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PAYCHECK PROTECTION PROGRAM – WHAT YOU NEED TO KNOW

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How Does the CARES Act Benefit Our Business?

In essence, Congress understands to drive the economy and preserve the American Dream, small businesses need to remain competitive, but simultaneously realizes that small businesses are at an inherent disadvantage and generally cannot compete with most larger organizations. This unequal playing field becomes all the more transparent and is exacerbated when a pandemic strikes.

In an attempt to balance this unstable environment, the CARES Act was enacted with specific provisions to provide $349 billion to fund forgivable loans under the Paycheck Protection Program to business concerns (including sole proprietorships, independent contractors and self-employed persons), nonprofit organizations, veteran organizations, and Tribal business concerns during the covered period. The covered period for this program begins on February 15, 2020 and ends on June 30, 2020. Lenders will begin processing loan applications as soon as April 3, 2020, and in light of the $349 billion cap along with the abundance of eligible recipients, it is necessary to apply immediately for this type of loan.

Is My Business Eligible for the Paycheck Protection Program?

Your business is eligible to receive a covered loan, which is a loan made during the covered period, under the Paycheck Protection Program if your business is not more than the greater of 500 employees or the size standard in number of employees (established by the Small Business Administration) for the industry in which your business operates.[1] In the construction industry, there is no size standard based upon the number of employees, so as long as your organization is below 500 employees then regardless of the average of your gross receipts, your business will be eligible. Individuals comprising the employee limits are those who are employed on a full-time, part-time, or other basis.

Although construction organizations are eligible for this loan if they do not have more than 500 employees, other organizations may remain eligible even if they have more than 500 employees, as long as the amount of employees for that particular organization does not exceed the number of employees established by the Small Business Administration for that industry. As an example, the size standard in number of employees for Direct Property and Casualty Insurance Carriers is 1,500. Thus, companies falling under this category can remain eligible even if they exceed 500 employees, as long as the number of employees does not exceed 1,500.

If I am Eligible for the Paycheck Protection Program, what is the Maximum Amount I can Receive? You made it past the first hurdle – you are considered an eligible business for purposes of the Paycheck Protection Program. Under the covered period, the maximum loan amount that your organization may receive is the lesser of $10,000,000.00 or the average of your total monthly payments for payroll costs incurred during the 1-year period *before the date on which the loan is made*[2] multiplied by 2.5.

1 Size Standards. https://www.sba.gov/sites/default/files/2019-08/SBA%20Table%20of%20Size%20Standards_Effective%20Aug%2019%2C%202019_Rev.pdf

2 Slight modifications need to be made if you are a seasonal employer or are an eligible recipient that was not in business during the period beginning February 15, 2019 and ending on June 30, 2019.

As an example, let's assume for simplicity sake that the average of your total monthly payments for payroll costs equated to $1,000,000.00. To ascertain the loan amount you are entitled to, you multiply this number by 2.5, which equals $2,500,000.00, and then compare it to the $10,000,000.00 cap. In this example, the maximum loan you will be eligible to receive is $2,500,000.00 since it is less than $10,000,000.00.

However, let's now assume that your average total monthly payments for payroll costs equated to $5,000,000.00. Once we multiply this average cost by 2.5, we see that it equals $12,500,000.00. According to the statute, the maximum loan you are eligible to receive is the lesser of these two numbers, which is $10,000,000.00.

With the Complicated Math Aside, What Constitutes a "Payroll Cost"?

To receive a covered loan, you need to understand the factors that constitute the phrase "payroll cost." Under this section of the CARES Act, a "payroll cost" means:

1. salary, wage, commission, and similar compensation;
2. cash tip or the equivalent;
3. payment for vacation, parental, family, medical, or sick leave (please see Mr. Hughbanks' well-articulated post on the Campbell & Bissell, PLLC website for the rules regarding sick leave);
4. allowance for dismissal or separation;
5. payment required for the provisions of group health care benefits, including insurance premiums;
6. payment of any retirement benefit; or
7. payment of State or local tax assessed on the compensation of employees; and
8. the sum of payments of any compensation to or income of a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment, or similar compensation and that is in an amount t*hat is not more* than $100,000.00 in 1 year, as prorated for the covered period.

Importantly, "payroll cost" does not include:

1. the compensation of an individual employee in excess of $100,000.00 as prorated for the covered period;
2. certain taxes imposed or withheld under the Internal Revenue Code during the covered period;
3. any compensation of an employee whose principal place of residence is outside of the United States;
4. qualified sick leave wages for which a credit is allowed under the Families First Coronavirus Response Act; or
5. qualified family leave wages for which a credit is allowed under the Families First Coronavirus Response Act.

Although these factors may seem overwhelming, if you calculate each factor individually before determining the combined average of "payroll costs", this task will seem a lot less burdensome. It is also important to not lose sight of the fact that although stressful, a proper calculation may mean you are eligible for more money, so it is necessary to diligently and competently work through these factors.

What Are the Next Steps After Diligently and Competently Calculating "Payroll Costs"?
After you have appropriately calculated the loan amount, you will need to certify that the uncertainty of current economic conditions make necessary the loan request to support ongoing operations; acknowledge that the funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments; certify that you do not have an application pending for a loan for the same purpose and duplicative of amounts applied for or received under a covered loan; and during the period beginning on February 15, 2020 and ending on December 31, 2020 that you have not received amounts for the same purpose and duplicative of amounts applied for or received under a covered loan.

Are Any Fees Associated With the Loan?
Great question. Fortunately, fees are waived.

Do I Need to Personally Guarantee the Loan?
A personal guarantee or collateral is not required for the covered loan.

What is the Interest Rate for the Covered Loan?
The interest rate of a covered loan shall not exceed 4 percent.

After Receiving the Loan, What Can I Use it Towards?
Once you obtain the loan, you may use it towards "payroll costs"; costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums; employee salaries, commissions, or similar compensations; payments of interest on any mortgage obligation (excluding prepayment of or payment of principal on a mortgage obligation); rent; utilities; and *interest* on any other debt obligation that were *incurred before* the covered period.

I'm Elated that I Received the Loan, But When Do I Need to Begin Paying the Lender Back?
Congress has presumed a borrower of the covered loan to be an "impacted borrower." As a result, the Small Business Administration shall require lenders to provide complete deferment for a period of not less than 6 months, including payment of principal, interest, and fees, and not more than 1 year. In other words, you will not need to begin paying the lender back for the covered loan until at least 6 months from the date of receiving it.

Business Has Been Infrequent Since the COVID-19 Crisis; Is There Any Way to Receive Forgiveness on my Covered Loan?
An eligible recipient may receive forgiveness of indebtedness on a covered loan in an amount equal to the sum of costs incurred and payments made during the covered period for:

1. "Payroll costs";
2. Any payment of interest on any covered mortgage obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation);
3. Any payment on any covered rent obligation; and
4. Any covered utility payment.

If these debts look familiar, it's because they are – these are the debts the covered loan can be used towards as mentioned above. Notably, however, excluded from forgiveness is payment towards interest on any other debt obligation that were incurred before the covered period. As a result, you need to remain cognizant of these payments from the covered loan, because you will owe the lender for these amounts. In addition, you will also notice that forgiveness is only allowed for the sum of the actual costs incurred and payments made. Put differently, if you do not use the entirety of the loan towards the costs enumerated in this section, you will owe the lender the balance of the covered loan.

Furthermore, a covered mortgage obligation must have been incurred prior to February 15, 2020 to be eligible for loan forgiveness – the same principle applies to rent (i.e., the leasing agreement must be in force prior to February 15, 2020). Moreover, and importantly, "covered period", as used in this section regarding forgiveness, means the 8-week period beginning on the *date of the origination* of a covered loan. Thus, you will only receive loan forgiveness for the enumerated costs for 8 weeks following the date of origination.

In addition, as if Congress could not make the loan forgiveness program any more complex, it has managed to do so by requiring a reduction of the amount forgiven if the average number of full-time employees during the covered period was less than either the average number of full-time employees per month during the period beginning on February 15, 2019 and ending on June 30, 2019, or the average number of full-time employees per month employed during the period beginning on January 1, 2020 and ending on February 29, 2020. To calculate the number of these employees, the employer must average the number of full-time employees for each pay period falling within a month.

Once the average amount of employees has been calculated, and if there was indeed a reduction in the number of average employees during the covered period, the employer must reduce the amount that the loan can be forgiven by multiplying the amount of costs (enumerated in bullet-points 1-4 in this section) by the quotient received from dividing the average amount of employees during the covered period by the average number of employees during either the February 15, 2019 through June 30, 2019 period or the January 1, 2020 through February 29, 2020 period.

As a simple example, let's assume the average number of full-time employees during the covered period was 8 while the average number of full-time employees per month during the February 15, 2019 through June 30, 2019 period was 9 and the average number of full-time employees per month for the January 1, 2020 through February 29, 2020 period was 10. Let's also assume the permissible costs totaled $1,000,000.00. To receive the most out of loan forgiveness, you will want to use the average number of full-time employees per month from February 15, 2019 through

June 30, 2019 period, which is 9, because the quotient is greater after you divide 8 (full-time employees in the covered period) by 9 – the quotient is .887 – than the quotient after dividing the average number of full-time employees during the covered period by those in the February 15, 2019 through June 30, 2019 – this quotient is .8 (8 divided by 10).

By using the .887 quotient, you can have $887,000.00 forgiven (multiply the permissible costs equaling $1,000,000.00 by the quotient of .887), whereas the quotient of .8 would only permit you to have $800,000.00 forgiven (again, multiply the permissible costs by the quotient). As you can see, the additional amount that can be forgiven by using one quotient over the other is $87,000.00! Thus, it is necessary to choose the correct period to come to a quotient because the amount of savings (i.e., amount of the loan that can be forgiven) will change.

In addition to the foregoing reduction, the amount of the covered loan that can be forgiven will be reduced further by the amount of any reduction in total salary or wages of any employee during the covered period that is in excess of 25 percent of the total salary or wages of the employee during the most recent full quarter during which the employee was employed before the covered period. An employee for purposes here includes anyone who did not receive, during any single pay period in 2019, wages or salary at an annualized rate of pay in an amount more than $100,000.00.

Does Any Paperwork Need to be Completed to Receive Forgiveness on my Covered Loan?

Yes, you need to submit documentation to your lender verifying the number of full-time equivalent employees on payroll and pay rates for the periods described in the section directly above. The documentation needs to include payroll tax filings reported to the IRS; and State income, payroll, and unemployment insurance filings.

In addition, you need to provide documentation regarding canceled checks, payment receipts, transcripts of accounts, or other documents verifying payments on covered mortgage obligations, payments on covered lease obligations, and covered utility payments. Finally, a representative of the eligible recipient needs to certify that the documentation presented is true and correct and that the amount for which forgiveness is requested was used to retain employees, make interest payments on a covered mortgage obligation, make payments on a covered rent obligation, or make covered utility payments.

What Happens If I Do Not Provide the Necessary Documentation to the Lender?

Simply put, if you do not provide the necessary documentation, you will not receive loan forgiveness. As a result, it is vital to document every expense that is used in calculating the amount for your loan forgiveness.

If Any Part of My Covered Loan Is Forgiven, Will It Count as Income Come Tax Time?

No, the amount of the covered loan that is forgiven will not count as income.

Conclusion

As an organization, it is necessary to apply for the Paycheck Protection Program loan immediately. To remain afloat, you may need this type of assistance; plus, since this loan can be forgiven to certain extents without counting as income, it is free money that you should otherwise take advantage of. Remember, however, if you do not apply soon enough, you may miss out on the opportunity to remain in business well after this national crisis ends because you did not receive the necessary support during it.