

Employee Benefits as Payroll Costs under the Paycheck Protection Program

April 28, 2020

Businesses that received a loan under the Paycheck Protection Program (“PPP”) are eligible for forgiveness of that loan if, among other things, the loan proceeds are used to cover “payroll costs” incurred over the eight-week period after the loan is made. Payroll costs, capped at \$100,000 on an annualized basis for each employee (*i.e.*, \$15,384 over the eight-week period), are broadly defined to include, among other things:

- Salary, wages, commissions, or tips;
- Employee benefits costs, such as for vacation or paid family or medical leave (other than wages for which a credit is received under the Families First Coronavirus Response Act), group health care costs, retirement plan contributions, and severance benefits; and
- State and local taxes assessed on employee compensation.

As of the date of this posting, no guidance has been issued by the IRS or the Department of Treasury to further clarify what specific items qualify as payroll costs. In the interim, employers should consider applying a common-sense approach when determining which expenses qualify as payroll costs by limiting such expenses to payments made in the normal course of the employer’s operations. For instance:

- Salary, wages, commissions, or tips should include regular compensation paid during the eight-week period, but likely will not include bonus payments or other equity or incentive compensation awards or payments made during that period;
- Group health care costs should include the premium costs of coverage (*i.e.*, the employer’s portion of the premium, whether paid to an insurance company or assessed under a self-funded plan), but likely will not include claims submitted to a self-funded group health plan during the eight-week period;
- Retirement plan contributions should include employer matching, nondiscretionary, or profit sharing contributions made with respect to the eight-week period to the extent an employee has a right to the payment (whether under a qualified or nonqualified plan), but likely will not include (i) employer contributions that require the employee to remain employed with the employer on the last day of the plan year or (ii) accruals under a defined benefit plan; and
- Severance benefits should include payments scheduled for payment during the eight-week period but likely will not include payments that, by agreement or plan, were scheduled to be paid after the eight-week period that the employer unilaterally decides to accelerate into the eight-week period solely for the purpose of treating the payments as payroll costs.

Employers should carefully document what expenses they intend to treat as payroll costs for purposes of PPP loan forgiveness and be able to defend why such expenses fall into an eligible payroll cost category. In addition, we anticipate additional guidance will be issued, so employers should be ready to adjust the expenses they are treating as payroll costs to reflect any such guidance.