

June 17, 2020

Today, the SBA and Treasury Department issued two forgiveness applications for the Paycheck Protection Program (PPP):

- A two-page simplified application (Form 35008EZ) for certain borrowers who self-certify as to their eligibility to file the simplified Form, which requires fewer calculations on the application and less accompanying documentation (but see discussion of substantial recordkeeping and document retention requirements below); and
- An updated “regular” forgiveness application reflecting changes made by the PPP Flexibility Act of 2020 (e.g., 60% payroll cost spend requirement, 24-week forgiveness period, extension of “rehire relief” for full forgiveness to December 31, 2020, and additional safe harbors for employee reductions outside of the employer’s control).

Aside from the Flexibility Act changes, the regular application is generally consistent with the previous version released by SBA. Below is a brief overview of the new simplified application.

Simplified Forgiveness Application

1. 3 Categories of Eligible Borrowers

Category 1 –

Self-employed individuals, independent contractors, or sole proprietors who had no employees at the time of the PPP loan application and did not include any employee salaries in calculating his/her loan amount.

Category 2 –

- Borrower did not trigger the salary reduction forgiveness penalty from the CARES Act (i.e., did not reduce annual salary or hourly wages of any employee who did not receive annualized wages/salary above \$100,000 during any pay period in 2019 by more than 25% during the forgiveness period or alternative payroll forgiveness period compared to January 1, 2020 - March 31, 2020); **AND**
- Borrower did not reduce the number of employees or the average paid hours of employees between January 1, 2020 and the end of the forgiveness period (ignoring reductions covered by safe harbors for borrower’s inability to rehire and/or restore wages).

Category 3 –

- Borrower did not trigger the salary reduction forgiveness penalty from the CARES Act (as described above); **AND**
- Borrower was unable to operate during the forgiveness period at the same level of business activity as before February 15, 2020, due to compliance with requirements established or guidance issued between March 1, 2020 and December 31, 2020 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, related to the maintenance of standards of sanitation, social distancing, or any other work or customer safety requirement related to COVID-19.

Note that the second category does not reference “full-time” or “full-time equivalent employees,” but rather, appears to be a belly button employee count in addition to an average paid hours calculation (but see discussion below about documentation requirements). Also note that this category appears to require a borrower to wait until the conclusion of the 6-month forgiveness period to apply for forgiveness (while the other categories could potentially allow for earlier application, e.g., when all loan funds have been spent).

With respect to the third eligibility category, “unable to operate at the same level of business activity as before February 15, 2020” is not clarified any further in the application or instructions and will apparently depend on the borrower’s own assessment (also see discussion of related documentation below, including per-location assessments and financial records). Also note that this category does not account for state business closer or stay-at-home orders, only Federal directives from specified sources.

2. Application Contents

The application instructions largely incorporate previous definitions, guidance, and calculations related to forgivable expenses (e.g., eligible payroll costs), except the required payroll cost spend for full forgiveness is now 60%. They do provide a few additional details and clarifications vis-à-vis prior releases (these same clarifications are also made in the updated regular application):

- For borrowers with a 24-week forgiveness period, the maximum compensation amount for any individual employee is \$46,154 (\$100,000 annual salary prorated for the longer forgiveness period), instead of \$15,385 for the 8-week forgiveness period.
- For the 24-week forgiveness period, “owner compensation” (for owner-employees/sole proprietors, self-employed individuals, and general partners) is capped at \$20,833 (2.5-month share of \$100,000 annualized salary) or 2.5 months’ worth of 2019 compensation, whichever is lower (for 8-week forgiveness period, this amount is still capped at 8/52 of 2019 compensation up to \$15,385).
- Clarifies that employer contributions to self-insured employer-sponsored plans count as eligible payroll costs.

- Borrowers who received their PPP loans before June 5, 2020 may opt to keep the original 8-week forgiveness period.
- The “alternative payroll covered period” option – beginning the forgiveness period on the first day of the first pay period following loan disbursement – is extended to the 24-week forgiveness period (still only for borrowers with a biweekly or more frequent payroll schedule).

Finally, even on the simplified application, borrowers who, together with their affiliates (unless an affiliation waiver applies) received a PPP loan over \$2 million must check a box, presumably for purposes of triggering additional SBA scrutiny.

3. *Documentation Requirements*

Borrowers must submit with the simplified application:

- *Payroll documents*: bank accounts or payroll service reports on cash compensation paid; federal and state payroll tax forms that overlap with the forgiveness period and have been or will be filed; payment receipts, canceled checks, or other account statements showing payments to employee health and/or retirement benefits; and only if you applied under the second eligibility category, the average number of full-time equivalent employees on the borrower’s payroll on January 1, 2020 and at the end of the forgiveness period.
- *Non-payroll documentation*: proof that the obligation/service was in place prior to February 15, 2020 and payment documentation such as receipts, cancelled checks, lender/lessor/utility account statements; and/or invoices.

Again, the last payroll documentation requirement for category 2 borrowers suggests that a forgiveness application cannot be completed until the forgiveness period has expired.

Finally, borrowers must maintain the following documentation for six years after the date of loan forgiveness or payment of the loan in full and allow SBA to access it upon request:

- Payroll records for each employee showing that the salary reduction forgiveness penalty was not triggered;
- Employee job offers and refusals, firings for cause, voluntary resignations or requests for reductions in hours, and “inability to hire similarly qualified employees for unfilled positions on or before December 31, 2020;”
- If applicable, payroll records for each employee supporting the certification that the borrower did no reduce the number of employees or average paid hours of employees between January 1 and the end of the forgiveness period;
- If applicable, documentation showing inability to operate at pre-February 15 levels due to federal orders, which must include copies of the applicable federal requirements/orders for each borrower location and “relevant borrower financial records;” and

- All records related to the PPP loan application (e.g., documents supporting loan amounts and certifications and “documentation demonstrating the borrower’s material compliance with PPP requirements”).

Links to both forgiveness applications and their corresponding instructions can be found here: <https://home.treasury.gov/policy-issues/cares/assistance-for-small-businesses>.

Also, our overall program summary has been updated: <https://www.stepto.com/en/news-publications/small-business-relief-under-the-cares-act.html>.

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