THE PAYROLL PROTECTION PROGRAM FLEXIBILITY ACT

On June 5, 2020, President Trump signed the Payroll Protection Flexibility Act (the "PPPFA") into law. The PPPFA modifies the statutes, rules and guidance relating to the Payroll Protection Program ("PPP"). The following is a summary of the noteworthy provisions of the PPPFA.

1. For new PPP loans, Loan Maturity is Extended from Two Years to Five

The PPPFA provides that for all PPP loans made after the enactment of the PPPFA, the maturity term shall be no less than five years. For already existing loans, the PPPFA allows lenders and borrowers to mutually agree to modify the PPP loan to conform with this five-year maturity period.

2. The PPP Loan and Forgiveness Covered Periods are Expanded

Pursuant to the CARES Act, the "covered period" from PPP loans started on February 15, 2020 and ended on June 30, 2020. The PPPFA changed this so the last day of the "covered period" for PPP loans is December 31, 2020. Additionally, under the CARES Act, PPP loans were eligible for forgiveness in an amount equal to the sum of the costs incurred and payments made on forgivable costs during the 8-week forgiveness covered period which commenced on the date of the loan origination. The PPPFA now expands the forgiveness covered period from the date of loan origination to the earlier of 24 weeks after the date of the loan origination or December 31, 2020. Borrowers who have received a PPP loan before the enactment of the PPPFA retain the option of utilizing the original 8-week forgiveness covered period.

3. The Period of Deferred Payment is Modified – Forgiveness Application Deadline is Imposed

Under prior PPP loan rules, the borrower's first payment was deferred for six months following the date of the first disbursement on the PPP loan. The PPPFA now provides that the borrower's first PPP loan payment is deferred to the date the PPP loan forgiveness amount is sent to the lender by the SBA. However, if a loan recipient fails to apply for forgiveness within ten months after the last day of the forgiveness covered period, payments of principal, interest and fees on the PPP loan shall start ten months after the last day of this covered period.

4. Only 60% of PPP loan proceeds must be spent on eligible payroll costs, and forgiveness may be denied in full if this requirement is not met

The PPPFA now provides that "[t]o receive loan forgiveness under this section, an eligible recipient shall use at least 60 percent of the covered loan amount for payroll costs, and may use up to 40 percent of such amount for any payment" on any covered mortgage interest, rent or utilities. Notably, this language suggests that if a borrower does not use at least 60% of the covered loan amount for eligible payroll costs, then the borrower will not receive any forgiveness of its PPP loan.

5. Employee Count and Wage/Salary Safe Harbors Extended

The PPPFA extends the deadline by which a borrower may avoid a forgiveness reduction by restoring its Full Time Equivalent Employee ("FTE") count or salary/wage reductions from June 30, 2020 to December 31, 2020. Accordingly, if a borrower fully restores its FTE count or wages to its February 15, 2020 levels before December 31, 2020, no reduction in forgiveness will be required.

6. New Exemption from Proportional Reduction of FTE Employees

Under the PPPFA, during the period beginning on February 15, 2020, and ending on December 31, 2020, the amount of loan forgiveness shall be determined without regard to a proportional reduction in the number of FTE employees if an eligible recipient, in good faith

A) is able to document an inability to rehire individuals who were employees of the eligible recipient on February 15, 2020, and an inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020; or

B) is able to document an inability to return to the same level of business activity as such business was operating at before February 15, 2020, due to compliance with requirements established or guidance issued by certain governmental agencies during the period beginning on March 1, 2020, and ending December 31, 2020, related to the maintenance of standards for sanitation, social distancing, or any other worker or customer safety requirement related to COVID–19.

7. Employer Tax Deferral Change

The PPPFA modifies the terms of the CARES Act by now allowing employers who have received forgiveness on PPP loans to defer payment of 50% of their Social Security tax until December 1, 2021 and the other 50% until December 31, 2022. A similar deferral is allowed for self-employed individuals.

The PPPFA states that it is effective as if included in the CARES Act. We will continue to monitor rules and guidance from the SBA and Treasury Department relating to the construction and application of the PPP loan provisions of the CARES Act and PPPFA. If you have any questions about the Payroll Protection Program Flexibility Act, please let us know.