

PPP Loan Updates: EZ Forgiveness Application, Updated Guidance, and More

On June 17, 2020, the U.S. Small Business Administration (“SBA”) published an abbreviated [“EZ” forgiveness application](#) and [accompanying instructions](#) (“EZ Forgiveness Application”) for certain eligible borrowers under the Paycheck Protection Program (“PPP”) as included in the Coronavirus Aid, Relief, and Economic Security Act (“CARES Act”).

The SBA also released an [Interim Final Rule](#) (“IFR”) aimed at harmonizing the Paycheck Protection Program Flexibility Act (“Flexibility Act”), signed into law on June 5, 2020, with the PPP, as well as an [updated long-form application for forgiveness](#) and [accompanying instructions](#) (“Forgiveness Application”). The SBA’s past guidance interpreting changes made by the Flexibility Act are discussed in greater detail in our [previous client alert](#).

This FAQ addresses eligibility for the EZ Forgiveness Application, changes and clarifications found in the IFR and the Forgiveness Application, and some of the most frequently asked questions that we are receiving from our clients. It is important to note that the PPP is complex, and the terms of its implementation continue to evolve. The information and guidance provided by the SBA and lenders is rapidly changing.

Q: Can I use the EZ Forgiveness Application?

Borrowers can use the EZ Forgiveness Application if at least one of the following is true:

- a. The borrower is a self-employed individual, independent contractor, or sole proprietor without employees at the time of application and who included no employee salaries in calculating average monthly payroll in its loan application;
- b. The borrower did not reduce annual salary or hourly wages of any employee by more than 25% during the covered period and did not reduce the number of employees or average paid hours of employees between January 1, 2020 and the end of the covered period. This does not include: (i) reductions of individuals who were employees on February 15, 2020 if the borrower hired similar qualified individuals on or before December 31, 2020; and (ii) reductions in employee’s hours that the borrower offered to restore but the employee refused); or

- c. The borrower did not reduce annual salary or hourly wages of any employee by more than 25% during the covered period and was not able to operate during the covered period at the same level of business activity commensurate with the business's activity level as of February 15, 2020, due to sanitation, social distancing, and worker or customer safety requirements related to COVID-19.

Q: What is the cap on forgiveness for cash compensation per employee if I use a covered period of 24 weeks?

Borrowers electing to use a 24-week covered period are capped at \$46,154 of cash compensation for an individual employee (equal to 24 weeks of pay for an employee with annual pay, including salary, wages, and tips, of \$100,000). The cap for borrowers using an eight-week period remains \$15,385 per employee.

Q: What is the cap on forgiveness for compensation replacement for business owners for a covered period of 24 weeks?

The IFR states that the limit on owner compensation replacement eligible for forgiveness for a 24-week covered period is 2.5 months' worth of 2019 net profits, capped at a maximum of \$20,833. This is different from the calculation for borrowers using an eight-week covered period, which caps owner compensation replacement at \$15,385 (equivalent to the cap on forgivable cash payroll costs of W-2 employees).

The 2.5 month limit is meant to prevent unintentional windfalls to business owners that may be able to take advantage of the new safe harbors for forgiveness related to full-time equivalency ("FTE") reduction. The IFR also explains that because the amount of the loan is capped at 2.5 months of payroll, this limit will have no effect on borrowers with no employees.

Q: Can I include employer health insurance and employer retirement contributions as payroll costs?

For W-2 employees, employer health insurance contributions and employer retirement contributions made on behalf of the employee can be included as payroll costs. However, the Forgiveness Application clarifies that employer health insurance contributions and employer retirement contributions are not included in payroll costs for self-employed individuals, general partners, or owner-employees of an S-corporation, because they are already included in the individual's compensation.



Q: On what date will my FTEs be measured to determine if I am eligible for the FTE safe harbor to avoid a reduction in loan forgiveness?

The Forgiveness Application states that borrowers will not be subject to a reduction in loan forgiveness based on FTE reductions made during the period between February 14, 2020 and April 26, 2020 if the borrower's FTE level is restored to the same level as during the pay period that included February 15, 2020 by the earlier of: (i) December 31, 2020 (previously June 30, 2020); or (ii) the date the borrower submits the forgiveness application.

Q: If I lay off employees, do I need to rehire the same employees that were laid off to avoid a reduction in loan forgiveness?

No. To avoid a reduction in the loan forgiveness amount, an employer is only required to eliminate the reduction in the number of FTE employees by the earlier of: (i) December 31, 2020 (previously June 30, 2020); or (ii) the date the borrower submits the forgiveness application.

Q: If I lay off employees and am unable to hire someone to fill the vacant position, will my loan forgiveness still be reduced?

Probably not. The Forgiveness Application incorporated changes made by the Flexibility Act, providing that the forgiveness amount will not be reduced if:

- a. The borrower can document (i) that they attempted, but were unable, to rehire individuals who had been employees on February 15, 2020 and (ii) that they have been unable to hire "similarly qualified employees" before December 31, 2020; or
- b. The borrower, in good faith, can document an inability to return to the "same level of business activity" commensurate with the business's activity level as of February 15, 2020, due to sanitation, social distancing, and worker or customer safety requirements related to COVID-19.

Q: What documentation do I need to maintain or submit to prove I fall under the safe harbor for forgiveness reduction due to reduction in FTEs?

In addition to other required documentation, the updated Forgiveness Application adds that borrowers should maintain, but are not required to submit, documentation of employee refusals to accept restoration of reduction in hours, and inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020. If applicable, borrowers should also maintain documentation supporting the borrower's inability to return to the "same level of business



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activity” commensurate with the business’s activity level as of February 15, 2020, due to sanitation, social distancing, and worker or customer safety requirements related to COVID-19 (including copies of the applicable requirements and relevant borrower financial records).

Q: Who can I contact to learn more?

If you have any questions regarding your PPP loan, [contact](#) your primary Tonkon attorney.

Tonkon Torp corporate finance attorneys Drea Schmidt (503.802.5703, drea.schmidt@tonkon.com), Betsy Judd (503.802.5769, betsy.judd@tonkon.com) Jeff Cronn (503.802.2048, jeff.cronn@tonkon.com), and Ferdie Ruplin (503.802.2029, ferdie.ruplin@tonkon.com), are also available to answer your questions on these matters.

