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ALERT

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Hospitality Employers Get More Options for Loan Forgiveness in Paycheck Protection Flexibility Act

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The U.S. Senate passed an amendment to the CARES Act on June 3 called the Paycheck Protection Flexibility Act of 2020 (PPFA), extending the time for employers to use funds received in a Paycheck Protection Program (PPP) Loan. The House of Representatives had already passed the PPFA and the President is expected to sign the bill into law. Once enacted, employers, especially those in the hospitality industry, will have greater flexibility for using funds received through a PPP loan and an increased chance to have those loans forgiven. The effective date of the loan forgiveness provisions of the PPFA is retroactive to the date of the enactment of the CARES Act, meaning that these changes to the loan forgiveness requirements will apply to existing borrowers. A summary of the existing loan forgiveness requirements for PPP loans under the CARES Act is available through a previous alert.

For employers in the hospitality industry and in other industries where business would not be able to return to business during the original covered period under the CARES Act, these new amendments may make a PPP loan more enticing. Employers with existing PPP loans or who are now considering applying for a PPP loan should work with counsel to determine how the PPFA will affect their loan or application.

Key Points of the Paycheck Protection Flexibility Act

The major provisions of the PPFA are as follows:

- The "covered period" for using funds received under the PPP loan has been extended from eight weeks after loan origination to the earlier of (1) 24 weeks after loan origination, or (2) December 31, 2020. The PPFA also extends the deadline for employers to rehire employees to achieve loan forgiveness from June 30, 2020 to December 31, 2020. Borrowers who already received a PPP loan may elect to use either the new definition of "covered period" or the original period of eight weeks after loan origination set forth in the CARES Act.

- The PPFA formally adds an exemption for loan forgiveness based on employee availability. Small Business Administration guidance on the PPP program previously stated that employees who refused to return to work would not be held against an employer in determining the amount of employees who were rehired for loan forgiveness purposes. The PPFA has now added an exemption for employers for both employees who do not return to work *and* a reduction in the number of employees that an employer could rehire because of reduced business activity.

Specifically, this exemption provides that during the period from February 15, 2020 to December 31, 2020, the amount of loan forgiveness shall be determined without regard to a proportional reduction in the number of full-time equivalent employees if a recipient in good faith:

> (a) Is able to document (i) an inability to rehire individuals who were employees of the eligible recipient on February 15, 2020; and (ii) an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020; or
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> (b) Is able to document an inability to return to the same level of business activity the business was operating at before February 15, 2020, due to compliance with requirements or guidelines established or issued by the Secretary of Health and Human Services, the Director of the Centers for Disease Control and Prevention or the Occupational Safety and Health Administration between March 1, 2020 and December 31, 2020 related to maintaining standards for sanitation, social distancing or any other worker or safety requirement related to COVID-19.

- The amount of PPP loan proceeds that can be used on non-payroll costs and still be forgiven was increased from 25% to 40%. Employers can now use up to 40% of the PPP loan to pay interest on any covered mortgage obligation (not including prepayment of or payment of principal on a covered mortgage obligation), any payment on a covered rent obligation, or any covered utility payment. The remaining 60% of the PPP loan must still be used for payroll costs during the covered period to be eligible for forgiveness of the loan.

- Although the payroll expenditure requirement has dropped to 60% from 75%, under the language of the House bill there is no partial forgiveness. Borrowers must spend at least 60% on payroll costs or none of the loan will be forgiven. Under the original text of the CARES Act, a borrower's loan forgiveness amount would be reduced if less than 75% of eligible funds are used for payroll costs, but is not completely eliminated. Senators have suggested that technical revisions could still be made to the bill to restore the availability of partial forgiveness.

- The deferment period for repaying PPP loan has also been extended. Under the CARES Act, lenders were required to offer lenders complete payment deferment relief for a period of at least six months, but no more than one year. The PPFA extends this deferment obligation to the date on which the amount of loan forgiveness is determined and such determination is remitted to the lender. If an eligible borrower does not apply for loan forgiveness within 10 months after the last day of the covered period, the borrower must begin repaying the PPP loan within 10 months from the end of the covered period.

- The PPFA also removes an exception that was in the CARES Act that made PPP loan recipients ineligible for payroll tax deferrals available under the Act. That exception has now been removed from the CARES Act and PPP loan recipients can now defer payment of a portions of their payroll taxes until 2021 and 2022.

- The maturity date of PPP loans was also extended from two years to five years. This provision applies to all loans made on or after the date of the PPFA. Lenders and borrowers are allowed to modify the maturity terms of any existing covered loan to conform to the new maturity requirements.

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