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# Post-Pandemic Risk Management: Audits, OSHA & Employment Practices

To help manage your company's business and employee risks related to COVID-19, this article covers best practices for minimizing audit risks, safety standards, and the return of the workforce based on legal guidance as of June 2020. It is likely that the federal government will continue to issue evolving guidance and interpretations. Keeping up with new changes will help your company ensure success in today's changing world.

## Minimize Audit Risks Related to Pandemic Recovery

The *Coronavirus Aid, Response, and Economic Security Act* (CARES Act)<sup>1</sup> created the Special Inspector General for Pandemic Recovery (SIGPR)<sup>2</sup> to audit the Paycheck Protection Program (PPP)<sup>3</sup> loans, Economic Disaster Injury Loan (EIDL),<sup>4</sup> and payroll tax credits. The SIGPR will audit any PPP loans of \$2 million or more, but also can audit smaller loans. Note that the *Paycheck Protection Program Flexibility Act of 2020* (PPP Flexibility Act) was signed into law on June 5, 2020 and provides relief to businesses that received PPP loan proceeds and are preparing to seek loan forgiveness within the requirements of the CARES Act.

A company that receives these loans must retain proper documentation to substantiate that it qualified for the loan, was accurate and truthful in the loan application documents, properly spent the funds for permissible purposes, and has corroborating support. The SIGPR may audit and pursue recovery of funds for up to five years.

## PPP Permissible Uses

At least 60% of PPP loan funds must be used for payroll costs (as revised under the PPP Flexibility Act), but the rest may be used for the following purposes:

- Mortgage interest payments (excludes mortgage prepayments or principal payments)
- Rent
- Utilities
- Interest on any other debt obligations incurred prior to February 15, 2020

- Refinancing an EIDL made between January 31, 2020 and April 3, 2020; the PPP loan must be used to refinance an EIDL loan if that was used for payroll costs

## PPP Payroll Costs: Defined

The PPP defines payroll costs to include salary, wages, commissions, tips, payment for vacation, family, medical or sick leave, severance payments, and state and local taxes on employment compensation (including state unemployment taxes). These payroll costs include expenses related to continuing group health care benefits during periods of paid sick, medical, or family leave; insurance premiums; and employee benefit plans such as 401k plans or paid time off (PTO).

As discussed below, PPP borrowers may elect either an eight or 24-week covered period, except that borrowers that received their PPP loan on or after June 5, 2020 must use a 24-week covered period. The salary, wages, commissions, or tips are capped at \$100,000 on an annualized basis per employee, which equals approximately \$15,385 for an eight-week covered period, or \$20,833 for a 24-week covered period in which a company must use the PPP funds in order to be eligible for loan forgiveness.

Payroll costs do not include compensation of an employee whose principal place of residence is outside the U.S. (e.g., temporary visas such as H-2B and H-2A visas), compensation of an individual employee in excess of an annual salary of \$100,000, federal employment taxes imposed or withheld between February 15, 2020 and June 30, 2020, or qualified sick and family leave wages for which a credit is allowed under the *Families First Coronavirus Response Act* (FFCRA).<sup>5</sup>

## PPP Loan Forgiveness

A PPP loan, including principal and accrued interest, is eligible for forgiveness up to the amount actually spent by the borrower during the applicable covered period. PPP borrowers that received their PPP loan before June 5, 2020 may elect either an eight or 24-week covered period. This election is made when the borrower applies for loan forgiveness. PPP borrowers that received their PPP loan on or after June 5, 2020 must calculate loan forgiveness based on a 24-week

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covered period. The maximum amount that may be forgiven consists of the eligible costs incurred and payments made during the applicable covered period, which begins on the date the loan is originated.

Origination occurs on the date the lender makes the first disbursement of loan funds to the borrower. Costs incurred outside the covered period are forgivable if the actual payment is made during the covered period (e.g., prepaid rent or payroll). Forgiven loan amounts are not taxable as cancellation of debt income for federal income tax purposes.

Only the following expenses are forgivable:

- Payroll costs for the covered period (cash compensation capped at approximately \$15,385 per individual for an eight-week covered period, or \$20,833 per individual for a 24-week covered period)
- Interest payments on any mortgage incurred prior to February 15, 2020
- Rent payments on any lease in force prior to February 15, 2020
- Utility payments for services that currently qualify for forgiveness (i.e., electricity, gas, water, transportation, telephone, and internet) and began before February 15, 2020

Forgiveness is subject to the following limitations and restrictions:

- Proceeds from any advance up to \$10,000 on the EIDL will be deducted from loan forgiveness.
- If the company receives a tax credit for qualified sick and family leave wages under the FFCRA, those wages are not counted as payroll costs for purposes of PPP forgiveness.
- At least 60% of the loan funds must be used for payroll costs in order to receive full forgiveness.
- Loan forgiveness is reduced proportionately by a reduction in the total number of full-time equivalent (FTE) positions during the covered period compared to one of two time periods, which the borrower may elect: February 15, 2019 to June 30, 2019 or January 1, 2020 to February 29, 2020.

For seasonal employers, the applicable time period is February 15, 2019 to June 30, 2019. The actual loan forgiveness amount that a borrower will receive is reduced if the borrower's average weekly FTE employees during the covered period was less than during the borrower's chosen reference period.

- If a given employee's salary is reduced by more than 25%, forgiveness is reduced by the amount of the reduction in salary. This restriction does not apply to employees who make more than \$100,000 per year.
- There is no reduction in forgiveness for layoffs and pay cuts made between February 15, 2020 and April 26, 2020 if the employer restores the number of employees and compensation of employees to February 15, 2020 levels by June 30, 2020.
- There is no reduction in forgiveness if an employer reduced the hours of an employee, then offered to restore the employee's hours, but the employee declined the offer, so long as the borrower maintains related records *and* so long as the decline of employment is timely reported to the applicable state unemployment office.

### **Requesting Forgiveness**

A borrower may submit a forgiveness request to its specific lender who is servicing the loan and should include documents that verify the number of FTE employees and pay rates as well as the payments on eligible mortgage, lease, and utility obligations. The borrower must certify that the documents are true and that it used the forgiveness amount to keep employees and make eligible mortgage interest, rent, and utility payments. The lender must make a decision on the forgiveness request within 60 days.

If a borrower does not apply for forgiveness of a PPP loan within 10 months after the last day of the covered period, or if the Small Business Administration (SBA) determines that the loan is not eligible for forgiveness (in whole or part), then the PPP loan is no longer deferred and the borrower must begin paying principal and interest. Interest will continue to accrue over this deferral period. PPP loans have a maturity of five years and bear a 1% fixed interest rate. There are no prepayment penalties or fees if a borrower wishes to pay off the loan early.

### **Documentation for Loan Qualification & Use**

Companies should consider creating a separate paper or electronic file in which to keep all of the information to substantiate their PPP loan, including the complete loan application and all communications with the lender. The file should also include corroborating documents for payroll, rent, other eligible expenses, etc.

To obtain the loan, companies must certify that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.”<sup>6</sup>



Organizations should consider preparing a written memo that identifies why the loan was necessary. This could include:

- The company's financial situation at the time of the loan;
- Any business that was already lost or projected to be lost at the time of the application;
- Any closures that impacted the company or the company's supply chain;
- Subcontractors or vendors;
- Any layoffs or furloughs that were conducted;
- A list of people who would have been laid off without the PPP funds;
- Articles on the pandemic's impact on the industry; and
- Any other factors considered when taking the loan.

This information will help substantiate that the company qualified for the loan and can also be produced for accountants, bankers, and government audits.

### **Small Business**

Small businesses should ensure that they have documents to prove their size. If a company is part of a group of related companies, make sure to analyze the application of the "affiliation" rules and demonstrate why the related entities are not affiliated under the SBA rules. The "aggregation" rules are a different standard and purpose, but it may allow a company to use the payroll tax credit even if disqualified from using the PPP loan under the affiliation rules.

### **Dedicated Loan Account & Tracking**

Without the proper documentation, forgiveness can be completely denied. It is advisable to create both a separate account to hold the PPP loan funds and a separate spreadsheet dedicated to tracking the funds. Companies should also keep a file for any fund-related documentation, which may include but is not limited to:

- Bank statements from the PPP account and any accounts to which funds were transferred;
- Documents to prove the number of FTE employees for each week of the covered period, which may include lists of employees and time records showing hours worked;
- Documents to prove the number of FTE employees during the comparison time periods;
- Spreadsheet or record of how you calculate the FTE employees;
- All payroll records for the covered period, including payroll reports and reports of hours worked by pay period;

- Copies of rental or lease agreements to show it was in place before February 15, 2020 as well as copies of any rent payments;
- Copies of any utility bills that were paid plus receipt or proof of payment;
- Proof of mortgage interest or other business loan interest, proof the debt was incurred prior to February 15, 2020, and proof of payment; and
- Cancelled checks, invoices, payment receipts, etc., relating to all authorized payments.

### **Additional Proactive Steps to Minimize Audit Risks**

Businesses that use the benefits of the CARES Act should take proactive steps to minimize risks during a SIGPR audit, including but not limited to:

- 1) Ensure applications and representations to the government are accurate and avoid fraud or integrity allegations.
- 2) Implement control measures to track and document the use of disbursed funds. Companies should ensure that they have an audit tracking feature to demonstrate the complete tracing of the monies to the government in the event of an audit.
- 3) Use a separate account to handle all transactions involving PPP funds.
- 4) Comply with restrictions and conditions required by the CARES Act programs and lenders.
- 5) Update their business code of ethics policies and adopt procedures to attain compliance.
- 6) Develop internal accounting controls and procedures for internal audits of PPP money to ensure compliance
- 7) Be thoughtful and responsive (not dilatory, uncooperative, or inaccurate in any communications) to any audit conducted by SIGPR and engage legal counsel.

### **OSHA & COVID-19 Prevention**

There is no direct Occupational Safety and Health Administration (OSHA) standard that covers COVID-19, but there are several OSHA standards that may require companies to take action to protect employees. Among the most relevant are:

- 1) The General Duty Clause (29 USC 654(a)(1)), which requires employers to provide each worker with employment that is "free from recognized hazards that are causing or likely to cause death or serious physical harm."

- 2) OSHA's personal protective equipment (PPE) standards (in general industry 29 CFR 1910 (i)), which requires the use of gloves, eye and face protection, and respiratory protection. OSHA has issued temporary guidance on respirator fit testing, the reuse of respirators, and the use of dust masks.
- 3) OSHA's Bloodborne Pathogen Standard (29 CFR 1910.1030), which applies to occupational exposure to human blood and other potentially infectious materials that typically do not include respiratory secretions that may transmit COVID-19. However, the standard's provisions offer a framework that may help control some sources of the virus, including exposures to bodily fluids (e.g., respiratory secretions) not covered by the standard.

Additionally, OSHA has issued several guidance documents for employers, including guidance on preparing workplaces for COVID-19,<sup>7</sup> on returning to work,<sup>8</sup> and for specific worker groups including construction.<sup>9</sup>

### **Pandemic Preparedness & Response Plan**

Companies are expected to have prepared and implemented a Pandemic Preparedness and Response Plan to help protect employees on the jobsite. This plan should include steps on physical distancing, PPE, cleaning and disinfecting work sites, and monitoring employee illness.

Employers should train employees on their Pandemic Preparedness and Response Plan and enforce physical distancing and other similar measures. Implement safety toolbox talks for the field and office and instill the mantra of "isolate, insulate, and sanitize."

Note that some states require masks or other face coverings. Some state OSHA agencies are conducting inspections to specifically address construction and COVID-19 measures. We are already responding to OSHA-issued citations against companies that are allegedly failing to enforce physical distancing and PPE requirements.

### **FFCRA Leave Programs**

The FFCRA created two leave programs applicable to employers with 1-499 employees, which expires in December 2020.

#### **Emergency Paid Sick Leave Act**

The *Emergency Paid Sick Leave Act* (EPSLA)<sup>10</sup> requires the equivalent of two weeks paid leave for an employee who is:

- Subject to a federal, state, or local quarantine or isolation order or an order by a health care provider to self-isolate;
- Caring for someone else who is subject to such order;

- Showing symptoms of COVID-19 and is seeking medical diagnosis; or
- Unable to work (or telework) because they need to care for their child whose school or place of care is closed or whose care provider is unavailable due to reasons related to COVID-19.

Employees who use EPSLA because they have been ordered to quarantine or self-isolate, or are experiencing symptoms of COVID-19, are entitled to up to two weeks leave at full pay, up to a maximum of \$511 per day and \$5,110 for the two-week period.

If they use EPSLA to care for another person who is under an order of quarantine or self-isolation or to care for a child whose school or place of care is closed, then the employee is entitled to two-thirds of their regular pay, up to \$200 per day and \$2,000 for the two-week period.

#### **Emergency Family & Medical Leave Expansion Act**

The *Emergency Family and Medical Leave Expansion Act* (EFMLEA)<sup>11</sup> requires up to 12 weeks of leave, including 10 weeks of paid leave, for an employee who is unable to work because of the need to care for their child whose school or place of care is closed or whose care provider is not available due to reasons related to COVID-19.

Employees using EFMLEA are entitled to two-thirds of their regular pay, with a maximum of \$200 per day and \$10,000 for the EFMLEA period.

#### **Tax Credit for Providing Covered Leave**

Companies that pay employees for leave under the FFCRA are entitled to a refundable tax credit to cover 100% of the cost of paid leave up to certain maximum amounts. The tax credit also can be taken for a commensurate share of the health insurance for the period the employee is on leave.

#### **Documenting & Substantiating Leave**

In order to qualify for the tax credit for payments made to employees under the FFCRA leave programs, the employer must obtain documentation to substantiate the need for leave. The IRS guidance requires that, in order to substantiate the eligibility for tax credits, the employer should obtain a written request for leave from the employee that provides:

- The employee's name;
- The date(s) for which leave is requested;
- A statement of the reason related to COVID-19 for which the employee is requesting leave *and written support for such reason*; and



- A statement that the employee is unable to work, including telework, because of the qualifying reason for such leave.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person's name and relation to the employee.<sup>12</sup>

In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee's inability to work or telework because of a need to provide care for a child older than 14 during daylight hours, a statement that special circumstances exist requiring the employee to provide care.<sup>13</sup>

The company must keep records relating to an employee's use of paid leave. Under U.S. Department of Labor (DOL) rules, the records must be maintained for four years. It is recommended that the company keep the documents for a minimum of seven years, as the IRS can audit the previous six years. These records include:

- Records provided by the employee to substantiate the need for leave;
  - Written records of any verbal requests made by the employee;
  - Documentation to show how the employer determined the amount of paid sick leave or expanded family and medical leave paid to employees, including records of the hours worked (including telework), rates of pay, and leave used;
  - Documentation to show how the company determined the amount of qualified health plan expenses allocable to the leave;
  - Copies of IRS forms 7200 and 941, which have been completed and submitted to the IRS;
  - If the employer denies leave, it must document the reasons that it denied leave;
- If the employer claims an exemption, such as the partial exemption for small businesses, keep documents showing the authorized officer's determination that the required criteria were considered and met; and
  - Any other records needed to support the request for tax credits.

Employers should consult with advisers regarding the tax credit and any other documentation that they suggest be maintained.

### Payroll Codes

Because the amounts to be paid and the amounts that can be recovered as a tax credit differ depending on the reason that an employee uses EPSLA or EFMLEA, employers must ensure they are separately accounting for the FFCRA leave for which it pays employees. Because the tax credits differ based on the type of leave, an employer should separately identify the reason that the leave was used from regular payroll. For example, an employer could change payroll codes to include:

- 1) *COVID-Self* to designate leave an employee takes because they have COVID-19 symptoms and are seeking treatment, or because they are quarantined or self-isolating based on the order of a health care provider or government entity.
- 2) *COVID-Other* to designate leave an employee takes to care for another person who is quarantined or self-isolating based on the order of a health care provider or government entity.
- 3) *COVID-Childcare* to designate leave an employee takes to care for their own child whose school or place of care is closed or regular care provider is not available due to reasons related to COVID-19.

### FFCRA Violations

The FFCRA can be enforced in the same manner as the *Family and Medical Leave Act (FMLA)* and the *Fair Labor Standards Act (FLSA)*, either through an investigation by the Wage and Hour Division, DOL or through a lawsuit filed directly by an employee.

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A violation of the EPSLA will be treated like a violation of the minimum wage requirements, which entitles the employees to recover two times the applicable minimum wage for the amount of sick leave that was denied plus reasonable attorneys' fees. Any action by the DOL may also include civil monetary penalties payable to DOL.

Violations of the EFMLEA are treated like violations of the FMLA, except that an employee cannot directly file a lawsuit against an employer that has fewer than 50 employees and is not subject to the regular FMLA provisions.

Covered employers should ensure that they have the emergency paid leave poster (available from the DOL) displayed with their other employment law posters, and that they are keeping records to show compliance with leave requirements. The poster would be removed after the expiration of the leave, which is currently set for December 2020.

### **Returning Employees to Work**

#### **Physical Distancing**

Over the next 18 months, businesses will confront various phases of actions to flatten the curve as the virus expands and contracts in society. Risk management strategies include evaluating the physical set-ups to conduct work and determining whether changes are needed for physical distancing, such as rearranging desks, limiting the number of employees in a common area, adding dividers, or designating one-way paths through office spaces.

By staggering shifts and moving to a mobile application for time-keeping, employers can keep workers from congregating at a time clock. Consider appointing someone to monitor and enforce physical distancing of least six feet, and prop doors open during busy times. Companies should evaluate how they address issues like multiple employees riding in a vehicle or sharing a hotel room as well.

#### **Cleaning**

Consider cleaning protocols and who will be in charge of regular cleaning, especially of high-touch areas. Will employees receive supplies to clean their own spaces? What about individually assigned tools? Will a third-party provide the majority of cleaning?

Consider limiting the use of shared equipment and whether to remove soft or porous materials that are harder to clean, such as rugs, pillows, and cushions.

#### **Hiring Practices**

What will your company change regarding hiring practices? Will there be plexiglass between the new hire and the human resource team to complete paperwork or conduct new employee orientation training? What method will your company use to conduct interviews?

#### **Remote Work**

If employees are continuing to telework, do you have a written telework policy or agreement? How will you determine when people will return to the office from teleworking? Do you have to allow them to continue to telework if they request it and they are in a group that is at high risk for COVID-19?

#### **Monitoring Employee Health**

Implement a policy to monitor employees for illnesses. The Equal Employment Opportunity Commission (EEOC)<sup>14</sup> has made an exception to allow companies to ask certain medical questions because a pandemic has been declared. Decide if you are going to take employees' temperatures and/or require them to complete a certification stating that they are not ill.

What PPE will your company require and who will provide the PPE? Will your company limit visitors or customers? Note that different states, and even some local governments, have requirements for face masks or other PPE.

Make sure to have a plan in place in the event that an employee tests positive for COVID-19. Prepare notices to distribute to employees and third parties who may have worked with those who have tested positive.

Finally, be ready to address accommodation requests under the *Americans with Disabilities Act* (ADA).<sup>15</sup> Remember to engage in an interactive dialogue and rely on health care provider notes to determine if the employee can perform the essential functions of the position with or without a reasonable accommodation. Remember that the employer chooses the accommodation but should document the dialogue and evaluate those suggested by the employee and health care provider.

#### **Conclusion**

Companies face increased government audits as well as an increase in employee claims based on new workplace realities brought on by the COVID-19 pandemic. Proactively updating safety plans, leave programs, ADA accommodations, interac-



tive dialogue requirements, and other coronavirus-related programs, as well as being prepared to defend any audits or legal actions will help your company stay compliant with evolving laws and regulations. ■

## Endnotes

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