Labor and Employment Alert: PPP Update: Loan Forgiveness Application Form Released by the SBA

May 19, 2020 – The long-awaited **loan forgiveness application form** from the Small Business Administration (SBA) under the Paycheck Protection Program (PPP) is now available. The form is 11 pages inclusive of instructions. Borrowers will need to work with their professionals to ensure submission of a complete and accurate forgiveness application. The key takeaways from the form are as follows:

- **Alternative Payroll Covered Period.** Although the "covered period" for spending the money is still eight weeks from the day the borrower received the money, the SBA has provided borrowers with a biweekly or more frequent payroll an alternative payroll covered period. These borrowers will be permitted, for some aspects of forgiveness, to count the eight weeks from the first day of their first pay period following loan disbursement.
- **Clarification of Eligible Payroll Costs and Timing of Payment.** Although the statute states that it is costs that are "incurred and payments made" during the covered period, the SBA form requires that the payroll costs be paid or incurred during the covered period. The payroll is considered paid on the date the paycheck is distributed or the borrower originates an ACH credit transaction. The payroll is considered incurred on the date the employee's pay is earned. And the borrower may include in its forgiveness amount payroll costs incurred but not paid during the last payroll of the covered period, provided the costs are paid on or before the next regular payroll date.
- **Clarification of Timing of Payment of Eligible Nonpayroll Costs.** Although the statute states that it is costs that are "incurred and payments made" during the covered period, the SBA form requires that the nonpayroll costs must only be paid during the covered period, or incurred during the covered period and paid on or before the next regular billing date (even if it is after the covered period).
- **FTE Comparison Calculation.** Although the statute does not define what an FTE is for purposes of the forgiveness calculation, the SBA form uses 40 hours a week as its standard. To determine how many FTEs your company has – for the covered period and for either of the two comparison periods at the company's discretion – the employer can count employees who work 40 hours or more a week as 1 FTE and count the others as .5 FTE. Alternatively, the employer would enter the average number of hours per week, divide by 40, and round to the nearest tenth. This will determine whether the employer may lose forgiveness, in part, for a reduction in FTEs.
- **Salary/Hourly Wage Reduction Calculation.** The SBA form confirms there will be a loss of forgiveness, in part, for any reduction in the total salary or wages of an employee (whose wages and salary did not exceed $100,000 in 2019) during the covered period in excess of 25% of the employee's total salary or wages during the most recent full quarter (Q1 2020). The form provides a worksheet to perform this calculation.
- **Confirmation of June 30 Safe Harbor Deadline.** The SBA form confirms that for any loss of forgiveness caused by either a reduction in FTEs or reduction in salary/hourly wages, occurring between February 15, 2020 and April 26, 2020, the employer will not lose forgiveness if the employer undoes these actions no later than June 30, 2020. The form also confirms that employers will not lose forgiveness for any employee who rejected a good-faith written offer to rehire the employee. Employers also will not lose forgiveness for any employee who, during the covered period, was fired for cause, voluntarily resigned, or voluntarily requested and received a reduction of their hours.
- **Documents Borrowers Must Submit With Their Forgiveness Application or Retain.** The form provides a comprehensive list of documents borrowers must submit with their forgiveness application or retain for six years from the forgiveness determination. Borrowers will be required to permit SBA representatives, including representatives of the Office of Inspector General, to access the records upon request.

As always, we are here for you. If you have any questions about the loan forgiveness form or if we can assist in any other way, please reach out.

Anthony Rainone, Member, Labor and Employment Practice, at arainone@bracheichler.com or 973-364-8372

Matthew Collins, Member and Chair, Labor and Employment Practice, at mcollins@bracheichler.com or 973-403-3151