

Client Alert: Sorting Through The Various COVID-19 Relief Programs and Conflicting Guidance on Loan Forgiveness

27 Apr 2020

Small businesses and charities may be sorting through the various programs recently enacted and signed into law, trying to figure out which one is best. While each business or charity is unique and no one option is best for all, bets can be hedged and more than one program may be utilized.

The [Paycheck Protection Program](#) (“PPP”) enacted through the Coronavirus Aid, Relief, and Economic Security (CARES) Act (P.L. 116-136) is the most generous program to date, with loans granted to cover payroll, rent or mortgage payments and utilities. The loan may be forgiven under certain prescribed circumstances. An entity that has applied for a PPP loan/grant but has not yet been approved or is awaiting funding from Congress may also take advantage of the employee retention credit, a deferral of certain employment taxes also set forth in the CARES Act.. Moreover, if a PPP loan has been received but not yet forgiven, the employee retention credit is also available. To claim the credit, the employer retains the employer’s portion of certain payroll taxes instead of paying those amounts to the IRS. The employer will not be liable for failure to deposit or failure to pay penalties otherwise applicable to employment taxes. All of this is reported on the quarterly Form 941 filed by the employer. If the PPP loan comes through and is eventually converted to a grant, the employer’s portion of employment taxes will need to be timely paid from the date the loan is forgiven. The previous credits will be due based upon the repayment schedule set forth in the legislation, with 50% due by 12/31/2021 and the balance due by 12/31/2022. (See FAQ 7 and FAQ 8) [IRS Q&As](#) The employee retention credit is a good way to receive monetary relief immediately, without having to depend upon applications and banks for approval. An employer may enjoy the benefit of both a PPP [loan](#) and the employee retention credit, but not both a PPP [grant](#) and employee retention credit. (See FAQ 4) [IRS Q&As](#) An employee retention credit can only be claimed as to \$10,000 in wages per employee with the credit capped at 50%, or \$5,000 per employee.

Conflicting Guidance on PPP Loan Forgiveness From SBA

Unfortunately, guidance issued by the Small Business Administration (“SBA”) on the PPP has not been consistent with the text of the CARES Act in explaining the amount of the loan that will be forgiven. If the employer uses less than 75% of the loan on payroll within eight weeks of the date the funds were received, that may or may not qualify for loan forgiveness. In the CARES Act, section 1102 lays out the allowable uses of the covered loan, including payroll costs, group health benefits, interest payments on mortgages, rent, and utilities, without specifying a percentage amount for any one item. In section 1106(b) of the CARES Act, the law states that an employer is eligible for loan forgiveness that is equal to the sum of payroll costs, rent, mortgage, and utilities. The SBA then issued an [“interim final rule”](#) on April 2, 2020 and introduced the idea that at least 75% of the PPP loan proceeds must be used for payroll or there may not be any loan forgiveness at all.

The SBA’s rule states as follows: “While the Act provides that borrowers are eligible for forgiveness in an amount equal to the sum of payroll costs and any payments of mortgage interest, rent, and utilities, the Administrator has determined that the non-payroll portion of the forgivable loan amount should be limited to effectuate the core purpose of the statute and ensure finite program resources are devoted primarily to payroll. The Administrator has determined in consultation with the Secretary that 75 percent is an appropriate percentage in light of the Act’s overarching focus on keeping workers paid and employed. Further, the Administrator and the Secretary believe that applying this threshold to loan

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forgiveness is consistent with the structure of the Act, which provides a loan amount [of] 75 percent ... Limiting non-payroll costs to 25 percent of the forgiveness amount will align these elements of the program.” (Emphasis added)

This language is subject to two different interpretations. One interpretation is that the loan forgiveness will be bifurcated into two categories, with 75% of the loan offset by payroll expenses and 25% of the loan offset by the other permissible expenses. Thus, on a \$100,000 loan, if \$60,000 was spent on payroll and \$40,000 on rent and utilities, \$60,000 + \$25,000 for a total of \$85,000 would be forgiven, with \$15,000 remaining as a loan. (Under the express language of the statute, all \$100,000 would be forgiven.) Another interpretation is that none of the loan would be forgiven, since the \$60,000 payroll expenditure did not reach the 75% threshold. We anticipate these issues will be litigated, given the express admission in the Rule that the “Administrator” did not agree with the language in the CARES Act, and so interpreted it independently. This was done in consultation with the “Secretary” but notably not in consultation with Congress.

While the Federal legislation specifies that the loan forgiveness is not taxable on the Federal level, most states have not indicated one way or another whether the forgiveness of indebtedness will be taxed at the state level. Stay tuned!

If you have any questions about these relief programs, please reach out to [Nancy Ortmeyer Kuhn, Esq.](#) or another member of Jackson & Campbell's [Tax Law Practice Group](#).

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TAGGED: irs, COVID-19, CARES Act, Paycheck Protection Program, Small Business Administration