

Paycheck Protection Program: Which Employee Benefits Count as “Payroll Costs”

The Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020 created the Paycheck Protection Program (PPP). The PPP is implemented in the form of forgivable loans to small businesses to pay their employees during the COVID-19 crisis. The loan proceeds can be used to pay for, among other things, “payroll costs” incurred during an 8 week period (Applicable Loan Forgiveness Period).

Specifically, the CARES Act defines “payroll costs” to include: 1) salary, wages, commissions, or tips (capped at \$100,000 on an annualized basis for each employee); 2) employee benefits including costs for vacation, parental, family, medical, or sick leave; allowance for separation or dismissal; 3) payments required for the provision of group health care benefits including insurance premiums; 4) payment of any retirement benefit; 5) state and local taxes assessed on compensation; and 6) for a sole proprietor or independent contractor wages, commissions, income, or net earnings from self-employment, capped at \$100,000 on an annualized basis for each employee.

Unfortunately, the CARES Act did not further define the phrase “payment of any retirement benefit” or how the dollar cap was to be applied. The Department of Treasury and Small Business Administration (SBA) (the agency that oversees the PPP) have issued interim final rules and frequently asked questions (FAQs) which provide some guidance on this topic.

Most important for this purpose is FAQ-7 contained in the SBA FAQs dated April 6, 2020. The CARES Act excluded from the definition of “payroll costs” any employee compensation in excess of an annual salary of \$100,000. FAQ-7 provides that the exclusion of compensation in excess of \$100,000 annually applies only to cash compensation, not to non-cash benefits. FAQ-7 also provides that employer contributions to defined-benefit (DB) or defined-contribution (DC) 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 are not subject to the annual salary limitation.

This guidance confirms that contributions to DB and DC plans are excluded from the dollar cap limitation. Additionally, it appears that a contribution to either type of plan would constitute a “payroll cost” for purposes of the PPP. However, there are some unanswered questions. For instance, how do you determine the amount of the contribution to the DB or DC plan for these purposes?

Is the amount of the DB or DC contribution which is considered to be a “payroll cost” based on amounts “actually paid” or “attributable” to the Applicable Loan Forgiveness Period or is the amount of the contribution determined in another manner? Clear examples of amounts which would be a “payroll cost” would include elective deferrals (including pre-tax deferrals, ROTH contributions and catch-up contributions) to the extent that the deferral is made out of current income during the Applicable Loan Forgiveness Period, or matching contributions made and funded on a payroll by payroll basis during the Applicable Loan Forgiveness Period.

Determining the amount of discretionary matching contributions, a matching “true-up,” certain corrective contributions (e.g., qualified matching contributions or qualified nonelective contributions), discretionary profit sharing contributions and DB contributions seems less clear. Maybe those contributions are prorated and only a portion of the contribution would be deemed to be a “payroll cost.”

Without additional guidance, caution should be exercised in estimating contributions associated with certain retirement benefit arrangements in requesting loans under the PPP. Since the PPP is administered by a lender, it may be advisable to double check with the lender to determine if they have any particular requirements associated with the payment of retirement benefits.

Please contact your Bodman attorney or Dave Walters at (248) 743-6052 or dwalters@bodmanlaw.com if you have any questions. Bodman cannot respond to your questions or receive information from you without first clearing potential conflicts with other clients. Thank you for your patience and understanding.