

# Paycheck Protection Program Flexibility Act of 2020

## *Relaxation of Loan Forgiveness Rules*

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On June 3, 2020, the Senate passed the House version of the Paycheck Protection Program Flexibility Act in response to concerns of small business owners that the rules surrounding forgiveness of Payroll Protection Program loans created through the CARES Act were too restrictive. The new rules expand the timeframe businesses have to spend the borrowed funds, as well as increasing the amount of funds that can be

utilized for non-payroll purposes. Additionally, businesses have more time to restore employee counts to pre-COVID levels and allows more exceptions in the event they are unable to do so.

This article addresses the key components of the PPP Flexibility Act and other evolving proposals that borrowers should be aware of.



## Background

The Paycheck Protection Program (“PPP”) was established in the CARES Act to provide relief for small businesses, with the intent that the funding would enable them to retain employees during the COVID-19 emergency. Loan amounts through the program were determined based on 2.5 months of payroll-related expenses, with provisions for forgiveness if certain criteria were achieved during the 8-week period following receipt of funding. The criteria included (1) retaining a similar number of employee full-time equivalent employees (“FTEs”) as pre-emergency levels and (2) maintaining salary or wage levels for those employees at near historical levels. Subsequent rules issued by the Department of Treasury and the Small Business Association (“SBA”) required that 75% of the loan amount be used for payroll-related expenses in order to qualify for forgiveness, even though other operating expenses such as rent and utilities were also approved uses for funds.

## PPP Flexibility Act

As “stay at home” orders and related business closures mandated by state and local governments were extended, many businesses expressed concern that they would be unable to utilize the funds for approved expenses in the allotted 8-week time period. Employees were not needed during periods in which businesses were closed, and even as businesses began to re-open at limited capacity, required FTE levels did not reach historical levels. Many of these businesses, particularly restaurant and retail, still incurred significant occupancy-related expenses even while closures were in effect and operations had ceased. These factors meant that many businesses who needed help the most would not qualify for PPP loan forgiveness.

To address these concerns and allow more borrowers to achieve full loan forgiveness, Congress passed the PPP Flexibility Act of 2020 to relax the forgiveness requirements and give business more time to utilize PPP loan funds and restore employee FTE levels.



**Covered Period**  
Increased from 8 weeks to 24 weeks



**Payroll Expense Requirement**  
Reduced from 75% to 60% of funds



**FTE Levels**  
Must be restored by December 31, 2020



## Covered Period

The covered period is now the 24-week period commencing upon receipt of loan funding, not to extend beyond December 31, 2020. This allows businesses much more time to incur approved expenses after they are able to re-open and ramp up operations.

Any business who received PPP funding prior to the PPP Flexibility Act being enacted into law may choose to utilize the previous 8-week Covered Period rather than the expanded 24-week period. Therefore, if they spent all the funds and qualify for full forgiveness, they do not have to wait to apply for forgiveness.

## Payroll Expenses

The original requirement that 75% of borrowed funds be used for payroll-related expenses has been reduced to 60%, allowing business to now use up to 40% of the loan amount for other approved expenses such as rent or mortgage payments and utilities.

The language of the legislation indicates that this provision is effectively an “all or nothing” test. In other words, if a business spends less than 60% of PPP funds on payroll expenses during the Covered Period, they will not qualify for forgiveness at all. This is a change from the “sliding scale” guidance in place currently, which *reduces* the amount available for forgiveness if the required percentage of payroll spending is not achieved but does not *eliminate* eligibility for forgiveness. Several legislators have indicated that the intent was to merely *reduce* forgiveness amounts in the event the 60% requirement is not met, and have requested that the SBA correct this in subsequent regulations. However, borrowers should be aware of this potential and plan accordingly.

## FTE Levels

While the original legislation required that businesses restore employee FTEs and pay rates to pre-emergency (i.e., February 15, 2020) levels by June 30, 2020, to achieve full loan forgiveness, the PPP Flexibility Act extends this deadline to December 31, 2020. Additionally, this Act allows exceptions in the event that a business is unable to return to historical levels of business activity due to compliance with guidance from government agencies with regard to sanitation, social distancing, or other safety requirements, or is unable to rehire employees or replace them with similarly qualified individuals.

## Loan Repayment

For business that do not ultimately qualify for full forgiveness of loan amounts, the PPP Flexibility Act expands the repayment period from two years to five years. As drafted, this component of the legislation applies only to loans received after enactment of the PPP Flexibility Act. However, lenders and borrowers have the ability to renegotiate existing loans to reflect the extended repayment period. The interest rate remains unchanged at 1%.



Additionally, this Act extends the deferral period for payment and interest from 6 months as reflected in the CARES Act to the date the lender receives the forgiveness amount from the SBA, which is likely to be much longer.

## **Payroll Taxes**

The CARES Act gave businesses the ability to defer the employer portion of Social Security taxes, with 50% due at the end of 2021 and the remaining 50% due at the end of 2022. However, for businesses obtaining PPP loans, the deferral was only available until the loan is forgiven. The PPP Flexibility Act now allows businesses who receive PPP funding to defer their full 2020 Social Security taxes until 2021 and 2022, even if the PPP loan is forgiven in 2020.

## ***What's Next?***

The bill now awaits approval by President Trump, who is expected to sign it into law.

As noted earlier, one significant concern relating to the PPP Flexibility Act is whether a business will lose eligibility for loan forgiveness if they spend less than the required 60% of loan proceeds on eligible payroll expenses. Borrowers should closely follow regulations and guidance issued by the Department of Treasury and the SBA with regard to how this will be implemented, and whether this will revert to a sliding scale as reflected in previous PPP guidance.

Several parties, including banking lobbyists, have begun pushing for blanket forgiveness of PPP loans under a certain threshold. Their argument is that small business do not have the time or the expertise to perform the complex calculations required for the forgiveness application, and should not have to expend resources on that process while they are focused on trying to save their businesses coming out of the pandemic. Further, banks are concerned about the time it will take to process the forgiveness applications for all PPP loans. No legislation has been introduced at this point related to blanket forgiveness, but this is likely to be a topic of conversation in the coming weeks.

## ***Conclusion***

While questions still remain, the PPP Flexibility Act will alleviate many of the obstacles to businesses qualifying for loan forgiveness. Businesses who may not have applied for PPP loans due to concerns regarding the ability to achieve forgiveness may want to reconsider now that the rules have been relaxed. As of now, there are still unused PPP funds available. The JTaylor team of professionals will continue to monitor developments as new guidance is issued. Contact us to discuss how we can help your business maximize your loan forgiveness opportunity.