

Following a frantic rush to become familiar with the CARES Act, and the Paycheck Protection Program (“PPP”) it introduced, businesses whose loans have been funded must now focus on carefully tracking how they spend their PPP loan.

While the process of calculating and applying for forgiveness of PPP debt is not yet clear, the PPP stipulates that loan proceeds must be used within eight weeks of being received. Businesses should immediately start tracking and gathering data to (i) maximize the forgiveness through the appropriate usage of the funds; and (ii) prepare to deliver to their lender the necessary documentation at the end of the eight week period.

As a borrower, your eligibility for the forgiveness of your PPP loan may be reduced if:

- Less than 75% of PPP funds are spent on payroll costs;
- A borrower employs fewer full-time equivalent (FTE) employees than it did during the base period, which can be either February 15, 2019 through June 30, 2019, or January 1, 2020 through February 29, 2020;
- The salary or wages of an employee are less than 75% compared to the prior quarter; and,
- The reduction in number of employees and/or compensation isn't cured by June 30, 2020.

It's important to note that the statute refers to costs incurred and amounts paid during the 8 week covered period. Currently, there is no guidance as to what “costs incurred” means, so borrowers should be diligent in tracking what their payments made during the covered period relate to.

Eligible expenditures incurred and paid during the covered period include:

- Payroll Costs up to \$15,385 per individual ($\$100,000 \times 8/52$) plus the following covered benefits for employees (Waiting for more guidance on the inclusion of covered benefits paid on behalf of owners)
- Health care expenses
- Retirement contributions
- State taxes imposed such as unemployment insurance premiums
- Active partners/LLC members may be included subject to the \$100,000 limitation (i.e. \$15,385 each)
- Interest on a mortgage in existence before 2/15/20
- Rent on a lease in force before 2/15/20
 - Waiting for further guidance on if this is just real estate rent or if it also includes equipment rentals
 - Waiting for further guidance on self-rentals
- Utilities for which service began before 2/15/20 - includes electricity, gas, water, telephone, Internet access, transportation
 - The statute uses the word transportation without further elaboration
 - The SBA has not given further guidance as to what is included in transportation
- Borrowers can use the money to pay interest on any other debt obligations that were incurred before 2/15/20 but those expenditures will not be included in the forgiveness amount
- The Act does not list any other expenses in the section entitled “Allowable Uses of Covered Loans”

Here are some suggestions to track PPP funds in order to maximize your eligibility for loan forgiveness:

- Keep PPP loan proceeds in a separate bank account to avoid co-mingling with other funds. This will

allow you to more easily track exactly how the funds are being used.

- Consider contacting your payroll provider to change the bank account from which your payroll costs are funded. Certain payroll costs, such as employer payroll taxes and compensation above an annualized \$100,000, are not allowable payroll costs under the PPP.
- Determine a process for transferring funds from the bank account that holds PPP loan proceeds to the company payroll bank account, or operating bank account, to cover the allowable costs. This will allow the business to track the funds that must be spent over the 8 week period.
- Compute the average full time employee count during the base period as defined above. Keep in mind that the amount of the loan that will be eligible for forgiveness will be based on maintaining a headcount of at least this number.
- Create a separate analysis listing the salary of current employees as of the first quarter of 2020. Then, list each employee's current salary payable utilizing the PPP funds. The current salary must be at least 75% of the salary paid in the first quarter. Employees making more than \$100,000 are excluded from this computation.
- Expand on the above analysis by tracking the amount paid in gross payroll to the employee over the 8 week period. For those employees with an annual salary of over \$100,000, track the gross payroll to an annualized salary of \$100,000.
- Other payroll costs such as health benefits paid and retirement benefits paid are allowable payroll costs under the PPP. Be sure to pay these costs within the 8 week period. Waiting for more guidance on the inclusion of health and retirement benefits paid on behalf of owners.
- Maintain documentation. While the loan forgiveness application is not yet available, proof of the usage of funds is expected to be a key component. Documentation requests are expected to include: (i) verification of the number of FTE employees and (ii) support for employee pay rates comparing before and after salary and wage rates, (iii) proof of expenditure on eligible mortgages, leases and utility obligations. The documentation requests for the non-payroll expenditures may include cancelled checks, payment receipts and copies of vendor invoices.
- As the 8 week window to spend the funds draws near, evaluate your remaining funds and consider whether a special payroll should be issued to capture 8 full weeks of payroll and maximize the usage of your PPP funds.

Implementing good processes and tracking mechanisms as soon as the funds are received will be key to maximizing the forgiveness of your PPP debt and complying with the PPP's loan provisions. The SBA has threatened criminal penalties for misrepresentation and false certification, so documentation of the usage of these funds is crucial.