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Benefits**Question of the Day: PPP Loan Forgiveness****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. The guidance discusses the Secretary of the Treasury's ability to grant de minimis exemptions from the CARES Act's limits on loan forgiveness. Additionally, "SBA and Treasury intend to issue an interim final rule excluding 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; and
- the employee's rejection of that offer must be **documented** by the borrower.

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: Guidance on this issue has not been issued. We know that the headcount of full-time equivalent (FTE) employees affects PPP loan forgiveness. As the language of the CARES Act stands, resignation of FTE employees **does** affect PPP loan forgiveness. We are hopeful a resignation would be considered on similar or equal terms as a refusal to accept re-hire, discussed above. Hopefully, this question will be addressed by the SBA and Treasury's interim rule. In the meantime, employers should carefully document the circumstances of any employee's resignation, in anticipation of further guidance about a potential exception or clarification.

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

Answer: Guidance on this issue has not been issued. We know that the headcount of FTE employees affects PPP loan forgiveness. As the language of the CARES Act stands, termination of FTE employees **does** affect PPP loan forgiveness. Hopefully, this question will be addressed by the SBA and Treasury's interim rule. In the meantime, employers should carefully document the circumstances of any employee's termination, in anticipation of further guidance about a potential exception or clarification.

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

Answer: Guidance on this issue has not been issued. We know that the headcount of FTE employees affects PPP loan forgiveness. This leave, when taken by full-time employees, **may** affect PPP loan forgiveness because the employee's salary will be essentially reduced by 100 percent. Hopefully, this question will be addressed by the SBA and Treasury's interim rule. In the meantime, employers should carefully document the circumstances of any employee's leave in anticipation of further guidance about a potential exception or clarification.

Takeaways

While many important questions have yet to be addressed by the SBA and Treasury, there are steps employers can take **now** to put themselves in the best position to maximize PPP loan forgiveness.

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.

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, voluntarily paying an employee his or her full wages for an employee-initiated leave of absence (not required to be paid by law) may maximize PPP loan forgiveness but may also set a precedent for paying employees for employee-initiated leaves of absence. Choosing to pay employees for certain leaves of absence, but denying paid leave to others, can give rise to discrimination and retaliation claims. Additionally, choosing not to terminate (or delaying a termination of) an employee who is a poor performer or who has engaged in misconduct in order to maximize PPP forgiveness may come back to haunt the employer in litigation down the road.

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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