

Resources

Paycheck Protection Program Loan Forgiveness Not Impacted by Employees Who Won't Return to Work, If Properly Documented

May 7, 2020

As borrowers use their loan proceeds from the Paycheck Protection Program (PPP) to continue or restore payroll and call back laid-off employees, they may encounter reluctance or refusal by employees to return to work, which could impede borrower's ability to obtain full forgiveness on their PPP loan. Borrowers looking toward full forgiveness of the loan amount must maintain a staffing level^[1] during the eight-week period following the funding of the loan at the level maintained during a comparative period preceding the loan, as described in Section 1106(d)(2) of the CARES Act.^[2]

For borrowers facing employee refusals to return to work, on April 29, 2020, the Small Business Administration (SBA) and Department of Treasury signaled relief, albeit informally, in an answer to Question 40 under the PPP Frequently Asked Questions. While promising formal guidance on the issue, the response stated the following.

40. Question: *Will a borrower's PPP loan forgiveness amount (pursuant to section 1106 of the CARES Act and SBA's implementing rules and guidance) be excused if the borrower laid off an employee, offered to rehire the same employee, but the employee declined the offer?*

Answer: *No. As an exercise of the Administrator's and the Secretary's authority under Section 1106(d)(6) of the CARES Act to prescribe regulations granting de minimis exemptions from the Act's limits on loan forgiveness, SBA and Treasury intend to issue an interim final rule excluding laid-off employees whom the borrower offered to rehire (for the same salary/wages and same number of hours) from the CARES Act's loan forgiveness reduction calculation. The interim final rule will specify that, to qualify for this exception, 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. Employees and employers should be aware that employees who reject offers of re-employment may forfeit eligibility for continued unemployment compensation.*

To prepare for this *de minimis* exemption,^[3] the importance of documentation cannot be overstated. Borrowers reaching out to laid off employees should use a trackable means of written communication to present the offer to return, describe any change in conditions of the job other than in salary/wage and hours (which should match the pre-layoff terms), and require a response from the employee by a specific date. Communications may state that a failure to respond will be considered abandonment of the position or declination of the offer, but a final written termination of employment or offer to rehire should also be sent and recorded. Whether a person's refusal to return to work absent a qualifying reason^[4] terminates the right to unemployment benefits is state-determined, but these notices should include a caution that declining the recall could jeopardize their eligibility for continued unemployment benefits.

Some reasons for not returning to work must be addressed before terminating employment, such as a COVID-19 diagnosis or child care needs. In these cases, the employer could consider implementing accommodations to address the employee's situation, such as permitting short-term telework or paying him or her a lower salary or wage that does not trigger the PPP loan forgiveness reduction relating to salary/wages reductions and would meet the two-thirds pay requirements of the paid leave provisions of the Families First Corona Response Act (FFCRA).^[6] Additional SBA guidance may specifically address loan forgiveness and cases of delayed returns to work. In the interim, navigating these options should be done with the assistance of counsel.

Consistent with general advice to PPP loan recipients, borrowers' careful documentation of all steps taken in applying for and using PPP loan proceeds and other COVID-19 emergency relief is more important now than perhaps ever, given the urgency with which the CARES Act and similar legislation were enacted and the absence of final guidance or precedence for applying the regulations.

Paycheck Protection Program Loan Forgiveness Not Impacted by Employees Who Won't Return to Work, If Properly Documented (Cont.)

For more information, please contact Alexis Schostak (248-203-0598 or aschostak@dykema.com), Thomas Vaughn (313-568-6524 or tvaughn@dykema.com), Robert Boonin (313-568-6707 or rboonin@dykema.com), Suzanne Johnson (313-568-6516 or smjohnson@dykema.com), or your Dykema relationship attorney.

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[1] Section 1106(d)(2)(A)(i) reduces the forgivable amount of borrower's loan by the proportion that the average number of full-time equivalent employees per month was decreased when compared to the same average during either: (1) the period beginning 2/15/19 to 6/30/19, or (2) the period beginning 1/1/20 to 2/29/20. Seasonal employers would compare the eight-week average to the average during the period beginning 2/15/19 to 6/30/19.

[2] Under Section 1106(d)(5), if, by June 30, 2020, a borrower rehires "all" persons laid off and/or restores all salary and wage reductions effectuated between February 15, 2020 and April 26, 2020, those reductions will not be reflected in the comparisons run under 1106(d)(2)(A)(i) to reduce the borrower's maximum loan forgiveness.

[3] The de minimis exception should also apply to calculations under Section 1106(d)(5).

[4] Michigan Executive Order 2020-57, for example, expands eligibility for unemployment benefits, listing five COVID-19-related fact situations that are temporarily exempt from strict compliance with Michigan's Employment Security Act and thereby may entitle an individual to benefits despite not having been laid off, among other things.

[5] Section 1106(d)(3) states: (A) The amount of loan forgiveness under this section shall be reduced by the amount of any reduction in total salary or wages of any employee described in subparagraph (B) during the covered period that is in excess of 25 percent of the total salary or wages of the employee during the most recent full quarter during which the employee was employed before the covered period. (B) An employee described in this subparagraph is any employee who did not receive during any single pay period during 2019, wages or salary at an annualized rate of pay in an amount more than \$100,000.

[6] Assumes the employee is otherwise qualified for the FFCRA leave. Also, if leave benefits are paid and claimed as a credit under section 7002 or 7004 of the FFCRA, such amounts cannot be included in payroll costs eligible for forgiveness under the PPP (FAQ No. 8).

Attorneys

Robert A. Boonin

Alexis J. Schostak

Thomas S. Vaughn

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