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Paycheck Protection Program Updates

Will floorplan interest be included as a non-payroll cost for automobile dealerships?

Yes, floorplan interest is considered a non-payroll cost. You can only make payments towards these costs with the PPP loan if the debt obligation was incurred prior to February 15, 2020. You also need to remain cognizant regarding the amount of the PPP loan you are using towards these costs since no more than 25% can be used on non-payroll costs.

Will PPP loan proceeds used toward floorplan interest be forgiven?

It depends upon a few factors. A recipient may receive loan forgiveness if the proceeds are used toward interest on covered mortgage obligations. A covered mortgage obligation means any indebtedness or debt instrument incurred in the ordinary course of business that is a liability of the borrower; is a mortgage on real or personal property; and was incurred before February 15, 2020. For many automobile dealerships, it seems that floorplan loans are commonly acquired in the ordinary course of business, although the business itself will know better. If the loan is indeed acquired in the ordinary course of business and is secured by a mortgage on the dealership's personal property (*e.g.*, the vehicle on the floor, which is inventory), then payments toward floorplan interest are forgivable so long as the loan was incurred prior to February 15, 2020.
The foregoing answer is not unique to automobile dealerships. If any other business acquires floorplan loans, then the same analysis applies.

As an example, let's use a dealership that acquired a floorplan loan to purchase a new vehicle as a display to prospective buyers. The loan was acquired in the ordinary course of this dealership's business (*i.e.,* this is a common practice) to allow the dealership to purchase the vehicle from a manufacturer. The loan is secured by a mortgage on the vehicle. The vehicle is considered inventory of the dealership, which means it is business personal property. Thus, the loan is secured by a mortgage on personal property. Furthermore, this loan was incurred before February 15, 2020. In this situation, any PPP loan proceeds used toward interest on this floorplan loan are forgivable.

If we slightly change the example above in any number of ways though, the payment towards floorplan interest may no longer be forgivable. Specifically, if the loan was not acquired in the ordinary course of business, then the loan is not considered a covered mortgage obligation; if the loan was not secured by a mortgage on real or personal property of the business, then it is not considered a covered mortgage obligation; and if it was not incurred prior to February 15, 2020, it is not considered a covered mortgage obligation.

How long after June 30, 2020 are employers required to retain employees rehired for forgiveness purposes?

This is a great question and focuses upon the exemption that nullifies the reduction upon the amount of the PPP that may be forgiven if the average number of fulltime equivalent employees is reduced during the 8-week period. To take full advantage of the loan forgiveness aspect of the PPP, the recipient should ensure that the average number of fulltime equivalent employees during the 8-week period is not reduced as compared to one of two other periods.[1] If the average number is reduced, then the recipient has until June 30, 2020 to rectify this reduction.

Importantly, the SBA has not issued any rule requiring the recipient to retain employees rehired for forgiveness purposes beyond June 30, 2020. However, if the recipient intends to lay off an employee, it may be prudent to wait until after its loan forgiveness application has been processed since the purpose of the exemption is for the employer to retain employees in general, not to retain employees only for loan forgiveness.

Does the term "Payroll Costs" include employer contributions towards Health Savings Accounts and dental insurance?

The CARES Act defines "Payroll Costs" to include "payment required for provisions of group health care benefits." Given the plain language, there are two key points to consider: (1) payment must be required; and (2) the requirement must be for provisions of group health care benefits. If an employer is not required to contribute to an HSA, then it is not a "payroll cost." If an employer is required to contribute to an HSA but it is not a group health care benefit, then it is similarly not a "payroll cost." A requirement to contribute may be found in an agreement with the employee. The SBA's guidance regarding this subject is unclear, so anyone contemplating paying HSA contributions from PPP funds should first get approval from the local SBA Field Office. The best practice is avoid making contributions to HSAs from PPP funds, or at least understand that such contributions may not be forgiven.

In regard to dental insurance, if the employer is required to contribute to this type of insurance as a group health care benefit, then these payments should be considered "payroll costs." There is an additional layer to consider here: is dental insurance considered a health care benefit? I believe it is, although it may not be essential. If the CARES Act intended to limit "Payroll Costs" to only essential health care, then it could have stated as much. Since it did not, it seems that dental insurance is a health care benefit.

How much can be paid and forgiven in the Covered Period regarding retirement contributions?

There is no cap regarding employer contributions to employee retirement plans. However, for loan forgiveness, contributions paid to employee retirement plans must be incurred. Thus, an employer cannot simply contribute to employee retirement plans to utilize the PPP loan proceeds. A requirement to contribute to employee retirement plans may be found within an employment

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[1] At the election of the recipient, the two other periods are February 15, 2019 and ending June 30, 2019 or January 1, 2020 and ending February 29, 2020.

agreement. Although the portion of the proceeds contributed to employee retirement plans may not be forgiven (*i.e.,* if it is not incurred), it is a "Payroll Cost" meaning the employer is permitted to contribute to the retirement plan.

How does wage reduction operate for incentive-based compensation agreements? For example, an employee makes 10% of net profit and net profit is $0; can they earn $0?

Remember, loan forgiveness is only applicable to payments made on costs incurred. If the cost is not incurred, as in the example, then the employer may not pay the employee an amount above the un-incurred cost and receive forgiveness. Although the employee may, theoretically, earn $0, this does not mean the amount of the PPP forgiven will be reduced. Instead, a reduction of loan forgiveness due to a reduction of wages is based upon the employee's *total* salary or wages during the covered period (8-week period) compared to the employee's total salary or wages during the most recent full quarter during which the employee was employed before the 8-week period. You then determine whether the total salary or wages the employee was paid during the covered period was reduced in excess of 25% of that employee's total salary or wages during the most recent full quarter. To ascertain the percentage, you divide the employee's total salary or wages during the covered period by the employee's total salary or wages during the most recent full quarter. As a result, though the employee may make less for salary or wages during one pay period during the covered period, that does not mean the employee will not make more during the next pay period nor be within 25% of the total salary or wages during the most recent full quarter.

What happens at the end of the covered period when the loan is either forgiven or converted to term debt? Is any unused portion added to the unforgiven amount and termed out?

At the end of the covered period, the unused portion of the PPP will be combined with the unforgiven amount to determine the amount the recipient needs to pay back. You should speak with your lender to determine how much of the remaining PPP loan needs to be paid per month. Remember, loan maturity is 2 years and the interest rate is 1%.