



COVID-19 SBA Loan Forgiveness & Paycheck Protection Program FAQs





Dear MCAA members,

The law firm of Cohen and Seglias has put together the following Q&A for our members to reference as questions arise regarding SBA's guidance on loan forgiveness and the Paycheck Protection Program. This information is not an endorsement, simply a resource as we navigate these uncertain times as an industry.

As first discussed in Cohen Seglias' article, "[Keeping the Lights on During the COVID-19 Pandemic: The Paycheck Protection Program](#)," the Paycheck Protection Program (PPP) provisions of the Coronavirus Aid, Relief, and Economic Security Act (CARES Act) provided an unprecedented amount of federal funding for small businesses struggling due to the COVID-19 pandemic. Now that employers across the nation have applied for and received loans under the PPP, they face a variety of questions about how to properly use and track their loan proceeds. In order to help employers navigate these largely uncharted waters, Cohen Seglias has prepared the below list of Frequently Asked Questions (FAQs). Notably, the U.S. Small Business Administration (SBA) just released anticipated [new guidance](#) regarding loan forgiveness under the PPP.

If you have any concerns about using or keeping track of loan proceeds that your business has received from the Paycheck Protection Program, please contact the Cohen Seglias [Labor & Employment Group](#).

Frequently Asked Questions:

Q: I've been hearing a lot of chatter about whether the rules are going to change and require that borrowers repay their loans. Is there any truth to this?

A: Over the last couple of weeks, there has been widespread panic over the issue of whether borrowers should return their PPP loans by the SBA's recently announced deadline of May 14, 2020. On May 13, 2020, the SBA released guidance on this issue. Borrowers who received less than \$2 million can breathe a sigh of relief. The guidance makes clear that these borrowers made their certification of the necessity of the loan in good faith. The issue is a bit murkier for borrowers who received more than \$2 million. The guidance states that the certification completed by borrowers who received more than \$2 million will be reviewed for compliance on a case-by-case basis. When conducting this review, the SBA will examine the following factors: (a) whether current economic uncertainty makes the loan request necessary to support the ongoing operations of the borrower, (b) the borrower's continuing business activity, and (c) the borrower's ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. Notably, if the SBA determines in the course of its review that a borrower lacked an adequate basis for the certification, the agency will seek repayment of the outstanding PPP loan balance but it will not pursue administrative enforcement or refer the situation to another federal agency for criminal sanctions.

Q: My business was approved for and received a loan from the PPP. Should we keep the loan proceeds in a separate bank account?

A: Yes. While there is no "legal" requirement to do so, from a practical business perspective, employers should deposit loan proceeds from the PPP into a separate account as they come in. Additionally, when they are used to make payments for permitted expenses, loan proceeds from the PPP should be drawn only from that separate account and used for items that qualify for forgiveness, such as payroll costs. That way, at the end of the covered loan period, you will be able to provide your lender (*to the extent required*) with clear-cut documentation to show the forgivable payments that were made with loan proceeds from the PPP.

Q: The PPP's definition of "payroll costs" excludes salaries above \$100,000 on an annualized basis. Does the value of fringe benefits count towards the \$100,000 threshold?

A: No. Both the SBA and the U.S. Department of Treasury have specified that with respect to the \$100,000 annualized threshold, employers should only include salary, wages, commissions, and tips. Fringe benefits, including the cost of any medical insurance benefits or retirement benefits, are not included. Accordingly, it is possible that the value of an employee’s total “compensation package” may exceed the annualized equivalent of \$100,000 and still be fully forgiven at the end of the covered loan period.

Q: Can my business choose to pay high-performing employees more than the annualized equivalent of \$100,000 using loan proceeds from the PPP?

A: No. Although employers may choose to pay certain employees more than the annualized equivalent of \$100,000, your business will not be able to use forgivable loan dollars to pay any amount of salary, wages, commissions, or tips paid to employees above that threshold. Additionally, if you choose to pay any employee’s salary, wages, commissions, or tips above the annualized equivalent of \$100,000, you should consider using a separate account (other than the one used to hold loan proceeds from the PPP) to cover the cost of any payments for salary, wages, commissions, or tips above the \$100,000 threshold. This will allow your business to more easily keep track of and distinguish between forgivable and unforgivable costs.

Q: Should loan proceeds from the PPP be measured on a “cost incurred” or “cost paid” basis?

A: The CARES Act provides that “[a]n eligible recipient shall be eligible for forgiveness of indebtedness on a covered loan in equal to the sum of the following costs incurred and payments made during the covered period *payroll costs*.” While the SBA has yet to release additional guidance, some commentators have suggested that this language from the CARES Act means that *payroll costs* must be incurred and paid during the eight-week covered loan period. This would create a problem for almost all employers because payroll is typically paid a week or two after wages are earned (e.g., a week or two after the employer’s obligation to pay is incurred. Although it is impossible to be absolutely certain at this time, we believe that it is highly unlikely that the SBA would refuse to forgive payroll paid by an employer during the eight-week covered period if the employer simply continues to fund payroll on its regularly scheduled payroll dates. Thus, unless and until the SBA issues guidance to the contrary, you should assume that any payments made with loan proceeds, including those for payroll costs, mortgage interest, rent, and utilities, will be forgivable on a “cost paid” basis so long as they are paid when due in the ordinary course of business.

Q: Can union contractors use loan proceeds from the PPP to cover the cost of employer-contributions towards defined benefit plans?

A: Yes. Under the CARES Act, the term “payroll costs” is defined to include employer contributions to the “payment of *any* retirement benefit,” without any limitation on the specific type of retirement plan. The U.S. Department of Treasury also explained that forgivable retirement benefits under the PPP include *both* defined benefit plans (such as defined pension plans) and defined contribution plans (such as 401k group retirement plans). Accordingly, union contractors can use loan proceeds from the PPP to cover the cost of employer contributions towards multi-employer pension funds.

Q: Can my business use loan proceeds from the PPP to cover the cost of paid sick time and paid expanded family or medical leave under the Families First Coronavirus Response Act?

A: No. The SBA specified that the cost of any payments made for paid leave under the Families First Coronavirus Response Act (FFCRA) do not count as “payroll costs” under the PPP, so employers should not use loan proceeds from the PPP to cover the cost of paid leave under the FFCRA. Essentially, employers cannot “double-dip” by receiving tax credits for any payments made towards paid sick time or paid expanded family and medical leave, on the one hand, while also being fully forgiven for those same payments under the PPP.

Q: My business was forced to lay off some employees after February 15, 2020 and before we received loan proceeds from the PPP. Will this impact loan forgiveness?

A: Yes, but there is a solution. While the amount of loan forgiveness will be reduced if an employer decreases its baseline headcount of full-time equivalent employees, the SBA specified that employers may avoid any reduction in loan forgiveness by restoring their baseline headcount of full-time equivalent employees by June 30, 2020. Therefore, if your business had conducted layoffs between February 15, 2020 and April 26, 2020, you may avoid forfeiting loan forgiveness by rehiring or replacing the employees who were laid off due to the COVID-19 pandemic. That being said, we are still awaiting regulatory guidance on the issue of whether there are any special terms and conditions applicable to rehired employees.

Q: How should I calculate my baseline number of “full-time equivalent” employees for purposes of loan forgiveness?

A: The CARES Act allows employers to choose between one of the following two formulas: (1) calculate the average number of its full-time equivalent employees from January 1, 2020 through February 29, 2020; or (2) calculate the average number of its full-time equivalent employees from February 15, 2019 through June 30, 2019. To maximize loan forgiveness, employers should choose the formula that will produce the *lower* number of full-time equivalent employees.

Q: For purposes of loan forgiveness, can I combine the hours of two or more part-time employees to make one “full-time equivalent” employee?

A: Most likely, yes. The SBA has yet to release any definition of the term “full-time equivalent employee,” as used in the PPP provisions of the CARES Act. However, the SBA uses the following definition of “full-time equivalent employee” for other loan programs: “a combination of employees, each of whom individually is not a full-time employee because they are not employed on average at least 30 hours per week, but who, in combination, are counted as the equivalent of a full-time employee.” Applying this same definition to the PPP, employers should be able to use two or more employee who, in combination, worked an average of 30 hours or more per week, when calculating its number of full-time equivalent employees.

Q: What if I invite previously furloughed employees to return to work during the covered loan period and they refuse to come back— will the amount of loan forgiveness be reduced?

A: No. The SBA recently supplemented its current guidance on the PPP to provide that employers will not face reduced loan forgiveness when that employer furloughed or laid off an employee, offered to rehire the same employee on the same terms and conditions that the employee previously enjoyed, but the employee declined the offer. Should this situation arise, you should make sure that the offer to return to work is conveyed in writing with a clear return to work date, setting forth the hours and terms and conditions of employment, and that you document the employee’s refusal to return. You must also be able to provide proof of delivery to confirm the foregoing. It is also important to note that should an employee reject such an offer to return to work, he or she may likely become ineligible to continue receiving unemployment compensation benefits.