

LEGAL UPDATES

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# SBA and Treasury Department Update: Paycheck Protection Program Guidance

On April 6, 2020, the U.S. Department of the Treasury and the Small Business Administration (SBA) provided further guidance in connection with the Paycheck Protection Program (PPP), clarifying some areas covered in previous communications, as well as addressing a few new topics in its recent Q&A document. This guidance was further updated on April 8, 2020.

## PPP eligibility

The government's new guidance clarifies previously issued information regarding the eligibility requirements for PPP loans, highlighting four main criteria for businesses. Generally, the following businesses are eligible for PPP loans:

Any business, 501(c)(3) nonprofit organization, 501(c)(19) veterans organization or Tribal business with not more than 500 employees whose principal place of residence is in the United States;

Any business that meets the SBA *employee-based* size standards for the industry in which it operates (if applicable);

Any business that is a "small business concern" as defined in Section 3 of the Small Business Act, 15 U.S.C. 632, and meets the SBA *employee-based* or *revenue-based* size standards corresponding to its primary industry; or

Any business that is a "small business concern" under the SBA's "alternative size standard" as of March 27, 2020, which standard is met if the business has not more than:

maximum tangible net worth of \$15 million, and an average net income of \$5 million (after Federal income taxes, excluding any carry-over losses) for 2 full fiscal years before the date of application.

### **Tax-accounting implications**

One of the new areas covered by the updated guidance addresses how a borrower should account for federal taxes when determining its payroll costs for purposes of calculating the maximum loan amount of a PPP loan.

The CARES Act calls for payroll costs to be calculated on a gross basis without regard to (i.e., not including subtractions or additions based on) federal taxes imposed or withheld, such as the employee's and employer's share of Federal Insurance Contributions Act (FICA) and income taxes required to be withheld from employees. As a result, payroll costs are not reduced by taxes imposed on an employee and required to be withheld by the employer, but payroll costs do not include the employer's share of payroll tax. For example, an employee who earned \$4,000 per month in gross wages, from which \$500 in federal taxes was withheld, would count as \$4,000 in payroll costs. The employee would receive \$3,500, and \$500 would be paid to the federal government. However, the *employer*-side federal payroll taxes imposed on the \$4,000 in wages are excluded from payroll costs under the statute.

### **Annual cash compensation in excess of \$100,000 is excluded from payroll costs**

The government's Q&A document also answered the question of what types of "payroll costs" are subject to the \$100,000 cap. According to the government's Q&A, the exclusion applies only to "cash compensation" in excess of \$100,000 annually. The government clarified that the exclusion does not apply to non-cash benefits paid on account of workers earning in excess of \$100,000, such as payment for provision of employee benefits consisting of group health care coverage, payment of state and local taxes assessed on compensation, and employer contributions to defined-benefit or defined-contribution retirement plans.

### **Contact us**

If you have additional questions regarding the Paycheck Protection Program, the CARES Act or other government initiatives to combat the COVID-19 crisis, please contact your Husch Blackwell attorney.

### **CARES Act updates**

Husch Blackwell's CARES Act resource team has reviewed the Act carefully and is developing content to help clients determine how best to access the available assistance. The team will add new content

frequently as the Act is implemented through a number of agency rulemakings over the coming weeks.

## **COVID-19 resource**

Husch Blackwell has launched a COVID-19 response team providing insight to businesses as they address challenges related to the coronavirus outbreak. The page contains programming and content to assist clients and other interested parties across multiple areas of operations, including labor and employment, retailing, and supply chain management, among others.