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Question of the Day: PPP Loan Forgiveness - Update

Legal Update

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Question

How will employment decisions affect my company's PPP loan forgiveness?

Answer

As employers across the country prepare to gradually return employees to work, those who have taken PPP loans under the CARES Act also face an eight-week deadline to use the full amount of the PPP proceeds in order to obtain full loan forgiveness. At the intersection of the two issues are concerns from employers about how employment decisions will affect the company's PPP loan forgiveness.

Here are four of the questions most commonly asked by employers:

Question

If an employee is laid off, offered re-hire, and declines the offer for re-hire, does that affect my PPP loan forgiveness?

Answer

No. On May 3, 2020, the U.S. Treasury Department updated its FAQs on PPP Loans to address this question, and on May 22, 2020, released the interim final rule (IFR) on loan forgiveness which further addresses the question. The guidance discusses the Secretary of the Treasury's ability to grant de minimis exemptions from the CARES Act's limits on loan forgiveness. The interim final rule excludes laid-off employees from the CARES Act's loan forgiveness reduction calculation who fit the following criteria:

- the borrower offered to rehire the employee for the **same salary/wages** and **same number of hours**;
- the borrower must have made a good faith, **written offer** of rehire (or to restore reduced hours of the employee);

- the offer was **rejected by the employee**;
- the borrower has **maintained records documenting** the offer and the employee's rejection; and
- the borrower informed the applicable state unemployment insurance office of the rejected offer of reemployment within 30 days of the employee's rejection.

The IFR notes that additional information on how borrowers are to report the information on rejected rehires to their state unemployment insurance offices will be available on the SBA's website.

For additional information on PPP loan forgiveness, see Fredrikson & Byron's article "PPP Loan Forgiveness: What Borrowers and Lenders Need to Know."

Question

If an employee resigns, does that count against PPP loan forgiveness?

Answer

No. The PPP Loan Forgiveness application and instructions issued on May 15, 2020, and the Interim Final Rule clarify that FTE employee reductions caused by **voluntary** employee resignation do not reduce the borrower's loan forgiveness. The IFR defines a "full-time equivalent employee" (FTE employee) as an employee who works 40 hours or more, on average, each week, and employees who work less than 40 hours are calculated as proportions of a single FTE employee and aggregated.

Question

If I have to terminate an employee for cause, does that count against PPP loan forgiveness?

Answer

No. The PPP Loan Forgiveness Application and IFR clarify that FTE employee reductions caused by terminating employees for cause do not reduce the borrower's loan forgiveness. However, no guidance has been issued on the definition of "for cause," and there is not a universally accepted definition of "cause" in employment law.

Question

If an employee goes out on an unpaid leave—at the employee's request—does that count against PPP loan forgiveness?

Answer

Probably not. While the PPP Loan Forgiveness application and IFR do not explicitly address unpaid leave, the guidance clarifies that FTE employee reductions caused by an employee **voluntarily** requesting and receiving a reduction of their hours do not reduce the borrower's loan forgiveness. The IFR further states that "borrowers should not be penalized for changes in employee headcount that are the result of employee actions and requests."

The IFR requires borrowers using the de minimis exemption to maintain records "demonstrating that each such employee was fired for cause, voluntarily resigned, or voluntarily requested a schedule reduction" and must have this documentation available upon request.

Takeaways

Thankfully, the SBA and Treasury are not interested in forcing employment relationships that are not desired by both parties. Moreover, the application and instructions, and Interim Final Rule, take a common-sense, reasonable approach to FTE employee reductions that further the goals of the PPP.

The takeaways we suggested several weeks ago when we published the original Question of the Day on this topic are even more pertinent with this new guidance:

Documentation

As with most employment issues, the key is good documentation. Employers should be carefully documenting each unpaid leave of absence or furlough, and each employment separation—especially where the leave or separation is employee-initiated. Employers should have employees confirm in writing a request for a leave of absence, a resignation or a refusal to return to work when an offer has been made. If an employee is not cooperative in providing this written confirmation, the employer should nevertheless document its conversations with the employee.

Rejected Offer of Reemployment

The requirement that the employer/borrower inform the applicable state unemployment insurance office of the rejected offer of reemployment within 30 days of the employee's rejection is particularly noteworthy and important. In some instances, employers have been choosing not to inform the state unemployment insurance office of a rejected offer of reemployment. An employer will have to do so if it wants to maximize PPP loan forgiveness, and maintain documentation of the same.

Terminations

As for terminations, employers should always document the reason for an employee termination, but the PPP's differential treatment of lay-offs and "for cause" terminations heightens this need. However, a word of caution is necessary here. Employers should not stretch to label a termination "for cause" in order to maximize PPP loan forgiveness, and you should have an objective basis to support your "for cause" determination.

If a termination is truly "for cause," then the employer should document the actions the employer took to confirm the facts to support the "for cause" termination, including the employee's response to any allegations of misconduct or poor performance.

Weigh Other Business and Employment Considerations

Finally, employers should be careful to weigh other business and employment considerations with PPP loan forgiveness. While maximizing PPP loan forgiveness is understandably an important goal for businesses, employers should not lose sight of unintended consequences attached to certain employment decisions. For example, choosing not to terminate, or delaying a termination of, an employee who is a poor performer in order to maximize PPP forgiveness may come back to haunt the employer in litigation down the road.

For additional information on the loan forgiveness application and instructions, see Fredrikson & Byron's article "PPP Loan Forgiveness Application and Instructions Now Available."

If you have any questions regarding how your employment decisions will affect your company's PPP loan forgiveness, contact your Fredrikson & Byron attorney.

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