THE NEW PPP TIMELINE & OTHER ISSUES FOR REOPENING BUSINESSES

A VANDENACK WEAVER LLC WEBINAR – JUNE 17, 2020

Mary Vandenack

Mary E. Vandenack is founding and managing member of **Vandenack Weaver LLC** in Omaha, Nebraska, a tax, business, trusts and estates boutique. Mary is a member of the American Bar Association Real Property Trust and Estate Section where she serves as Co-Chair of the Futures Task Force, co-Chair of the Law Practice Group and on the Planning Committee. She also is active in the American Bar Association Law Practice Division where she serves on the TechShow Board, the Executive Council, and as Editor-in-Chief of the Law Practice Magazine.

Mary is also an advocate for wellness in the profession. She teaches mindfulness, meditation, yoga and Pilates, and often shares a presentation on mindfulness when teaching at substantive conferences. She writes a column on wellness for SpiritofOmaha.

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Mike Weaver

Michael J. Weaver is a managing member of Vandenack Weaver LLC in Omaha, Nebraska, a tax, business, trusts and estates boutique.

Mike's practice focuses on providing experienced counsel to businesses and individuals. His areas of expertise include corporate and business law, real estate transactions, federal and state taxation and tax planning, estate, retirement and financial planning, and trust administration and probate. In his practice, Mike represents a wide variety of business interests on tax, corporate, contract, real estate, and financial matters, including sole proprietorships, partnerships, limited liability companies and corporations of all sizes. Mike especially enjoys working with closely held businesses. He helps them reach their goals by providing practical advice that minimizes risk while navigating complex legal issues associated throughout the life-cycles of their business. Mike represents individuals in all stages of life on their estate, retirement and financial planning, be it a newly married couple establishing their first estate plan or a business owner working on complex business succession issues.

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Jim Pieper

James S. Pieper is an attorney at **Vandenack Weaver LLC** in Omaha, Nebraska, a tax, business, trusts and estates boutique.

He has more than 30 years of experience at the intersection of law, politics, public policy, business and finance. He specializes in the research and analysis of complex statutory, administrative, constitutional, political and financial issues to assist those facing compliance with regulatory and governmental issues. He also has extensive background in development projects involving public-private partnerships. Representative clients include employers, health care providers and nonprofits.

In addition to his background in private practice, Pieper served as legal counsel to the Speaker of the Nebraska Unicameral Legislature and the Chair of the Judiciary Committee for nearly 12 years. In that role, he played a key part in drafting and analyzing major legislation on a wide variety of issues.

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Matt Dunning

Matthew G. Dunning is an attorney at **Vandenack Weaver LLC** in Omaha, Nebraska, a tax, business, trusts and estates boutique.

Matt is an accomplished attorney with extensive risk management experience and more than two decades of legal experience. He brings strong analytical and problem-solving skills to complex business challenges. His ability to negotiate and resolve intricate disputes in fast changing, complex business environments has helped him effectively represent the interests of 501(c)(6) organizations as well as advise large non-profit organizations on employment compliance issues across 11 jurisdictions, including California, New York and the District of Columbia. Dunning has successfully litigated and mediated employment contract issues including for-cause terminations and non-competition and non-solicitation agreements. In his career, he had defended clients against discrimination and harassment claims in Iowa and Nebraska courts and in administrative proceedings in multiple states, including in the Eighth Circuit Court of Appeals.

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Reopening Update

U.S. Chamber of Commerce data from early June for businesses with under 500 employees:

79% have reopened

- 41% fully open
- 38% partially open

80% have adopted modified procedures and policies in response to the pandemic

- Cleaning
- Protective gear
- Sick leave

67% concerned about lawsuits

55% believe it will take six months or longer for business climate to return to pre-pandemic state

Nebraska Pandemic-Related Grants

Small Business Stabilization Grants:

- Nebraska businesses with at least 5 but no more than 49 full- or part-time employees (as of March 13, 2020)
- $12,000 grants to address pandemic impact
- Certain industries excluded
- Applications taken June 15-26
- Not competitive – first-come, first-serve basis

Also special grants for livestock, broadband & training

THE PPP FLEXIBILITY ACT & THE NEW TIMELINE

JIM PIEPER

PPP Flexibility Act

Adopted on bipartisan basis

Only one dissenting vote

Signed into law on June 5, 2020

Most provisions apply immediately, so those nearing end of 8-week period can take advantage

If You Did Not Apply ...

There is still money available!

$129 Billion as of June 12

Application deadline is June 30

If you thought you might not get forgiveness – your odds have greatly improved

If you thought you could not use the money in eight weeks – you now have 24

If you preferred the payroll tax deferral – now you can use both

PPP Forgiveness Changes

PRIOR FORGIVENESS PROCESS

Preliminary Forgiveness Amount
Based on Payroll Costs During 8 weeks = 75%

Adjustment for FTE Reduction
Based on Comparison to Base Period

Unless Safe Harbor of Full Restoration by
June 30

Adjustment for Compensation Reduction
Based on Comparison to February 15

Unless Safe Harbor of Full Restoration by
June 30

NEW FORGIVENESS PROCESS

Preliminary Forgiveness Amount
Based on Payroll Costs During **24** weeks = **60%**

Adjustment for FTE Reduction
Based on Comparison to Base Period

Unless Safe Harbor of Full Restoration by
December 31

Adjustment for Compensation Reduction
Based on Comparison to February 15

Unless Safe Harbor of Full Restoration by
December 31

Additional Forgiveness Flexibility

Borrowers will not be adversely affected by:

- Employee declining to return if a bona fide offer made in writing and not accepted
- Inability to hire replacement workers of comparable skill after good-faith search
- Inability to fully reopen due to pandemic-related operating restrictions

Will not have negative adjustment for both compensation reduction and FTE reduction for same position

Can opt to retain the 8-week period if preferable

Some Technical Points

Each employee remains capped at $100,000 salary annualized, but ...

- The "annualized" amount will be based on 8 weeks ($15,385) for those who choose the 8-week period or 24 weeks ($46,154) for those who choose the 24-week period
- Except that owner-employees are further limited to a prorated share of 2019 income, which will be based on 2.5 months ($20,833 cap) for those who choose the 24-week period

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

Borrowers using weekly or bi-weekly pay periods may align their covered period with their pay periods.

- This is done 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.

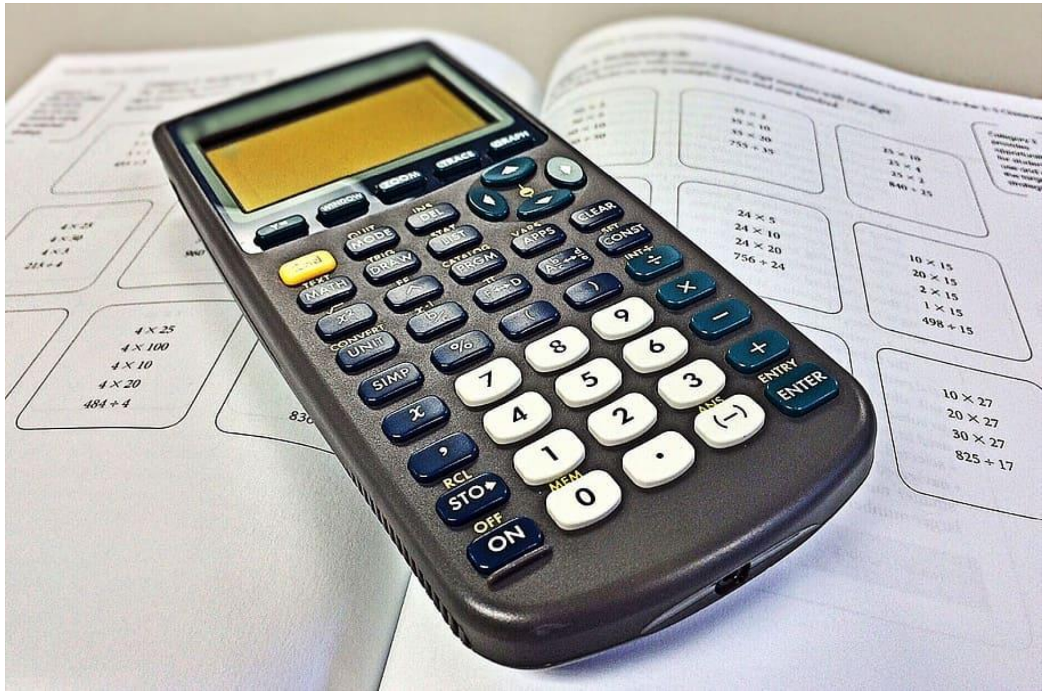
Cost “incurred” during the covered period can still be included as forgivable expenses if they are paid by the next pay date or due date after the expiration of the covered period.

How the Math Works

Loan amount was based on 2.5 months of 2019 payroll

- 75% of the loan amount is approximately 8 weeks of payroll
- 60% of the loan amount is approximately 6.5 weeks of payroll

So borrowers will have 24 weeks to use 6.5 weeks of 2019 payroll costs



Forgiveness Strategies

Borrowers have various options for reaching the 60% requirement during the new covered period

Backload: Plan for full workforce during the final several weeks of the 24-week period (likely early fall)

Spread out: Use a smaller workforce but compensate over a longer period of time

Use Bonuses and "Hazard Pay": The latest guidance recognizes that bonuses and "hazard pay" paid during the covered period will qualify as forgivable payroll costs. If you have been using a smaller workforce, you can provide additional compensation in recognition of their work during the pandemic.

Forgiveness Timeline

1. Determine Your “Covered Period” (8 weeks or 24)
2. Repayment is Deferred Until a Forgiveness Determination is Remitted
   - Government pays principal, interest and fees until end of deferral
3. Complete and Submit the Loan Forgiveness Application
   - Borrower has 10 months to apply without obligation
   - Certain borrowers can now use an “EZ” application form
4. Lender Review (Usually)
   - Some loans will be reviewed by the SBA first
5. SBA Review
6. Borrower Can Appeal a Determination of Non-Forgiveness
7. Repayment of Non-Forgiven Principal
   - New loans after June 5 issued with five-year repayment period
   - Older loans with two-year repayment period can be extended at option of lender

Forgiveness Checklist

1. Basic business and ownership information
2. 2019 tax returns
3. Payroll and payroll-costs documentation
4. Mortgage, rent and utility documentation
5. FTE documentation
6. Document retention for six years after date of full forgiveness or payment

PANDEMIC-RELATED TAX STRATEGIES

MIKE WEAVER

Delay Payment of Employer Payroll Taxes

- Employers generally are responsible for paying certain employment taxes, i.e. Federal Insurance Contribution Act (FICA) taxes, with respect to their employees. The employer's responsibility includes a 6.2% share of social security tax and a 1.45% share of Medicare tax on employee wages.

- This provision allows employers and self-employed individuals to defer payment of the employer's 6.2% share of the social security tax they otherwise are responsible for paying to the federal government with respect to their employees.

Delay Payment of Employer Payroll Taxes

- The deferral period runs through December 31, 2020.

- The provision requires that the deferred employment tax be paid over the following two years, with half of the amount deferred required to be paid by December 31, 2021 and the other half by December 31, 2022.

Delay Payment of Employer Payroll Taxes

- The PPP Flexibility Act repeals the prohibition on businesses receiving PPP forgiveness also taking the payroll tax deferral.

- Therefore, PPP borrowers should review their options for taking advantage of the deferral if they had previously concluded they were not eligible.

Employee Retention Credit for Employers Subject to Closure due to COVID-19

For employers subject to closure or significant loss of business due to COVID-19, this provision provides a refundable payroll tax credit for 50% of wages paid by employers to employees during the COVID-19 crisis.

An eligible employer includes:

- Employers whose operations were fully or partially suspended during any calendar quarter during 2020 due to a COVID-19 shutdown order, OR
- Employers whose gross receipts declined by more than 50% when compared to the same quarter in the prior year.

Employee Retention Credit for Employers Subject to Closure due to COVID-19

- The credit is based on qualified wages paid to the employee. The amount of qualified wages that can be included in the calculation of the credit is dependent on the employer's number of full-time employees.

  - For eligible employers with greater than 100 full-time employees in 2019, qualified wages are wages paid to employees when they are not providing services due to the COVID-19-related situations described above.

  - For eligible employers with 100 or fewer full-time employees in 2019, all employee wages qualify for the credit, whether the employer is open for business or subject to a shut-down order.

Employee Retention Credit for Employers Subject to Closure due to COVID-19

- The credit is capped at $10,000 of compensation, including health benefits, paid to an eligible employee. The credit is applicable for wages paid or incurred from March 13 through December 31, 2020.

- An employer cannot take the credit if the employer receives a PPP loan under the CARES Act.

Modifications for Net Operating Losses

- Prior to the Tax Cuts and Jobs Act (TCJA), a corporation was able to carry back any net operating losses (NOL’s) for up to two years.
- TCJA revised the NOL rules so that such losses could not be carried back at all, only carried forward.
- In addition, for years 2018 and forward, any NOL deduction could not be used to zero out a corporation’s income as the NOL deduction could not exceed 80% of the corporation’s taxable income.

Modifications for Net Operating Losses

- This provision modifies the limitations on a corporation's use of losses. The provision provides that an NOL arising in a tax year beginning in 2018, 2019 or 2020 can be carried back five years.

- The provision also temporarily removes the taxable income limitation to allow an NOL to fully offset income. Companies with unused losses arising in 2018, 2019 or 2020 that paid tax in one or more of the five preceding tax years will be able to immediately file amended returns seeking a refund of taxes paid, which can provide much needed cash flow and liquidity during the crisis.

Modification of Limitation on Losses for Taxpayers Other Than Corporations

- In an effort to assist taxpayers with their losses that are organized as other than corporations, this provision modifies the loss limitation rules applicable to pass-through businesses and sole proprietors, so they can also utilize excess business losses and access much needed cash flow.

Modification of Credit for Prior Year Minimum Tax Liability of Corporations

- TCJA repealed the alternative minimum tax (AMT) with respect to corporations. If a corporation had AMT credits for years prior to 2018 that were able to be carried forward, TCJA allows the credits to be refundable in 2018 through 2021. The amount refundable in each year is basically equal to 50% of the remainder of the credit in that year.

- This provision modifies the refundable credit so that corporations can take the entire amount in 2018 and 2019. Also, corporations that prefer to can elect to take the entire amount in 2018.

Modifications of Limitations on Business Interest

- A limit on the deductibility of interest expense that a corporation pays on its loans was imposed by TCJA. The limit is equal to 30% of the corporations adjusted taxable income.

- This provision increases the limitation to 50% of the corporations adjusted taxable income for 2019 and 2020.

- In addition, a corporation can elect to use its 2019 adjusted taxable income in 2020, allowing the 50% limitation to be higher in 2020 if earnings go down in 2020 due to the crisis.

Technical Amendments Regarding Qualified Improvement Property

- Due to a drafting error during the passage of TCJA, improvements to the interior of non-residential buildings were not eligible for 100% bonus depreciation because the recovery period of such improvements was inadvertently classified as a 39-year recovery period instead of the intended 15-year recovery period. Only property with a recovery period of 20 years or less is eligible for the bonus depreciation.

- This provision fixes the drafting error retroactively to property placed in service in 2018 and after. Companies will be able to amend prior year returns to take advantage of any increased bonus depreciation allowed due to the correction.

PANDEMIC EMPLOYMENT UPDATE

MATT DUNNING

Returning to Work—CDC Guidelines

Role of Businesses and Employers in Responding to COVID-19

- All employers should implement and update as necessary a plan that:
  - Is specific to your workplace
  - Identifies all areas and job tasks with potential exposures to COVID-19, and
  - Includes control measures to eliminate or reduce such exposures.

Prevent and Reduce Transmission Among Employees

- Actively encourage sick employees to stay home.
- Consider conducting daily in-person or virtual health checks.
- Identify where and how workers might be exposed to COVID-19 at work.
- Separate sick employees.
- Take action if an employee is suspected or confirmed to have COVID-19 infection.
- Educate employees about steps they can take to protect themselves at work and at home.

Maintain Healthy Business Operations

- Identify a workplace coordinator.
- Implement flexible sick leave and supportive policies and practices.
- Protect employees at higher risk for severe illness through supportive policies and practices.
- Communicate supportive workplace polices clearly, frequently, and via multiple methods.
- Assess your essential functions.
- Determine how you will operate if absenteeism spikes.
- Establish policies and practices for social distancing.

Maintain a healthy work environment

- Consider improving the engineering controls using the building ventilation system.
- Give employees, customers, and visitors what they need to clean their hands and cover their coughs and sneezes.
- Perform routine cleaning.
- Perform enhanced cleaning and disinfection after persons suspected/confirmed to have COVID-19 have been in the facility.
- Limit travel and advise employees if they must travel to take additional precautions and preparations.
- Minimize risk to employees when planning meetings and gatherings.

THANK YOU

STAY TUNED TO OUR WEBSITE AND SOCIAL MEDIA FOR NEWS ABOUT COVID-19 AND REOPENING ISSUES

WWW.VWATTYS.COM/COVID-19-LEGAL-GUIDANCE