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What Comes Next: Re-Opening the Workplace after COVID-19

Douglas Desmarais, Esq., *Smith & Downey*

May 14, 2020



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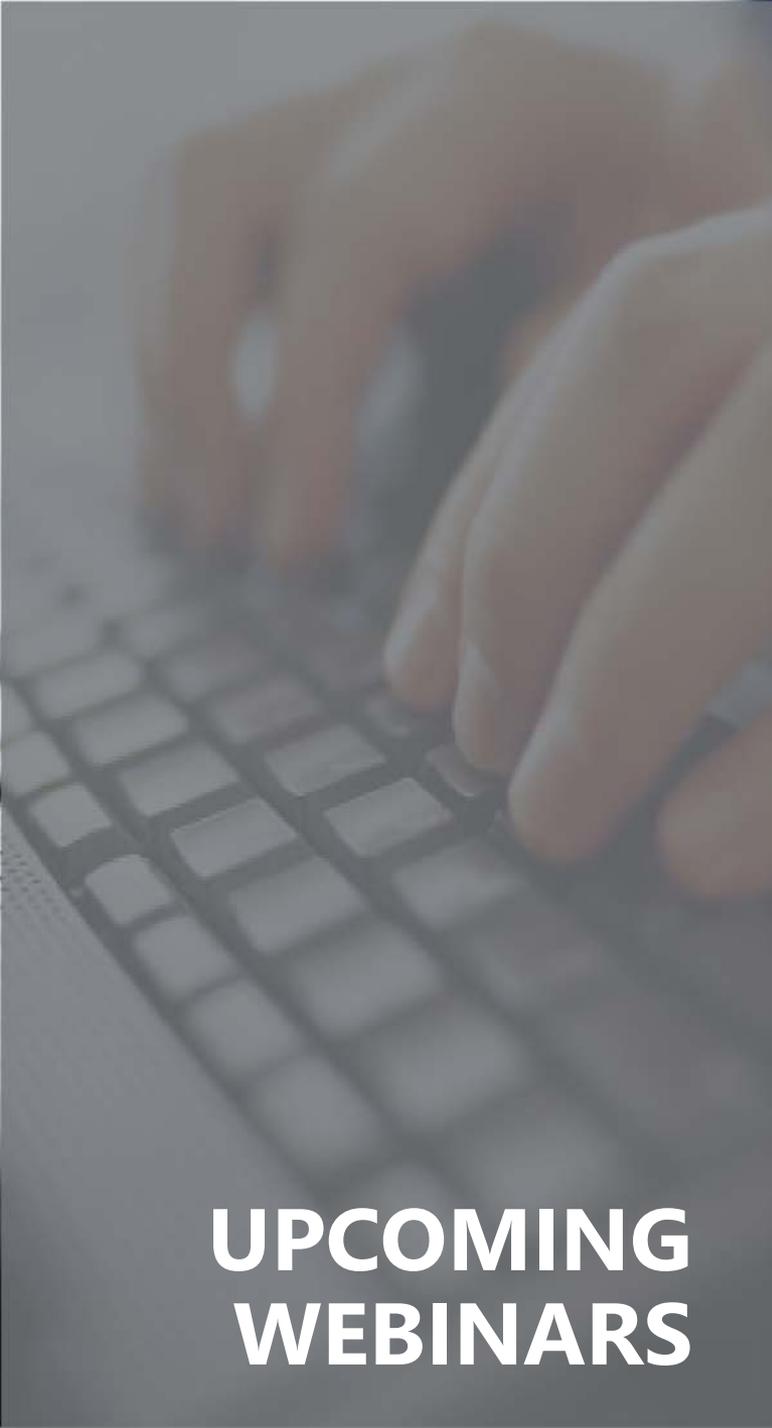
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HCM Trends: COVID-19 Next Steps in Workforce Dynamics

Presenter(s): Bobbi Kloss, Director of HCM Services
Shannon Uecker, PHR, Human Resources Consultant
Diana Gaking, PHR, SHRM-CP, Benefits Consultant
Karin Tierney, PHR, Director of Strategic HR Services
Stacy Barrow, Esq., Compliance & Legal Director

MAY 14TH, 1 PM – 2 PM EST

Remaining Resilient: Facing Today's Mental Health Challenges

Presenter: Mike Blanche, MSS, LCSW

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Building a Global Mental Health Strategy for Multinationals

Presenter: Petra Velzeboer, Global Mental Health Consultant



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Roundtable Working Session – HR Strategy
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Presenter: Sarah Sheckells, HR Executive

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Our New Normal: Creating a Lifestyle that Helps People Work on Building Healthy Immune Systems

Presenter: Dr. William S. Queale, MD, *Johns Hopkins*

Opening the Doors: Return to Workplace Considerations and Potential Screening Measures for Employees Returning to the Workplace

Presenter(s):

Ellen Lindahl, Director of Clinical Review, *Relph Benefit Advisors*

Post-COVID: Health Plan Data is More Important than Ever

Presenter: Rod Reason, Co-Founder/CEO, *Springbuk*

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QUESTIONS?

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May 14, 2020



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Note that this presentation is intended as a
general discussion of the law and is not
intended as legal advice for any particular
situation.

Question #1 – PPP Update

How will the SBA and Dep't of Treasury review a borrower's required good-faith certification concerning the necessity of the loan request?

Answer #1 – PPP Update

- Each PPP loan borrower is required to make a good-faith certification that the PPP loan is necessary due to economic uncertainty.
 - The SBA has stated that it will be reviewing certain loan application files to determine whether the borrower made the certification of necessity in good faith.
- The SBA updated the PPP FAQs yesterday (5/13/2020) to reflect the position that borrowers of loans of less than \$2 million will be “deemed to have made the required certification concerning the necessity of the loan request in good faith.”
 - The safe harbor applies if the borrower, *together with all of its affiliates*, received the PPP loan(s) with an original principal amount of less than \$2 million.
 - Reasoning: if a borrower receives less than \$2 million from the PPP, the borrower is less likely to have had access to adequate sources of liquidity in this environment.

Question #2 – PPP Update

Will the SBA and Dep't of Treasury automatically audit loans of more than \$2 million?

Answer #2 – PPP Update

- The SBA previously announced that it would automatically review individual PPP loan files for every loan in excess of \$2 million.
- The review will take place after the lender submits the borrower's loan forgiveness application.
- The review of the loan file will likely include the initial application, the forgiveness application, and all supporting documents.
- The SBA will be determining if the loan was actually necessary given the business's economic uncertainty and access to adequate liquidity.

Question #3 – Economic Uncertainty

What does it mean that a business has economic uncertainty and needs a loan?

Answer #3 – Economic Uncertainty

- Loan applicants must certify that “current economic uncertainty makes [the] loan request necessary to support the ongoing operations of the Applicant.”
- Whether a business has economic uncertainty when submitting the loan application will be based on the business’s revenue and whether it has access to any other capital.
 - This means fewer customers, lost contracts, failure of customers to pay outstanding invoices, loss of credit lines, etc.
 - Large businesses with an ability to access other sources of liquidity sufficient to support ongoing operations will likely be scrutinized and required to show that access to that other source of liquidity would be significantly detrimental to the business.

Question #4 – Economic Uncertainty

What if it is determined that the business did not have economic uncertainty?

Answer #4 – Economic Uncertainty

- If a business determines *after* submitting a loan application that it does not have any economic uncertainty, perhaps because it has access to necessary liquidity without detrimentally impacting its business, the loan can be repaid in full by May 18.
 - If repaid by May 14, the economic uncertainty certification will be deemed to be made in good faith.
 - The good-faith repayment date was recently changed from May 7 to May 14 to May 18.
- If the SBA determines that the business did not have economic uncertainty, the SBA will seek repayment of the outstanding PPP loan balance and will deem the business unqualified for loan forgiveness.
 - If the borrower repays the loan in full after receiving notification from the SBA, there will be no administrative enforcement pursued and no referrals made to other agencies.

Question #5 – Documenting Uncertainty

What is the best way to show that a business has current economic uncertainty?

Answer #5 – Documenting Uncertainty

- Businesses should memorialize all circumstances of their economic uncertainty as soon as possible.
- This would include documenting lost contracts, customers' failure to pay invoices, losses of credit lines, etc., including:
 - Balance sheets, income statements, historical tax returns, expense reports, etc.;
 - Projections regarding impact of the virus on the particular industry; and
 - Increases in accounts payable and decreases in accounts receivable.
- This would also include internal discussions related to the mindset of why there is economic uncertainty, including:
 - Internal emails and correspondence regarding financial needs and access to credit.
- The documentation could later form the basis of an internal, notarized affidavit memorializing what the business was thinking in “real time” as it assessed its eligibility for a PPP loan and why it chose not to repay the PPP loan prior to the May 14, 2020 good-faith repayment date.

Question #6 – Other PPP Documents

Will a PPP audit be limited to “economic uncertainty”?

Answer #6 – Other PPP Documents

- An audit will likely look at all aspects of the PPP loan, including application certifications related to employer size, use of the loan, and documents submitted in requesting the loan amount as well as the forgiveness.
- For these reasons, it is important to retain the following documents:
 - Documents related to the business' existence prior to Feb. 15, 2020, including income tax returns, payroll statements, and government filings;
 - Documents related to payroll expenses, including pre- and post-application expenses, payroll statements, bank statements, insurance information and payments, retirement benefit statements and plan documents, time sheets, and tax records (W-2, Form 1099);
 - Documents related to business size, including income tax returns and payroll records; and
 - Documents related to non-payroll expenses, such as mortgage statements and agreement, rental agreement, invoices for utilities and service agreements.

Question #7 - FFCRA Noncompliance

Will there be risk if an employer has not fully complied with the FFCRA's leave requirements?

Answer #7 – FFCRA Noncompliance

- There have been FFCRA noncompliance lawsuits brought by employees against employers as early as three weeks ago.
 - In *Jones v. Eastern Airlines*, the employee alleged that she was terminated as retaliation for requesting to work from home and alter her work schedule to care for her son.
 - The employee alleged she “formally requested” FFCRA leave but was met with “hostility” from the employer’s human resources officer who allegedly stated that the FFCRA is “there as a safety net for employees, not as a hammer to force management into making decisions which may not be in the best interest of the company or yourself.”
- The probability of a successful lawsuit in such a situation is unknown, but the *Jones* lawsuit shows just how quickly one can be filed.
 - The FFCRA does not required aggrieved parties to exhaust administrative remedies prior to bringing a lawsuit.
 - The FFCRA permits remedies available under the FLSA, including liquidated damages.
 - And individual managers may be sued under the FFCRA.

Question #8 – FFCRA Litigation Risk

What claims could theoretically be brought in a FFCRA lawsuit?

Answer #8 – FFCRA Litigation Risk

- In *Jones v. Eastern Airlines*, the employee filed suit for FFCRA interference and FFCRA retaliation.
- In a separate lawsuit against Kroger, a terminated employee filed suit alleging that her termination violated both the FFCRA and the Family and Medical Leave Act.
 - The Kroger leave policy requires documentation including the employee's name, diagnosis, date seen by a doctor, and a return-to-work date, all of which was required to be submitted within 3 days of the first absence.
 - Failure to follow Kroger's policy would result in "attendance points," which may lead to a termination.
- The *Kroger* case will test the theory that a COVID-19-related absence qualifies as a "serious health condition," which would entitle the employee to 12 weeks of unpaid, job-protected, sick leave.
 - The *Kroger* plaintiff's FFCRA claim is unlikely to succeed, as Kroger has more than 500 employees, thus, not covered by the FFCRA.
 - However, the FFCRA claim theorizes that Kroger voluntarily submitted to the FFCRA and should thus be required to comply with its provisions.

Question #9 – Other Litigation Risks

Is there other litigation risk regarding COVID-19 and related issues?

Answer #9 – Other Litigation Risks

- Whether covered by the FFCRA or not, the recent *Kroger* case highlights the risk of a breach of contract claim based on a sick leave policy.
 - Noncompliance with an internal leave policy can be a risk leading to litigation.
 - The *Kroger* case also highlights the risk of FMLA litigation.
- A complaint filed in mid-April (*Scott v. Hooters*) alleges violations of the WARN Act.
 - Employers with 100 or more employees are required to provide employees with 60 days notice prior to any plant closing or mass layoff involving loss of employment of more than 30 days affecting at least 500 employees, or 33% of the workforce if such percentage amounts to at least 50 employees.
 - There is an unforeseeable business circumstance exception to the WARN requirement, but notice is still required as soon as it is practicable, and the employer must provide good reasoning as to why the circumstances were unforeseeable and the notice was late.

Question #10 – Updated EEOC Guidance

As states start to re-open, along with businesses, what has recently changed in the EEOC Guidance?

Answer #10 – Updated EEOC Guidance

- Employers may screen all employees entering the workplace, including taking temperatures and asking whether the employee has any COVID-19 symptoms identified by any reputable medical source.
 - Employers may also administer a COVID-19 test to employees before allowing them to enter the workplace.
 - These screenings will likely still be permitted even after states re-open, at least for the foreseeable future while COVID-19 is still a major pandemic.
- Employees with a preexisting mental illness/disorder that has been exacerbated by COVID-19 may be entitled to a reasonable accommodation.
 - Employers may ask any employee with a reasonable accommodation right now whether the employee will need the accommodation in the future.

Question #11 – Symptom Tracking

Are there ways for an employer to track an employee's COVID-19 symptoms while the employee is out on leave?

Answer #11 – Symptom Tracking

- Supplying ill employees with a self-certification and medical tracking chart is a good way to help employees track their symptoms to determine when they will be permitted to return to work.
 - NOTE: The CDC has changed its guidelines for returning to work from 7 days after the onset of symptoms to 10 days.
- The self-certification should include an employee attestation that:
 - The employee has not had a fever for at least three days without taking medications to reduce fever (while requesting the date of last fever of 100.4 degrees or higher); the employee's respiratory symptoms have improved for at least three days; and at least ten days have passed since the employee's symptoms first started.
- The medical tracking chart should include:
 - A spreadsheet that allows an employee to document his/her temperature, respiratory symptoms, and other symptoms; and
 - A disclaimer that the medical tracking chart is for the employee's use only and should not be provided to the employer.

Question #12 – Asymptomatic Employees

May an employer ask asymptomatic employees to disclose whether they have a medical condition that could make them especially vulnerable to COVID-19 complications?

Answer #12 – Asymptomatic Employees

- Generally, asking an employee about underlying medical conditions is a disability-related inquiry, which is highly restricted by the ADA.
- Because COVID-19 is a pandemic and is considered severe by health officials, employers have sufficient objection information to reasonably conclude that employees will face a direct threat if they contract COVID-19.
 - As such, an employer may make a disability-related inquiry of asymptomatic employees in order to identify those at higher risk of COVID-19 complications.
- Those at higher risk for severe illness from COVID-19, according to the CDC, are:
 - People 65 years or older;
 - People with chronic lung disease or moderate to severe asthma;
 - People who are immunocompromised; and
 - People with severe obesity, diabetes, chronic kidney disease, and/or liver disease.

Question #13 – Fear of Infection at Work

Is an employee able to take FFCRA leave due to his/her general fear of coming to work because of the risk of being infected by COVID-19?

Answer #13 – Fear of Infection at Work

- The employee is not missing work due to an FFCRA-approved reason, thus, he/she would not generally be entitled to paid sick leave under the Act.
 - Unless a quarantine, isolation order, or shelter-in-place order applies specifically to the employee (such as “all people older than 65 may not leave their house”), the employee would not be permitted to FFCRA leave simply out of fear of coming to work.
- There are a few limited circumstances where leave to avoid contracting COVID-19 might be covered under FMLA:
 - For example, if an employee has an underlying mental health condition (severe anxiety) which triggers an incapacitating fear of COVID-19, it could be considered a serious health condition as defined by the FMLA. (This would also trigger an ADA interactive dialogue.)
- Additionally, if the employee has an underlying chronic condition (diabetes, lung disease, asthma), and a health care provider advises the employee to stay home to avoid triggering the condition, the employee would likely qualify for FFCRA leave.
- Otherwise, staying at home simply to avoid getting sick, even for employees with underlying chronic conditions, does not qualify for leave, or as a serious medical condition under the FMLA.

Question #14 – Intermittent Leave

Are employees required to use the sick leave in 8 hour increments or can they use them as needed?

For example, if an employee is in self isolation, and he/she wants to work 4 hours in the morning, can they record his/her morning time as working, and then his/her afternoon time as COVID-19 related leave?

Answer #14 – Intermittent Leave

- Employees may ***not*** take intermittent paid sick leave if the employee is still working at the typical worksite (meaning, not teleworking).
 - Instead, the employee must take paid sick leave in full-day increments, unless (1) the paid sick leave is being taken for care of a child whose school or place of care has closed due to COVID-19 reasons, and (2) the employer agrees to such intermittent use.
 - Otherwise, once an employee begins taking paid sick leave, the employee must continue taking paid sick leave in full-day increments until (1) the full available amount of paid sick leave is exhausted; (2) the employee no longer has a qualifying reason for paid sick leave. Any unused sick leave may be saved and used later, until December 31, 2020.
- If teleworking, and the employer permits it, an employee may take intermittent leave for any reason in the FFCRA.
 - The increment of leave must be agreed to be employer/employee.

Question #15 – FMLA+ First Two Weeks...

May an employee choose between available paid leave and EPSL for the first two weeks of FMLA+ Leave?

Answer #15 – FMLA+ First Two Weeks...

- An employee may take both paid sick leave and expanded family and medical leave to care for a child whose school or place of care is closed, or child care provider is unavailable, due to COVID-19 related reasons.
- The Emergency Paid Sick Leave Act provides for an initial two weeks of paid leave. This period thus covers the first ten workdays of FMLA+, which are otherwise unpaid under the FFCRA, unless the employee elects to use existing vacation, personal, or medical or sick leave under an employer's policy.
- After the first ten workdays have elapsed, the employee will receive 2/3 of his/her regular rate of pay for the hours you would have been scheduled to work in the subsequent ten weeks under the Emergency and Family Medical Leave Expansion Act.

Question #16 – Documenting Leave

What documents should an employer request of an employee who is taking FFCRA leave, and how long should those documents be maintained?

Answer #16a – Documenting Leave

- Leave documentation is necessary to ensure compliance with the FFCRA's tax credit provisions – employers will substantiate eligibility for tax credits if the employer receives documentation from an employee in which the employee provides:
 - The employee's name;
 - The date or dates for which leave is requested;
 - A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
 - Statement that the employee is unable to work or telework for such reason.

Answer #16b – Documenting Leave

- If leave is based on a **quarantine order** or **self-quarantine advice**, the statement from the employee should include the name of the government entity, or the name of the health care professional advising self-quarantine, and, if the person subject to the quarantine order is not the employee, that person's name and relation to the employee.
- If leave is based on a **school closing or child care provided being unavailable**, the statement from the employee should include the name and age of the child to be cared for, the name of the school that has closed or place of care that is unavailable, *and a representation that no other person will be providing care for the child.*
- Documents should be maintained by the employer for **four years**.

Question #17 – COVID-19 Positive Employees

What steps should an employer take if an employee reports that he/she has tested positive for COVID-19?

What if the employee only shows symptoms?

Answer #17a – Employee Tests Positive

- OSHA’s general duty clause requires employers to take reasonable steps to ensure that the workplace is safe from known dangers.
 - An employer who is notified that an employee is positive for COVID-19 should:
 - Ensure the employee does not report to the office until he/she is free of all symptoms;
 - Conduct an inquiry into the employee’s last known work date, and the employee’s interactions;
 - Take disinfecting steps to sanitize the employee’s workspace, common areas, etc.; and
 - Notify other employees that there has been an employee who tested positive for COVID-19.
- Notifying other employees should be generic – never disclose identifying information, but do share the employee’s general work location and department.
- An employer might have to report the illness under OSHA if the employee contracted COVID-19 as a result of performing his/her work-related duties.
 - Unlike the common cold, or flu, OSHA’s guidance has advised employers that COVID-19 is a reportable illness.

Answer #17b – Employee Has Symptoms

- If an employee only shows COVID symptoms, but no positive test yet, the employee would likely still be considered a “known danger” to the workplace, and should be sent home.
- The ADA’s guidance has explicitly stated that being COVID-19 positive, or even showing symptoms of it, poses significant risk of substantial harm to the workplace.

Question #18 – Loan Forgiveness

The PPP loan is eligible for full forgiveness if used properly.

What are some of the ways an employer may **not** use the loan?

Answer #18 – Loan Forgiveness

- To secure total forgiveness, the PPP loan may not be used for the following:
 - Any compensation of an employee whose principal place of residence is outside of the United States;
 - Compensation of an individual employee is excess of an annual salary of \$100,000;
 - Employer's share of payroll taxes imposed/withheld between Feb. 15 and June 30.
 - Qualified sick and family leave required under the FFCRA; and
 - Principal payments on a mortgage.
- Example: spending \$1,000 of a \$100,000 PPP loan on FFCRA-required paid leave will result in only \$99,000 of the PPP loan being forgiven (but it might result in \$1,000 in FFCRA tax credits).

Question #19 – Rehired Employees

If an employee is furloughed after the PPP loan is distributed, but rehired before June 30th, does that affect the amount of loan forgiveness?

Answer #19 – Rehired Employees

- To determine if an employer’s employee headcount has decreased during the 8-week loan period, the initial headcount is calculated by taking the average number of monthly employees per pay period from February 15, 2019 to June 30, 2019, or from January 1, 2020 to February 29, 2020.
 - Whichever period results in fewer employees should be used.
- A reduction in headcount must be “**eliminated**” by June 30 for it to not count against forgiveness – this likely does not mean simply hire the employee back on June 29, but, rather, likely means both hiring the employee back and providing sufficient back wages during the 8-week loan period.
 - Example: an employee who was employed for the previous 4 years but was laid off on March 15, 2020 will count against loan forgiveness, unless the employee is hired back (or replaced) by June 30, 2020, and provided backpay for the 8-week loan period.
 - More guidance on this particular issue is expected from the SBA soon.

Question #20 – Offer of Re-employment

Will loan forgiveness be reduced if the borrower offered to rehire the same employee but the employee declined the offer?

Answer #20 – Offer of Re-employment

- The SBA intends to issue an interim final rule that excludes laid-off employees from loan forgiveness calculations if the borrower offered to rehire the employee and the employee refused.
- The offer of re-employment must be for the same salary/wages and same number of hours as before the employee was laid off.
 - It is still unclear what will happen if the offer of re-employment was not for the exact same salary/wages and/or number of hours.
- To qualify for this exception, the borrower must have made a good faith, written offer of rehire, and the employer must document the employee's rejection.
- The SBA also makes clear that an employee who rejects the offer of re-employment may forfeit eligibility for continued unemployment compensation.
- It is unclear when the interim final rule will be released by the SBA.

Question #21 – Unemployment Benefits

An employer laid off several employees who then received unemployment benefits from the state. Upon receiving the PPP funds, the employer rehired all laid off employees, and provided back pay to cover at least a portion of the period in which the employee received unemployment benefits.

How does back pay interact with unemployment benefits already received?

Answer #21 – Unemployment Benefits

- Employees who have received back pay from an employer for the period that they were laid off and receiving unemployment benefits must pay back any unemployment benefits received.
- Employees will receive a form requesting information regarding the retroactive pay.
- Once the Division of Unemployment receives proof of back pay, the employee will be sent a Notice of Benefit Overpayment, which will detail the overpayment amount due and information on how to repay the amount.
 - Employees will be expected to repay the full amount; however, payment installments might be permitted.
 - Employees may also request an overpayment waiver within 30 days of receiving the Notice of Overpayment.

Question #22 – Applying for Forgiveness

How does a PPP borrower apply for forgiveness?

Answer #22 – Applying for Forgiveness

- The borrower will submit documentation to its lender supporting a request for forgiveness, and the borrower will also be required to attest that the documents submitted and statements made are accurate.
 - Such documentation will include accountings of payroll, mortgage interest payments, rent payments, and utility costs.
- The timing of forgiveness requests will likely be based on the lender, but not before the completion of the 8-week loan period and should be submitted 60 days prior to the first payments (i.e., 60 days before the 6-month anniversary of the loan distribution).
- Lenders are instructed that they do not need to conduct any verification of the documents submitted or statements made.
- Lenders must make forgiveness decisions within 60 days of receiving forgiveness requests.

Question #23 – Loan Terms

What are the terms of the PPP loan if the borrower does not qualify for total loan forgiveness?

Answer #23 – Loan Terms

- Payments on the loan will be deferred for six months following the loan's disbursement.
 - Interest will accrue on the loan during this deferment period.
- Interest rate will be 1%.
- PPP loans may be sold on the secondary market, but the interest rate will not change, even if the lender does.
- The loan will mature two years following the date of distribution.

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