

Retirement Benefit Expenses Covered under the CARES Act's Paycheck Protection Program

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The Paycheck Protection Program (the "PPP") under the CARES Act aims to assist small businesses affected by COVID-19 by covering certain operating expenses as an incentive to retain employees during the crisis. Expenses, such as payroll costs, are used in the calculation of the amount of the available loan and in the amount that may be forgiven under the program. Notably, the PPP does not consider an individual's compensation in excess of \$100,000 annualized, prorated for the covered period, to be covered as a payroll cost. The payment of any retirement benefit[s] are among the payroll costs that are included. However, at this time, it is not entirely clear what is intended to be included in the payment of any retirement benefit. No formal guidance has been issued by the IRS or Treasury, and initial guidance issued by the U.S. Small Business Administration does not shed much light on this question. While the phrase appears broad, based on the intent of the PPP and the limited period of time during which expenses incurred may be forgiven, it is likely that a narrower interpretation of the phrase will be adopted (i.e., payments made solely as part of the employer's normal and current payroll costs). In this respect, it is likely that participant elective deferrals and matching employer contributions are covered and perhaps any normal payroll period payments to a multiemployer pension plan. However, it is less likely that profit sharing contributions or defined benefit funding obligations are covered. Until additional guidance is issued, small employers should look at their retirement plans (including, without limitation, 401(k) plans, pension plans, profit-sharing plans, 457 plans, nonqualified deferred compensation plans, etc.) and evaluate their expenses under such plans and when such expenses are required to be paid under the terms of such plans.