



ATTORNEYS AT LAW

***FAQ #40: SBA GUIDANCE AS TO THOSE
EMPLOYEES UNWILLING TO RETURN TO THE WORKFORCE***

By: Anthony J. Vizzoni, Esq., Partner, Becker LLC

On March 27, 2020, the Coronavirus Aid, Relief and Economic Security Act (“CARES Act”) was signed by President Trump. The CARES Act created a new Small Business Administration (“SBA”) loan program known as the Paycheck Protection Program (“PPP”) which has provided billions of dollars in potential forgivable loans to businesses for purposes of maintaining and restoring jobs to their employees.

Since the CARES Act has taken effect, the SBA and the Department of Treasury have been providing guidance addressing questions raised by both lenders and borrowers. On May 3, 2020, the SBA, in consultation with the Department of Treasury, provided additional guidance to address questions concerning the rehiring of employees that were previously laid off and have refused to return to work after the employer has made an attempt to rehire the employees.

As you may recall, to the extent that the PPP loan funds are used for maintaining payroll, the employer will be eligible for loan forgiveness as to that portion of payroll costs incurred from the time of loan funding through the next eight week period, subject to certain limitations. To qualify for loan forgiveness, at least 75% of the PPP loan amount must be used for payroll costs.

The amount forgiven however will be reduced if there is a reduction in either (a) the average number of full-time employees compared to the average full-time employees from either February 15, 2019 to June 30, 2019 or January 1, 2020 to February 29, 2020; or (b) in the pay of any employee earning \$100,000 or less beyond 25% of prior year compensation. The reductions do not apply, however, if, by June 30, 2020, the employer rehires the same number of employees who were laid off between February 15, 2020 and 30 days after enactment of the CARES Act, or restores any salaries or wages reduced during the same time period. Of significance, a failure to replace dismissed employees will not only reduce forgiveness based on the percentage loss resulting from the loss of headcount, but will also reduce forgiveness on a dollar-for-dollar basis attributable to the lost wages portion in excess of 25% for those employees earning \$100,000 or less in annualized wages.

Newly published FAQ #40 now asks the 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 reduced if the borrower laid off an employee, offered to rehire the same employee, but the employee declined the offer?”***

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The answer provided states:

“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.”

It seems that the SBA has properly addressed an ongoing concern of many PPP loan recipient employers whom are having difficulty rehiring employees previously laid off. With the availability of extended unemployment benefits (which have been expanded to provide greater financial benefits during the COVID-19 crisis), many previously laid-off employees are simply refusing to come back to work. This is compounded with the added stress of health concerns that employees face, notwithstanding new policies and social distancing measures implemented by employers to protect their workforce from COVID-19. Of course, as noted in the answer to FAQ #40, those previously laid-off employees that reject offers of employment are at risk of forfeiting continued unemployment compensation.

As will be the case in submitting for loan forgiveness, proper documentation and good record keeping will be important in establishing that the employer’s loan forgiveness should not be reduced by reductions in former employee wages and headcounts for those refusing to return to work. Despite the guidance in FAQ #40, even with the elimination of those employees that could have had a negative effect on loan forgiveness due to reductions in employee head count and/or wage reductions, 75% of the PPP funds must continue to be used for payroll costs to qualify for forgiveness.

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About the Author:



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Anthony is co-chair of the firm's Transportation Group and a member of the Firm. He primarily focuses his practice on corporate transactional matters, complex financing transactions and commercial real estate. Mr. Vizzoni has over 30 years' experience in the practice of law and the area of financing.

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