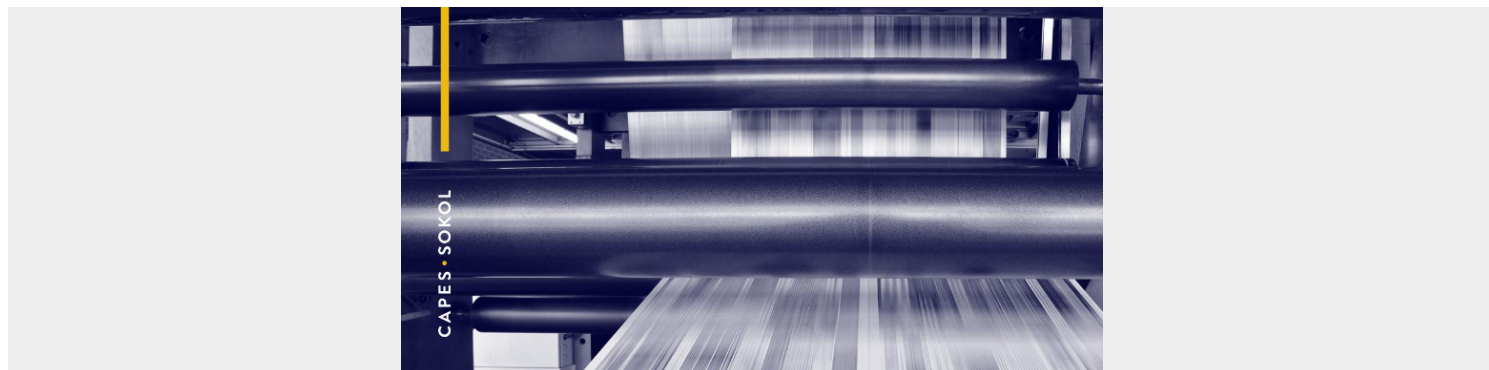


HOT OFF THE PRESS: SBA RELEASES NEW FAQs ON PPP LOAN FORGIVENESS

Posted on August 7, 2020 by Michelle F. Schwerin



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On **August 4, 2020**, the Small Business Administration ("**SBA**") released a new set of [Frequently Asked Questions](#) ("**FAQs**") addressing forgiveness of Paycheck Protection Program (PPP) Loans. These FAQs supplement the 49 FAQs previously published by the SBA and Treasury addressing the PPP generally.

The 23 FAQs are broken into four categories: General Loan Forgiveness (3 FAQs), Loan Forgiveness Payroll Costs (8 FAQs), Loan Forgiveness Nonpayroll Costs (7 FAQs), and Loan Forgiveness Reductions (5 FAQs). The new FAQs discuss many of the concepts set forth in the PPP Loan Forgiveness Applications – reiterating the statute and prior regulations, providing clarity, and raising additional questions.

The FAQs include several noteworthy takeaways:

- **FAQ 5 of Loan Forgiveness Payroll Costs FAQs** clarifies that all forms of cash compensation, including lost tips, lost commissions, bonuses, or other forms of incentive pay (e.g., hazard pay) qualify as payroll costs for loan forgiveness purposes.

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- **FAQ 8 of Loan Forgiveness Payroll Costs FAQs** discusses treatment of owner compensation for various ownership structures, including C-Corporation owner-employees, S-Corporation owner-employees, Self-employed Schedule C, general partners and LLC owners. The guidance outlines caps on cash compensation and retirement contributions. For C-Corporations, S-Corporations, partnerships and sole proprietorships, compensation to owner-employees cannot exceed the lesser of \$20,833 or 20.833% of the owner-employee's 2019 compensation. This cap is cumulative over all the companies that compensate the owner-employee. Specific rules concerning health insurance and retirement benefits are set forth for each ownership type.
- **FAQ 5 of Loan Forgiveness Nonpayroll Costs FAQs** notes that payments made on renewed leases or refinanced mortgage loans qualify for loan forgiveness so long as the original lease or mortgage existed before February 15, 2020.

A few important outstanding questions and issues on which we are still waiting for guidance, include:

- **FAQ 7 of the Loan Forgiveness Payroll Costs FAQs** states that "employer contributions for retirement benefits accelerated from periods outside the Covered Period or Alternative Covered Period" are not forgivable. But, what is an accelerated contribution? Does it mean that only retirement benefits that are attributable to the Covered Period are forgivable; or, are prepaid benefits accrued after the Covered Period excluded, while benefits that accrued before and are paid during the Covered Period qualify for forgiveness? The word "accelerate" seems to suggest prepayment...but does it apply to the prepayment of benefits not yet incurred or prepayment of an already existing amount due? Either way, this could be problematic based on previous guidance regarding the "paid and incurred" statutory language under the CARES Act which the PPP Loan Forgiveness Applications clarified meant payroll costs paid **or** incurred. Thus, for borrowers who already paid employee retirement benefits, expecting to rely on the SBA's own instructions and clarifications for PPP loan forgiveness, this FAQ may result in the disqualification of retirement benefits which the borrower paid with the expectation that they would be forgivable.
- Does a borrower qualify for an EZ application if it furloughed a few employees during the Covered Period but hired more new employees than were furloughed? May such an employer legitimately certify that it "did not reduce annual salary or hourly wages of any employee by more than 25 percent during the Covered Period ..." and "did not reduce the number of employees or the average paid hours of employees between January 1, 2020 and the end of the Covered Period..."? Does a borrower "reduce the annual salary or hourly wages of any employee" when it furloughs one employee but immediately hires a replacement? We've argued this issue five ways to Sunday and raised the question with attorneys from across the country and come out with different perspectives each time.

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