

Labor and Employment Alert: A Fly on the Wall During the Most Recent SBA/Treasury Meeting Heard: “No, Really, This Time, We Mean It, You Can Trust This Interpretation of the Paycheck Protection Program”

We told you we would write each time we got new guidance on the Paycheck Protection Program (PPP). After issuance of the interim final rule on the PPP that the Small Business Administration (SBA) adopted late last week, we thought we had the agency's final interpretation of the statute and the program (despite all of our frustrations at the rule's contradiction of the statute). But it's a new week and I suppose the SBA and Treasury Department thought, how best can we ring in Holy Week and Passover for everyone? How about a new set of frequently asked questions as guidance for the PPP issued on April 6, and already updated on April 8 – just in time for the first night of Passover! We cannot wait to see what we get on Easter Sunday.

So here is what the SBA and Treasury are now saying (we mean it – at least as of the time we are publishing this post) through 20 FAQs dated April 8, 2020 posted by the Treasury Department. We have highlighted the significant guidance below but you should **read the full FAQ**.

- In question 1, the Treasury Department made clear that it is the borrower's responsibility to provide an accurate calculation of payroll costs and that the lender is required to do only a good faith review in a reasonable time.
- In question 4, the Treasury Department made clear that lenders are not required to make an independent determination regarding the applicability of the SBA affiliate rules. Instead, it is the borrower's obligation to determine which entities are affiliates and the headcount of employees.
- In question 7, the Treasury Department confirmed that the \$100,000 max on annual compensation applies only to cash compensation, not non-cash benefits like employer contributions to retirement plans, group health insurance benefits, nor state and local taxes assessed on employee compensation.
- In question 10, the Treasury Department clarified that when the borrower uses a third-party payer such as a PEO to process payroll and report taxes, it will be acceptable for the employer to use the third-party payer's quarterly payroll tax documentation, including a statement from the third-party payer, to support the loan.
- In question 14, the Treasury Department is now allowing borrowers to use the past 12 months (that is what the statute and interim rule provide) or 2019 to determine their average monthly payroll costs. Seasonal business, like the statute provides, may use any date commencing between Feb. 15 and March 1, 2019 through June 30, 2019; new businesses may use the period January 1, 2020 to February 29, 2020.
- In question 15, the Treasury Department confirmed the recent exclusion of independent contractors from the company's loan application, and added to the exclusion sole proprietors. This is despite the fact that the statute expressly allows for independent contractors and sole proprietors to be included in the company's loan application.
- In question 16, the Treasury Department (thankfully) stated that borrowers should not deduct federal withholding taxes or federal payroll taxes withheld from the employee's wages. Employers should not, however, include the employer share of payroll taxes in the loan calculation.
- Finally, in question 20, the Treasury Department stated that the eight-week spend period begins on the date the lender disburses the loan proceeds, and the lender must do so within ten days from the date of loan approval.

That's what we know right now.