

## COVID-19 Help for Businesses

April 1, 2020

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The Paycheck Protection Program (“PPP”) was included in the CARES Act enacted by Congress and signed by the President last week. The PPP is designed to encourage small businesses to maintain jobs and payroll by making them eligible for emergency SBA loans up to \$10 million that are forgivable if used for allowable purposes. The program is complex, and there are many unanswered questions and seeming inconsistencies. We guidance is issued in the near future, and a technical corrections bill may be necessary. Below is a summary of the program as well as a number of questions, comments and insights.

### 1. Who is eligible?

Eligibility is more expansive than under normal SBA loan programs. Generally, any business concern, nonprofit organization, veterans’ organization or Tribal business concern with 500 or fewer employees is eligible. Individuals who operate as a sole proprietorship or independent contractor and self-employed individuals are also eligible.

Eligibility rules that apply to other types of SBA loans do not apply to loans under the PPP, such as counting employees of affiliated companies for purposes of the 500 employee limit, and the inability to obtain credit elsewhere.

### 2. How much can I borrow?

The maximum loan a company may obtain is 2.5 times its average monthly payments for “payroll costs” during the 12 months prior to the PPP loan, plus, if the company obtained a disaster relief SBA loan between January 1, 2020 and March 27, 2020, that loan can be rolled into a covered loan under the PPP. The maximum loan in any is \$10 million.

If a company was not in business during the period February 15, 2019 to June 30, 2019, it may request computation of the loan amount by reference to its payroll costs during the period from January 1 through February 29, 2020.

### 3. What is included in “payroll costs”?

The definition of “payroll costs” is critical both for purposes of determining the amount of the loan and for purposes of forgiveness.

- a. “Payroll costs” means payments of compensation with respect to employees that is any of the following and not excluded below:
  - Salary, wages, commissions, or similar compensation;
  - Payment of cash tips or equivalent;
  - Payment for vacation, parental, family, medical, or sick leave;

- Allowance for dismissal or separation;
  - Payment for group health care benefits, including insurance premiums;
  - Payment of any retirement benefit; or
  - Payment of state or local payroll tax.
- b. "Payroll costs" also include payments to a sole proprietor or independent contractor that is a wage, commission, income, net earnings from self-employment or similar compensation up to \$100,000 per year.
- c. "Payroll costs" specifically exclude:
- Any individual's compensation in excess of \$100,000 per year (compensation up to \$100,000 per year can be counted);
  - Federal payroll taxes;
  - Compensation to an employee whose principal residence is outside the U.S.;
  - Qualified sick leave wages for which a credit is section 7001 of the Families First Coronavirus Response Act; and
  - Qualified family leave wages for which a credit is allowed under the Families First Coronavirus Response Act.
- d. Covered / Not Covered.
- Many S corporation shareholders receive compensation as well as profit distributions. The compensation is included in "payroll costs" (subject to the \$100,000 limit); the profit distributions are not.
  - Partners in a partnership (including most LLCs) may receive a guaranteed payment in addition to profit allocations and distributions. None are included in "payroll costs."
  - A borrower may include in its "payroll costs" certain payments to sole proprietors and independent contractors. This appears to mean individuals acting as independent contractors and would not include independent contracting companies.
  - Payments to sole proprietors and independent contractors may be included in a borrower's "payroll costs" without regard to whether the individual obtains its own loan.

#### 4. Loan Forgiveness

The loan will be forgiven to the extent it is used, during the 8 weeks following the loan date, for "payroll costs," mortgage interest, rent or utilities. Since the amount of the loan is computed based on 2.5 x monthly "payroll costs" and forgiveness is determined by expenditures in an 8 week period, a borrower will be able to pay its "payroll costs" and will have essentially one-half month's payroll costs to pay these other expenses.

##### a. Reduction in Forgiveness for Reduction in Staff

The amount otherwise forgivable will be reduced by a fraction the numerator of which is the number of full-time equivalent employees ("FTEs") during the 8 weeks following the loan date, and the denominator of which is the number of FTEs during the period February 1 through June 30, 2019 or January 1 through February 29, 2020, whichever is better for the borrower. For seasonal employers the

statute authorizes the issuance of guidance on an appropriate period of time for purposes of this measurement.

b. Reduction in Forgiveness for Reduction in Compensation

The amount otherwise forgivable will be reduced by subtracting the amount of any reduction in total salary or wages of certain employees during the 8 weeks following the loan date in excess of 25% of their total salary or wages during the most recent full quarter of employment prior to the covered period. This is determined on an individual employee basis, and not in the aggregate. For this purpose, only those employees are included who did not receive, during any single pay period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000.

c. Questions.

There are many questions about how to determine FTEs, particularly where employees are unable to work due to shut down orders. Our best guess is that if they are paid the equivalent as if they worked full-time they will be treated as an FTE.

**5. Other Loan Terms**

- a. No personal guarantees or collateral required.
- b. Nonrecourse against any individual shareholder, member, or partner of an eligible recipient, except to the extent loan proceeds are used for an unauthorized purpose.
- c. The maximum interest rate according to the statute is 4%; but the SBA recently announced that an interest rate of 0.5% would apply.
- d. Full deferral of payment obligations for a minimum of 6 months.
- e. No prepayment penalty.
- f. Express processing of loans of up to \$1 million, although reportedly all loans will receive express processing.

**6. When can I get the money?**

The SBA begins accepting applications on April 3, 2020 from most businesses, and on April 10, 2020 from independent contractors and self-employed. The SBA is implementing expedited processing procedures.

GMH's Coronavirus Task Force is here to answer your questions. While GMH is complying with Governor Whitmer's Executive Order, we are working remotely and available to assist you. Please contact any of the below lawyers for more Coronavirus support.

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