U.S. Small Business Administration Releases New FAQ Document on PPP "Safe Harbor" for Loans Under $2 Million

Recently, the U.S. Small Business Administration, in consultation with the U.S. Department of Treasury, released an updated FAQ document concerning the implementation of the Paycheck Protection Program (PPP). Through this document, we learned that the SBA has determined that loans with an original principal amount of less than $2 million will be deemed to have made the requisite certification regarding the necessity of the loan "in good faith." This information is tremendously helpful for those who are awaiting guidance on the forgiveability of PPP loans.

In particular

46. Question: How will SBA review borrowers' required good-faith certification concerning the necessity of their loan request?

Answer: When submitting a PPP application, all borrowers must certify in good faith that "current economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant." SBA, in consultation with the Department of the Treasury, has determined that the following safe harbor will apply to SBA's review of PPP loans with respect to this issue: Any borrower that, together with its affiliates, received PPP loans with an original principal amount of less than $2 million will be deemed to have made the required certification concerning the necessity of the loan request in good faith.

SBA has determined that this safe harbor is appropriate because borrowers with loans below this threshold are generally less likely to have had access to adequate sources of liquidity in the current economic environment than borrowers that obtained larger loans. This safe harbor will also promote economic certainty as PPP borrowers with more limited resources endeavor to retain and rehire employees. In addition, given the large volume of PPP loans, this approach will enable SBA to conserve its finite audit resources and focus its reviews on larger loans, where the compliance effort may yield higher returns.

Importantly, borrowers with loans greater than $2 million that do not satisfy this safe harbor may still have an adequate basis for making the required good-faith certification, based on their individual circumstances in light of the language of the certification and SBA guidance. SBA has previously stated that all PPP loans in excess of $2 million, and other PPP loans as appropriate, will be subject to review by SBA for compliance with program requirements set forth in the PPP Interim Final Rules and in the Borrower Application Form. If SBA determines in the course of its review that a borrower lacked an adequate basis for the required certification concerning the necessity of the loan request, SBA will seek repayment of the outstanding PPP loan balance and will inform the lender that the borrower is not eligible for loan forgiveness. If the borrower repays the loan after receiving notification from SBA, SBA will not pursue administrative enforcement or referrals to other agencies based on its determination with respect to the certification concerning necessity of the loan request. SBA's determination concerning the certification regarding the necessity of the loan request will not affect SBA's loan guarantee.

Wage and Hour Division Issues Final Rule Providing Uniform Analysis for Employers to Determine whether They Qualify as Retail or Service Establishments

Today the U.S. Department of Labor's Wage and Hour Division (WHD) announced a final rule to provide one analysis for all employers when determining whether they qualify as "retail or service" establishments for purposes of an exemption from overtime pay applicable to commission-based employees.

Section 7(i) of the Fair Labor Standards Act (FLSA) provides an exemption from the FLSA's overtime pay requirement for certain employees of retail or service establishments paid primarily on a commission basis. Today's rule withdraws two provisions from WHD's regulations. The first withdrawn provision listed industries that WHD viewed as having "no retail concept" and thus were categorically ineligible to claim the section 7(i) exemption. The second withdrawn provision listed industries that, in WHD's view, "may be recognized as retail" and thus were potentially eligible for the exemption. As the rule explains, some courts have questioned whether these lists lack any rational basis.

As a result of the withdrawal of these two lists, establishments in industries that had been on the non-retail list may now assert that they have a retail concept, and if they meet the existing definition of retail and other criteria, may qualify to use the exemption. These other criteria include paying a regular rate at least one and a half times the minimum wage and providing commissions that comprise more than half the employee's compensation for a representative period. Some establishments on the withdrawn non-retail list may have been deterred from availing themselves of the exemption and its compensation flexibilities. If establishments on the withdrawn non-retail list now qualify for the exemption, they have added flexibility regarding commission-based pay arrangements with their workers. For these employers and workers, they could consider whether, for instance, more commission-based pay is sensible.

Establishments in industries that had been on the "may be" retail list may continue to assert that they have a retail concept. Moving forward, WHD will apply the same analysis to all establishments to determine whether they have a retail concept and qualify as retail or service establishments, promoting greater clarity for employers and workers alike.

WHD is issuing this rule without notice and comment, and it will take effect immediately. Notice and comment and delaying the effective date are not required because both lists being withdrawn were part of WHD's interpretive regulations and were originally issued in 1961 without notice and comment or a delay.