

SBA and Treasury Provide PPP Loan Forgiveness Applications

Hinshaw Alert | 7 min read

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Last month, the U.S. Treasury and the Small Business Administration (SBA) released two Paycheck Protection Program (PPP) loan forgiveness applications. The first was a new EZ PPP loan forgiveness application with instructions (short-form application). The second was an updated version of the previously released PPP loan forgiveness application with revised instructions (long-form application).

The short-form application, SBA Form 3508EZ, may be used if a borrower meets at least one of the three criteria below.

(1) The borrower is a self-employed individual, independent contractor, or sole proprietor who had no employees at the time of the PPP loan application and did not include any employee salaries in the computation of average monthly payroll in the loan application.

OR

(2) The borrower did not reduce annual salary or hourly wages of any employee by more than 25% during the Covered Period or the Alternative Payroll Covered Period compared to the period between January 1, 2020 and March 31, 2020. **AND** the borrower did not reduce the number of employees or the average paid hours of employees between January 1, 2020 and the end of the Covered Period **OR** the borrower (a) was unable to rehire employees or hire similarly qualified employees, or (b) reduced hours of employees and the borrower offered to restore and the employee refused.

OR

(3) The borrower did not reduce annual salary or hourly wages of any employee by more than 25% during the Covered Period compared to the period between January 1, 2020 and March 31, 2020. **AND** the borrower was unable to operate during the Covered Period at the same level of business activity as before February 15, 2020, due to compliance with COVID-19 guidance or safety standards issued between March 1, 2020 and December 31, 2020.

The short-form application is streamlined, relying to a large extent on certifications of the borrower and lightened documentation submission requirements. A borrower will submit documentation verifying payroll and benefit costs as well as non-payroll costs, but a borrower is not required to submit documentation substantiating the number of full-time employees (FTEs). Documentation substantiating the various certifications—including certifications regarding the number of FTEs—must be retained by the borrower (See, [Documentation](#)).

Costs Eligible for Forgiveness

As we explain below, both applications provide that borrowers are eligible for loan forgiveness for payroll and nonpayroll costs.

Eligible Payroll Costs

Borrowers are generally eligible for forgiveness for the payroll costs paid and payroll costs incurred during the 24-week or 8-week Covered Period (or Alternative Payroll Covered Period).

- Payroll 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).
- For each individual employee, the total amount of cash compensation eligible for forgiveness may not exceed an annual salary of \$100,000, as prorated for the Covered Period.
- For information on what qualifies as payroll costs, see Interim Final Rule on Paycheck Protection Program posted on April 2, 2020 (as amended by the Revisions to First Interim Final Rule, posted on June 11, 2020).
- A borrower may only include payroll costs for employees whose principal place of residence is in the United States.

Eligible Nonpayroll Costs

Nonpayroll costs eligible for forgiveness consist of:

- covered mortgage obligations: payments of mortgage interest (not including any prepayment or payment of principal) on any business mortgage obligation on real or personal property incurred before February 15, 2020;
- covered rent obligations: business rent or lease payments pursuant to lease agreements for real or personal property in force before February 15, 2020; and

- covered utility payments: business payments for a service for the distribution of electricity, gas, water, telephone, transportation, or internet access for which service began before February 15, 2020.

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.

Eligible nonpayroll costs cannot exceed 40% of the total forgiveness amount. Nonpayroll costs that were both paid and incurred should only be counted once.

FTE Tests

The long-form application provides three tests designed to eliminate the need to reduce a portion of the loan to be forgiven due to reductions in FTEs.

FTE Reduction Exceptions

The following are not counted as FTE reductions:

- any positions for which the borrower made a good-faith, written offer to rehire an individual who was an employee on February 15, 2020 and the borrower was unable to hire similarly qualified employees for unfilled positions on or before December 31, 2020;
- any positions for which the borrower made a good-faith, written offer to restore any reduction in hours, at the same salary or wages, during the Covered Period or the Alternative Covered Period and the employee rejected the offer; and
- any employees who during the Covered Period or the Alternative Payroll Covered Period:
 - were fired for cause,
 - voluntarily resigned, or
 - voluntarily requested and received a reduction of their hours.

In these cases, FTE reductions do not reduce the borrower's loan forgiveness.

Operational Issues: The borrower is exempt from the reduction in loan forgiveness based on a reduction in FTE employees if the borrower, in good faith, is able to document that it was unable to operate between February 15, 2020, and the end of the Covered 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 for sanitation, social distancing, or any other worker or customer safety requirement related to COVID-19.

Restoration of FTEs: The borrower is exempt from the reduction in loan forgiveness based on a reduction in FTE employees described above if both of the following conditions are met: (a) the borrower reduced its FTE employee levels in the period beginning February 15, 2020, and ending April 26, 2020; and (b) the borrower then restored its FTE employee levels by not later than December 31, 2020 to its FTE employee levels in the borrower's pay period that included February 15, 2020.

Forgiveness Amount

The short-term application (3508EZ) provides that a borrower may receive forgiveness for the lesser of the following:

- the total of the permitted payroll and non-payroll expenses;
- the PPP loan amount; or
- the total payroll costs paid or uncured in the Applicable Covered Period divided by 0.60.

The long-term application (3508) provides that a borrower may receive forgiveness for the lesser of the following:

- the PPP loan amount;
- the Modified Total as calculated below; or
- the total payroll costs incurred or paid during the Applicable Covered Period divided by 0.60.

The Modified Total is calculated by (a) adding the sum of the permitted payroll and non-payroll costs, (b) subtracting the amount of the reduction required by the wage forgiveness reduction test, (c) multiplying the difference by the average number of FTEs during the Alternative Payroll Covered Period as determined in the employee forgiveness reduction test, and (d) dividing the product by average number of FTEs during the chosen Reference Period.

Certifications

The applications contain eight certifications a borrower must make. These should be reviewed carefully.

One of the certifications requires the borrower to acknowledge that if the PPP proceeds were used for unauthorized purposes, the federal government may pursue recovery of the amounts and/or civil or criminal fraud charges. A second states that “knowingly making a false statement to obtain forgiveness” is punishable by various criminal statutes. In another, the borrower agrees to provide any documents requested by the SBA related to its loan or forgiveness application.

Documentation

Each application form contains a list of the documents that must be submitted by the borrower along with the application. In addition, each application provides a list of records that need to be maintained by the borrower.

Borrowers must retain all records relating to a 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 loan forgiveness application, and documentation demonstrating the borrower's material compliance with PPP requirements—for six years after the date the loan is forgiven or repaid in full. Additionally, borrowers must permit authorized representatives of the SBA, including representatives of its Office of Inspector General, to access such files upon request.

Submission of Forgiveness Application to a Lender

When a borrower submits the long-form application (SBA Form 3508 or lender's equivalent form), the lender must confirm:

- receipt of the borrower certifications contained in the long-form application;
- receipt of the documentation the borrower must submit to aid in verifying payroll and nonpayroll costs, as specified in the instructions to the long-form application;
- the borrower's calculations on the borrower's long-form application, including the dollar amount of the (A) Cash Compensation, Non-Cash Compensation, and Compensation to Owners claimed on Lines 1, 4, 6, 7, 8, and 9 on PPP Schedule A and (B) Business Mortgage Interest Payments, Business Rent or Lease Payments, and Business Utility Payments claimed on Lines 2, 3, and 4 on the PPP Loan Forgiveness Calculation Form, by reviewing the documentation submitted with the long-form application; and
- that the borrower made the calculation on Line 10 of the long-form application correctly, by dividing the borrower's Eligible Payroll Costs claimed on Line 1 by 0.60.

When the borrower submits the short-form application (SBA Form 3508EZ or lender's equivalent form), the lender must confirm:

- receipt of the borrower certifications contained in the short-form application;
- receipt of the documentation the borrower must submit to aid in verifying payroll and nonpayroll costs, as specified in the instructions to the short-form application;
- the borrower's calculations on the borrower's short-form application, including the dollar amount of the Payroll Costs, Business Mortgage Interest Payments, Business Rent or Lease Payments, and Business Utility

Payments claimed on Lines 1, 2, 3, and 4 of the short-form application, by reviewing the documentation submitted with the short-form application; and

- that the borrower made the calculation on Line 7 of the short-form application correctly, by dividing the borrower's Eligible Payroll Costs claimed on Line 1 by 0.60.

Regardless of which application is submitted, a borrower is responsible for providing an accurate calculation of the loan forgiveness amount. The borrower must attest to the accuracy of its reported information and calculations on the loan forgiveness application.

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