THE PAYCHECK PROTECTION FLEXIBILITY ACT

The Paycheck Protection Flexibility Act (the "Flexibility Act") was signed into law on June 5, 2020. The Flexibility Act made significant changes to the Paycheck Protection Program ("PPP") for small businesses, to ease certain restrictions on the use of PPP loan proceeds and make it easier for the borrower to maximize forgiveness. The SBA has already issued a new Interim Final Rule to implement some of the changes in the Flexibility Act, although it has yet to issue new guidance regarding forgiveness or a revised forgiveness application. This article will address some of the key points of the Flexibility Act and the new rules.

The "Covered Period"

- The "Covered Period" for forgiveness has been extended from 8 weeks to the earlier of 24 weeks from loan disbursement or December 31, 2020.

- Borrowers who received a PPP loan before June 5, 2020 can elect to use their original 8-week "Covered Period" (i.e. 56 days from receipt of PPP loan funds for permissible spending and forgiveness) or the new 24-week Covered Period (i.e. 168 days from receipt of PPP loan funds for permissible spending and forgiveness), but not any number of weeks between 8 and 24. It is unclear how the employee headcount and pay reduction rules, and the "Safe Harbor", will apply to a long 24-week Covered Period for forgiveness purposes. The SBA has indicated that it will issue additional guidance on forgiveness.

- For loans made after June 5, the "Covered Period" is 24 weeks from disbursement. In all cases, the Covered Period must end no later than December 31, 2020.

The 60% Rule

- Borrowers must spend at least 60% of the PPP loan funds on Payroll Costs in order to receive full forgiveness. This is a change from the prior rule, which required that at least 75% of the PPP loan funds be spent on Payroll Costs to achieve full forgiveness. Assuming the borrower meets the 60% threshold, the remaining 40% or less of the PPP loan funds must still be spent on only permissible Nonpayroll Costs to be forgiven (mortgage interest, rent, utilities).

- The PPP Flexibility Act, as written, provided that if a borrower did not spend at least 60% of the loan proceeds on payroll, it was not eligible for any forgiveness at all. The SBA has clarified that failure to meet the 60% threshold will merely reduce the borrower's forgiveness, as was the case with the previous 75% threshold, not eliminate it entirely.

- For example, if a borrower receives a $100,000 loan, but only spends $54,000 of that on Payroll Costs during the Covered Period, its maximum forgiveness will be reduced to $90,000 (because $54,000 equals 60% of $90,000).

FTE Headcount and Wage Tests

- Borrowers can use up to the entire 24-week period to restore full-time employee ("FTE") headcount and wage levels to the applicable look-back date or period required for full forgiveness. The previous deadline was June 30; the new deadline is December 31, 2020, or the end of the borrower's selected Covered Period.

- There are two new important changes to the FTE Headcount Reduction Test and the FTE Headcount Safe Harbor. The PPP Flexibility Act allows the borrowers to reduce FTE headcount, without penalty, if the borrower can document in good faith that it is:

  1) unable to find qualified employees; or

  2) unable to restore its business operations to the same levels that existed on February 15, 2020, due to COVID-19 related operating restrictions (e.g. Stay Home Orders).

Other Important Changes:

- The payment deferral period has been changed from six months to the date on which the SBA remits the loan forgiveness amount to the lender. If a borrower does not apply for forgiveness within 10 months after the end of the borrower's Covered Period, it must begin to make payments to the lender.

- The repayment period (for amounts not forgiven) has been extended from two years to five years only for loans made after the effective date of the PPP Flexibility Act, unless the lender agrees to modify the terms of previously-disbursed PPP loans. The interest rate is unchanged at 1%.

- PPP loan borrowers may now also delay payment of their payroll taxes. That was a benefit under the original CARES Act, but the law previously prohibited PPP borrowers from taking advantage of that benefit.

The changes included in the PPP Flexibility Act will be most beneficial to employers who have not yet obtained a PPP loan or only recently did so. Unfortunately, many employers have already spent a majority of their PPP loan funds to pay employees who could not work, or worked much less, due to the Governor's Stay Home Orders or the lack of business during the height of the pandemic, in accordance with the PPP forgiveness rules then in effect. Nevertheless, such employers should carefully consider their PPP spend to date/current forgiveness status, as well as the revised rules for the FTE Headcount Reduction Test, FTE Headcount Safe Harbor, 25% Pay Reduction Test and other issues, before greatly extending their PPP Covered Period and again furloughing/laying off employees who were previously put back on full payroll with PPP loan funds.

This memo is intended only as a summary and general overview. If you have any questions or would like legal advice regarding the above or any other employment issue, please contact David Lawrence or Sarah Gidley.