from the Small Business Administration.
    - Previously the deferral was set to expire six months after the loan date.
    - Borrowers will have up to 10 months after the end of the covered period to apply for forgiveness before payments on non-forgiven amounts.
- Businesses receiving PPP forgiveness will also be permitted to defer payroll tax.
    - The provision permits businesses to defer up to one-half of payroll taxes coming due in 2020 and pay those taxes in 2021 and 2022.
    - The deferral had been previously limited to businesses not receiving PPP forgiveness.

In addition to the new legislation, some additional guidance has emerged in recent days with respect to the forgiveness process:

- Borrowers using weekly or bi-weekly pay periods may align their covered period with their pay periods by delaying the commencement of their covered period to the first day of the next pay period beginning after the loan origination date. Borrowers using other pay periods are not permitted to make this adjustment.

- Cost "incurred" during the covered period can still be included as forgivable expenses if they are paid by the next pay date or due date after the expiration of the covered period.

- Subject to the cap on compensation for any one employee, additional payments for "hazard pay" or bonuses will count as forgivable payroll costs.

- Owner-employees with more than one business will be limited to the capped amount across all businesses.

With the new timeline and flexibility, PPP forgiveness should be achievable for most businesses. For assistance with planning your forgiveness strategy, please contact Vandenack Weaver attorneys at 402-504-1300 and check our COVID-19 webpage for ongoing updates.