Labor and Employment Alert: Congress Giveth, and the Agency Taketh Away – the Paycheck Protection Program Regulations

Late last night, the U.S. Small Business Administration (SBA) issued interim regulations, effective immediately, under the Paycheck Protection Program (PPP). We will save for our next cocktail party the fact that the SBA just issued regulations that at least at one point directly contradict the statute passed by Congress and signed into law by the President (I am partial to a good Manhattan, shaken, not stirred).

But what you really care about right now is, "Lawyer, tell me how to get the money!" Without further commentary (and good unless and until the SBA issues any more guidance or regulations), here is what you need to know

1. Borrower Eligibility and Loan Terms (no change)

What we said before remains the same: employers, for profit and certain non-profits, with 500 or less employees in operation as of Feb. 15, 2020 are eligible for the program. For employers larger than that, you may still qualify under the SBA's size standards for your industry. The SBA is yet to issue guidance on application of the affiliation rules at 13 CFR 121.103 and 121.301. When they do, we assure you, we will tell you all about it.

As before the regulation, there is no collateral and no personal guarantee of the loan. There is no up-front guarantee fee paid by the borrower. Agents for the loans will not be permitted to collect fees from the borrower or be paid out of the loan proceeds.

2. Maximum Loan Amount (no change)

You may still borrow the lesser of $10 million, or 2.5 times the business' average monthly payroll costs plus the outstanding amount of any Economic Injury Disaster Loan (EIDL) made between Jan. 31, 2020 and April 3, 2020. The SBA recommends applicants seek the full amount they are eligible for because you can only make one application under this program.

3. Exclusion of Independent Contractors from the Loan Amount Calculation (significant change)

Despite the fact that the statute creating the PPP expressly allows the inclusion of payments of any compensation to or income of an independent contractor in the definition of payroll costs, the regulations expressly exclude independent contractors from the loan amount calculation. The regulations expect the independent contractor to apply for his/her own loan under the program.

4. Time Period and Items Includable and Excludable from Payroll Costs for Purposes of Loan Amount Determination (some change)

Includable: business must compile their payroll costs from the last 12 months, which should include:

- Compensation in the form of salary, wages, commissions, or similar compensation, as well as cash tips or the equivalent, paid to employees whose principal residence is in the United States;
- Payment for vacation, parental, family, medical, or sick leave
- Allowance for separation or dismissal;
- Payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums, and retirement; and
- Payment of local and state taxes assessed on the compensation of employees

Excludable: after adding up the items above, you must back out/subtract from those amounts:

- Compensation of each individual employee in excess of $100,000 annually;
- For the period Feb. 15, 2020 to June 30, 2020, all Federal employment taxes imposed including the employee and employer share of FICA and Railroad Retirement Act taxes, and income taxes required to be withheld from employees; and
- Qualified sick and family leave wages for which is a credit is allowed under the Families First Coronavirus Response Act.

5. Interest Rate and Repayment Term of the Loan (change from guidance, not the statute)

The loan interest rate will be 1% (not the .5% from the SBA guidance earlier this week) with a maturity of two years. Repayment of the loan is deferred for six months although interest will accrue during that deferment period.

6. Forgiveness and Reduction of Forgiveness of the Loan Amount (some change)

The loan amount and all interest are forgivable if spent on the following:

- Employee and compensation levels are maintained
- At least 75% on payroll costs (accounting for all of the includable and excludable items set forth above in item 4 above)
- No more than 25% for non-payroll costs consisting of:
    - Rent payments for leases dated before Feb. 15, 2020;
    - Mortgage interest obligations incurred before Feb. 15, 2020;
    - Utility payments under service agreements dated before Feb. 15, 2020;
    - Interest on any other debt obligations incurred before Feb. 15, 2020; and
    - Refinancing a SBA EIDL loan made between Jan. 31, 2020 and April 3, 2020 (make sure to consult with your counsel if you have an EIDL loan that you want to refinance with the PPP loan because it will impact the forgiveness process).

The SBA expects to issue more guidance on the forgiveness process.

7. Application Form and Certifications

According to the SBA, applicants must complete and submit SBA Form 2483, which contains several representations, as well as payroll documentation such as payroll processor records and payroll tax filings. For independent contractors and sole proprietors applying on behalf of themselves, they should submit Form 1099-MISC in the case of the former and income and expenses from a sole proprietorship. The SBA expects to issue more guidance regarding the affiliation rules at 13 CFR 121.103 and 121.301. When they do, we assure you, we will tell you all about it.

8. Misuse of the Loan Funds (significant change)

Use of the funds for unauthorized purposes will require repayment of those amounts. If you knowingly use the funds for unauthorized purposes, you will be subject to additional liability such as fraud charges. If one of the shareholders, members, or partners uses the funds for unauthorized purposes, the SBA will have recourse against the person for the unauthorized use.

And that's all we can tell you right now, as of April 3, 2020. Hopefully, the SBA and Treasury Department don't create any more issues for the business owners who are simply trying to keep their workforce gainfully employed.