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SBA Issues Paycheck Protection Program Frequently Asked Questions

The Small Business Administration Issued Additional New Resources related to Paycheck Protection Program Loans in the Form of Frequently Asked Questions (“FAQs”). The FAQs were issued on April 7, 2020 and updated as of April 8, 2020

April 8, 2020

The Small Business Administration, in conjunction with the Department of the Treasury, issued FAQs in an effort to provide additional guidance to borrowers and lenders on provisions of the Paycheck Protection Program (the “PPP”) contained within the CARES Act. Some of the topics included are:

- Eligibility and affiliation rules for the PPP
- Methods for employers to be eligible for the PPP even if they employ more than 500 employees
- Confirmation that benefits and other costs associated with employees earning more than \$100,000 count towards payroll costs in addition to the first \$100,000 of their compensation
- Guidance on the time period to use for calculation of payroll costs, including special rules for seasonal and new businesses
- Guidance on documentation to present in support of a PPP application where an employer uses a Professional Employer Organization (“PEO”) for payroll
- Clarification on whether independent contractors should be included in calculating payroll costs
- Guidance on amending applications based upon information contained in the FAQs
- Guidance on when the 8-week covered period begins and when the borrower must make disbursements from the PPP loan

Below are highlights of some of the more significant FAQs:

Employers with More than 500 Employees – The guidance notes that a business with more than 500 employees may be eligible to participate in the PPP if it meets the SBA employee based or revenue based size standard within its industry to qualify as a small business or if it meets both tests in the SBA’s alternative size standard as of March 27, 2020. Passing these tests require that the maximum tangible net worth of the business does not exceed \$15 million and the average net income after Federal income taxes over the past two full fiscal years does not exceed \$5 million.

Compensation in Excess of \$100,000 – Regarding employees earning compensation in excess of \$100,000, the FAQs state that the exclusion from payroll costs of compensation in excess of \$100,000 only applies to cash compensation, not non-cash benefits. Such non-cash benefits include employer contributions to retirement plans, payment for provision of group health care coverage and payment of state and local taxes.

Professional Employer Organizations – In circumstances where an employer uses a PEO for payroll and the PEO’s payroll documentation may reflect more than an individual borrower’s payroll, payroll documentation provided by the payroll provider indicating the amount of wages paid and payroll taxes reported to

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the IRS related to the individual borrower will be considered acceptable documents to support the employer's application for a PPP loan. Notably, the guidance makes clear that, for purposes of the PPP, the employees will not be considered employees of the PEO.

Period To Be Used for Payroll Cost Determination –

The CARES Act and prior guidance differed in whether employers should use either the 12-month period prior to applying for the loan or the 2019 calendar year for purposes of calculating payroll costs. The guidance makes clear that applicants may use either time period. Special timeframes apply for seasonal employers and business not in operation during the relevant timeframes.

Independent Contractors – In the most definitive statement on the treatment of independent contractors to date, the guidance makes clear that businesses should not include payments made to independent contractors in their calculation of payroll costs. The FAQs reiterate that independent contractors and sole proprietors may apply on their own if they satisfy other applicable requirements.

Federal Employment Taxes – The guidance also provided much need clarification on treatment of federal

employment taxes. Despite the language of the Act and the Interim Rules, per the SBA FAQs, payroll costs are not reduced by federal taxes (either Federal Insurance Contributions Act ("FICA") or Federal Income Tax withholding) imposed upon on an employee. Therefore, federal taxes should not be deducted from the employee's gross pay for purposes of calculating payroll costs. However, employers should not add their federal employment FICA taxes to the calculation of payroll costs.

8-Week Covered Period – Finally, the guidance states that the 8-week covered period commences on the date the borrower's lender makes the first disbursement of the loan. Upon loan approval, a lender must make the first disbursement of the loan proceeds within ten (10) days.

The FAQs can be found here (https://www.sba.gov/sites/default/files/2020-04/Final%20PPP%20FAQs%20for%20Lenders%20and%20Borrowers%204-8-20_0.pdf).

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