Delaware Coronavirus Tracker: Heroes Act; PPP and Forgiveness Update; Unemployment Fraud Ring – 5.17.20

Heroes Act-Financial Services Provisions

The House passed the Heroes Act (H.R. 6800), critical legislation to respond to the COVID-19 pandemic crisis. The legislation includes numerous provisions proposed by members of the House Financial Services Committee:

Here is a one-pager on the Financial Services Committee provisions in the Heroes Act. **Here** are fact sheets on how the bill helps renters, homeowners, individuals experiencing homelessness, first responders, essential workers, consumers, small businesses, non-profits, public universities, states, tribes and localities.

The HEROES Act also calls for enhancements to the Paycheck Protection Program ("PPP") including to:

- Extend the PPP program through the end of the year;
- Guarantee access to PPP loans for small businesses with 10 or fewer employees;
- Increase the eight-week loan use period to 24 weeks;
- Create a safe harbor for borrowers who can't rehire workers in the required timeframe;
- Repeal the requirement that 75% of the forgiven loan amount be used for payroll; and
- Clarify that expenses paid with PPP loans that are forgiven are tax deductible.

While all the PPP enhancements contained in the HEROES Act will not eventually become law, a few the bill's most significant PPP provisions may move forward.

PPP Loan Forgiveness Update

The PPP loan forgiveness application is now available at **https://home.treasury.gov/system/files/136/3245-0407-SBA-Form-3508-PPP-Forgiveness-Application.pdf**

Borrowers are expected to complete the application and submit it to lenders, who are ultimately be responsible for assessing forgiveness. The application requires that a forgiveness calculation form and an additional schedule be submitted. The process can be completed electronically. Notably, the form asks whether borrowers received a loan in excess of $2 million as plans have been announced to audit all loans over $2 million. In addition, charities receiving those loans will be required to show that the money was necessary to keep operations running and that they had limited access to other sources of liquidity.

The 11-page application document contains measures that will benefit businesses, including an option that allows them to calculate payroll costs using an "alternative" eight-week covered period that aligns with their regular payroll cycles. It also includes an exemption from the loan forgiveness reduction for borrowers who have made "a good-faith, written offer to rehire workers that was declined."

Businesses will be able to count any payroll and eligible non-payroll expenses incurred, but not paid, during the covered period, as long as they are paid by the next regular payroll or billing date. There had been concerns that only expenses that were paid during the covered period would be allowed to count toward forgiveness. The agencies did not reduce a requirement that 75% of the borrowed funds be used for payroll. The stipulation was not written into in the language of the coronavirus stimulus package that created the $660 billion lending program. The SBA and Treasury addressed it in regulations implementing the program.

A safe harbor from loan forgiveness reduction for borrowers that were able to rehire employees who had previously been let go or laid off by June 30, 2020 is included, as well as an exemption from forgiveness reduction for borrowers who have made a good-faith, written offer to rehire workers that was declined. Yet, the application and instructions are not without issues. The most notable items addressed are as follows:

1. **Payroll Paid After the Eighth Week.** Payroll expenses do not have to be both "paid and incurred" in the exact eight week period (56 days) that begins on the day that the first loan proceeds are received. By the language of the CARES Act, and the regulations and FAQs issued by the SBA, only payroll that was actually paid during the eight weeks for services actually rendered by employees, plus applicable PTO used during that eight weeks, were going to be forgiven.

This would have caused a significant hardship, and accounting nightmares for the majority of businesses, which pay their workers in arrears.
The Application allows the borrower to choose to use the 56-day period following the receipt of the first loan money, which is referred to as the "Covered Period," or to select the "Alternative Payroll Covered Period," to coincide with the payroll schedule of the borrower, if it is bi-weekly or more frequently. The Alternative Payroll Covered Period, if elected, will begin on the first day of the borrower's first pay period following the date that they receive their first PPP loan dollars, and will end on the 56th day thereafter. This assumes that all borrowers pay their employees in full on the last day of each pay period.

Employers who pay their employees after the last day of the pay period may still lose the forgiveness of payroll that is paid in arrears beyond the last day of the last pay period that is within the 56 days, and should therefore adjust their procedures accordingly. Employers who pay monthly should adjust their procedures to pay every two weeks so that they can qualify to use the Alternative Payroll Covered Period.

A borrower that elects to use the Alternative Payroll Covered Period must also account for employee health insurance, retirement plan contributions, and state and local taxes assessed on employee compensation during the same period of time, but will keep track of rent, interest and utilities for the "Covered Period" (the first 56 days after the receipt of the first PPP loan amount), subject to the rule described in Section 3 below.

2. **Rent and Interest on Non-Real Estate Secured Loans and Leases**. Rent and interest paid on leases of non-real estate business assets, and interest paid on loans that are secured by non-real estate "mortgages," which are normally referred to as "Security Agreements," will qualify for forgiveness, if they are based upon loans and leases that were in effect on February 15, 2020.

Planning Idea. It is unknown whether below market value loans or leases could be modified after February 15th to reflect fair market value interest or rent. Many borrowers will amend related party loan and lease agreements to reflect fair market value, pay fair market value during the eight weeks, and then wait for further guidance before filing the Forgiveness Application in order to determine whether the forgiveness will apply to the rate of interest or rent that was applicable under the agreement that was in effect on February 15, 2020, or whether the higher fair market value amounts paid during the eight week period can be counted.

3. **Interest Rent and Utilities Paid in Arrears**. Interest, rent and "utilities" that are incurred during the eight week repayment measurement period and paid shortly thereafter in the normal course of business will also qualify to be forgiven. This provision of the Application reads as follows:
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.

The above language will not apply to health insurance or retirement plan contributions, because they are considered to be "payroll costs" under the applicable terminology.

4. **The 75% Rule Is Not An "All Or Nothing" Requirement**. There has been much confusion over whether this rule being imposed by the SBA, which indicates that forgiveness will be limited if 75% of the amounts loan amount is not spent on payroll, health insurance and pension expenses. The rule makes it clear that the borrower can first determine its payroll, health insurance and retirement plan expenses ("Payroll Amount") and then the sum of the other forgivable expenses ("rent, utilities, and interest") cannot exceed 33 1/3% of the Payroll Amount.

For example, if the loan is $100,000, and only $70,000 is spent on payroll, health insurance and retirement plan expenses, then 33 1/3rd% of $70,000 is $23,333, and the maximum amount forgiven based on interest rent and utilities will be $23,333, so that the total loan forgiveness would be $93,333.
The language in the Instructions that confirms this states that "eligible nonpayroll costs cannot exceed 25% of the total forgiveness amount."

5. **Reduction Ratios for Reduced Workforce and Compensation**. The Application indicates how to apply the related calculations with respect to reduction of what is forgiven when there is a reduction in workforce or large salary reductions for non-highly compensated employees. One clarification is that the amounts otherwise forgiven for rent, interest and utilities are also reduced if there is a reduction in the number of employees under the test.

6. **When Does the Eight Week Period Start?** The eight week forgiveness period begins when the first PPP monies are received. A business that borrowed $100,000 on May 1st, and gets another $50,000 on May 14th, will have to track the expenses for the eight weeks beginning May 1st. The Instructions do not indicate what occurs if the second or third tranche of a loan is received after the eight week period ends. Hopefully, more guidance on this s forthcoming.

It is noteworthy that the present SBA guidance indicates that entities taxed as partnerships that did not receive loan amounts based upon the compensation paid to partners, and also seasonal businesses that did not receive an extra loan amount based upon the later released seasonal business rules, can now apply for additional PPP loan amounts. There is no guidance on what might be forgiven if the additional loan amount received after the eight week period has expired.

7. **When Are Pension Expenses "Paid and Incurred?** The Instructions indicate that the total "amount paid by [the] Borrower for employer contributions to employee retirement plans" will be entered in the calculation worksheet, and now this will be based upon the above-referenced "Covered Period" or the "Alternative Payroll Covered Period," but that

there is no indication as to whether the amount that is "paid by Borrower" can include contributions attributable to an entire year, or even 2019 and 2020 combined.

8. **Independent Contractors, Proprietors and Partners in Partnerships May Be Left Out in the Cold.** The Application and Instructions confirm an apparent intent to not permit independent contractors, proprietors, or individuals who are partners in a partnership to receive the benefit of forgiveness for the costs of their own health insurance and retirement plan contributions. The newly issued Instructions for what is known as "PPP Schedule A" provide that the "Payroll" will include total amounts paid by the Borrower for "employee health insurance…[and] employer contributions to employee retirement plans…[and] state and local taxes assessed on employee compensation…"

The Instructions for Line 9 provides for the inclusion of "any amounts paid to owners (owner-employees, a self-employed individual, or general partners). This amount is capped at $15,385 (the eight week equivalent of $100,000 per year) for each individual," and reference is made to the April 14, 2020 Interim Final Rule, which indicates at FAQ #4 that partnerships would include health insurance and retirement plan expenses for "employees" in determining the amount that can be borrowed, but this guidance does not indicate whether such items would be limited to monies paid for employee health insurance and retirement plans (as opposed to being paid for partners who work for a partnership) with respect to forgiveness.

More guidance is forthcoming to assist borrowers and lenders as they begin the process.

Coronavirus Unemployment Fraud Ring

A well-organized Nigerian crime ring is exploiting the COVID-19 crisis by committing large-scale fraud against multiple state unemployment insurance programs, with potential losses in the hundreds of millions of dollars, according to a new alert issued by the U.S. Secret Service. The ring has been filing unemployment claims in different states using Social Security numbers and other personally identifiable information ("PII") belonging to identity theft victims, and that a substantial amount of the fraudulent benefits submitted have used PII from first responders, government personnel and school employees.

The primary state targeted so far is Washington, although there is also evidence of attacks in North Carolina, Massachusetts, Rhode Island, Oklahoma, Wyoming and Florida.

The fraud network is believed to consist of hundreds of "mules," a term used to describe willing or unwitting individuals who are recruited to help launder the proceeds of fraudulent financial transactions. Individuals residing out-of-state are receiving multiple ACH deposits from unemployment programs, all in different individuals' names with no connection to the account holder.

The crime ring operates in much the same way as crooks do who specialize in filing fraudulent income tax fund requests with states and the U.S. Internal Revenue Service. In those schemes, the scammers typically recruit people, often victims of on line romance scams or those who also are out of work and looking for any source of income, to receive direct deposits from the fraudulent transactions, and then forward the bulk of the illicit funds to the perpetrators.

The Rhode Island Department of Labor and Training has received hundreds of complaints of unemployment insurance fraud, and the number of purportedly fraudulent accounts is keeping pace with the unprecedented number of legitimate claims for unemployment insurance. Rhode Island has over 31 percent of its workforce filing for unemployment.

Local financial institutions, including banks and credit unions, as well as large national banks have been targeted. According to the Secret Service, it is extremely likely that every state is vulnerable to this scheme and will be targeted if they have not been already.