# **PPP Forgiveness**[1]

Current as of April 26, 2020

*This document is for general informational purposes only and is not legal advice. Readers should consult their attorney, accountant, lender, and payroll provider to make determinations regarding loan forgiveness and to ensure compliance with all applicable laws and regulations. Because every organization's situation is unique, it is important that readers seek appropriate advice before taking or refraining from taking any action as a result of this document.*

The Paycheck Protection Program (the "PPP") is a forgivable loan program administered by the Small Business Administration and delivered through financial institutions. On April 16, 2020, the initial $349 Billion in loans authorized by Congress was exhausted. However, Congress recapitalized the program with an additional $310 Billion on April 23, 2020. President Donald Trump signed the bill on April 24, 2020 and funding is expected to be available April 27, 2020.[2]

The PPP allows eligible borrowers to apply for forgivable loans from financial institutions, at 1% interest, for a term of two years, and with principal, interest, and fee payments deferred for the first 6 months of the loan. Ultimately the entire loan can be forgiven if the borrower uses the funds for eligible expenses throughout the 8-weeks following its receipt of the loan funds.[3] PPP loan applications will be accepted through June 30, 2020 or the earlier exhaustion of available funds.[4]

Each applicant for a PPP loan is required to certify that the information provided in the application and all supporting documents is true and accurate in all material respects and that the borrower will use the PPP funds for specific allowable purposes.[5] This makes the way an organization uses and tracks its use of the PPP loan very important.

There are five main questions to consider in preparation for applying for loan forgiveness. In truth, applicant's need to have answered these questions prior to receiving the loan funds, since the 8-week period that determines their eligibility for forgiveness begins as soon as it receives the loan funds.[6]

1. What are eligible expenses?
2. How is loan forgiveness determined?
3. How should a borrower track its expenses?
4. How should a borrower track employee-related considerations?
5. What records will borrowers likely need for the forgiveness application?

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1 This document was drafted by Jonathan Murphy, an attorney with Fortif Law Partners, LLC in Birmingham, Alabama.

2 *See* SBA Notice: PPP Resumes April 27, 2020 (last visited April 26, 2020) https://www.sba.gov/funding-programs/loans/coronavirus-relief-options/paycheck-protection-program#section-header-0.

3 *See* CARES Act Section 1106(a)(d); *see also* Paycheck Protection Program Loans FAQs, at Question 20 (April 24, 2020).

4 *See* CARES Act Section 1102(a)(2)(36)(A)(iii).

5 *See* SBA PPP Borrower Application Form (last visited April 26, 2020) https://www.sba.gov/sites/default/files/2020-04/PPP%20Borrower%20Application%20Form.pdf.

6 *See* Paycheck Protection Program Loans FAQs, at Question 20 (April 24, 2020).

## 1. What are eligible expenses?

PPP loan funds may be used for the following allowable costs:

- Payroll costs;
- Interest on Mortgage obligations;
- Rent under lease agreements;
- Utilities on service agreements;
- Refinancing an Emergency Injury Disaster Loan;[7] or
- Interest payments on other debt obligations that were incurred before February 15, 2020.[8]

Of these allowable uses, the only expenses eligible for forgiveness include Payroll, Mortgage Interest, Rent, Utilities, and EIDL refinancing. Interest payments made on other debt obligations will not be forgiven.[9]

## 2. How is loan forgiveness determined?

Borrowers must apply to their lenders for loan forgiveness. This forgiveness is determined based on what portion of the loan was used for eligible expenses, up to 100% of the loan.[10] The forgiveness amount is reduced, however, if during the 8-week period:

- The borrower uses loan proceeds on non-eligible expenses;[11]
- The borrower uses EIDL proceeds and PPP proceeds for the same purposes;
- More than 25% of the total loan amount is used for purposes other than payroll costs (75% should be used for payroll costs to ensure forgiveness);[12]
- Average monthly full-time equivalent employee headcount declines;[13] or
- Employee salaries and wages decrease by more than 25% (for employees paid less than $100,000).[14]

Note that borrowers have until June 30, 2020 to restore their full-time equivalent employee headcount and salary levels for any changes made between February 15, 2020 and April 26, 2020.[15]

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7 *See* SBA Interim Final Rule at 9 (April 14, 2020) https://home.treasury.gov/system/files/136/Interim-Final-Rule-Additional-Eligibility-Criteria-and-Requirements-for-Certain-Pledges-of-Loans.pdf.

8 *See* CARES Act Section 1102(a)(2)(36)(F).

9 *See* CARES Act, Section 1106(a)(7), (b); see also SBA Final Interim Rule at 14 (April 14, 2020) https://home.treasury.gov/system/files/136/Interim-Final-Rule-Additional-Eligibility-Criteria-and-Requirements-for-Certain-Pledges-of-Loans.pdf.

10 *See* CARES Act, Section 1106(b).

11 *See id*.

12 *See* SBA Interim Final Rule at 16 (April 2, 2020) https://www.sba.gov/sites/default/files/2020-04/PPP--IFRN%20FINAL_0.pdf; *see also* SBA Interim Final Rule at 9 (April 14, 2020) https://home.treasury.gov/system/files/136/Interim-Final-Rule-Additional-Eligibility-Criteria-and-Requirements-for-Certain-Pledges-of-Loans.pdf.

13 *See* CARES Act, Section 1106(b),(d)(2).

14 *See* CARES Act, Section 1106(d)(3).

15 *See* CARES Act, Section 1106 (d)(5).

If a borrower's headcount drops after April 26th (or is not restored by June 30th in the case of reductions between Feb. 15, 2020 and April 26, 2020)[16], the borrower's loan forgiveness will be reduced using one of the following two formulas (as elected by the borrower):

1. Forgiveness Reduction = Eligible Expenses * (average number of full-time equivalent employees / average number of full-time equivalent employees per month employed from Feb.15, 2019- June 30, 2019); or
2. Forgiveness Reduction = Eligible Expenses * (average number of full-time equivalent employees / average number of full-time equivalent employees per month employed from Jan.1, 2020- Feb. 29, 2020).[17]

If the salary and wages of employees is reduced by more than 25% during the 8-weeks following borrower's receipt of the loan funds (and is not restored by June 30, 2020), the borrower's loan forgiveness will be reduced by the amount of the reduction beyond 25%.[18]

**3. How should a borrower track its expenses?**

In order to ensure that the loan is forgiven, it is essential that your organization establish and execute a plan for tracking its use of the loan funds.

- Create a separate bank account for loan funds. Some banks are requiring this but even if your bank does not, it will provide a clean way to identify the funds.
- To prove how your loan funds are used, be sure to pay eligible expenses directly from the separate bank account or transfer funds directly from the separate bank account to other accounts in amounts directly traceable to eligible expenses (i.e. payroll account transfers).
- Consider creating a worksheet that documents the payment and type of eligible expenses, while also tracking compliance with 75% payroll cost requirement.
- Maintain a file of proof of eligible expenses (invoices, payroll journals, etc.) and consider flagging expenses in your organization's accounting system to make it easy for you to generate a report when it comes time to apply for forgiveness.

**4. How should a borrower track employee-related considerations?**

In order to maintain full-time equivalent employee headcount, a borrower should begin by calculating the borrower's pre-loan headcount using the lesser of the following:

- the average number of full-time equivalent employees per month employed by the organization during the period from Feb. 15, 2019 through June 30, 2019; OR
- the average number of full-time equivalent employees per month employed by the organization during the period from Jan. 1, 2020 through Feb. 29, 2020.[19]

When applying for forgiveness, the borrower must calculate the average number of full-time equivalent employees using each pay period within a month during the 8-week period.[20] Borrowers should monitor their full-time equivalent employee headcount closely throughout the 8-week period following their receipt of PPP loan funds. Note that borrowers do not need to keep

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16 *See id.*

17 *See* CARES Act, Section 1106(d)(2)(A)(seasonal employers must use option 1).

18 *See* CARES Act Section 1106(d)(3)(A).

19 *See* CARES Act Section 1106(d)(A)(ii)(I).

20 *See* CARES Act Section 1106(d)(2)(B).

the same full-time equivalent employees in order to comply with the headcount requirement. Borrowers merely need to match the full-time equivalent employee headcount just described.[21]

As to tracking employee wages, Borrowers should remember that compensation cannot drop more than 25% during the 8-week period after the borrower's receipt of the loan funds.[22] Borrowers should begin by calculating pre-loan employee salary and wages by aggregating the most recent full quarter during which the employee was employed before February 15, 2020[23] (excluding employees paid more than $100,000 in any single pay period in 2019).[24] Borrowers should monitor such employee salary and wages closely during the 8-week period. Note that it appears to be the case that reductions in salary and wages between February 15, 2020 and April 26, 2020, must be corrected as to the specific employee whose salary and wages were reduced by June 30, 2020 to avoid reductions in loan forgiveness.[25]

**5. What records will borrowers likely need for the forgiveness application?**

Since borrowers must apply for forgiveness from their lender, they will need to consult with their lender as to what documentation they will require in order to approve the loan forgiveness request. Generally, however, a borrower should be able to provide the following:

- Documentation that verifies your employee counts and pay rates during covered period;
- Payroll tax filings;
- State income, payroll, and unemployment insurance filings; and
- Documentation including cancelled checks, payment receipts, transcripts of accounts, or other documents verifying payments on:
  - Covered mortgage obligations,
  - Covered lease obligations, and
  - Covered utility payments.[26]

Borrowers must also certify in their forgiveness application that the documentation they have provided is true and correct and that the amount forgiven was used for eligible expenses.[27]

If an organization receives a PPP loan, it should work closely with its lender, accountant, payroll provider, and attorney to ensure that it uses and tracks its use of PPP loan funds in order to be eligible for maximum loan forgiveness.

21 *See* CARES Act Section 1106(d)(5)(B)(i).
22 *See* CARES Act Section 1106(d)(5)(B)(i).
23 *See* CARES Act Section 1106(d)(3)(A).
24 *See* CARES Act Section 1106(d)(3)(B).
25 *See* CARES Act Section 1106(d)(5)(B)(ii).
26 *See* CARES Act Section 1106(e)-(f).
27 *See* CARES Act Section 1106(e)(3).