

Legislative Update, Issues and Considerations in Re-Opening Business

4.24.20



Paycheck Protection Program

We are hearing from many employers that have received approval for the Paycheck Protection Program (PPP).

As you know this loan provides 8 weeks of payroll:

- Up to a maximum of \$100,000 in salary
- Commissions
- Paid sick or medical (excluding the tax credit provided under FFCRA)
- Healthcare benefits
- Retirement benefits
- Mortgage
- Rent
- Utilities



PPP Loan Forgiveness

- The loan is forgiven if at least 75% of the money is used for payroll.
- Any loan amounts that are not forgiven at the end of one year is carried forward as an ongoing loan with terms of a maximum of 10 years, at a maximum 4% interest.
- Loans under the PPP is available to eligible employers from April 11th, 2020 through June 30th, 2020.
- As of April 16th, 2020 the money ran out. However, it is recommended that employers still apply for the loan. The Trump administration and the Democrats are discussing how to add additional funds to it.



PPP Loan Forgiveness

1. The loan is forgiven if employees remain on the payroll during the 8 week time period provided that the employer maintain the same level (no more than a 25% reduction) in payroll.
2. If more than 25% reduction occurs, the forgiveness will be reduced by the percent decrease in the number of employees.
3. If your total payroll expense on workers making less than \$100,000 annually decreases by more than 25%, loan forgiveness is reduced by the same amount.
4. If you have already laid off employees, you can still be forgiven for the full amount of your payroll if you rehire your employees by June 30th, 2020.



What To Do Now

- If you have furloughed or laid off your employees, you will need to rehire them.
- We are recommending that employers send a certified letter to each employee communicating the return to work.
- Employee's should then notify unemployment that they have been rehired.



Issues

Q: I don't have work for my employees to do, do I still need to rehire them?

A: Yes. If you would like to be forgiven for the PPP loan, you will need to rehire your employees, even if you don't have work for them.

Q: I would like to rehire my employee, but they are refusing to come to work. They are telling me that they will make more money if they stay on unemployment.

A: Staying on unemployment when they have a valid job offer is not an option. It would be considered fraud. Each state has a fraud division and will be looking into claims. If an employee is caught, they will need to repay the money, pay a fine and possible jail time.

Unemployment – Fraud Alert

- Last week, the Inspector General at the US Department of Labor issued an Unemployment Fraud Alert.
- In a fraudulent scheme, scammers are offering to help people file claims for unemployment. They are asked for personal information including their social security numbers and dates of birth.
- They are asking people to provide payment or credit card information, in assisting you to filing or qualifying for your unemployment benefits.
 - **Your employees do not need to pay anyone to file or qualify them for benefits
 - **To report an allegation of fraud contact the OIG Hotline at www.oig.dol.gov/hotline.htm or 202-693-6999.

Unemployment - Stimulus

- Eligibility for Pandemic Unemployment Assistant (PUA) includes those individuals not eligible for regular unemployment compensation or extended benefits under state or federal law or Pandemic Emergency Unemployment Compensation (PEUC), including those who have previously exhausted their rights to benefits.
- Covered individuals also include self-employed individuals, 1099 workers, gig workers, those seeking part-time employment, and individuals lacking sufficient work history.
- Depending on state law, covered individuals may also include clergy and those working for religious organizations who are not covered by regular unemployment compensation.

Unemployment - Stimulus

Benefits extend for up to 39 weeks for qualifying individuals who are otherwise able to work and available for work within the meaning of state law, except that they are unemployed, partially unemployed, or unable or unavailable to work due to COVID-19 related reasons, as defined in the CARES Act, as set forth below:

- The individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and is seeking a medical diagnosis;
- A member of the individual's household has been diagnosed with COVID-19;
- The individual is providing care for a family member or a member of the individual's household who has been diagnosed with COVID-19;
- A child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;

Unemployment - Stimulus

- The individual is unable to reach the place of employment because of a quarantine imposed as a direct result of the COVID-19 public health emergency;
- The individual is unable to reach the place of employment because the individual has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;
- The individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of the COVID-19 public health emergency;
- The individual has become the breadwinner or major support for a household because the head of the household has died as a direct result of COVID-19;

Unemployment - Stimulus

- The individual has to quit his or her job as a direct result of COVID-19; or
- The individual's place of employment is closed as a direct result of the COVID-19 public health emergency.
- Benefit payments under PUA are retroactive, for weeks of unemployment, partial employment, or inability to work due to COVID-19 reasons starting on or after January 27, 2020. The CARES Act specifies that PUA benefits cannot be paid for weeks of unemployment ending after December 31, 2020.
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Issues

Q: My employee does not want to come to work because they are afraid of catching COVID19. I am going to fire them and they can stay on unemployment.

A: Proceed with caution. If the employee has a reason to be afraid of coming to work, they may be a protected right under section 502 of the NLRA and OSHA's General Duty Clause. Dig a little deeper to find out why the employee is so fearful and see if you can mitigate the fear by explaining the steps to the employee you are taking to make the workplace safe.

My Employee Is Afraid

An employee doesn't want to return to work due to fear.

- Speak with the employee to get an understanding as to where the fear is coming from
- Make sure you are following guidance from the CDC, OSHA along with state directives for infection prevention measures.
- Consider your PTO policies and apply them consistently.
- Strongly consider legal risks and seek advice before disciplining staff.
- The OSHA "general duty" clause and the NLRA protects employees from working in dangerous conditions.

Employees With Underlying Medical Conditions

Certain medical conditions are at higher risk for more severe illness (including death) if they contract COVID19:

- Chronic Medical Conditions – chronic medical conditions such as lung disease, serious heart conditions, diabetes.
- Immunocompromising conditions – cancer, autoimmune, etc.

American's With Disability Act (ADA)

Requires employers to reasonably accommodate employees that may have an underlying medical conditions.

- Requests for leaves or telework due to increase risk for COVID is a request for an accommodations.
- Employers are required to enter the interactive process as they would with any other physical or mental condition.
- Employers may request documentation, use our leave of absence form. Be cautious of medical documentation.

Age Discrimination in Employment Act

The ADEA does not require employers to reasonably accommodate older people who are requesting not to work as a result of COVID. However employers should not treat older employees differently than other employees.

Pregnant Employees

- Pregnant employees – should be treated the same as other employees. If a pregnant employee requests an accommodation, the employer should get into an interactive process with the employee. IF they have a medical condition that maybe covered by ADA, a reasonable accommodation and interactive process may be put into play. Pregnancy itself is not a disability.
- Do NOT layoff a pregnant employee because you are concerned about them contracting COVID19. The pregnant employee would need to ask you for an accommodation.

How Do I Re-Hire Employees?

- You will bring employees back onto your payroll as though there was no break in service.
- If employees were removed from benefits, they should be put back on your plans.
- If retirement plans stopped, they should be restarted
- If your employees don't have their regular work to do, consider other project work that they can help out with. Be cautious of having Exempt employees working on non-exempt tasks as it may cause them to lose the Exempt designation.

Form I9- New Hires

- USCIS has stated that during this time of COVID, employers do not need to view original documents or have the new hire come into the employer's office to have it completed.
- Employers can now have a family member or friend complete section 2 and you can accept copies of documents.
- Keep in mind that the employer is still responsible for compliance with the I9 Form.

Form I9- Re-Hires

- DHS will likely consider returning employees to be continuing in employment when they are rehired and a new Form I9 will not be needed.
- Employers should continue as though there was no break in service and if you are required to use E-Verify, no new E-Verify cases should be opened as long as one was opened when the employee was originally hired.
- Employees who have had documents expire will need to provide new documentation to update Form I9.

Form I9- Re-Hires

- If the employment authorization stated in section I has expired or if list A or List C documents in section 2 has expired, reverification must be completed.
- US Citizens, non-citizen nationals and lawful permanent residents should not be reverified. List B documents should not be reverified.
- Form I9 – if you have reemployed an employee within 3 years from the date the form was executed, you may use the previous I9 or have the employee complete a new I9 form.

Form I9- Re-Hires

- If the employee remains employment authorized as indicated on the previous I9 form, the employee does not need to provide additional documentation. Complete section 3 with the employee's rehire date, any name changes if applicable and sign and date the form.
- If the employment authorization from Section I or employment authorization documentation from section II that is subject to reverification is expired, then reverification of employment authorization is required in section 3 in addition to providing the rehire date. If the previous version is not the current version of the I9, you may complete section 3 on the new form I9 and staple it to the old form.
- If you already used section 3 on the previously executed I9, but are rehiring the employee within 3 years, you may complete section 3 of the new I9 and attach it to the old form.

House Passes Coronavirus Relief Act

- Effective: April 1st, 2020.
- Provides employees up to 80 hours of paid sick leave
- Provides emergency FMLA 12 weeks of leave to care for a child if their school or day care center is closed paid at two-thirds of their regular salary
- Employers with 500 or more employees are exempt.

Emergency Paid FMLA - Coronavirus Relief Act

- Covers employers with less than 500 employees that has worked for the employer for at least 30 days (excluding healthcare providers and emergency responders)
- Employers with less than 50 employees maybe exempt if it would jeopardize the viability of the business, this needs to be approved by the DOL and very few businesses will be exempt
- Amends FMLA to provide 12 weeks of paid leave to employees who need to care for a child if school or daycare is closed.
- The first ten days may be unpaid during this period. Employees may use any accrued paid time off (vacation, sick, personal) to cover some of the time or they may use the emergency sick leave

Emergency Paid FMLA - Coronavirus Relief Act

- After the 10-day period, the employer must pay the employee 2/3rd's of their regular rate of pay up to \$200 per day and \$10,000 in aggregate per employee.
- Part-time employees are entitled to be paid based on the average hours worked for six months prior to taking emergency FMLA.
- Employers with employees over 25 employees need to return employees to the same or equivalent position upon return to work.
- Employers with less than 25 employees are generally excluded from this return to work provision if the employee's position no longer exists but must make reasonable attempts to return people to the same or equivalent position up to one year from the leave.
- Remains in effect until 12/31/2020.

Paid Sick Leave - Coronavirus Relief Act

Employees can take up to 80 hours of paid sick leave for the following reasons:

1. Subject to federal, state, local quarantine or isolation order due to COVID-19. AT 100% pay.
2. Advised to self-quarantine due to COVID-19 concerns. At 100% pay.
3. Experiencing COVID-19 symptoms and seeking a medical diagnosis. At 100% pay.
4. Caring for an individual subject to quarantine, isolation or advised by a healthcare provider to self-quarantine. At 2/3rds pay.

Paid Sick Leave - Coronavirus Relief Act

5. Caring for employer's child if a school or day care center is closed due to a public health emergency. At 2/3rds pay
6. Experiencing any other substantially similar condition specified by Secretary of Health and Human Services. At 2/3rds pay

Eligibility:

Employers with fewer than 500 employees are required to pay employees up to 80 hours of paid sick leave at the employees regular rate of pay except for healthcare responders and emergency responders

Paid Sick Leave - Coronavirus Relief Act Limits

Limits:

- Limit up to \$511 per day or \$5,110 per employee if they are taking the time for their own use.
- Limit up to \$200 per day or \$2,000 if they are caring for others.
- No carry over to next year.
- This maybe added in addition to current PTO time.
- Part time employees – average hours worked over previous six months
- Effective until 12/31/2020

Tax Credits & Testing - Coronavirus Relief Act

Tax Credits

- Using form 7200, refunds to employers via tax credits are allowed against the employer portion of social security taxes.
- No co-pays for testing

Opening Up America Again

- New Federal guideline for opening up business in the states.
- The ultimate responsibility and onus will be placed on the governors
- The three-phase process will be based on the scope of the outbreak in individual states.
- States are encouraged to base their decisions on data.
- States should move to the first phase of reopening after exhibiting a downward trend of documented cases or positive tests over a two-week period.
- States are encouraged to move into other stages after showing that cases are not surging.

Opening Up America Again

Phase 1

- Movie theaters, restaurants, sports venues, places of worship, gyms and other venues could open with strict social distancing guidelines in place.
- Bars, schools and day care centers would stay closed. Vulnerable people would be asked to remain at home during this first phase.
- Visits to nursing homes and hospitals would be prohibited.
- Some people could return to work in phases – telework is still encouraged under the plan.

Opening Up America Again

Phase 2

- Nonessential travel can resume and bars can open with some restrictions.
- Schools and youth activities can reopen.
- Vulnerable people would still be asked to stay home.
- Visits to nursing homes and hospitals would still be prohibited.
- Telework is still encouraged under the plan.

Opening Up America Again

Phase 3

- No restrictions on workplaces.
- Vulnerable people can resume social interactions but should seek to follow social distancing.
- Visits to hospitals and nursing homes can resume.
- Bars can increase standing-room capacity.

Medical Screening Protocol

With businesses opening, medical screening protocol will be put in place and will require (some will be mandated depending on state law) employers to screen employees, vendors, delivery drivers, salespeople, merchandizers and other vendor employees to go through a medical screening process prior to entering a workplace.

Medical Screening Protocol

- We will be releasing a tool kit and training for employers regarding Medical Screening.
- This training will provide employers with information on how to perform this task keeping legal compliance in check.
- We will provide employers with training, notices to employees, posters, policies and more.

Thank You



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