Labor and Employment Alert: The PPP Latest: More Extensions, More Guidance, More Confusion

May 14, 2020 – Through over a dozen updates to the Paycheck Protection Program (PPP) "guidance" (a/k/a the FAQs the SBA and Treasury Department keep releasing) the regulators updated the FAQs twice on May 13. And remember, this is "guidance" from the SBA – not the statute and not the regulations. While it will give us a preview of what's to come in the forgiveness regulation, whatever the SBA and Treasury do, it must be consistent with the PPP program law passed by Congress and signed by the President.

The additional guidance includes FAQs 46 and 47. FAQ 47 is pretty straightforward – it extends the current safe harbor deadline of May 14 (it was originally May 7) to May 18 in order for the borrower to consider FAQ 46. FAQ 46 relates, again, to the borrower's good-faith certification concerning the necessity of their loan request.

A little history first. The statute adopted by Congress and signed by the President on March 27, 2020 requires the borrower to certify in good faith "that the uncertainty of the current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient." If you received PPP money or applied for PPP money and expect it to arrive soon, you already certified as much. The statute also states under the section "Credit Elsewhere" that "[d]uring the covered period [of Feb. 15, 2020 – Jun. 30, 2020], the requirement that a small business concern is unable to obtain credit elsewhere, as defined in Section 3(h), shall not apply to a covered loan." These were and are simple rules enacted into law for borrowers to follow.

But then came "guidance" known as FAQ 31 on April 23, 2020 relating to businesses owned by "large companies with adequate sources of liquidity to support the business's ongoing operations…." FAQ 31 caused uncertainty because it contradicted the statute. Specifically, FAQ 31 required borrowers to return PPP money by May 7, 2020 if they could no longer truthfully certify what was required by the statute. Specifically, the "guidance" instructed borrowers to take "into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business." FAQ 37, issued on April 28, 2020, applied this "guidance" to privately "owned companies with adequate sources of liquidity to support the business's ongoing operations …." ***But this requirement does not exist in the statute and directly contradicts the Credit Elsewhere section of the statute.*** The SBA also advised, in FAQ 39 issued April 29, 2020, that it would review all loans in excess of $2 million following the submission of the loan forgiveness application.

On May 5, 2020, the deadline to return the PPP money was extended to May 14 by FAQ 43. On May 13, 2020, that deadline has been extended again until May 18 by FAQ 47. That is because of the issuance of FAQ 46 answering the question: "How will the SBA review borrowers' required good-faith certification concerning the necessity of their loan request?" In response, the SBA's "guidance" is now "[a]ny borrower that, together with its affiliates, received PPP loans with an original principal amount of less than $2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith." The explanation from the SBA is that these borrowers are less likely to have had access to adequate sources of liquidity. But, as stated above, other credit elsewhere should not be a consideration for the borrower at all.

The SBA then reiterated its guidance from FAQ 31 for borrowers of more than $2 million to review the basis of their good-faith certification. More importantly, the SBA made clear that if the borrower lacked an adequate basis for the certification, the SBA will seek repayment of the PPP loan balance and will inform the lender that the borrower is not eligible for forgiveness. ***However, the SBA also stated that if the borrower repays the loan after receiving notification of no forgiveness from the SBA, the SBA will not pursue administrative enforcement or other referrals to other agencies with respect to the certification.***

We still believe the “guidance” that plainly contradicts the statute, if the SBA acts on it, will result in more than a handful of legal challenges. Regardless, and for now, we have a little clarity on the certification at least as to borrowers of under $2 million and options to repay the money for those who are determined not to have an adequate basis to have made the good faith certification.

As always, we are here for you. For more information about this Alert or any other Labor and Employment issue, please contact:

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