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CARES Act Creates New $349 Billion SBA Loan Program to Offer Loans to Eligible Small Businesses

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A FREEBORN & PETERS LLP CLIENT ALERT

On March 27, 2020, Congress approved the Coronavirus Aid, Relief, and Economic Security Act (*the "CARES Act"*) to provide financial assistance to individuals and businesses. Title I of the CARES Act (*the "Keeping Workers Paid and Employed Act"*) includes several provisions intended to help small businesses suffering the adverse economic effects of the coronavirus (*"COVID-19"*). Among those is the establishment of a new loan program called the "Paycheck Protection Program" ("PPP") and the allocation of $349 billion for the making of PPP loans. Additionally, for eligible borrowers, a portion, and potentially all, of the amount of funds borrowed under this program may be forgiven without payment.



THE LOAN PROGRAM:

- **Who is eligible for a PPP loan?**

  The PPP is open to any of the following:

  - any business that qualifies as a small business under the current SBA rules;
  - any business concern, nonprofit organization, veterans organization, or Tribal business concern that employs less than (a) 500 employees total (*including across all affiliate entities*) or 500 employees per location for certain industries (*including hotels and restaurants*); or (b) where applicable, the larger size standard in number of employees established by the SBA for industry in which the subject entity operates;
  - individuals who operate under a sole proprietorship or as an independent contractor; and
  - individuals who are self-employed to the extent that: (a) they regularly carry on any trade or business within the meaning of Section 1402 of the Internal Revenue Code, and (b) they would be entitled to receive paid leave during the taxable year pursuant to the Emergency Paid Sick Leave Act (made part of the *Families First Coronavirus Response Act*) if they are an employee of an employer (other than himself or herself).

  In addition to the above, an applicant must have been in operation on or before February 15, 2020 and either have paid salaries and payroll taxes to employees (*including the applicant himself or herself, as applicable*) or have paid independent contractors, as reported on a Form 1099-MISC.

  Please note, unlike in connection with the SBA COVID-19 Disaster Recovery Loans, under the PPP an applicant is not required to evidence an "economic injury" or other adverse financial affect as a result of COVID-19.

- **How is the number of employees calculated and does it include independent contractors?**

  The standard rules for making this determination are identified in SBA Section 121.106. However, the PPP provides for certain amendments/modifications to these general rules for purposes of qualifying for a PPP loan, including waiving the related affiliation rules of SBA Section 121.103 with respect to hotel and restaurant applicants. With respect to independent contractors, based on the outstanding guidance surrounding the PPP to date, it does not appear that independent contractors should be included in determining the number of employees for PPP loan qualification.

  Notwithstanding the foregoing, determining the number of employees for purposes of qualifying for a PPP loan can include both full and part-time employees and requires a detailed and fact specific analysis of the applicable rules. **As such, we highly recommend that you contact a qualified attorney to assist you in making this determination as you will be required to make a formal certification as to the total number of employees as part of your PPP loan application. Our specialists can assist you in making this determination.**

- **Can I get a PPP Loan if I already received a SBA COVID-19 Disaster Recovery Loan?**

  Under the PPP an applicant who received a SBA COVID-19 Disaster Recovery Loan (*i.e. a Section 7(b)(2) loan*) between January 31, 2020 and the respective PPP loan application date may elect to refinance such disaster recovery loan and roll the principal amount of the same into their new PPP loan.

- **How much can I get?**

  The maximum loan amount a particular applicant will be eligible for will be based primarily on the average total monthly payment for "payroll costs" as defined in the CARES Act made by the subject applicant during the applicable calculation period, determined as follows:

    - for an applicant that was not in business during the period of February 15, 2019 through June 30, 2019, the applicable calculation period is January 1, 2020 through February 29, 2020;

    - for an applicant that is a seasonal employer and that was in business during the period of February 15, 2019 through June 30, 2019, the applicable calculation period is from February 15, 2019 (*or March 1, 2019, if elected by the subject applicant*) through June 30, 2019; and

    - for all other applicants, the applicable calculation period is the one year period before the date on which the loan is made.

  An eligible applicant may borrow a maximum amount equal to the lesser of:

    - an aggregate amount equal to: (a) the total outstanding principal amount of SBA COVID-19 Disaster Recovery Loans received by the applicant as of the PPP loan application date (*if any*); plus (b) an amount equal to 2.5 times the respective average total monthly amount of "payroll costs" for the subject period; or

    - $10 Million.

  Under the PPP, "payroll costs" are limited to the following:

    - with respect to sole-proprietor and independent contractor applicants, payments made with respect to wages, commissions, income, net earnings from self-employment or similar compensation (*exclusive of any compensation in excess of an annual amount of $100,000, as prorated for the covered period*); and

    - with respect to all other applicants,

        - payments made to employees with respect to salaries, wages, commissions, or similar compensation

(*exclusive of the compensation of an individual employee in excess of an annual salary of $100,000, as prorated for the covered period, any compensation of an employee whose principal place of residence is outside the United States and any payments made to non-employees including independent contractors*);

- payments made to employees with respect to vacation, parental, family, medical, or sick leave;
- cash tips or equivalent paid to employees;
- payments made with respect to the dismissal or separation of any employee(s);
- payments made with respect to the provision of group health care benefits, including insurance premiums;
- payments made with respect to retirement benefits of any employee(s); and
- state and local tax assessed on, or otherwise with respect to, all compensation payments made to employees.

In either case above, payroll costs do NOT include: (a) the compensation of an individual employee in excess of $100,000 in one year, as prorated for the subject period; (b) taxes imposed or withheld under Chapter 21 (*the Federal Insurance Contributions Act*), Chapter 22 (*the Railroad Retirement Tax Act*) or Chapter 24 (*the Collection of Income Tax at Source of Wages*) of the Internal Revenue Code of 1986; (c) any compensation of an employee whose principal place of residence is outside of the United States; (d) qualified sick-leave wages for which a credit is allowed under Section 7001 of the Families First Coronavirus Response Act, or (e) qualified family-leave wages for which a credit is allowed under Section 7003 of the Families First Coronavirus Response Act.

To aid in calculating the maximum loan amount you may be eligible for, we have created the attached "Loan Amount Calculation" worksheet. **PLEASE NOTE: the attached worksheet is being provided for educational and informational purposes only, should not be relied upon, and is not intended and should not be construed as legal advice. We highly recommend that you contact a qualified attorney to assist you in making the applicable calculations and our specialists can assist you in that process.**

- **What can PPP loan funds be used for?**

Until June 30, 2020, loan funds may only be used to pay one or more of the following expenses:

- direct payroll costs;
- costs related to the continuing of group health care benefits (*including paid sick, medical, or family leave and insurance premiums*);
- employee salaries, commissions, or similar compensation;
- payments of interest on any mortgage obligation (*specifically excluding the payment or prepayment of principal);*
- rent (*including rent under any lease agreement*);
- utilities; and
- interest on other debt obligations that were incurred before February 15, 2020.

- **What is the rate/term of a PPP loan?**

  Per the CARES Act, a PPP loan will have a maximum interest rate of 4% and a maximum repayment term of 10 years. It should be noted however that per the current information available on the SBA's PPP loan website a PPP loan will have an interest rate of only .5% and a repayment term of 2 years.

- **Is there any required collateral and/or guaranty for a PPP loan?**

  No collateral or personal guarantee is required in connection with a PPP loan. Additionally, PPP loans are expressly non-recourse to the shareholders, members, and partners (*as applicable*) of the subject borrower so long as the loan funds are used for a permitted purpose.

- **How do you apply for a PPP loan?**

  PPP loans must be applied for by June 30, 2020 and the U.S. Treasury recently released a form of PPP loan application. However, those interested in obtaining a PPP loan should contact an SBA accredited lender to find out exactly how to apply and what additional information will be required in connection with the application, if any.

POTENTIAL LOAN FORGIVENESS:

A borrower who obtains a PPP loan may qualify for forgiveness of a portion (*and potentially all*) of the principal of the indebtedness if, and to the extent, the loan funds were used during the eight-week period commencing on the opening of the respective loan (*the "**Forgiveness Period**"*) to fund any one or more of the following (*collectively, the "**Eligible Forgiveness Amount**"*):

- payroll costs;
- payments of interest on indebtedness secured by a mortgage on real or personal property that was incurred prior to February 15, 2020;
- payments on leases entered into and in force prior to February 15, 2020; and
- payments for all utilities that were in service prior to February 15, 2020.

Notwithstanding the foregoing, it should be noted that per the current information available on the SBA's PPP loan website at least 75% of the Eligible Forgiveness Amount must be from the payment of "payroll costs" only. As no such limitation is identified in the language in the CARES Act itself, the foregoing limitation percentage is subject to change.

In any case, the total amount that can be forgiven will be capped at the total principal amount of the loan. In addition, the actual amount that will be forgiven will be subject to 2-step potential reduction based on whether the borrower has reduced its staff and/or decreased employee salaries during the Forgiveness Period.

In the first step, a borrower's respective Eligible Forgiveness Amount will be multiplied by a percentage (*respectively, the "**Applicable Percentage**"*). The Applicable Percentage with respect to a borrower will be the lesser of 100% and the quotient resulting from dividing the numerator described below by the applicable denominator described below:

Average number of full-time equivalent employees employed by the subject borrower during the Forgiveness Period

(A)	OR	(B)
Average number of full-time equivalent employees employed by the subject borrower from February 15, 2019 – June 30, 2019	*(at borrower's election; except for seasonal employers who must use the period in column (A))*	Average number of full-time equivalent employees employed by the subject borrower from January 1, 2020 – February 29, 2020

In the second step, the resulting amount after the application of the above will be subject to further reduction based on any salary reductions made by the subject borrower with respect to its employees during (*and prorated for, as applicable*) the Forgiveness Period, if and to the extent that, on a per person basis:

- the subject employee did not, for any pay period in 2019, receive wages or salary of $100,000 (*annualized*) or more; and
- such salary or wage reduction is in excess of 25% of the total salary/wages paid to the subject employee for the most recent full quarter prior to the Forgiveness Period.

Notwithstanding the foregoing, a borrower who has reduced its staff and/or decreased employee salaries between February 15, 2020 and April 26, 2020 would be able to reverse any resulting reduction in the forgiveness amount if they "eliminate" the reduction by re-hiring such terminated employee(s) (*or hire an equal number of new employees*) and/or reverse the subject salary reductions, as applicable, prior to June 30, 2020.

In order to be eligible for loan forgiveness an eligible borrower will need to submit an application to the respective lender servicing the subject loan, after the expiration of the respective Forgiveness Period, which must include:

- documentation verifying the number of full-time equivalent employees on payroll and pay rates during each of the applicable periods discussed above, including all related:
    - payroll tax filings reported to the IRS; and
    - state income, payroll and unemployment insurance filings;
- documentation verifying payments made on covered mortgage obligations, rent, or utility payments (*including cancelled checks, payment receipts, transcripts of accounts or other documentation*);
- a certification from the respective borrower certifying that:
    - all submitted documentation is true and correct; and
    - the amount for which forgiveness is requested was used to retain employees, make interest payments on a covered mortgage obligation, make payments on a covered rent obligation and/or to make covered utility payments; and
- such other documents and agreements as the SBA and/or the servicing lender may require.

Within 60 days from the receipt of a loan forgiveness application the servicing lender will issue a decision as to the forgiveness of the subject amounts. **To the extent forgiven, such amounts will be considered canceled indebtedness by a lender (*authorized under Section 7(a) of the Small Business Act*) and may be excluded from the gross income of the borrower.** To the extent not forgiven the remainder of the loan will continue to bear interest, and be payable pursuant to the terms of the loan, through the remainder of the loan term.

To aid in calculating the maximum loan forgiveness amount you may be eligible for we have created the attached "Loan Forgiveness Calculation" worksheet. **PLEASE NOTE: the attached worksheet is being provided for educational and informational purposes only, should not be relied upon, and is not intended and should not be construed as legal advice. We highly recommend that you contact a qualified attorney to assist you in making the applicable calculations and our specialists can assist you in that process.**

We will continue to follow this and the other CARES Act programs and offer updates as further developments arise. If you have any questions, please contact Anthony Zeoli, Steven Hartmann, Karen Hayes and Meghan Tepas, and stay tuned for more developments on Freeborn's COVID-19 webpage.

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LOAN CALCULATION WORKSHEET

FOR SOLE-PROPRIETOR AND INDEPENDENT CONTRACTOR APPLICANTS:

1.	Total amount of actual payments made during the Calculation Period* with respect to wages, commissions, income, net earnings from self-employment or similar compensation:	$_____	
2.	**Sub-Total (*being the amount in line (1)*):**		**$_____**
3.	Total amount of actual payments made during the Calculation Period included in line (1) that exceeds an annual amount of $100,000, as prorated for the Calculation Period *(if any)*:	$_____	
4.	Total amount of taxes imposed or withheld under Chapters 21, 22, or 24 of the Internal Revenue Code of 1986 during the Calculation Period (*if any*):	$_____	
5.	**Sub-Total (*being the sum of lines (3) and (4)*):**		**$_____**
6.	Total applicable payroll costs (*being the result of the amount in line (2) minus the amount in line (5)*):	$_____	
7.	Average total monthly payment for payroll costs (*being the amount in line (6) divided by the total number of months (including any fractional part thereof) in the Calculation Period*):	$_____	
8.	Adjusted total monthly payment for payroll costs (*being the amount in line (7) multiplied by 2.5*):	$_____	
9.	Principal amount of SBA COVID-19 Disaster Loans (*i.e. Section 7(b)(2) loans*) received on or after January 31, 2020 and prior to the loan application date *(if any)*:	$_____	
10.	**Sub-Total (*being the sum of lines (8) and (9)*):**		**$_____**
11.	**TOTAL Eligible Maximum Loan Amount *(being the lesser of: (i) the amount in line (10); and (ii) $10,000,000:***		**$_____**

* The applicable calculation period with respect to a particular applicant (respectively, the "***Calculation Period***") means:

- for an applicant that was not doing business during the period of February 15, 2019 through June 30, 2019, the period from January 1, 2020 through February 29, 2020;
- for all other applicants, the applicable calculation period will be the one-year period before the date on which the loan is made.

This worksheet is provided by Freeborn & Peters LLP and its affiliates for educational and informational purposes only, should not be relied on, and is not intended and should not be construed as legal advice. Further, neither Freeborn & Peters LLP nor any of its affiliates assumes, or will otherwise be responsible for, any liability whatsoever in connection with the use of this worksheet.

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LOAN CALCULATION WORKSHEET

FOR NON-INDIVIDUAL APPLICANTS:

1. Total amount of actual payments made to employees during the Calculation Period* with respect to salaries, wages, commissions, or similar compensation: $_____

2. Total amount of cash tips or equivalent actually paid to employees during the Calculation Period: $_____

3. Total amount of actual payments made to employees during the Calculation Period with respect to vacation, parental, family, medical, or sick leave: $_____

4. Total amount of actual payments made during the Calculation Period with respect to the dismissal or separation of any employee(*s*): $_____

5. Total amount of actual payments made during the Calculation Period with respect to the provision of group health care benefits, including insurance premiums: $_____

6. Total amount of actual payments made during the Calculation Period with respect to retirement benefits of any employee(*s*): $_____

7. Total amount of all state and local tax assessed on, or otherwise with respect to, all compensation payments made to employees during the Calculation Period: $_____

8. **Sub-Total (*being the sum of lines (1) through (7)*):** **$_____**

9. Total amount of actual payments made to employees during the Calculation Period included in line (1) that, on a per person basis, exceeds an annual salary of $100,000, as prorated for the Calculation Period *(if any)*: $_____

10. Total amount of actual payments made to employees during the Calculation Period included in line (1) that are paid to an employee whose principal place of residence is outside of the United States (*if any*): $_____

11. Total amount of taxes imposed or withheld under Chapters 21, 22, or 24 of the Internal Revenue Code of 1986 during the Calculation Period (*if any*): $_____

12. **Sub-Total (*being the sum of lines (9) through (11)*):** **$_____**

13. Total applicable payroll costs (*being the result of the amount in line (8) minus the amount in line (12)*): $_____

14. Average total monthly payment for payroll costs (*being the amount in line (13) divided by the total number of months (including any fractional part thereof) in the Calculation* $_____

Period):

15. Adjusted total monthly payment for payroll costs (*being the amount in line (14) multiplied by 2.5*): $_____

16. Principal amount of SBA COVID-19 Disaster Loans (*i.e. Section 7(b)(2) loans*) received on or after January 31, 2020 and prior to the loan application date *(if any)*: $_____

17. **Sub-Total (*being the sum of lines (15) and (16)*):** **$_____**

18. **TOTAL Eligible Maximum Loan Amount *(being the lesser of: (i) the amount in line (17); and (ii) $10,000,000:*** **$_____**

* The applicable calculation period with respect to a particular applicant (respectively, the "***Calculation Period***") means:

- for an applicant that was not in business during the period of February 15, 2019 through June 30, 2019, the period from January 1, 2020 through February 29, 2020;
- for an applicant that is a seasonal employer and that was in business during the period of February 15, 2019 through June 30, 2019, the period from February 15, 2019 (*or March 1, 2019, if elected by the subject applicant*) through June 30, 2019; and
- for all other applicants, the applicable calculation period will be the one-year period before the date on which the loan is made.

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LOAN FORGIVENESS WORKSHEET
(FOR SOLE-PROPRIETOR AND INDEPENDENT CONTRACTOR BORROWERS)

1. CALCULATION OF TOTAL ELIGIBLE PAYROLL COSTS:

(a) Total amount of actual payments made during the 8 week period commencing on the start of the loan (*the "**Forgiveness Period**"*) with respect to wages, commissions, income, net earnings from self-employment or similar compensation: $_____

(b) **Sub-Total (*being the amount in line 1(a)*):** **$_____**

(c) Total amount of actual payments made during the Forgiveness Period included in line 1(a) that exceeds an annual amount of $100,000, as prorated for the Forgiveness Period *(if any)*: $_____

(d) Total amount of taxes imposed or withheld under Chapters 21, 22, or 24 of the Internal Revenue Code of 1986 during the Forgiveness Period (*if any*): $_____

(e) **Sub-Total (*being the sum of lines 1(c) and 1(d)*):** **$_____**

(f) **TOTAL** ***(being the amount in line 1(b) minus the amount in line 1(e) – the "Eligible Payroll Costs")*:** **$_____**

2. CALCULATION OF TOTAL ELIGIBLE FORGIVENESS AMOUNT:

(a) Total Eligible Payroll Costs (*from line 1(f) above*): $_____

(b) Total amount of actual interest payments made during the Forgiveness Period on all indebtedness secured by a mortgage on real or personal property that was incurred prior to February 15, 2020 (*i.e. "covered mortgage obligations"*): $_____

(c) Total amount of actual payments made during the Forgiveness Period on all leases entered into and in force prior to February 15, 2020 (*i.e. "covered rent obligations"*): $_____

(d) Total amount of actual payments made during the Forgiveness Period for all utilities that were in service prior to February 15, 2020 (*i.e. "covered utility payments"*): $_____

(e) **TOTAL** ***(being the sum of lines 2(a) through 2(d) – the "Eligible Forgiveness Amount")*:** **$_____**

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LOAN FORGIVENESS WORKSHEET
(FOR NON-INDIVIDUAL BORROWERS)

1. CALCULATION OF TOTAL ELIGIBLE PAYROLL COSTS:

(a) Total amount of actual payments made to employees during the 8 week period commencing on the start of the loan (*the "**Forgiveness Period**"*) with respect to salaries, wages, commissions, or similar compensation: $_____

(b) Total amount of cash tips or equivalent actually paid to employees during the Forgiveness Period: $_____

(c) Total amount of actual payments made to employees during the Forgiveness Period with respect to vacation, parental, family, medical, or sick leave: $_____

(d) Total amount of actual payments made during the Forgiveness Period with respect to the dismissal or separation of any employee(*s*): $_____

(e) Total amount of actual payments made during the Forgiveness Period with respect to the provision of group health care benefits, including insurance premiums: $_____

(f) Total amount of actual payments made during the Forgiveness Period with respect to retirement benefits of any employee(*s*): $_____

(g) Total amount of all state and local taxes assessed on, or otherwise with respect to, all compensation payments made to employees during the Forgiveness Period: $_____

(h) **Sub-Total (*being the sum of lines 1(a) through 1(g)*):** **$_____**

(i) Total amount of actual payments made to employees during the Forgiveness Period included in line 1(a) above that, on a per person basis, exceeds an annual salary of $100,000, as prorated for the Forgiveness Period *(if any)*: $_____

(j) Total amount of actual payments made to employees during the Forgiveness Period included in line 1(a) above that are paid to an employee whose principal place of residence is outside of the United States (*if any*): $_____

(k) Total amount of taxes imposed or withheld under Chapters 21, 22, or 24 of the Internal Revenue Code of 20 1986 during the Forgiveness Period (*if any*): $_____

(l) **Sub-Total (*being the sum of lines 1(i) through 1(k)*):** **$_____**

(m) **TOTAL** ***(being the amount in line 1(h) minus the amount***

***in line 1(l) - the "Eligible Payroll Costs")*:** **$_____**

2. CALCULATION OF TOTAL ELIGIBLE FORGIVENESS AMOUNT:

(a) Total Eligible Payroll Costs (*from line 1(m) above*): $_____

(b) Total amount of actual interest payments made during the Forgiveness Period on all indebtedness secured by a mortgage on real or personal property that was incurred prior to February 15, 2020 (*i.e. "covered mortgage obligations"*): $_____

(c) Total amount of actual payments made during the Forgiveness Period on all leases entered into and in force prior to February 15, 2020 (*i.e. "covered rent obligations"*): $_____

(d) Total amount of actual payments made during the Forgiveness Period for all utilities that were in service prior to February 15, 2020 (*i.e. "covered utility payments"*): $_____

(e) **TOTAL** ***(being the sum of lines 2(a) through 2(d) – the "Eligible Forgiveness Amount"):**** **$_____**

3. CALCULATION OF ACTUAL FORGIVENESS AMOUNT:

(a) Total Eligible Forgiveness Amount (*from line 2(e)*): $_____

(b) Average number of full-time equivalent employees employed during the Forgiveness Period:** _____

(c) Average number of full-time equivalent employees employed from February 15, 2019 – June 30, 2019:** _____

(d) Average number of full-time equivalent employees employed from January 1, 2020 – February 29, 2020:** _____

(e) The number in line 3(b) divided by either the number in line 3(c) or line 3(d) (*in borrower's discretion, provided that seasonal employers must use the number in line 3(c)*); expressed as a percentage): _____%

(f) **Sub-Total (*being the amount from line 3(a) multiplied by the lesser of: (i) the percentage in line 3(e) above; and (ii) 100%*):** **$_____**

(g) Total amount of salary reductions made with respect to employees during (*and prorated for, as applicable*) the Forgiveness Period, if and to the extent that, on a per person basis:

- such employee did NOT, for any pay period in 2019, receive wages or salary of $100,000 (*annualized*) or more; and
- such reduction is in excess of 25% of the total salary/wages paid to the subject employee for the most recent full quarter prior to the Forgiveness Period: $_____

(h) Total amount of salary reductions included in line 3(g) that:

- were made between February 15, 2020 and April 26, 2020; and
- on a per person basis, were reversed prior to June 30, 2020: $_____

(i) **Sub-Total (*being the amount from line 3(g) minus the amount from line 3(h)*):** **$_____**

(j) **Sub-Total (*being the amount from line 3(f) minus the amount from line 3(i)*):** **$_____**

(k) **TOTAL (*being the lesser of the amount in line 3(j) and the full principal amount of the loan*):** **$_____**

**Please note, as of the date of distribution of this worksheet, per the current information available on the SBA's PPP loan website, at least 75% of the Eligible Forgiveness Amount must be from the payment of "payroll costs" only. As no such limitation is identified in the language in the CARES Act itself, the foregoing limitation percentage is subject to change.*

***For the purposes of calculating:*

- *the number of full-time equivalent employees in lines 3(b), 3(c) and 3(d), the average number of full-time equivalent employees is to be determined by calculating the average number of full-time equivalent employees for each pay period falling within a month; and*
- *the number of full-time equivalent employees in line 3(b), to the extent any full-time equivalent employee was terminated between February 15, 2020 and April 26, 2020, and the company rehires such employee (or hires a new employee) prior to June 30, 2020; such employee position will will be considered to have been filled for the entirety of the Forgiveness Period.*

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