

## Frequently Asked Questions Paycheck Protection Program Loan Forgiveness

Updated as of ~~May 18~~ June 3, 2020

### [Revisions Incorporate Paycheck Protection Program Flexibility Act of 2020](#)

On May 15, 2020, the Small Business Administration (SBA) and the U.S. Treasury Department released their much anticipated Loan Forgiveness Application and corresponding instructions (Forgiveness Application) for the Paycheck Protection Program (PPP), which includes updated guidance and a detailed procedure on how borrowers and lenders will calculate forgiveness. The SBA ~~'s press release also announced the SBA will "soon issue regulations and guidance to further assist borrowers as they complete their applications, and to provide lenders with guidance on their responsibilities."~~ then released two interim final rules on May 22, 2020 regarding forgiveness and the process of review of PPP loans. Finally, legislation known as the Paycheck Protection Program Flexibility Act of 2020 (PPPFA) was passed by Congress on June 3, 2020 and is expected to be signed into law by President Trump imminently.

In addition to clarifying certain ambiguities and inconsistencies with respect to calculating forgiveness, the Loan Application and new interim final rules also included several new concepts, including:

- An "alternative payroll covered period" for borrowers using a bi-weekly or more frequent payroll period that aligns with their regular payroll period, as opposed to the ~~eight-week~~ covered period;
- Flexibility to include eligible payroll costs, rent, mortgage interest, and utility expenses that are *paid or incurred* during the ~~eight-week~~ covered period;
- Exemptions from the loan forgiveness reduction based on FTEs (1) for borrowers who made a good-faith, written offer to rehire workers that was declined, and (2) for employees who (a) were terminated for cause, (b) voluntarily resigned, or (c) voluntarily requested and received a reduction in their hours-; and
- Bonuses and hazard pay for employees whose total compensation does not exceed \$100,000 on an annualized basis may be included as forgivable payroll costs.

The PPPFA has been described in more detail in our Client Alert issued June 4, 2020, but the legislation provides for the following changes to the PPP forgiveness process:

- It expands the covered period from 8 weeks to the earlier of 24 weeks from origination of the loan or December 31, 2020;
- It reduces to 60% the requirement that 75% of forgivable expenses be used for payroll costs;
- It extends the period for restoration of FTEs or salaries/wages from June 30, 2020 to December 31, 2020; and
- It adds two new exceptions to the existing rehiring exceptions provided by the SBA
  - First – if borrowers cannot find qualified employees for unfilled positions; and
  - Second – if the borrower cannot restore its operations to comparable levels of business activity due to social distancing, sanitation requirements or customer safety needs established 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 during the period beginning on March 1, 2020, and ending December 31, 2020.](#)

~~Even though the Forgiveness Application answers many questions, there remain several material unresolved issues. Until those are addressed, we hope this helps borrowers and their advisors determine how to spend PPP funds to maximize forgiveness.~~

All answers herein are based on the Coronavirus Aid, Relief, and Economic Security Act (CARES Act), [the Paycheck Protection Program Flexibility Act of 2020 \(PPPFA\)](#) and the guidance that has been provided by the SBA and the Treasury Department as of the date noted above and are subject to change as additional guidance is issued.

You can access the SBA and Treasury guidance here and PDFs of the applicable documents may be found at the following links:

1. CARES Act
2. Top-line overview of the paycheck protection loan program
3. Borrower Fact Sheet
4. PPP Application
5. Interim Final Rule
6. Interim Final Rule – Additional Eligibility Criteria and Requirements for Certain Pledges of Loans
7. Frequently Asked Questions
8. Loan Forgiveness Application and Instructions
- [9. Interim Final Rule – Loan Forgiveness](#)
- [10. Interim Final Rule – Loan Review Procedures and Related Borrower and Lender Responsibilities](#)
- [11. Paycheck Protection Program Flexibility Act of 2020](#)

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## Defined Terms

The following terms referenced throughout these FAQs have the meanings set forth below:

“**Alternative Payroll Covered Period**”<sup>1</sup> means, for Payroll Costs only, an alternative period for calculating the ~~eight-week (56-day)~~ covered period that begins on the first day of a borrower’s first pay period following their PPP Loan disbursement date. This period may be selected by borrowers with a biweekly (or more frequent) payroll schedule and allows borrowers to align their payroll period to the covered period. The example included in the Forgiveness Application is as follows: If the borrower received its PPP Loan proceeds on Monday, April 20, and the first day of its first pay period following its PPP Loan disbursement is Sunday, April 26, the first day of the Alternative Payroll Covered Period is April 26 and the last day of the Alternative Payroll Covered Period is Saturday, June 20.<sup>2</sup> Borrowers who elect to use the Alternative Payroll Covered Period must apply the Alternative Payroll Covered Period wherever there is a reference in this application to “the Covered Period or the Alternative Payroll Covered Period.” However, borrowers must apply the Covered Period (not the Alternative Payroll Covered Period) wherever there is a reference in the Forgiveness Application to “the Covered Period” only.”<sup>3</sup>

“**CARES Act**” means the Coronavirus Aid, Relief, and Economic Security Act.

“**Covered Period**” means the period beginning on the date the PPP Loan is first disbursed by the lender and ending ~~eight weeks on the earlier of twenty-four (56 days)~~ 24 weeks thereafter or December 31, 2020.<sup>4</sup> For example, if a borrower received its PPP Loan proceeds on April 20, the first day of the Covered Period is April 20 and the last day of the Covered Period is ~~June 14~~ October 5. A borrower that received a PPP Loan prior to the enactment of PPPFA may also elect for the Covered Period to remain an eight-week period.

“**Designated PPP Expenses**” means Payroll Costs, mortgage interest, rent payments, utility payments and interest on other debt payments (for mortgages, leases, utility contracts, or other debt contracts that were in place as of February 15, 2020).

“**Eligible Nonpayroll Costs**” means (i) mortgage interest payments (not including any prepayment or payment of principal), (ii) rent payments, and (iii) utility payments for a service for the distribution of electricity, gas, water, transportation,<sup>5</sup> telephone, or internet access (for mortgage, lease or utility payments, the applicable contracts must have been in place as of February 15, 2020)

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<sup>1</sup> This is a new period of calculation in the Loan Forgiveness Application.

<sup>2</sup> We note that the PPPFA has expanded the length of the covered period, so the end date provided in the Forgiveness Application example is no longer correct.

<sup>3</sup> We note that inclusion of Eligible Nonpayroll Costs in Forgivable Expenses is based on whether such costs were paid or incurred during the Covered Period, even if a borrower elects to use the Alternative Payroll Covered Period to determine what Payroll Costs to include in the Forgivable Expenses.

<sup>4</sup> Note that the PPPFA extended the Covered Period from eight weeks.

<sup>5</sup> The word “transportation” was included in the definition of utility payment in the CARES Act but there has been no guidance released on what the term means. Our general advice is to take a conservative approach and not interpret the phrase too broadly.

that are paid by a borrower during the Covered Period *or* incurred during the Covered Period and paid by a borrower on or before the next regular billing date, even if the billing date is after the Covered Period.

“**Forgivable Expenses**” means (i) Payroll Costs, and (ii) Eligible Nonpayroll Costs.<sup>46</sup>

“**Forgiveness Application**” means the SBA’s PPP Loan Forgiveness Application (SBA Form 3508) and corresponding instructions, which may be found here: [Loan Forgiveness Application and Instructions](#).

“**FTE**” means full-time equivalent employee during the Covered Period or the Alternative Payroll Covered Period. The Forgiveness Application includes the following guidance: “For each employee, enter the average number of hours paid per week, divide by 40, and round the total to the nearest tenth. The maximum for each employee is capped at 1.0. A simplified method that assigns a 1.0 for employees who work 40 hours or more per week and 0.5 for employees who work fewer hours may be used at the election of the [b]orrower.”

“**FTE Reference Period**” means, at the borrower’s choice, either:

- (i) the period between February 15, 2019 and June 30, 2019, or
- (ii) the period between January 1, 2020 and February 29, 2020, or
- (iii) in the case of seasonal employers, either of the preceding periods or any consecutive twelve-week period between May 1, 2019 and September 15, 2019.

“**Payroll Costs**” means, with respect to an employee, all of the following payroll costs paid *or* incurred<sup>57</sup> during the Covered Period or Alternative Payroll Covered Period and paid by a borrower on or before the next regular payroll date, even if the payroll date is after the Covered Period or Alternative Payroll Covered Period:

- (a) The following payments, up to a \$100,000 annualized rate per employee or partner (~~i.e., Payroll Costs cannot exceed \$15,385 for any employee or partner during the eight-week period~~), (i) salaries; (ii) hourly wages; (iii) commissions; (iv) similar compensation, which includes bonuses and hazard pay;<sup>6</sup> (v) any guaranteed payments (or other payments subject to self-employment income) to a partner of an LLC and the partner’s corresponding tax liability associated with such payments; and (vi) any other amounts paid to owners who are owner-employees, self-employed individuals, or general partners, as long as the amount does not exceed

<sup>46</sup> Paying interest on other indebtedness is a permitted use of a PPP Loan but those payments are not counted towards forgiveness.

<sup>57</sup> The CARES Act §1106(b) states that the forgivable payroll costs include “costs incurred and payments made” during the Covered Period. However, there has been uncertainty about how Payroll Costs and other Forgivable Expenses could all be incurred **and** paid during the ~~eight-week period~~ Covered Period, because many of these expenses are paid in arrears. The Forgiveness Application simplifies this issue and allows for Forgivable Expenses to be incurred **or** paid during the ~~eight weeks~~ Covered Period.

<sup>6</sup> ~~There is still no specific guidance on how bonuses paid to employees during the Covered Period are factored into the calculation of compensation.~~

the *lesser* of (i) \$15,385 or (ii) the ~~eight-week~~ Covered Period equivalent of their applicable compensation for 2019.<sup>78</sup>

- (b) Cash tips or equivalent payments;
- (c) Payments for vacation, parental or family leave, or sick or medical leave;
- (d) Payments for any group health insurance coverage (including the employer's portion of any premiums or the employer's contributions to a self-insured, employer-sponsored group health plan, but excluding (i) any pre-tax or after tax contributions by employees, and (ii) any health care costs attributable to owners or general partners, unless such persons are also classified as employees and are covered under the borrower's general health insurance plan);
- (e) Employer contributions to retirement plans (but excluding any retirement plan costs attributable to owners or general partners, unless such persons are also classified as employees and are covered under the borrower's general retirement plan);
- (f) Employee's portion of federal payroll taxes;
- (g) Payments for separation or dismissal of the employee; and
- (h) State and local taxes assessed on compensation (e.g., state unemployment insurance tax).

Payroll Costs expressly exclude:

- (i) Cash compensation in excess of \$100,000 per employee or partner on an annual basis (~~i.e., any amounts paid to an employee or partner during the eight-week period that are in excess of \$15,385~~);
- (ii) Employer's portion of any federal income tax, FICA, non-US employee payroll costs (and other taxes imposed under Sections 21, 22 or 24 of the Internal Revenue Code);
- (iii) Qualified medical/sick leave under Section 7001 of the Families First Coronavirus Response Act;
- (iv) Compensation to an employee whose principal place of residence is outside the USA;
- (v) Payments to independent contractors or other 1099s.

[“PPPFA” means the Paycheck Protection Program Flexibility Act of 2020.](#)

“PPP Loan” means a paycheck protection program loan provided by a lender under the CARES Act and related SBA guidance under the SBA's Section 7(a) loan program.

“SBA” means the Small Business Administration of the United States.

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<sup>78</sup> Line 9 of the Forgiveness Application includes this new limitation on compensation paid to owners, which is intended to prevent an owner from increasing their compensation during the ~~eight-week period~~ Covered Period. We note that this fixed amount should be increased based on the passage of the PPPFA which extends the Covered Period from 8 weeks to up to 24 weeks, but the SBA has not issued updated forms or guidance yet. We expect that the amount will be calculated by taking \$100,000 and dividing by 52 and then multiplying that result by the length of the Covered Period (in most cases, 24 weeks for an amount equal to \$46,154).

## Calculating the Forgiveness Amount

### 1. What conditions are required for forgiveness?

The full principal amount<sup>89</sup> of a PPP Loan may be forgiven if the following conditions are met:

- i. All loan proceeds were used for Forgivable Expenses;
- ii. At least ~~75~~60% of the Forgivable Expenses are used for Payroll Costs over the Covered Period or the Alternative Payroll Covered Period;
- iii. There is no reduction in FTEs when comparing the average weekly number of FTEs during the Covered Period or the Alternative Payroll Covered Period (as applicable) to FTEs in the FTE Reference Period, unless any reduction is restored on or before ~~June~~December ~~30~~1, 2020; and
- iv. There is no reduction in salaries (or wages) by more than 25% for any employee that received compensation from the borrower at an annualized rate of less than or equal to \$100,000 for all pay periods in 2019<sup>90</sup> when comparing the employee's average annual salaries (or wages) during the Covered Period or the Alternative Payroll Covered Period to the employee's average annual salaries (or wages) during the first quarter of 2020, unless such reduction is restored on or before ~~June~~December ~~30~~1, 2020.

Interest on other debt payments is included as a Designated PPP Expense, but those payments do not count towards a borrower's Forgivable Expenses.

#### **Example**

Assuming no reductions in FTEs or salaries ~~between~~after February 15, ~~2020 and April 26~~, 2020, if a borrower received a \$100,000 PPP Loan, and spent \$100,000 on Forgivable Expenses during the Covered Period or the Alternative Payroll Covered Period and ~~\$75,000~~(~~75~~60,000 (60%)) of those expenditures were for Payroll Costs and the remaining ~~\$25,000~~(~~25~~40,000 (40%)) were for other Forgivable Expenses, then the full \$100,000 would be forgiven.

### 2. When are Payroll Costs considered paid or incurred during the Covered Period or the Alternative Payroll Covered Period?

According to the Forgiveness Application, “[p]ayroll costs are considered paid on the day that paychecks are distributed or the Borrower originates an ACH credit transaction. Payroll costs are considered incurred on the day that the employee's pay is earned. Payroll costs incurred but not paid during the borrower's last pay period of the Covered Period (or Alternative Payroll Covered Period) are eligible for forgiveness if paid on or before the next regular payroll date. Otherwise, payroll costs must be paid during the Covered Period (or Alternative Payroll Covered Period).”

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<sup>89</sup> The CARES Act and the Forgiveness Application are silent on whether any accrued interest is (or is not) included in the forgivable amount. However, the SBA's Interim Final Rule released on April 2, 2020 stated that forgiveness may include the full principal amount and any accrued interest. Given the inconsistency, we have not included accrued interest in the amount eligible for forgiveness.

<sup>90</sup> See Question 12 and Footnote ~~12~~14 below for additional information about this calculation.

### **Example – Covered Period**

The borrower received its PPP Loan proceeds on April 20, and the first day of its first pay period following its PPP Loan disbursement is April 26. The borrower elects to use the Covered Period for purposes of calculating Payroll Costs. The first day of the Covered Period is April 20 and the last day of the Covered Period is ~~June 15~~October 5. Any Payroll Costs paid on the first payroll period that occurs after April 20 are eligible for forgiveness even though some or all of the costs associated with those payments were incurred prior to the beginning of the Covered Period. If the final pay period during the Covered Period ends on ~~June 13~~October 3 and wages are not paid until ~~June 26~~October 16, because the Payroll Costs were incurred during the Covered Period and paid on the next regular payroll date, even though that date occurs after the Covered Period, all Payroll Costs for this payroll period should be included in the Forgivable Expenses because they were all incurred during the Covered Period. The same logic applies to any compensation earned during the stub-period between the final payroll period and the end of the Covered Period (in the above example, the stub-period is ~~June 14~~October 4 and ~~15~~5).

### **Example – Alternative Payroll Covered Period**

The borrower received its PPP Loan proceeds on April 20, and the first day of its first pay period following its PPP Loan disbursement is April 26. The borrower elects to use the Alternative Payroll Covered Period for purposes of calculating Payroll Costs. The first day of the Alternative Payroll Covered Period is April 26 and the last day of the Alternative Payroll Covered Period is ~~June 20~~October 11. The payroll period that runs from April 26 through May 9 and is paid on May 15 has been incurred and paid during the Alternative Payroll Covered Period and all Payroll Costs for this pay period should be included. The final pay period during the Alternative Payroll Covered Period ends on ~~June 20~~October 11, but is not paid until ~~June 26~~October 16. Because the Payroll Costs were incurred during the Alternative Payroll Covered Period and paid on the next regular payroll date, even though that date occurs after the Alternative Payroll Covered Period, all Payroll Costs for this payroll period should be included in the Forgivable Expenses.

### **3. When are Eligible Nonpayroll Costs considered paid or incurred during the Covered Period?**

According to the Forgiveness Application, an “eligible nonpayroll cost must be paid during the Covered Period or incurred during the Covered Period and paid on or before the next regular billing date, even if the billing date is after the Covered Period.”

#### **Example**

The Covered Period runs from April 20 to ~~June 14~~October 5. The water bill for the borrower is paid on the first of each month for the prior month. The bill due on May 1 for the month of April’s water usage is paid during the Covered Period and 100% of the bill can be included as Forgivable Expenses. The bill due on ~~July~~November 1 for the month of ~~June’s~~October’s water usage is partially incurred during the Covered Period and paid

at the next regular billing date after the Covered Period and the amount of the bill incurred during the Covered Period (~~145~~ of ~~3031~~ days) may be included in Forgivable Expenses.<sup>4011</sup>

**4. Is there a “general rule” for when Payroll Costs or Eligible Nonpayroll Costs are paid or incurred?**

The borrower should generally consider the following payments as eligible Payroll Costs or Eligible Nonpayroll Costs:

- a. Any Payroll Costs paid during the Covered Period or the Alternative Payroll Covered Period;
- b. Any Eligible Nonpayroll Costs paid during the Covered Period; and
- c. Any Payroll Costs or Eligible Nonpayroll costs incurred during the Covered Period or the Alternative Payroll Covered Period but paid on the first regular due date thereafter.

The intent of the above is to eliminate the need for a special payment for Payroll Costs and Eligible Nonpayroll Costs at the end of the ~~eight-week period~~ Covered Period or Alternative Payroll Covered Period.

**5. Can a borrower accelerate a payment for a Forgivable Expense so that it falls within the Covered Period or Alternative Payroll Covered Period?**

The Forgiveness Application specifies that prepayments of business mortgage interest payments may not be included in the Forgivable Expenses. Otherwise, the only guidance on timing for what counts as Forgivable Expenses is the costs “paid” or “incurred” described in Questions 2 and 3 above. Borrowers should be cautious about accelerating any payments or including payments outside the normal course of business in any forgiveness calculation, however, as we expect the SBA may issue additional guidance on this issue. In addition, the changes provided by the PPPFA allow for borrowers to include more in Forgivable Expenses without pushing any boundaries of the provided guidance. We suggest staying within the clear guidance to the full extent possible.

**6. What happens to the portion of the PPP Loan that is not forgiven?**

The unforgiven portion of a PPP Loan will continue to accrue interest at 1% and have a maturity date that is ~~two-five~~ years from the date of the note entered into between the borrower and the lender. In addition, (i) the first interest payments are not due ~~for six months after the date of the note entered into between the borrower and the lender (the CARES Act included a six-month deferral of interest on PPP Loans)~~ until the date the borrower’s loan forgiveness amount is determined, and (ii) the borrower must spend any remaining loan amount on Designated PPP Expenses.

**Example**

Same facts as Question 1 above, but if (i) \$90,000 of the \$100,000 PPP Loan was spent on Forgivable Expenses, and (ii) ~~\$67,500 (75%)~~ \$54,000 (60%) of the \$90,000 was spent on Payroll Costs, then \$90,000 of the \$100,000 PPP Loan would be forgiven. The

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<sup>4011</sup> We note that the Forgiveness Application does not specify the need to pro-rate bills, but instead simply refers to what has been incurred during the Covered Period. Additional guidance may clarify this issue, but for now, we recommend that borrowers take a conservative approach and pro-rate any bills for the portion of such payments that were incurred during the Covered Period.

remaining \$10,000 (plus any interest that accrued during the Covered Period) will continue to accrue interest and have a maturity date that is ~~two~~ five years from the date of the note.

**7. What happens if a borrower spends more than ~~25~~40% of PPP Loan proceeds on Eligible Nonpayroll Costs?<sup>4412</sup>**

The forgiveness amount will be reduced on a dollar-for-dollar basis so that ~~75~~60% of the forgivable amount is spent on payroll costs and ~~25~~40% of the forgivable amount is spent on Eligible Nonpayroll Costs. Any other expenses, whether incurred during the Covered Period or the Alternative Payroll Covered Period or after, must still be Designated PPP Expenses, but would not be Forgivable Expenses.

**Example**

Assuming no reduction in FTEs or salaries (or wages), if a borrower spends \$100,000 during the Covered Period or the Alternative Payroll Covered Period on Forgivable Expenses, but only ~~\$70,000~~ \$50,000 of such amount was on Payroll Costs, the borrower would not be in compliance with the requirement that at least ~~75~~60% of the ~~loan proceeds~~ forgivable amount be used for payroll costs. As a result, the amount forgiven would be limited to ~~\$93,333~~ (\$70,000 - \$8,333) + \$50,000 / ~~75~~60% = ~~\$93,333~~ \$83,333.

Loan Forgiveness & FTE Headcount and Salaries/Wages

The below calculations and examples are based on [the PPPFA](#), the Forgiveness Application and the most recent guidance from the SBA, but ~~we are expecting~~ additional information from the SBA may be provided, which may contradict or supplement the below information.

**8. How does a borrower calculate average FTEs for the applicable period?**

The borrower has two options to choose from when calculating FTEs and it must apply the applicable option for all its employees (i.e., it cannot use option 1 for some FTEs and option 2 for others).

*Option 1: Standard Method*

An FTE is calculated as follows:

- First, find the employee's average number of hours worked per week over the applicable measurement period (Total Hours/8 weeks);
- Second, divide the weekly average by 40 (Average Hours/40 hours); and
- Finally, round the total to the nearest tenth.

The maximum FTE for each employee is capped at 1.0 per week.

*Option 2: Simplified Method*

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<sup>4412</sup> The requirement that 75% of the funds be used for Payroll Costs arose in the SBA's first interim final rule. The rule provides that "not more than 25% of the forgivable amount may be attributable to non-Payroll Costs" and that "at least 75% of the PPP Loan proceeds shall be used for Payroll Costs". [The PPPFA changes this amount to 60% of the forgivable amount must be spent on Payroll Costs. The PPPFA does not address the requirement that a certain percentage of the PPP Loan proceeds must be "used" for Payroll Costs. However, we expect the SBA to issue additional guidance on this issue.](#)

Borrowers may also elect to use a simplified method that assigns a 1.0 for employees who work 40 hours or more per week and 0.5 for employees who work fewer hours.

**Example**

During the applicable measurement period, a borrower has five employees working an average of at least 40 hours per week and 10 employees working an average of 25 hours per week. The standard method calculation (Option 1) would result in 5.0 FTEs for the five employees working 40 hours, plus 6.0 FTEs  $((25/40) * 10 = 6.0)$  for the part-time employees, for a total of 11 FTEs.

Alternatively, the borrower could elect to use the simplified method (Option 2), which would result in 5.0 FTEs for the five employees working 40 hours, and 5.0 FTEs  $(0.5 * 10 = 5.0)$  for the part-time employees, for a total of 10 FTEs.

**Example**

During the applicable measurement period, a borrower has five employees working an average of at least 40 hours per week; one employee (Employee X) working an average of 35 hours per week; one employee (Employee Y) working an average of 28 hours per week; and one employee (Employee Z) working an average of 16 hours per week.

Using the standard method (Option 1), the borrower calculates FTEs as follows:

Five employees at or over 40 hours:  $40/40$  capped at 1 FTE = 5 FTEs

Employee X:  $36/40 = 0.9$  FTE

Employee Y:  $28/40 = 0.7$  FTE

Employee Z:  $16/40 = 0.4$  FTE

**Total FTEs = 7.0**

Using the simplified method (Option 2), there would be 5.0 full-time FTEs  $(5 * 1 = 5)$  and 1.5 part-time FTEs  $(0.5 * 3 = 1.5)$ , for a total of 6.5 FTEs.

**9. If the borrower reduced FTE headcount or salaries/wages between February 15, 2020 and April 26, 2020, what must it do to be eligible for 100% PPP Loan forgiveness?**

A borrower may still be eligible to have 100% of its PPP Loan forgiven if it laid off or furloughed any FTEs between February 15, 2020 and April 26, 2020, or reduced their salaries during the same period, as long as any reductions are restored to February 15, 2020 levels on or before ~~June~~ December 30<sup>13</sup>, 2020<sup>13</sup>. The Forgiveness Application clarifies that for the FTE reduction safe harbor, the comparison is to the pay period that included February 15, 2020, rather than the specific date. The Forgiveness Application refers to this as the “FTE Reduction Safe Harbor” for purposes of FTE headcount and the “Salary/Hourly Wage Reduction Safe Harbor” for purposes of reductions in salaries/wages.

<sup>13</sup> Note that the PPPFA extended the restoration date from June 30, 2020 to December 31, 2020, but it did not extend the safe-harbor period past April 26. We expect additional guidance from the SBA on whether the April 26 safe-harbor period will also be extended.

See Question 16 below for exceptions to an FTE reduction if a borrower is unable to re-hire certain employees.

### **Example**

If a borrower terminated five FTEs on March 15, 2020, but rehired five FTEs for the same positions on or before ~~June-December 30~~1, 2020, then the reduction in forgiveness amount the borrower would have been required to take because of the five FTE loss would not be applied and the borrower would receive full forgiveness (assuming all other obligations under the program for purposes of obtaining forgiveness are followed).

### **10. What happens if the borrower reduced FTE headcount or salaries/wages between February 15, 2020 and April 26, 2020, but does not restore headcount or salaries/wages to 100% of February 15, 2020 levels?**

Neither the FTE Reduction Safe Harbor nor the Salary/Hourly Wage Reduction Safe Harbor would apply and the borrower will have to reduce the amount of the PPP Loan that may be forgiven.

If FTE headcount is not restored to the applicable FTE Reference Period level on or prior to ~~June-December 30~~1, 2020, the forgivable portion of the PPP Loan will be reduced by the amount of any headcount reduction, as calculated in Question 14.

If salary/wage levels are not restored to the same levels as the first quarter of 2020 on or prior to ~~June-December 30~~1, 2020, the forgivable portion of the PPP Loan will be reduced by the amount of any salary/wage reductions, as calculated in Question 13.

[Note that the SBA's Interim Final Rule on Loan Forgiveness provided clarification that the reductions should not be double counted. If an employee suffers a salary/wage level reduction due to a reduction in hours worked but not due to an hourly pay reduction, the FTE reduction will apply and the salary/wage reduction will not.](#)

### **11. What happens if the borrower reduces FTE headcount after April 26, 2020?**

The FTE Reduction Safe Harbor described in Question 9 above will not apply and the amount of loan forgiveness will be decreased proportionally based on the reduction in FTE headcount when compared to the FTE headcount during the applicable FTE Reference Period level. See Question 14 below for further information and examples.

The borrower may choose which FTE Reference Period it would like to use when calculating FTE headcount. The intent is for borrower to choose the time period most beneficial to it and not penalize a borrower that may have gone through a natural process of contraction or expansion prior to COVID-19.

### **12. What happens if the borrower reduces salaries (or wages) after April 26, 2020?**

The Salary/Hourly Wage Reduction Safe Harbor described in Question 9 above will not apply and the amount of loan forgiveness will be decreased proportionally based on the reduction in salaries (or wages), as long as the decrease in salaries (or wages) is greater than 25% of the FTE's previous quarter's annualized salary (or wages). This requirement

only applies to any FTE that received cash compensation at an annualized rate of less than or equal to \$100,000 for all pay periods in 2019.<sup>4214</sup> See Question 13 below for further guidance and examples.

**13. How will loan forgiveness be impacted if a borrower reduces salaries (or wages) of employees before or during the Covered Period or the Alternative Payroll Covered Period and does not restore these salaries (or wages) by ~~June~~ December 31, 2020?**

Loan forgiveness is only impacted if the employees who had their salaries (or wages) reduced made less than or equal to \$100,000 on an annualized basis in 2019 or were not employed by the borrower at any point in 2019. Each employee who made more than \$100,000 on an annualized basis in 2019 is not included in this calculation, even if their salaries (or wages) are reduced by more than 25% during the Covered Period or the Alternative Payroll Covered Period.

The penalty for reducing salaries (or wages) of employees is only applicable if the borrower reduces the salaries (or wages) of the applicable employees (i.e., those employees who made less than or equal to \$100,000 on an annualized basis in 2019 or were not employed by the borrower at any point in 2019) by more than 25% of the employee's salary (or wages) earned during the first quarter of 2020.

The salary/wage reduction *for each employee* who made less than or equal to \$100,000 on an annualized basis in 2019 or were not employed by the borrower at any point in 2019 should be calculated as follows:

Step 1. Determine if pay was reduced by more than 25%:

- i. Divide (a) the average annual salary/wages during the Covered Period or Alternative Payroll Covered Period, by (b) the average annual salary/wages between January 1, 2020 and March 31, 2020.
- ii. If the result is 0.75 or more, no reduction will apply for this employee.
- iii. If the result is less than 0.75, proceed to Step 2.

Step 2. Determine if the Salary/Hourly Wage Reduction Safe Harbor is met:

- i. Compare (a) annual salary or hourly wage as of February 15, 2020 to (b) the average annual salary or hourly wage between February 15, 2020 and April 26, 2020.
- ii. If (b) is equal to or greater than (a), then there was no reduction of salary/wages during the applicable safe harbor period and there will be a Salary/Hourly Wage Reduction to be calculated in Step 3.

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<sup>4214</sup> The CARES Act says the reduction in salary (or wages) does not apply to any employee who, during any pay period in 2019, received an annualized salary in excess of \$100,000. The Forgiveness Application also refers to "any pay period" in Table 2 of the PPP Schedule A Worksheet. However, the it seems unlikely that the SBA intended to use this language because it could result in excluding any employee from the salary/hourly wage reduction who received a bonus during any single pay period in 2019 that, if annualized, would exceed \$100,000. For example, if an employee had a regular salary of \$80,000 and was paid monthly, but received a \$15,000 bonus in January 2019, the employee would have received approximately \$21,666 in the month of January 2019 and annualizing that month would result in an annualized salary of \$259,992. While in reality, the employee only received \$95,000 in salary and bonus in 2019 and should not be excluded from the reduction calculation.

- iii. If (b) is less than (a), then compare (c) the average annual salary or hourly wage as of ~~June-December 30~~1, 2020 to (a) above.
- iv. If (c) is equal to or greater than (a) above, the borrower restored the salary/wages of the employee within the Salary/Hourly Wage Reduction Safe Harbor period and no reduction will apply.
- v. If (c) is less than (a), then a reduction will apply as calculated in Step 3 below.

**Step 3.** Determine the Salary/Hourly Wage Reduction:

- i. Multiply the average annual salary/hourly wage between January 1, 2020 and March 31, 2020 by 0.75;
- ii. Subtract the average annual salary/hourly wage during the Covered Period or Alternative Payroll Covered Period from the result of Step 3(i) above;
- iii. Multiply the result of Step 3(ii) by either:
  - A. For hourly workers: The average number of hours worked per week between January 1, 2020 and March 31, 2020. Then multiply this result by ~~8~~the number of weeks in the Covered Period. This is the amount of the reduction for that hourly worker.
  - B. For salaried workers: ~~8~~multiply by the number of weeks in the Covered Period then divide this result by 52. This is the amount of the reduction for that salaried worker.

***Keep in mind that these calculations must be made for every single employee!***

**Example**

If (i) an employee made less than \$100,000 on an annualized basis in 2019, (ii) the employee was paid \$7,000 during the Covered Period or the Alternative Payroll Covered Period for an average annual salary of \$42,000 during the Covered Period or Alternative Payroll Covered Period, and (iii) the employee was paid \$12,000 during the period between January 1, 2020 and March 31, 2020 for an average annual salary of \$48,000 during the first quarter of 2020.

$$(a) \$42,000 / \$48,000 = 0.875$$

The analysis can end here because the employee's salary reduction was not more than 25% and therefore no reduction to the Forgivable Expenses will apply.

**Example**

If (i) an employee made less than \$100,000 on an annualized basis in 2019, (ii) the employee was paid \$7,000 during the Covered Period or the Alternative Payroll Covered Period for an average annual salary of \$42,000 during the Covered Period or Alternative Payroll Covered Period, (iii) the employee was paid \$20,000 during the period between January 1, 2020 and March 31, 2020 for an average annual salary of \$80,000 during the first quarter of 2020, (iv) the annual salary or hourly wage as of February 15, 2020 was \$80,000, and (v) the average annual salary or hourly wage between February 15, 2020 and April 26, 2020 was \$80,000.

- (a)  $\$42,000 / \$80,000 = 0.525$
- (b)  $\$80,000 = \$80,000$  so the Salary/Hourly Wage Reduction Safe Harbor does not apply because the reduction in salary occurred after April 26, 2020.
- (c) To calculate the reduction:
  - i.  $\$80,000 * .75 = \$60,000$ , then
  - ii.  $\$60,000 - \$42,000 = \$18,000$
  - iii.  $\$18,000 * 8^{15} = \$144,000$
  - iv.  $\$144,000 / 52 = \$2,769.23$  is the reduction amount.

**Example**

If (i) an employee made less than \$100,000 on an annualized basis in 2019, (ii) the employee was paid \$7,000 during the Covered Period or the Alternative Payroll Covered Period for an average annual salary of \$42,000 during the Covered Period or Alternative Payroll Covered Period, (iii) the employee was paid \$20,000 during the period between January 1, 2020 and March 31, 2020 for an average annual salary of \$80,000 during the first quarter of 2020, (iv) the annual salary or hourly wage as of February 15, 2020 was \$80,000, (v) the average annual salary or hourly wage between February 15, 2020 and April 26, 2020 was \$50,000; and (vi) the average annual salary or hourly wage as of ~~June~~ December 30<sup>1</sup>, 2020 was \$80,000.

- (a)  $\$42,000 / \$80,000 = 0.525$
- (b)  $\$80,000 > \$50,000$ , but as of ~~June~~ December 30<sup>1</sup>, 2020 the average annual salary = \$80,000, so the Salary/Hourly Wage Reduction Safe Harbor is met and no reduction to the Forgivable Expenses will apply.

**14. How will PPP Loan forgiveness be calculated if the borrower does not restore FTE headcount to the applicable FTE average weekly levels before ~~June~~ December 30<sup>1</sup>, 2020 or reduces FTE headcount after April 26, 2020?**

If the borrower does not restore FTE headcount to February 15, 2020 levels before ~~June~~ December 30<sup>1</sup>, 2020 or reduces FTE headcount after April 26, 2020, the “FTE Reduction Quotient” (located on the bottom of PPP Schedule A of the loan application) should be calculated as follows:

- (a) First, calculate the average weekly FTEs during the applicable FTE Reference Period;
- (b) Second, calculate the average weekly number of FTEs during the Covered Period or the Alternative Payroll Covered Period;
- (c) Third, calculate the “FTE Reduction Quotient,” which equals (i) the average weekly number of FTEs during the Covered Period or the Alternative Payroll Covered

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<sup>15</sup> Note that for purposes of this example, we continued to use an 8-week Covered Period. However, due to the changes provided by the PPPFA, most borrowers will likely have a 24-week Covered Period instead.

Period (item (b) above), divided by (ii) the applicable average weekly FTEs during the FTE Reference Period (item (a) above).

To determine the amount that may be forgiven, borrowers should multiply (A) the above “FTE Reduction Quotient” by (B) (i) the amount spent on Forgivable Expenses during the Covered Period or the Alternative Payroll Covered Period, minus (ii) the Salary/Hourly Wage Reduction in Step 3 in Question 13 above.

### Example

If borrower has \$100,000 in Forgivable Expenses but reduces the number of FTEs to an average of 90 FTEs per week during the Covered Period or the Alternative Payroll Covered Period and the borrower had 100 average weekly FTEs during the applicable FTE Reference Period, the borrower would be eligible for forgiveness on \$90,000 and the remaining \$10,000 would be treated as a loan.

$$\$100,000 \times (90/100) = \$90,000$$

### 15. How will loan forgiveness be calculated if a borrower reduces (1) FTE headcount and (2) salaries (or wages) of FTEs during the Covered Period or the Alternative Payroll Covered Period without curing these reductions or if the reductions are made after April 26, 2020?

As mentioned above, the amount forgiven will be impacted by both reductions to FTE headcount and salaries (or wages) of FTEs during the Covered Period or the Alternative Payroll Covered Period. [However, the SBA has also clarified that the reductions should not be double counted. If an employee suffers a salary/wage level reduction due to a reduction in hours worked but not due to an hourly pay reduction, the FTE reduction will apply and the salary/wage reduction will not.](#)

### 16. Are there any exceptions to an FTE reduction if a borrower is unable to re-hire an employee?

FTE reductions will not reduce a borrower’s loan forgiveness in the following situations so long as the position was not filled by a new employee:

- The borrower made a good-faith, written offer to rehire an employee during the Covered Period or Alternative Payroll Covered Period which was rejected by the employee;
- The borrower fired the employee for cause;
- The employee voluntarily resigned;
- The employee voluntarily requested and received a reduction of their hours;
- [The borrower cannot find qualified employees for unfilled positions; or](#)
- [The borrower cannot restore its operations to comparable levels of business activity due to social distancing, sanitation requirements, or customer safety needs established 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 during the period beginning on March 1, 2020, and ending December 31, 2020.](#)<sup>16</sup>

### *Other Questions Regarding Use of PPP Funds*

#### **17. Can an employer use the PPP funds to supplement the income of a commission-only based employee, and if so, what effect does that have on the PPP funds?**

As of now, there is no direct guidance on how commission-only based compensation is treated but the analogy that may be helpful is that the CARES Act includes a provision stating that borrowers may receive forgiveness for “additional wages” paid to employees. ~~We anticipate the SBA issuing guidance to the effect that the~~ [The SBA’s Interim Final Rule on Loan Forgiveness also provided that payments to furloughed employees would be considered Payroll Costs, as well as bonuses and hazard pay.](#) ~~The~~ intent of PPP is to keep people employed at similar wage levels and if ~~the~~ commissions are ~~not there anymore~~ [no longer earned](#), then the amount that ~~the~~ an employer allocates to the FTE to make up the missing amounts should be forgivable.

#### **18. What is included in “rent” costs?**

The Forgiveness Application allows for forgiveness of “business rent or lease payments” which is defined as “business rent or lease payments pursuant to lease agreements for real or personal property in force before February 15, 2020.”

#### **19. Can borrowers use funds for interest on other debt and receive forgiveness?**

A borrower may use PPP funds to pay interest on debts that are not mortgages, but may not receive forgiveness for any amounts used in that manner.

### *Loan Forgiveness Process*

#### **20. What is the process to obtain forgiveness?**

~~After June 30, 2020, the~~ [The](#) borrower will submit its Forgiveness Application to the lender servicing its loan. The lender may allow for borrowers to submit their applications electronically.

After the borrower submits the Forgiveness Application and all required documentation, the lender has 60 days to make a decision on forgiveness.

#### **21. What information and documentation is required for the Forgiveness Application?**

Borrowers should be prepared to provide the following when completing their Forgiveness Application (See the instructions in the Forgiveness Application for more details):

- [Business Legal Name /DBA or Tradename \(if applicable\)/Business TIN \(EIN, SSN\)](#): This must match borrower’s application.
- [Business Address/Business Phone/Primary Contact/E-mail Address](#): this must match borrower’s application unless the borrower’s contact information has changed.

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<sup>16</sup> [Note that these last two exceptions were added by the PPPFA and the SBA has not yet provided guidance about what documentation will be required to prove that these exceptions should apply.](#)

- SBA PPP Loan Number: This is the loan number assigned by SBA at the time of loan approval.
- Lender PPP Loan Number: This is the loan number assigned to the PPP Loan by the Lender.
- PPP Loan Amount: This is the disbursed principal amount of the PPP Loan (the total loan amount borrower received from the lender).
- Employees at Time of Loan Application: This is the total number of employees at the time of the borrower's PPP Loan Application.
- Employees at Time of Forgiveness Application: This is the total number of employees at the time the borrower is applying for loan forgiveness.
- PPP Loan Disbursement Date: This is the date that borrower received the PPP Loan proceeds from the lender. If loan proceeds were received on more than one date, enter the first date on which borrower received PPP Loan proceeds.
- EIDL Advance Amount: If the borrower received an Economic Injury Disaster Loan (EIDL) advance, enter the amount.
- EIDL Application Number: If the borrower applied for an EIDL, enter the Borrower's EIDL Application Number.
- Payroll Schedule: Frequency with which payroll is paid to employees (weekly/biweekly/twice a month/monthly/other). This is relevant for calculating when payroll costs are paid or incurred and calculating FTEs for certain periods.
- Calculation of Covered Period: The ~~eight-week~~ Covered Period of the PPP Loan.
- Calculation of the Alternative Payroll Covered Period, if applicable: The ~~eight-week~~ Alternative Payroll Covered Period, if applicable.
- If Borrower Received PPP Loans in Excess of \$2 Million: Borrowers must check a box if they (together with affiliates, if applicable) received PPP Loans in excess of \$2 million.
- Forgiveness Amount Calculation: Borrowers will lay out the calculation of the Forgivable Expenses.

Borrowers should also include documentation requested in the Loan Forgiveness Application, which includes the following:

- **Payroll** - Documentation verifying the eligible cash compensation and non-cash benefit payments from the Covered Period or Alternative Payroll Covered Period, including:
  - Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees;
  - Tax forms (or equivalent third-party payroll service provider reports) for the periods that overlap with the Covered Period or Alternative Payroll Covered Period, including:
    - Payroll tax filings reported, or that will be reported, to the IRS (typically Form 941); and
    - State quarterly business and individual employee wage reporting and unemployment insurance tax filings reported, or that will be reported to the relevant state.

- Payment receipts, cancelled checks, or account statements documenting the amount of any employer contributions to employee health insurance and retirement plans that the borrower included in the forgiveness amount.
- **FTE** - Documentation showing the average number of FTE employees on payroll per month employed by the borrower during the FTE Reference Period chosen by the borrower. Documents may include payroll tax filings reported, or that will be reported, to the IRS (typically Form 941) and state quarterly business and individual employee wage reporting and unemployment insurance tax filings reported, or that will be reported, to the relevant state. Documents submitted may cover periods longer than the FTE Reference Period.
- **Nonpayroll** – Documentation verifying existence of the obligations/services prior to February 15, 2020 and eligible payments from the Covered Period, including:
  - For mortgage interest payments – lender amortization schedule and receipts or cancelled checks verifying eligible payments from the Covered Period; or lender account statements from February 2020 and the months of the Covered Period through one month after the end of the Covered Period verifying interest amounts and eligible payments.
  - For rent or lease payments – copy of current lease agreement and receipts or cancelled checks verifying eligible payments from the Covered Period; or lessor account statements from February 2020 and from the Covered Period through one month after the end of the Covered Period verifying eligible payments.
  - For utility payments – copy of invoices from February 2020 and those paid during the Covered Period and receipts, cancelled checks or account statements verifying those eligible payments.

Borrowers will be required to certify that the documents are true and correct and that the amount for which forgiveness is sought was used on Forgivable Expenses.

Finally, there is an optional demographic information form that borrowers may choose to complete and submit to the SBA. This disclosure is voluntary and has no bearing on the forgiveness decision.

Borrowers should keep meticulous records of how they spend PPP funds so that when they seek forgiveness they can easily meet requests for documentation from lenders and the SBA. In addition, borrowers should consider opening a separate bank account to keep track of how loan proceeds are used (some lenders are requiring this).

**22. Are there other documents a borrower should maintain?**

Yes.

Borrowers should keep PPP Schedule A Worksheet from the Forgiveness Application and the following:

- Documentation supporting the listing of each individual employee in PPP Schedule A Worksheet Table 1, including the “Salary/Hourly Wage Reduction” calculation, if necessary.

- Documentation supporting the listing of each individual employee in PPP Schedule A Worksheet Table 2; specifically, that each listed employee received during any single pay period in 2019 compensation at an annualized rate of more than \$100,000.
- Documentation regarding any employee job offers and refusals, firings for cause, voluntary resignations, and written requests by any employee for reductions in work schedule.
- Documentation supporting the PPP Schedule A Worksheet “FTE Reduction Safe Harbor.”

Borrowers should also keep all records relating to the borrower’s PPP Loan, including documentation submitted with its PPP Loan application, documentation supporting the borrower’s certifications as to the necessity of the loan request and its eligibility for a PPP Loan, documentation necessary to support the borrower’s Forgiveness Application, and documentation demonstrating the borrower’s material compliance with PPP requirements.

**23. For how long should documents be maintained and does a borrower have to share these with the SBA?**

All PPP Loan documentation and records should be maintained by the borrower for six years after the PPP Loan is forgiven or repaid in full. Borrowers will be required to permit authorized representatives of the SBA to access such files upon request.

*Other Questions*

**24. Must a borrower include the amount forgiven as taxable income on its 2020 tax returns?**

No, the CARES Act specifically provides that the forgiven amount under a PPP Loan is not included as taxable income.

**25. Can a borrower deduct expenses associated with any amount forgiven on its 2020 tax returns?**

While many borrowers expected that the business would also be able to write off the expenses that were forgiven, as they have traditionally done, the Internal Revenue Service (IRS) released Notice 2020-32 stating that no deduction is allowed on the borrower’s 2020 tax return under the Internal Revenue Code for an expense that is otherwise deductible if the payment of the expense results in forgiveness of a PPP Loan. We expect that this guidance will be challenged and Section 265 of the Internal Revenue Code may be amended by Congress to allow a deduction for forgivable expenses. [While the PPPFA did not include a legislative fix for this issue, additional legislation may do so.](#) We will continue to monitor this issue and additional information may be provided.

**26. Do independent contractors count as employees for purposes of PPP Loan forgiveness?**

No, payments to independent contractors (1099s) do not count as employees. They have the ability to apply for a PPP Loan on their own so they do not count as a FTE for purposes of a borrower’s PPP Loan forgiveness.

**27. Is it possible to delay the disbursement date so that the Covered Period falls later in the year?**

No, lenders must disburse loan proceeds within ten days after the loan is approved by the SBA. The Covered Period begins on the date of disbursement.