

Updated as of May 18, 2020

SBA issued guidance on loan forgiveness in the form of an application that will need to be submitted to lenders: <https://home.treasury.gov/system/files/136/3245-0407-SBA-Form-3508-PPP-Forgiveness-Application.pdf>. The application contains detailed worksheets that can be used to calculate expected forgiveness amounts.

SBA also issued a new rule this morning indicating that loan applicants need to count the non-U.S. employees of their affiliates when determining whether they qualify for PPP loans unless an exemption from the SBA's affiliation rules applies: <https://home.treasury.gov/system/files/136/Interim-Final-Rule-on-Treatment-of-Entities-with-Foreign-Affiliates.pdf>. Although SBA is characterizing this change as a clarification, it has indicated that it will only apply to applications submitted on or after May 5, 2020 given that SBA regulations previously included contradictory text.

For the forgiveness application, the following new details and deviations from the CARES Act are worth noting:

- i. *Forgiveness for Incurred or Paid Amounts*: Eligible forgiveness amounts can be paid or incurred during the 8-week forgiveness period, generally as long as payment is made on the first payment date following the 8-week period.
- ii. *Alternative 8-Week Period*: A recipient can choose to use an alternative 8-week forgiveness period for some purposes beginning on the first day of the first pay period following disbursement of a loan.
- iii. *40-Hour Workweek*: FTEs will need to be calculated based on a 40-hour workweek.
- iv. *Leases of Personal Property*: Lease payments for personal property (e.g., equipment) can be included in the forgiveness amount.
- v. *Relevant Quarter for Salary and Wage Reductions*: Reductions for decreases in the salaries or wages of individual employees over the 8-week forgiveness period will be compared to January 1 through March 31, 2020 as the most recent quarter, rather than the last quarter in 2019 as suggested in many loan documents or the last quarter of a recipient's tax year.
- vi. *Expansion of Safe Harbor*: The safe harbor period from February 15 through April 26 can be relevant for all loan recipients even if a loan was received after April 26. The safe harbor also covers all salary and wage reductions for individual employees, as well as overall FTE reductions, to the extent that it applies.
 - a. *Safe Harbor for Reductions in Salaries or Wages*: A recipient can avoid reductions for salary or wage decreases that occur for an individual employee across the 8-week forgiveness period compared to January 1 through March 31, 2020 if (1) the employee's average annualized salary or wages from February 15 through April 26, 2020 was lower than the employee's annualized salary or wages on February 15, 2020 and (2) the employee's average annualized salary or wages as of June 30, 2020 is equal to or greater than the employee's annualized salary or wages on February 15, 2020. In other words, if a decrease that occurred from February 15 through April 26, 2020 is corrected by June 30, 2020, the recipient will not be subject to a reduction in forgiveness for each employee that experienced this decrease and correction.

Employees that did not have their salary or wages reduced between February 15 and April 26, 2020 do not appear to be eligible for the safe harbor even if reductions occurred before February 15 or after April 26, 2020. Also, it is not clear how SBA expects recipients to calculate annualized salary or wages on the specific dates of February 15 and June 30, 2020, and additional guidance will likely be required on this point, particularly with respect to hourly employees.

- b. *Safe Harbor for Reductions in FTEs*: A recipient can avoid a reduction for FTE decreases that occur across the 8-week forgiveness period compared to, as applicable, February 15 to June 30, 2019, January and February 2020, or, for seasonal employers, a 12-week period from May 1 through September 15, 2019, as long as the recipient (1) reduced average FTE levels from February 15 through April 26, 2020 compared to the pay period that covered February 15, 2020 and (2) restored FTEs by June 30, 2020 to the same level as the pay period that covered February 15, 2020. In other words, if a decrease in FTEs that occurred from February 15 through April 26, 2020 is corrected by June 30, 2020, the recipient will not be subject to a reduction in forgiveness for FTEs. Recipients that did not reduce FTEs from February 15 through April 26, 2020 do not appear to be eligible for the safe harbor even if reductions occurred before February 15 or after April 26, 2020.
- vii. *Order of Forgiveness Reductions*: Contrary to the express language of the CARES Act, salary and wage reductions in excess of 25 percent per individual employee will apply to forgiveness amounts before the reduction for average FTEs, which will result in higher forgiveness amounts when both reductions apply.
- viii. *Forgiveness Documentation*: The form provides a list of documentation that will be required when seeking forgiveness.