Paycheck Protection Program: Common Questions and Updated Guidance

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Brian Carnevale:	My name is Brian Carnevale, I am your host for today's episode. We're going to dive into common questions about the latest round of the Paycheck Protection Program, more commonly known as "PPP." I'm joined today by Josh Steele, a partner in our labor and employment group and a member of our CARES Act team. In addition to his work counseling employers on a litany of labor and employment issues, Josh has been extremely active in this PPP space supporting clients with the application and forgiveness processes, as well as how to avoid or deal with fraud investigations. Josh, thanks so much for joining us to discuss this relief effort. It's an interest to so many organizations in New York State and nationwide.
Josh Steele:	Very happy to be here Brian.
Brian Carnevale:	So we'll launch right into it Josh, I think the biggest question that people have right now is what are the changes to PPP eligibility in this round of loans?
Josh Steele:	Well under the EAA, this past late December, we have some expanded eligibility rules in terms of borrowers under the PPP. So these are entities that previously weren't eligible for PPP loans and now they are. There are four new general categories of eligible entities. They are housing cooperatives, that don't employ more than 300 people; certain news organizations that don't employ more than 500 people per physical location; 501C6 non-profit organizations, as long as they are exempt from taxation under 501A if they don't employ more than 300 people and don't exceed some lobbying restrictions; and then also some destination marketing organizations that don't employ more than 300 people. Again, as long as they don't exceed certain limits on lobbying activities. On the flip side that is good news. The entities weren't eligible for loans in the spring or the summer now they are. There is also some new restrictions that are now applicable to PPP loans: if you weren't in operation on February 15th, 2020, you can't go now and get a loan; if you're getting covered under this other program which is a grant for shuttered venue operators, this is under the AA, if you're getting that you can't get a PPP loan; and if you are otherwise eligible but you have some owners of the entity that either they or their spouse are in certain branches of the federal government, you're not going to be eligible. If you're a publically traded company is a big one, they've come out and said just listen if you are a publically traded company you are

	not eligible anymore. A lot of publically traded companies did receive loans back in the spring. And then if you've permanently closed. So unfortunately if you've permanently closed due to the pandemic you're not eligible for a loan. These rules, these new eligibility with both expansions and the restrictions they apply both to first draw PPP loans and second draw PPP loans although there is additional eligibility criteria for the second draw PPP loans.
Brian Carnevale:	Josh you mentioned that those general changes in eligibility apply to first and second draw loans. What additional eligibility rules apply just to second draw PPP loans?
Josh Steele:	So, the additional eligibility criteria for second draw PPP loans, I'll just call them second draw loans, its easier moving forward. Is first you have to be an eligible entity, so to meet both the preexisting and the new eligibility criteria and you've received a first draw PPP loan. There is a different size restriction here for second draw loans. You, together with any affiliates have to have 300 or fewer total employees, the only exception to that is entities in the accommodation of food service industries that had this NAICS code beginning with 72. They have to have 300 or fewer employees at each location so that's the only exception to that. You have to have used or will have used the entire amount of your first draw loan on eligible expenses on or before the date of the second draw loan that is going to be disbursed. That won't be difficult for most followers but that is something they want to do. Again, you don't get a second draw unless you've completely used the first draw and I think the big one here and the one receiving the most press is you have to have experienced a qualifying revenue reduction in 2020 relative to 2019 rates of at least 25%. And that's, Brian, really the important element here, it's the most complicated and how they're defining that is very specific and they're looking at gross receipts and they define that gross receipts term so that's what people are looking at now is trying to see if they qualify for that 25% reduction on the second draw loans.
Brian Carnevale:	When it comes to what constitutes an eligible, forgivable expense, I feel like that was a pretty straightforward rundown in the first waves of PPP loans. Have there been changes to what is now considered forgivable or changes to the period of time covered?
Josh Steele:	Yeah, so there has been two changes and we'll flip this up a little bit to kind of differentiate between eligible uses of PPP proceeds and the uses of PPP proceeds that are eligible for forgiveness. There is a little bit of a difference there. So, initially under the PPP prior to this new legislation, the allowable uses for PPP loans were payroll costs which includes employee benefits and retirement benefits, that's a pretty broad category. It's been really well flushed out so you know what goes in there. Mortgage interest payments, rent payments, utility payments, interest on payments of any other debt obligation as long as it predated, you know, February 15th, 2020 and

	refinancing the idle loan if you took one of those out. Those are all allowable uses. However, not all of them were subject or capable of forgiveness. For example, the payments of other debt obligations, that wasn't subject to forgiveness and with respect to the refinancing of the SPA loan, that wasn't eligible for forgiveness so you could use it, but it wasn't eligible for forgiveness. The new legislation in the interim final rules have added four new categories both of allowable uses of PPP loans and all four of these are also capable of being forgiven. These apply both to, I think importantly here, second draw loans and also first draw loans if the SPA hasn't already remitted forgiveness to your lender for that loan or if that didn't occur prior to December 27th. So the important thing here is these apply to second draw loan and if anybody is still waiting for forgiveness in the first draw loans, these apply to those as well. Those four new elements are covered operational expenses, which is very specific definition related to business software or cloud computing services if it facilitates your business operations, think HRS, think inventory tracking, think some payroll expenses, that kind of, again, underneath the software or cloud computing service, covered property damage costs which they're referring there the second one is cost related to property damage or vandalism due to public disturbances that occurred during 2020 as long as they weren't covered by insurance or something else so you can't get double recovery. Covered supplier costs, which is probably the biggest one here which is expenditures that suppliers made for goods that were essential to their business during that and then the covered worker protection expenditures. These are looking at operating or capital expenditures that businesses had to incur in order to meet the guidance or requirements of you know, CDC, OSHA, HHS or state entities. Their rules relating to COVID-19 for the protection of employees and customers, think partitions between work spaces, think masks, think the addition of outdoor eating for restaurants, the addition of a new outdoor pick up window, things like that. Entities where you had to use expenditures in order to comply with some of the state or federal requirements to protect your workers or customers. The other thing you mentioned, Brian, in your question, was changes to the covered period. There wasn't significant change to that under the SPA as well. What that covered period can be referred to as a covered period, covered loan period, covered forgiveness period, it's the period of time after receipt of a loan and it starts on the date you actually received the loan proceeds but it's a period of time during which money that you spend on covered expenses, covered forgivable expenses, can be actually forgiven. So it's that period of time where you look at to see how much spent on allowable items that can give you forgiveness. Originally, under PPP, that was an 8 week period so it started on the date you received your loan and it lasted for 8 weeks. Then, when the PPP flexibility act was passed in the beginning of June, that changed that 8 week period to a 24 week period. Again, starting on the day that you received the loan for borrowers it had to have received the loan prior to this, the PPPSA, the flexibility act they could choose either 8 or 24 but it's still one of those

	two periods. Under the new rule, in the interim rules in the law, borrowers now have some more flexibility with respect to that covered period. It still has to start on the date you received the loan proceeds but now you can select a period of varying length anywhere between 8 and 24 weeks. So you can choose 9 weeks, you can choose 10 weeks, you can choose 8, you can choose 22. Any period of time in there you get to choose as a borrower. This does add a significant amount of flexibility with respect to the use of these loans it allows you to, if you have the money pursuant to the loan, kind of float it for a little bit longer and they kind of provided a flexibility to just allow you to get full forgiveness because a lot of borrowers with respect to the first period, you know, they had the choice between 8 and 24, well the problem was 8 weeks maybe they didn't use all the money yet on covered expense but if they went out to 24 weeks, they were in a position where their full time employee count went down so much during that subsequent time period that they resulted in a loss of forgiveness due to that full time approval and reduction. So they were kind of put between a rock and a hard place. This new approach, you know, provides them with the flexibility to choose the length that covered period to really tailor their needs and again, this applies to both second draw loans and first draw loans as long as SPA didn't remit forgiveness to your lender on that loan prior to December 27th, 2020.
Brian Carnevale:	That's really specific, really really helpful overview there. When you think about the guidance, is there anything else about forgiveness that remains a little bit unclear, a little bit fuzzy or, you know, should people have a really clear understanding at this point?
Josh Steele:	If you had asked me this question a few days ago I would have had a really long list of pretty significant concerns, with the biggest one being how are the preexisting forgiveness rules going to apply to second draw loans specifically with the previous reduction in forgiveness amount due to a reduction in an employer or borrowers full time equivalent count during the covered period. So big picture here, they want to encourage people to keep employees, they want to encourage borrowers to keep employees on the payroll so one of the ways they did that with the PPP was saying listen, we're going to compare what your average full time employee count is during this covered period and then we are going to compare that to a baseline period and if you're employee count during the covered period when you're using the loan is less, then we're going to reduce your forgiveness. That is something now that we weren't clear how they were going to apply that with a second draw loan. What was going to be the base period that we compare it to, was it going to be, you know, the day you received the loan proceeds, was it going to be some previous time during 2020, was it going to be some time prior to the COVID-19 pandemic. What was that base period really going to be compared against, the new rules now that were just issued, a couple days ago, Brian, we're looking at an employer can choose the base period of either February 15, 2019 through June 30, 2019 to get their base full time equivalent count or January 1, 2020 through February 29, 2020.

	There is also an additional separate rule for seasonal employers. The additional issue with respect to forgiveness are these new four allowable uses, right, the covered worker expenditures, the covered operational expenses, covered supplier costs and covered property damage. With respect to the allowable and forgivable use that were part of the initial PPP, we have had a ton of guidance on this, lots of FAQs, lots of different versions of rules come out that really have helped focus what falls in there with respect to these new ones, especially the covered supplier costs and the covered operational expenses, it's still unclear what exactly falls within those categories, especially around -, you know, the entirety of the definition for those right now is, you know, a paragraph of a couple sentences each for both of those categories. So what falls within those and what doesn't? That is going to be very significant and we just don't know that yet.
Brian Carnevale:	So I'm going to switch gears for a second here Josh just a little bit. It appears that PPP fraud investigations are increasing from the initial draws and, you know, you can see in the news that some of those investigations are, you know, quite blatant in the, in the misuse of loan funds but give our audience a little bit of color on the idea that, you know, even if a recipient did use the funds for appropriate purposes, are they still at risk for an investigation? What should they be mindful of, even when using those funds appropriately?
Josh Steele:	Yeah, Brian, that's a really good point and I, think, you know, obviously a lot of borrowers use the funds correctly and then might be surprised they still can be subject to some kind of audit and review. I think there is two things really to talk about here. One, when you're looking at these audit investigation, we're seeing that they are investigating technical and clerical errors with respect to the applications. The big one we're seeing here is affiliation. When the initial round of PPP applications came out they were confusing, they went through several different versions within the first couple weeks of that application for the PPP loans and borrowers were, you know, struggling to get those out quickly, work with their banks because they wanted the money so they could stay in business, you know, to pay their employees, so people were moving quickly and there was a lot of uncertainty especially around with respect to affiliations so that is kind of a clerical error or what you might consider, you know, something that is a technical error, nothing intentional here, maybe you didn't list all of your affiliates correctly, or maybe you didn't understand the question but now let's see you've applied for a second round, they're more clear about that so you do list your affiliates correctly, that could trigger an investigation. We're seeing things like that, similar to, you know, setting up your employee counts or calculating your payroll, we know really well what goes into calculating the loan amount now, but when we initially did that it wasn't that clear. What could be included, what couldn't be, there was issues with payments to 1099, independent contractors, initially there was some guidance indicating that they could be included in payroll costs subsequently its clear they're not. So these are all kind of technical errors or issues. Little bit of hindsight, you

	know, 2020, Monday morning quarterbacking with respect to these applications that we're seeing that can trigger this audit and investigation. The other big one, again we're assuming all the money was used correctly, usable allowable expenses, the other big one we're seeing here which is a big focus is the certification on the application that the loan was necessary due to economic uncertainty surrounding COVID at the time, they're really targeting that. That statement of necessity, that certification that the loan was necessary. They're looking at automatically any loan over two million is going to have to complete this questionnaire when they're asking for forgiveness. That questionnaire on loan necessity looks at not just what position you were in at the loan when the loan occurred, but when you apply it to the loan is also looking at, you know, how you fared over the months after you received the loan. Which again, doesn't necessarily go to the statement you made on the application but it's something they're looking at so that's another big one we're seeing a lot of activity on that and we expect that to continue specifically with that necessity certification on the loan application.
Brian Carnevale:	Josh I know that every organization is going to approach these loans differently they have different circumstances, they have different needs, but, you know if you can boil it down are there a few sort of common questions that you're getting from clients as they embark on this process?
Josh Steele:	Yeah, absolutely so I guess the common questions would be split into different categories. For people who have not yet submitted a forgiveness application that they expect to be given 100% forgiveness of their first draw PPP loan, for those individuals what they're really asking questions about is the forgiveness application. How can I try to boost the amount of forgiveness I get to get close to 100%, both under the preexisting standards and for these new rules, what falls within them, what are my next steps, you know, how can we get that 100% forgiveness. Another component of that is, you know, some of these safe harbors that apply to certain businesses there is a couple that are kind of nebulous, they're not really well described, we've got like two paragraphs that are very big safe harbors. The big one here is a safe harbor that avoids a reduction in forgiveness amount due to a full time equivalent employee reduction if you couldn't return to pre-covid levels due to, you know, compliance or a loss of business activity due to compliance with these federal or state guidelines on COVID-19. That's obviously a big one. I'm getting a lot of questions on that. So again the people that haven't yet submitted that first round forgiveness or they submitted it but they're not expecting 100% forgiveness they want to know under the new rules is there anything I can do to increase my forgiveness amount. On the flip side, with respect to the second draw loans, the big questions were seeing relate to eligibility and specifically as we discussed before, establishing and proving that they suffered that 25% loss in revenue so that they're eligible for the second draw loan. That's a big one, its technical that includes, you know, working with an attorney and accountants

	or a tax preparer to determine whether or not you meet that requirement and again, then making the same kind of certifications of necessity that you made with respect to the first loan. Those same certifications apply to the second draw loan. And then the other question with respect to second draw loans is forgiveness. How much of this can I expect to be forgiven or, what do I have to do if and when I receive this loan to set myself up to ensure that I am going to get as much forgiveness as possible.
Brian Carnevale:	Last question. These loans are our lifelines to many, many businesses and clearly there is so much to know, so many details to follow. If you're a business thinking about applying for a new loan or working on forgiveness from initial draw, how can an attorney aid in the process. How can you help them?
Josh Steele:	There is quite a few things we can do but I think that the big ones are we can help you feel comfortable, that you've a good faith basis for making the certifications on the loan that you're making with respect to things like necessity. With respect to things like, you know, the forgiveness application or forgiveness, we know what the rules are, we know what the pitfalls are and we can help guide you through that process and provide opinions on what you can and can't do so that you avoid making mistakes that you kind of pay for later. The second thing we can do is with respect to forgiveness applications, work with you to try to maximize that potential amount of forgiveness, work with your accountants. Again, we're not doing the math as attorneys but we are checking the math that is being done by somebody else that works for you, making sure its accurate, pointing out areas where there might be concerns, and then I think that the big one is getting you in a position so that once you get the loan, you have a really good idea of what you can use it on and if you use it in a way you're planning, how much will be forgiven because worst case scenario for a borrower and we were in this position a little bit with the first loan where we had clients giving loans before we had the rules on forgiveness. So the worst case scenario I said back then the worst case scenario was to get this loan, you spend it all, even though your business is not doing well, you spend it all on wages and covered expenses because you want to follow the rules and then you find out that something you did prevents you from getting forgiveness. So now you're in a worst position than you were in before because now you're not going to get forgiveness on the loan and you spent it on something that didn't result in a high amount of economic activity that could pay it back. So I think that is another thing in terms of peace of mind is putting you in a position so that you can know when you get the loan, you know how to spend it and you can have a really accurate assessment of how much will be forgiven when that period ends.

Brian Carnevale:	Josh thanks again for joining us. That was a really fantastical review of a subject that's very, very trending right now to say the least so, so we appreciate it. If you're organization has questions about pursuing a new PPP loan or forgiveness from an earlier loan, visit our website www.harrisbeach.com for more information including how to get in touch with Josh Steele. Thanks for listening.
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