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# NEW GUIDANCE FROM THE SBA: $100,000 CAP DOES NOT APPLY TO BENEFITS, AND PAYROLL COSTS SHOULD BE CALCULATED ON A GROSS BASIS

On April 6, the SBA updated its Paycheck Protection Program Loans Frequently Asked Questions, which provides much needed guidance to borrowers and lenders.

Many important questions were answered, including these two listed in italics:

***Question**: The CARES Act excludes from the definition of payroll costs any employee compensation in excess of an annual salary of $100,000. Does that exclusion apply to all employee benefits of monetary value?*

***Answer**: No. The exclusion of compensation in excess of $100,000 annually applies only to cash compensation, not to non-cash benefits, including:*

- *employer contributions to defined-benefit or defined-contribution retirement plans;*
- *payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums; and*
- *payment of state and local taxes assessed on compensation of employees.*

The $100,000 cap on payroll costs for each employee used in calculating the amount of a PPP loan under the CARES Act was widely interpreted to include cash compensation and other employee benefits. The SBA, however, clarified that only cash compensation was subject to the $100,000 cap. Other non-cash employee benefits, such as health insurance premiums and 401(k) contributions, can be included in payroll costs without regard to the $100,000 cap. This allows borrowers to be eligible for larger loan amounts.

***Question**: How should a borrower account for federal taxes when determining its payroll costs for purposes of the maximum loan amount, allowable uses of a PPP loan, and the amount of a loan that may be forgiven?*

***Answer**: Under the Act, payroll costs are calculated on a gross basis without regard to (i.e., not including subtractions or additions based on) federal taxes imposed or withheld, such as the employee's and employer's share of Federal Insurance Contributions Act (FICA) and*

*income taxes required to be withheld from employees. As a result, payroll costs are not reduced by taxes imposed on an employee and required to be withheld by the employer, but payroll costs do not include the employer's share of payroll tax.*

*For example, an employee who earned $4,000 per month in gross wages, from which $500 in federal taxes was withheld, would count as $4,000 in payroll costs. The employee would receive $3,500, and $500 would be paid to the federal government. However, the employer-side federal payroll taxes imposed on the $4,000 in wages are excluded from payroll costs under the statute.*

The FAQs state that borrowers and lenders may rely on the guidance provided by the SBA's interpretation of the CARES Act and PPP Interim Final Rule, which was discussed previously here. Further, the SBA makes clear that the U.S. government will not challenge actions taken by PPP lenders that conform to the guidance in the FAQs.

O'Neil, Cannon, Hollman, DeJong and Laing remains open and ready to help you. For questions or further information relating to the Paycheck Protection Program, please speak to your regular OCHDL contact, or the author of this article, attorney Jason Scoby.