




**COVID-19**

UPDATE:  
May 18, 2020

**Coronavirus / COVID-19  
Response Team**


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**Be PPP Prepared:  
Compliance, Audit &  
Enforcement Readiness**

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## Today's Topics

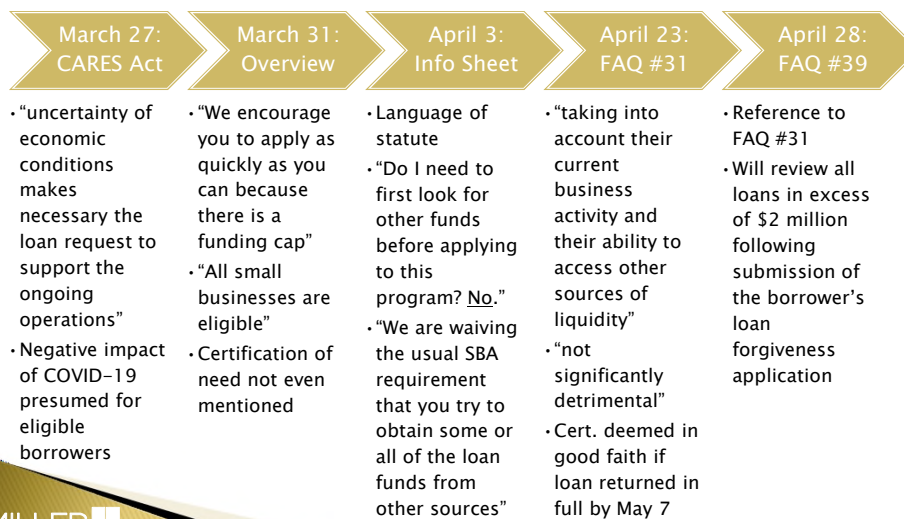
- SBA guidance on “need” certifications
- Release of PPP Loan Forgiveness Application
  - Some key questions answered
  - Further guidance and FAQs expected
- Implications for PPP borrowers
  - Emphasis on document production and retention
  - Taking a strategic, long-term view
- Overview of new Miller Johnson PPP Compliance Readiness Program

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## Paycheck Protection Program (PPP): Conceptual Overview

- Small business loans that may be wholly or partially forgiven
  - Support cash flow to cover payroll costs (at least 75% of loan) and rent, mortgage interest and utility payments
  - Loans may be forgiven (wholly or partially) based on use of funds and employee / wage retention
  - Available to businesses with 500 or fewer employees (maybe more depending on industry and other factors)
  - Also available to self-employed/“gig economy” workers and 501(c)(3) non-profit organizations
  - No “credit elsewhere” testing (\*sort of\*)

## Evolving Guidance on PPP Loan “Need” Certification



## **Evolving Guidance on PPP Loan “Need” Certification (cont.)**

- On May 5, SBA extended the “safe harbor” deadline for returning PPP loan proceeds to May 14
- On May 13, SBA published FAQ 46 to provide guidance to borrowers regarding “need” certifications
  - Also, further extended “safe harbor” deadline for returning PPP loan proceeds to May 18
- SBA’s approach was essentially to provide a further “safe harbor” – on the “need” certification only – to 99% of borrowers (by number of loans), but to leave meaningful uncertainty in place for remaining borrowers with loans greater than \$2MM

## **Evolving Guidance on PPP Loan “Need” Certification (cont.)**

- PPP borrowers with loans in an original principal amount less than \$2 million will be deemed to have made their “need” certifications in good faith
  - For measuring loan size, borrowers must also include the original principal amount of PPP loans obtained by affiliates
- SBA noted that PPP borrowers that do not qualify for this “safe harbor” may still be able to make the “need” certification in good faith based on their “individual circumstances in light of the language of the certification and SBA guidance.”

## Evolving Guidance on PPP Loan “Need” Certification (cont.)

- If SBA determines in the course of its review that a borrower that is ineligible for the “safe harbor” lacked an adequate basis for its “need” certification, then SBA will seek repayment of the outstanding PPP loan balance
- If the borrower then repays its PPP loan, SBA stated that it will not pursue “administrative enforcement or referrals to other agencies” based on its determination with respect to the “need” certification
  - While helpful, this should not be equated to full “amnesty,” especially if a borrower cannot establish it acted in good faith

## Connection to Compliance & Enforcement Considerations

- While this guidance is welcome news to borrowers with loans less than \$2 million, the blanket “safe harbor” for such loans may increase scrutiny on PPP borrowers that do not qualify for the safe harbor
- SBA explained that the creation of the safe harbor for smaller loans would allow it to direct its “audit resources and focus its reviews on larger loans, **where the compliance effort may yield higher returns.**”
  - SBA will focus its audit and enforcement resources on a comparatively small subset of PPP borrowers (appx. 1% of borrowers) who account for a relatively large amount of PPP loan appropriations (appx. 24% of total loan principal)

## **“Need” Certification Uncertainty Remains for Larger Borrowers**

- FAQ 46 does not clarify what types or amounts of other available sources of capital/liquidity SBA would consider relevant to its determination that a PPP loan request was “unnecessary”
- Nor does FAQ 46 address what types of negative trends in business or economic activity would sufficiently justify a borrower’s need for a PPP loan
- Since these issues remain open, it is critical for larger borrowers to create and retain thoughtful, contemporaneous records in support of their “need” certifications in preparation for potential SBA scrutiny

## **Changing Gears: PPP Loan Forgiveness Application Released**

- Late on May 15, SBA and Treasury released the PPP Loan Forgiveness Application
  - SBA announced that companion forgiveness-related rules and guidance would be forthcoming
- The Application provides PPP borrowers with a certain amount of new flexibility to plan and manage toward maximizing their loan forgiveness
- However, the Application also requires additional borrower certifications and imposes extensive documentation submission and long-term document retention requirements

## Key Initial Takeaways from Loan Forgiveness Application

- **Payroll Schedules:** The Application accounts for the fact that borrowers' payroll dates are unlikely to align precisely with their eight-week forgiveness periods and gives borrowers some flexibility to ensure they receive 56 days' worth of payroll relief.
- **Mortgage Interest / Rent / Utilities:** Similarly, there is an acknowledgment that mortgage interest, rent and utilities may be incurred during the eight week covered period but may not be paid until a regular billing date after the covered period. The Application provides some timing flexibility for these payments.

## Key Initial Takeaways from Loan Forgiveness Application (cont.)

- **FTE Employee Calculations:** The Application bases full-time equivalent (FTE) employment on a 40-hour work week (many borrowers had anticipated a 30-hour standard).
  - The Application also confirms that borrowers may include "fractional" employees in their total FTE employee calculations (i.e., an employee who works 20 hours/week would count as 0.5 FTEs).
  - However, no individual may count for more than 1.0 FTE (i.e., somebody who works 60 hours/week would still count as only 1.0 FTE).

## Key Initial Takeaways from Loan Forgiveness Application (cont.)

- **June 30 “Safe Harbor”:** The Application does not impose “tail” obligations on borrowers who rehire employees/reinstate compensation levels by June 30.
  - However, the application does seem to indicate that employers must hire all the way back up to February 15 levels to receive the benefit of this June 30 “safe harbor” (i.e., no “partial credit” for partial rehiring under this “safe harbor”).
- **Employee Reductions:** Employees terminated for cause will not count against a borrower’s FTE reduction calculations, nor will employees who turned down rehire offers, voluntarily resigned or requested and received reduced working hours.

## Key Initial Takeaways from Loan Forgiveness Application (cont.)

- **Certifications:** The Application requires additional certifications regarding the borrower’s forgiveness request and the veracity of information provided, among other things.
  - As with the original PPP loan application certifications, these forgiveness-related certifications, if falsely made, create the potential for civil and/or criminal penalties.
- **Further SBA Guidance:** The Application states that eligibility for loan forgiveness will be determined based on SBA rules/guidance issued through the date of the forgiveness application, suggesting SBA may seek to apply some rules and guidance retroactively.



## Documentation Submission & Retention Requirements

- **Documentation Submission/Retention Requirements:** The documentation requirements (both for the initial submission of the Application and ongoing record retention obligations) are **extensive**.
  - A borrower must retain its entire PPP support file for at least **six years** for potential review.
- **Additional Information:** SBA reserves the right to request additional information and, if not provided, may determine that a borrower was PPP-ineligible or decline loan forgiveness on that basis.

**Paycheck Protection Program  
Loan Forgiveness Application**

OMB Control Number 3245-0407  
Expiration Date: 10/31/2020

**Documents that Each Borrower Must Submit with its PPP Loan Forgiveness Application**

**PPP Loan Forgiveness Calculation Form**

**PPP Schedule A**

**Payroll:** Documentation verifying the eligible cash compensation and non-cash benefit payments from the Covered Period or the Alternative Payroll Covered Period consisting of each of the following:

- a. Bank account statements or third-party payroll service provider reports documenting the amount of cash compensation paid to employees.
- b. Tax forms (or equivalent third-party payroll service provider reports) for the periods that overlap with the Covered Period or the Alternative Payroll Covered Period:
  - i. Payroll tax filings reported, or that will be reported, to the IRS (typically, Form 941); and
  - ii. State quarterly business and individual employee wage reporting and unemployment insurance tax filings reported, or that will be reported, to the relevant state.
- c. Payment receipts, cancelled checks, or account statements documenting the amount of any employer contributions to employee health insurance and retirement plans that the Borrower included in the forgiveness amount (PPP Schedule A, lines (6) and (7)).

**FTE:** Documentation showing (at the election of the Borrower):

- a. the average number of FTE employees on payroll per month employed by the Borrower between February 15, 2019 and June 30, 2019;
- b. the average number of FTE employees on payroll per month employed by the Borrower between January 1, 2020 and February 29, 2020; or
- c. in the case of a seasonal employer, the average number of FTE employees on payroll per month employed by the Borrower between February 15, 2019 and June 30, 2019; between January 1, 2020 and February 29, 2020; or any consecutive twelve-week period between May 1, 2019 and September 15, 2019.

The selected time period must be the same time period selected for purposes of completing PPP Schedule A, line 11. Documents may include payroll tax filings reported, or that will be reported, to the IRS (typically, Form 941) and state quarterly business and individual employee wage reporting and unemployment insurance tax filings reported, or that will be reported, to the relevant state. Documents submitted may cover periods longer than the specific time period.

**Non payroll:** Documentation verifying existence of the obligations/services prior to February 15, 2020 and eligible payments from the Covered Period.

- a. Business mortgage interest payments: Copy of lender amortization schedule and receipts or cancelled checks verifying eligible payments from the Covered Period; or lender account statements from February 2020 and the months of the Covered Period through one month after the end of the Covered Period verifying interest amounts and eligible payments.
- b. Business rent or lease payments: Copy of current lease agreement and receipts or cancelled checks verifying eligible payments from the Covered Period; or lessor account statements from February 2020 and from the Covered Period through one month after the end of the Covered Period verifying eligible payments.
- c. Business utility payments: Copy of invoices from February 2020 and those paid during the Covered Period and receipts, cancelled checks, or account statements verifying those eligible payments.

**Documents that Each Borrower Must Maintain but is Not Required to Submit**

PPP Schedule A Worksheet or its equivalent and the following:

- a. Documentation supporting the listing of each individual employee in PPP Schedule A Worksheet Table 1, including the "Salary/Hourly Wage Reduction" calculation, if necessary.
- b. Documentation supporting the listing of each individual employee in PPP Schedule A Worksheet Table 2; specifically, that each listed employee received during any single pay period in 2019 compensation at an annualized rate of more than \$100,000.
- c. Documentation regarding any employee job offers and refusals, firings for cause, voluntary resignations, and written requests by any employee for reductions in work schedule.
- d. Documentation supporting the PPP Schedule A Worksheet "FTE Reduction Safe Harbor."

All records relating to the Borrower's 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. The Borrower must retain all such documentation in its files for six years after the date the loan is forgiven or repaid in full, and permit authorized representatives of SBA, including representatives of its Office of Inspector General, to access such files upon request.

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## Big Picture Summary of Recent Developments

- SBA and Treasury have responded, at least in part, to concerns raised by PPP borrowers and their advisors regarding "need" certification uncertainties and certain key loan forgiveness-related questions
- **However**, statements about enforcement priorities (e.g., "yielding higher returns") and documentation submission and retention requirements strongly suggest that SBA, Treasury and other enforcement bodies will scrutinize forgiveness applications and expect borrowers to be "audit-ready"

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|   | <p><b>COVID-19<br/>RESPONSE TEAM</b></p>   |
| <p><b>PPP Compliance<br/>Readiness Program</b></p> <p>Miller Johnson's interdisciplinary team of corporate and litigation attorneys will work with you to identify and gather relevant documents and performance data to ensure your business is best positioned to comply with the ever-changing rules governing the Paycheck Protection Program (PPP) and any resulting inquiry or investigation related to your business's application for, and receipt of, PPP funds.</p>  | <p><b>Learn More</b><br/>For more program information and enrollment, please contact Max Barnes or Jeff Muth.</p> <p><b>Max Barnes</b><br/>Corporate<br/>(616) 831-1725<br/>barnesm@millerjohnson.com</p> <p><b>Jeff Muth</b><br/>Litigation<br/>(616) 831-1706<br/>muthjg@millerjohnson.com</p>   |
| <p><b>Services</b></p> <ul style="list-style-type: none"> <li>Assist with identifying and compiling records and performance data to support the good faith "need certification" made at the time the PPP loan application was made.</li> <li>Review use and accounting of funds to support your application for loan forgiveness.</li> <li>Compliance assessment based on review of information received.</li> <li>Advise on best practices and evolving rules and guidance related to the PPP.</li> <li>Development of audit preparedness plan.</li> <li>Advise on enforcement defenses and evidentiary support for the same.</li> </ul>      | <p><b>Pricing</b><br/>Flat Fee* based on amount of PPP loan.</p> <p><b>\$5,000</b><br/>Loan amount of \$2MM+</p> <p><b>\$3,500</b><br/>Loan amount between \$1MM - \$1,999K</p> <p><b>\$3,000</b><br/>Loan amount between \$500K - \$999K</p> <p><b>\$2,000</b><br/>Loan amount between \$250K - \$499K</p> <p><b>\$1,500</b><br/>Loan amount less than \$250K</p> |
| <p><small>*Legal services related to responding to, or otherwise participating in, an informal or formal inquiry, investigation, audit or any other enforcement action (collectively, "PPP Enforcement Action") are excluded from the scope of legal services offered in this Compliance Readiness Program. However, in the event your business is required to respond to, or otherwise participate in, a PPP Enforcement Action, Miller Johnson will credit 50% of the Flat Fee paid for the Compliance Readiness Program against the cost of advising and representing your business with respect to any PPP Enforcement Action.</small></p> | <p>Grand Rapids (616) 831-1700</p> <p>Kalamazoo (269) 226-2950</p> <p>info@millerjohnson.com</p> <p>www.millerjohnson.com</p>  |

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**Pricing**

*Flat Fee\* based on amount of PPP loan.*

- \$5,000**  
Loan amount of \$2MM+
- \$3,500**  
Loan amount between \$1MM - \$1.99MM
- \$3,000**  
Loan amount between \$500K - \$999K
- \$2,000**  
Loan amount between \$250K - \$499K
- \$1,500**  
Loan amount less than \$250K

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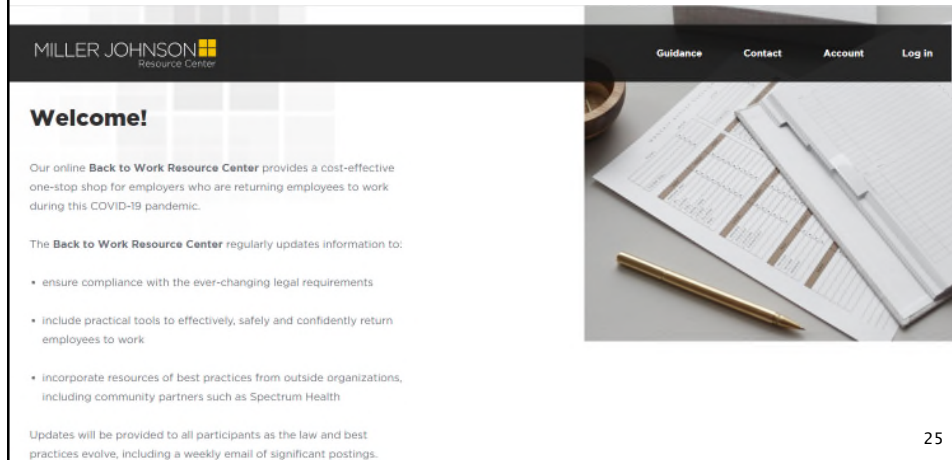
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## Miller Johnson Back to Work Resource Center

<https://resources.millerjohnson.com/>



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Resource Center

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### Welcome!

Our online **Back to Work Resource Center** provides a cost-effective one-stop shop for employers who are returning employees to work during this COVID-19 pandemic.

The **Back to Work Resource Center** regularly updates information to:

- ensure compliance with the ever-changing legal requirements
- include practical tools to effectively, safely and confidently return employees to work
- incorporate resources of best practices from outside organizations, including community partners such as Spectrum Health

Updates will be provided to all participants as the law and best practices evolve, including a weekly email of significant postings.

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