

## Payroll Protection Program Update : Documenting Compliance with Agency Requirements and Guidance to Qualify for the Business Activity Exemption

**June 12, 2020**

The CARES Act created the Paycheck Protection Program (“PPP”), which amended the Small Business Act (“SBA”) to provide short term loans to companies with fewer than 500 employees and other companies (such as those in the restaurant and hospitality industry). Such loans may be eligible for full forgiveness if used for payroll and other business expenses and all other statutory requirements are met. The SBA continues to issue guidance on a rolling basis, which can impact a company’s eligibility for the loan, use of the loan, and the level of forgiveness.

### **Business Activity Exemption and Documentation Requirement**

On June 5, 2020, the President signed a bill called the [Paycheck Protection Flexibility Act](#) (“PPFA”) into law. The PPFA adds a new exception that may make it easier for certain borrowers of PPP loans to qualify for forgiveness if they experience a reduction of full-time equivalent employees. Specifically, the exception applies if a borrower is unable to return to the same level of business activity it was operating at pre-COVID-19 due to compliance with requirements established or guidance issued by the Department of Health and Human Services (HHS), the Centers for Disease Control and Prevention (CDC), or the Occupational Safety and Health Administration (OSHA) 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. A borrower is required to document its compliance with such issued requirements or guidance by these three agencies in order to qualify for the exception.

All three federal agencies have issued various requirements and guidance relating to a handful of mitigation and safety protocols, including:

- testing,

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- social distancing,
- personal protective equipment (PPE),
- sanitation and
- other worker and customer safety requirements pertaining to COVID-19.

Such requirements and guidance vary by industry, including nursing homes and long-term care, retail, construction, restaurants, and manufacturers. Because a borrower must show documentation in order to qualify for the exemption, it is crucial that companies maintain written policies that evidence compliance with agency regulations and guidance.

In addition to having industry-specific written policies to submit as part of a forgiveness application in support of the business activity exception, such written policies are now a critical best practice given that not only do some states now require safety plans to be put in place, but such plans also may serve to protect companies against claims related to safety and/or exposure, whether from employees or the public.

FordHarrison's PPP team is working with borrowers to develop such written policies and will continue to monitor the release of new guidance and provide updates on a regular basis as guidance continues to roll out. The following attorneys are members of our PPP team:

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FordHarrison is closely monitoring COVID-19 developments including associated federal and state legislation and reopening guidance. The firm has implemented continuity plans to allow our lawyers and staff to work remotely in a technologically secure environment when necessary, ensuring continuity of our operations and uninterrupted service to our clients. We are following all CDC guidelines and state and local laws as applicable. We are committed to ensuring the health and welfare of our clients, employees, and communities while continuing to provide our clients with the highest quality service. Please see our dedicated [Coronavirus Taskforce](#), [Coronavirus – CARES Act](#), and [Coronavirus - Return to Work](#) pages for the latest FH Legal Alerts and webinars on COVID-19, the new American workplace, workplace-related provisions of the CARES Act, as well as links to governmental and industry-specific resources for employers to obtain additional information and guidance. For more information or to be connected with a Coronavirus Taskforce or CARES Act attorney, please contact [clientservice@fordharrison.com](mailto:clientservice@fordharrison.com).