COVID 19: Furloughs-Work Share-Layoffs- PPP??
What to do and How to do it

Kay H. Hodge
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Introduction

This summary does not include all of the provisions of the new statutes and regulations. It does not address many of the complexities of employment law and is not intended to be a substitute for the advice of legal counsel in specific situations.

Families First Coronavirus Response Act


1. **Coverage.** The FFCRA applies to private sector employers with less than 500 employees\(^1\) and government/public sector employers, including schools, employing at least one employee.

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\(^1\) The 500-employee threshold for coverage includes all full-time and part-time employees in the U.S., District of Columbia, or possessions, employees on leave, temporary employees, joint employees (regardless of whether on your or another employer’s payroll) and
2. **Effective Date.** The FFCRA was effective on April 1, 2020. The regulations (29 CFR Part 826) are applicable from April 1, 2020 through December 31, 2020.

The FFCRA is not retroactive. Any pay or leave an employer provided before April 1 would not be covered by FFCRA or eligible for reimbursement/tax credit. Similarly, if an employer gave an employee leave because of the COVID-19 pandemic before April 1, the employer may not deny FFCRA emergency paid sick leave or emergency family and medical leave based on that previous time off. (29 CFR § 826.160(a)(2)).

The FFCRA does not apply to employees who are no longer employed by the employer before or after April 1, 2020. (29 CFR § 826.160(d)). All FFCRA rights and payment requirements end on December 31, 2020. (29 CFR § 826.160(e)).

3. **Payment for Work/Telework.** The FFCRA is applicable when an employee is unable to work due to various circumstances. When an employee is working or teleworking, the employer is obligated to pay for all hours worked. However, when an employee is working remotely, the regulations provides that the FFCRA definition of “Telework” requires that an employer only pay for all hours actually worked and which the employer knew or should have known were worked by the employee. By making the obligation under 29 CFR § 790.6 inapplicable, this provision relieves an employer from the obligation to count and pay for all hours from the first time the employee begins to work until the last work time in the day.

An employee’s exempt status under the FLSA is not affected by the taking of EPSL or EFML. (29 CFR § 826.20(c)).

4. **Emergency Paid Sick Leave.** FFCRA provides for 80 hours or two weeks of emergency paid sick leave (“EPSL”) for employees, who are unable to work/telework because of COVID-19, in the following six situations:

1. The employee is subject to a federal, state or local quarantine or isolation order related to COVID-19.2/

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2/ “[A] quarantine or isolation order includes quarantine, isolation, containment, shelter-in place, or stay-at-home orders issued by any Federal, State or local government authority that cause the employee to be unable to work even though his or her employer has work that the employee could perform but for the order. This also includes when a Federal, State, or local government authority had advised categories of citizens (e.g., of certain age ranges or of certain medical conditions) to shelter in place, stay at home, isolate, or quarantine, causing those categories of employees to be unable to work even though their employers have work for them.” (29 CFR § 826.10(a)).

The EPSL is only available when “but for” the quarantine or isolation order, the employee would be able to perform work/telework. (29 CFR § 826.20(a)(2)). Therefore, the
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.  
3. The employee is experiencing symptoms of COVID-19 and seeking a medical diagnosis.  
4. The employee is caring for an individual who is subject to an order as required by paragraph 1 or has been advised as described in paragraph 2.  
5. The employee is caring for a son or daughter if the school or place of care has been closed, or unavailable, due to COVID-19 precautions.

Application of the above definition is not as broad as it may initially appear. An employee is not eligible for EPSL where the employer does not have work for the employee as a result of the order or other circumstances. For example, in the introductory explanation of the Regulations, the DOL distinguishes an eligible employee from an employee who is not eligible because the employee is not working/teleworking because there is no work even if his/her employer has had to close or has no work due to a quarantine or isolation order. 

“[A]dvised by a health care provider [as defined under the FMLA] to self-quarantine” applies only if the advice of a health care advisor is based on the belief that the employee has COVID-19, may have COVID-19, or is particularly vulnerable to COVID-19 and that it is that advice that causes the inability to work either at the employer’s workplace or by telework. (29 CFR § 826.20(a)(3)).

Paid leave for “seeking medical diagnosis for COVID-19” is “limited to the time the employee is unable to work because the employee is taking affirmative steps to obtain a medical diagnosis, such as making, waiting for, or attending any appointment for a test for COVID-19.” (29 CFR § 826.20(a)(4)).

An “individual” is a person who is an immediate family member of the employee, a person who regularly resides in employee’s home, or a similar person with whom the employee has a relationship that creates an expectation that the employee would care for that person if he or she was quarantined or self-quarantined. It does not include persons with whom the employee has no relationship. “An employee caring for an individual may not take Paid Sick Leave where the employer does not have work for the employee.” (29 CFR § 826.20(a)(4)). The employee must be unable to work for his/her employer and the individual must depend on the employee for care and reason #1 or # 2 applies.

An employee must need to take EPSL because s/he is unable to work due to the need to care for a son or daughter whose school or place of care has been closed, or whose care provider is unavailable for reasons related to COVID-19. The standard is that the employee is unable to work “but for” the need to care for the child. EPSL is only available “if no other suitable person is available to care for the son/daughter during the period of such leave.” (29 CFR § 826.20(a)(5)).

“Son or Daughter” is defined as “a biological, adopted or foster child, a stepchild, a legal ward, or a child of a person standing in loco parentis, who is under 18 years of age; or 18 years of age or older who is incapable of self-care because of a mental or physical disability.” (29 CFR § 826.10(a)).

In addition to center based child care providers, a group home child care provider, a family child care provider, or other provider of child care services for compensation that is licensed, regulated, or registered under State law, the regulations provide that “[u]nder the Families First Coronavirus Response Act (FFCRA), the eligible child care provider need not be
6. The employee is experiencing any other substantially similar condition as defined by the Federal government.

An employee’s right to EPSL is an additional benefit and may not be diminished, reduced or eliminated because of any other law (except the FMLA as provided by § 826.70 regarding leave to care for a child). (29 CFR § 160(a) and § 826.160(b)). An employee may use EPSL before any other leave provided by law, collective bargaining agreement or employer policy that existed prior to April 1, 2020. (29 CFR § 826.160(b)).

5. **Amount of EPSL.** Under the FFCRA, a full-time employee is defined as an employee who works 40 hours per week and is entitled to 80 hours of EPSL.² (29 CFR § 826.21(a)). A part-time employee is entitled to pay for his/her normal work schedule or the average hours worked for a two-week period.³ (29 CFR § 826.21(b)(1)).

Employees taking leave for themselves (under Paragraph 4, Nos. 1, 2 or 3 above) must be paid at least their normal pay rate ⁴ or the applicable minimum wage, whichever is greater, up to a maximum of $511 per day or $5,110 in the aggregate. (29 CFR § 826.22(a)). For care of an individual or child (under Paragraph 4, Nos. 4, 5, or 6 above), the required compensation is 2/3 of the employee’s regular rate of pay or the applicable minimum wage, whichever is greater, up to a maximum of $200 per day or $2,000 in the aggregate. (29 CFR § 826.22(b)).

An employee is entitled to only 80 hours of EPSL regardless of whether the employee changes employers. Hence, an employee who uses some EPSL and changes employers is only entitled to use the remaining portion up to 80 hours. Once the employee receives a total of 80 hours, no further EPSL is to be paid. (29 CFR § 826.160(f)). In addition, any leave remaining on December 31, 2020 expires. (29 CFR § 826.160(e)).

6. **Expanded Family and Medical Leave ("EFML").** The FFCRA adds a new basis for up to 12 weeks of leave under the Family and Medical Leave Act ("FMLA") when an employee is unable to work (or telework) on account of having to care for a son/daughter under 18 years because the school or place of care has been closed or the child care provider is unavailable due to a public health emergency or a child 18 years or older is incapable of self-care because of a disability.

²/ Under FFCRA, full-time is defined as a normal work schedule of at least 40 hours per week. (29 CFR §826.21(a)(2)).
³/ Under FFCRA, part-time is defined as a normal weekly work schedule of less than 40 hours. When the employee does not have a normal weekly schedule, the FFCRA Regulations provide a method for determining the number of hours for which a part-time employee is eligible for EPSL. (29 CFR § 826.21(b)(2)).
⁴/ The regular rate applicable to both the EPSL and EFML is determined under the FLSA and the methods contained in 29 CFR Parts 531 and 778. (29 CFR § 826.25).
To be eligible for EFML, the employee need not meet the requirements of the FMLA (29 CFR § 826.30(b)(3)), but must only be employed for 30 calendar days or longer.\(^{10}\) (29 CFR § 826.30(b)). The employee must also comply with the employer’s usual notice requirements, absent unusual circumstances. Should an employee fail to give notice, the employer should give him/her notice of the failure and an opportunity to provide the required documentation before denying the leave. (29 CFR § 826.90).

EFML is available “only if no suitable person is available to care for his or her son or daughter during the period of such leave.” (29 CFR § 826.20(b)). EFML is not available unless, but for the need to care for the child, the eligible employee would be able to perform work/telework. Therefore, no EFML would be available when the employer does not have work for the employee. (29 CFR § 826.20(b)).

The first two weeks of EFML are unpaid. (29 CFR § 826.24). However, if the employee has EPSL available, the EPSL will run concurrently with that provided under EFML. (29 CFR § 826.60(a)). If an employee has already used all or part of EPSL for a reason other than care of a child due to school closure, then all or part of the first 2 weeks of EFML will be unpaid, but the employee may elect to use other accrued, but unused sick/personal/vacation leave (29 CFR § 826.60(b)(2)), or the employer may require the use of that accrued time (29 CFR § 826.23(c)).

After the first 2 weeks of EFML, the remaining available leave up to 10 weeks is paid at 2/3 the employee’s regular rate of pay to the maximum of $200 per day and up to $10,000 in the aggregate per eligible employee.\(^{11}\) (29 CFR § 826.24(a)). The employer may require, or the employee may elect, to use leave that is available to the employee under the employer’s existing policies, such as vacation, personal leave or paid time off to make up the difference to allow the employee to receive full pay.\(^{12}\) (29 CFR § 826.24(d)). Any leave that the employee elects to use or the employer requires the employee to use would run concurrently with EFML. (29 CFR § 826.23(c)).

Any leave taken for EFML counts towards the 12-weeks of FMLA leave to which the employee may be entitled for any qualifying reason in a 12-month period. (29 CFR § 826.23(b); § 826.70(b)). If an employer uses an established year for FMLA (e.g. calendar or

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\(^{10}\) Even though an employee has not been continuously employed, s/he may still meet the 30-day requirement and qualify for a leave if the employee meets the requirements of 29 CFR § 826.30 (b).

\(^{11}\) The “scheduled number of hours” will usually be the employee’s normal work schedule, the number of hours the employee is normally scheduled to work on a workday. (29 CFR § 826.24(b)(1)). If the employee’s work schedule varies, the Regulations contain a method for calculating the schedule. (29 CFR 826.24(b)(2)-(3)).

\(^{12}\) The initial FFCRA regulations issued on April 6, 2020, contained an internal inconsistency as §826.24(d) allowed employers to require the use of available paid time off as allowed by the FMLA, and another provision §826.70(f). This inconsistency was eliminated to allow employers to require the use of available paid time by the withdrawal of §826.70(f) in 85 FR 20156-02 (April 10, 2020).
fiscal year), then the employee’s 12 weeks of EFML may span the 2 FMLA leave periods. (29 CFR § 826.70(e)).

7. **Intermittent Leave.** In contrast to requirements under the FMLA, there is no requirement that the employer allow EFML to be taken intermittently. However, if both the employer and the employee agree, EPSL and EFML may be taken intermittently (i.e. in separate periods of time, rather than one continuous period). The agreement need not be in writing, but the employer is required to memorialize any agreement and maintain any document developed. (29 CFR §§ 826.50(a) and 826.140(a)).

If the employee is reporting to the employer’s worksite and the reason for the EPSL or EFML is the care of a child, then the leave may be taken intermittently in whatever increment the employer and employee agree. (29 CFR § 826.50(b)(1)). However, the employee may not take EPSL intermittently when the leave is for a reason under Nos. 1-4 and 6, as the employee should not be exposing others. (29 CFR § 826.50(b)(2)). On the other hand, when the employee is teleworking, the employee may agree with the employer to allow EPSL to be taken intermittently in any agreed implement when the reason for leave is COVID-19 related. (29 CFR § 826.50(c)). Only the amount of leave actually taken may be counted against the employee’s EPSL or EFML entitlement. (29 CFR § 826.50(d)).

8. **Health Care Coverage.** While an employee is on EPSL or EFML, an employer must maintain the employee’s coverage under any group health plan on the same conditions as coverage would have been provided if the employee had been continuously employed during the entire leave period, including any employee required premium contribution. (29 CFR § 826.110(a) and § 826.110(e)). If, therefore, there is a change in the health care plan that would have applied to the employee had s/he been employed, the employee would be subject to the change applicable to all employees in the workforce. (29 CFR § 826.110(c)).

9. **Return to Work.** At the conclusion of EPSL or EFML, an employee has the right to be restored to the same or an equivalent position in accordance with the rules applicable to the FMLA in 29 CFR 825.214 and 215. (29 CFR § 826.130(a)). However, the employee is not protected against layoffs that would have affected the employee regardless of whether s/he had taken the leave. (29 CFR § 826.130(b)(1)). In addition, the rules regarding key employees under the FMLA (29 CFR 825.217) are applicable under the FFCRA. (29 CFR § 816.130(b)(2)).

An employer with fewer than 25 eligible employees may deny job restoration following an EFML when the following conditions exist: (i) employee took the leave to care for a child under reason No. 5; (ii) position held by employee does not exist due to economic circumstances or other changes in operating conditions caused by a Public Health emergency during the period of leave; (iii) employer made reasonable efforts to restore the employee to a position equivalent to the position the employee held when the leave commenced; and (iv) reasonable efforts of the employer failed and the employer makes reasonable efforts to contact employees during the following year. (29 CFR § 826.130(b)(3)).
10. **Exclusion of Health Care Providers and First Responders.** An employer may exclude from EPSL and EFML employees who are health care providers and emergency responders as defined in 29 CFR § 826.30(c). The definition of health care provider for purposes of exclusion from EPSL and EFML is extremely broad and applies only to whether an employer may elect to exclude an employee from EPSL and EFML. (29 CFR § 826.30(c)(1)).

11. **Multi-employer Plans.** Employers, who are signatories to multi-employer collective bargaining agreements, must provide EPSL and EFML to their employees by providing contributions to the multi-employer fund, plan or other program equal to the benefits required. To the extent that the multi-employer funds, plans or other programs do not enable or otherwise allow and employees to secure payments for EPSL or EFML, the funds, plans or other programs do not satisfy the requirements of FFCRA. Alternatively, consistent with its obligations to bargain, an employer may comply with the requirements of FFCRA other than by making payments to the multi-employer funds, plans or programs. (29 CFR § 826.120).

12. **Exemption for Small Employers With Less Than Fifty Employees.** An employer, including a religious or nonprofit organization, with fewer than 50 employees (“small business”) is exempt from EPSL and EFML “when imposition of such requirements would jeopardize the viability of the business as a going concern.” A small business under this section is entitled to this exemption if an authorized officer of the business determines that:

   (i) The [EFML or EPSL] would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
   (ii) The absence of the employee or employees requesting leave under either [EFML or EFML] would entail a substantial risk to the financial health or operational capabilities of the business because of their specialized skills, knowledge of the business, or responsibilities; or
   (iii) There are not sufficient workers who are able, willing and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting leave under either [EFML or EPSL], and these labor or services are needed for the small business to operate at a minimal capacity.” 29 CFR § 826.40 (b)(1).

   To elect this exemption, the employer must document and retain the determination for its files. 29 CFR § 826.40(2). Regardless of whether an employer chooses to exempt one or more employees, the employer is required to post the notice pursuant to 29 CFR § 826.80.

13. **Notice Posting.** The DOL has issued a posting that the FFCRA requires be posted. The posting can be found at https://www.dol.gov/sites/dolgov/files/WHD/posters/FFCRA_Poster_WH1422_Non-Federal.pdf.

   This posting should be posted in a conspicuous place on the employer’s premises. An employer may satisfy this requirement by e-mailing or direct mailing the notice to employees or posting this notice on an employee information internal or external website. (29 CFR § 826.80).
14. **Documentation.** An employee is required to provide the employer with documentation prior to taking EPSL or EFML: name, dates for which leave is requested; qualifying reason for leave; and oral or written statement that employee is unable to work because of a qualified reason for leave. (29 CFR § 826.100).

- If the reason for leave is because of a Quarantine or Isolation Order, the employee must give the name of the government entity that issued the order. (29 CFR § 826.100(b)).
- If the reason for leave is advice of a health care provider, the employee must provide the employer with the name of the health care provider who advised the employee to self-quarantine due to concerns related to COVID-19. (29 CFR § 826.100(c)).
- If the reason for leave is care for an individual, then the employee must additionally provide the employer with either the name of the government agency that issued the Quarantine or Isolation Order or the name of the health care provider that advised the individual cared for to self-quarantine due to concerns related to COVID-19. (29 CFR § 826.100(d)).
- If the reason for leave is care for a child, then the employee must provide the name of the child, name of the school, place of care, or child care provider that has closed or is unavailable, and a representation that no other suitable person will be caring for the child during the period for which the employee takes EPSL or EFML. (29 CFR § 826.100(e)).

In addition, the employer may request an employee to provide additional material as needed for the employer to support a request for tax credits pursuant to the FFCRA. The employer is not required to provide leave if materials sufficient to support the applicable tax credit have not been provided. (29 CFR § 826.100(f)).

If an employee provides oral statements in support of his/her request, the employer is required to document and to maintain that information in its records. All documentation must be maintained for four years regardless of whether the leave was granted or denied. (29 CFR § 826.140(a)).

Private Sector employers covered by FFCRA are eligible to receive tax credits for EPSL and EFML payments made to employees. The DOL recommends that the employer retain the following information in order to apply for a tax credit:

1) Documentation to show how the employer determined the amount of EPSL and EFML paid to employees, including records of work, telework and leave;
2) Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages;
3) Copies of any completed IRS Forms 7200 that the employer submitted to the IRS;
4) Copies of completed IRS Forms 941 that the employer submitted to IRS or, for employers that use third party payers, records of information provided to the payers regarding the employer’s entitlement to a credit claimed on IRS Form 942; and
5) Other documentation needed to support its request for tax credits pursuant to the IRS applicable forms, instructions and information for the procedures to follow to claim a tax credit.
The IRS has issued FAQs regarding COVID-19 Related Tax Credits at https://www.irs.gov/newsroom/covid-19-related-tax-credits-for-required-paid-leave-provided-by-small-and-midsize-businesses-faqs#basic. The documents required to qualify are slightly different from the information required by the DOL. For example, the IRS requires that in addition to the information required by the DOL, the employee must provide a statement that special circumstances exist requiring the employee to provide care for a child older than 14 during daylight hours. See IRS Questions 44 and 46.

15. **Prohibited Acts and Enforcement.** Employers are prohibited from discharging, disciplining, or discriminating against any employee because the employee has taken EPSL or filed a complaint, instituted a complaint or proceeding, or testified in any proceeding. (29 CFR § 826.150(a)). A failure to provide EPSL is considered a failure to pay the minimum wage and subject to the enforcement procedures under the FLSA. (29 CFR § 826.150(b)).

EFML will be subject to the prohibitions against interference and discrimination and the enforcement provisions of the FMLA, 29 USC 2615 and 2617, 29 CFR 825.400. except that an employee may file a private action to enforce EFML only if the employer is otherwise subject to the FMLA. (29 CFR § 826.151).

Complaints for violations of the EPSL and EFML should be filed with the DOL Wage & Hour Division. (29 CFR § 826.152).

**CARES Act and Unemployment**

The Coronavirus Aid, Relief, and Economic Security Act (“CARES” or “Act”) provides enhanced unemployment benefits for individuals unemployed during the coronavirus pandemic. The Act provides benefits to additional categories of individuals, including self-employed workers, independent contractors, and those individuals without a sufficient work history. (§2102(c)-(d)). In addition, individuals who are unemployed or have exhausted their all rights to regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation are eligible for 13 weeks of benefits. (§2107).

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13/ The basic requirement for unemployment of “able, available and work search requirements” are reaffirmed and analyzed in the context of COVID-19 in Unemployment Insurance Program Letter (“UIPL”) No. 10-20.

14/ The CARES Act includes a provision of temporary benefits for individuals who have exhausted their entitlement to regular unemployment compensation (UC) as well as coverage for individuals who are not eligible for regular UC (such as individuals who are self-employed or who have limited recent work history). These individuals may also include certain gig economy workers, clergy and those working for religious organizations who are not covered by regular unemployment compensation, and other workers who may not be covered by the regular UC program under some state laws. ULPI No. 16-20 at ¶3(b), pp. 1-2.

15/ The implementation of §2107 is contained in UIPL No. 17-20.
Expanded benefits are provided not only to those individuals whose unemployment is the direct result of COVID-19 pandemic, but also those who are already receiving unemployment and/or those who have recently concluded receiving unemployment, provided the individual is able to provide a self-certification that s/he is otherwise able to work except that the individual is unemployed, partially unemployed, or unable or unavailable to work because of a COVID-19 related reason, including:

a) individual has been diagnosed with COVID-19 or is experiencing symptoms of COVID-19 and seeking a medical diagnosis;

b) member of individual’s household has been diagnosed with COVID-19;

c) individual providing care for a family member or member of the individual’s household who has been diagnosed with COVID-19;

d) a child or other person in the household for which the individual has primary caregiving responsibility is unable to attend school or another facility that is closed as a direct result of the COVID-19 public health emergency and such school or facility care is required for the individual to work;

e) individual is unable to reach the place of employment because of a quarantine imposed as a direct result of COVID-19 public health emergency;

f) individual is unable to reach the place of employment because s/he has been advised by a health care provider to self-quarantine due to concerns related to COVID-19;

g) individual was scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of COVID-19 public health emergency;

h) individual has become breadwinner or major support for a household because head of household has died as a direct result of COVID-19;

i) individual has to quit job as a direct result of COVID-19;

j) individual’s place of employment is closed as a direct result of COVID-19 public health emergency; or

k) individual meets any additional criteria established by Secretary of Labor for unemployment assistance under this section.

(§2102(a)(3)(A)(I)). It also includes an individual who is self-employed, is seeking part-time employment, does not have sufficient work history, or otherwise would not qualify for regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment compensation under §2107 and meets the requirements above. (§2102(a)(3)(A)(II)).

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16/ The definition of a “covered individual” includes one who is eligible for unemployment and “who has exhausted all rights to regular unemployment or extended benefits under State or Federal law or pandemic emergency unemployment under section 2107.” (§2102(3)(A)(if)). Specific qualifications are laid out in §§2107(2)-(4). Coverage for such an individual is 13 weeks of average weekly benefits until December 31, 2020, and $600 Pandemic Compensation under § 2104. UIPL 14-20 at ¶vi, p. 5.
Unemployment compensation is not available for an individual who is able to telework with pay or an individual who is receiving paid sick leave or other paid leave benefits regardless of whether the individual meets the qualifications described in items a) through k) above. (§2102(a)(3)(B)).

While unemployed, partially unemployed, or unable to work for the weeks of unemployment or for which the individual is not entitled to any other unemployment compensation or waiting period credit (§ 2102(b)), an individual may receive the enhanced unemployment benefit for unemployment caused by COVID-19 beginning on or after January 27, 2020 and ending on or before December 31, 2020, as long as unemployment continues within that period. (§2102(c)(1)). Although an individual was precluded from benefits for any week for which the covered individual received regular compensation or extended benefits under any Federal or State law, after enactment (March 27, 2020), the number of weeks of benefit are extended to 39 weeks.\textsuperscript{17} (§2102(c)(2)). If after the date of enactment, the total number of weeks is extended the total is extended by the number of weeks of such extension. (§2102(c)(2)).

The CARES Act waives any State required waiting period. (§§2102(e), 2105(b)). The weekly benefit paid is:

- The amount under the unemployment compensation law of the State, including any increase in benefits after CARES enactment, where the covered individual was employed,\textsuperscript{18} (§§2102(d)(1)(B), 2104(b)(A)).
- Plus $600, the amount of the Federal Pandemic Unemployment Compensation (“FPUC”) under § 2104 until July 31, 2020. (§§2102(d)(1), 2104(b)(1)(B)).

(§2104(b)(1)). If the individual is eligible to receive at least one dollar ($1) of underlying benefits for the claimed week, the claimant will receive the full $600 FPUC.” UIPL No. 15-20 at Attachment I, ¶ 4(a)(ii), p. I-5.

In the case of a self-employed individual or individual who would not otherwise qualify for unemployment compensation under State law, unemployment benefits are calculated in accordance with 20 CFR § 625.6 and includes the $600 FPUC until July 31, 2020. (§2102(d)(2)). The FPUC is to be paid at the same time as regular unemployment assistance or separately on a weekly basis. (§§2102(d)(3), 2104(b)(2)).

For governmental and non-profit organizations that make payments to the unemployment fund in lieu of contributions, the CARES Act provides reimbursement of one-half the compensation paid by the State for weeks of unemployment paid beginning on March 13, 2020, and ending on December 31, 2020. (§2103(b)). This partial reimbursement applies to all

\textsuperscript{17} The Secretary of Labor is charged with the responsibility of establishing a process for assistance for weeks beginning on or after January 27, 2020, and before the date of enactment. (§ 2102(c)(3)).

\textsuperscript{18} The amount paid may not be less than the minimum weekly benefit amount described in 20 CFR § 625.6.
payments made even if the unemployed individual is not unemployed as a result of COVID-19. (UIPL 14-20 at ¶ii, p. 4).

The CARES Act also includes provisions to increase the use of Short-Time Compensation (“STC”) programs (also known as work sharing or shared-work programs). It provides 100% of STC paid by states with programs already in place (§2108), and 50% funding of new STC programs implemented. (§2109). It also provides grants for implementing and improving such programs. (§2110).

The Federal government reimburses the State for 100% of the amount of Pandemic compensation paid and any additional administrative expenses. (§§2102(f)-(g), 2103(b), 2104(d)(1), 2105(c), 2107(c). There is also a non-reduction rule which prohibits states from changing the computation method governing regular unemployment compensation law in a way that results in the reduction of average weekly benefit amounts or the number of weeks of benefits payable (i.e. maximum benefit entitlement). (UIPL 14-20 at ¶ iii, p. 4).

The CARES Act provides for repayment of Federal Pandemic Compensation from, or prosecution of an individual who “knowingly has made, or caused to be made by another, a false statement or representation of a material fact, or knowingly has failed, or caused another to fail, to disclose a material fact, and as a result of such false statement or representation or of such nondisclosure such individual has received an amount of Federal Pandemic Unemployment Compensation to which such individual was not entitled.”19 / (§§2104(f), 2107(e)).

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19/ “While the Act does provide workers some flexibilities, quitting work without good cause to obtain additional benefits would be fraud.” UIPL No. 14-20 at 2 (April 2, 2020). See also UIPL No. 15-20 at 2 (April 4, 2020).
Small Business Employer and Employee Options in This Uncertain Time
By Sarah K. Bowen, John M. Kreuter

Many small U.S. businesses are facing uncertainty about continued viability as a result of the COVID-19 pandemic. An important part of this deliberation is how these small businesses can not only continue operations, but care for their valued employees during continued operation. The legal landscape related to these issues is constantly evolving. This article addresses some available legal options in the current legal landscape related to both small employer and employee rights related to the pandemic.

We recently posted an article regarding the Families First Coronavirus Act. For your convenience, that article is copied in substantial part below. The full article can be found here.

EMERGENCY PAID SICK LEAVE ACT AND EMERGENCY FEDERAL FAMILY AND MEDICAL LEAVE ACT

1. Who is covered?

Employers: Covered employers under the Act include private employers with less than 500 employees and certain public employers. Under the emergency FMLA provisions, small businesses with fewer than 50 employees may be exempted if complying with the paid leave requirements would jeopardize the viability of the business.

Employees: For Emergency Paid Sick Leave, covered employees generally include all full-time and part-time employees, regardless of tenure.

To be eligible for paid emergency FMLA leave, employees must have been employed by the employer for at least 30 calendar days. Additionally, employers may exclude certain health care providers and emergency responders from the definition of eligible employees.

2. When are employees eligible for paid leave?

Paid Sick Leave: Covered employees are entitled to paid sick leave if they are unable to work or telework due to any of the following conditions:

- The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
- The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
- The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
- The employee is caring for an individual who is subject to an order described in bullet point 1 above or has received advice as described in bullet point 2 above.
- The employee is caring for a son or daughter because the son's or daughter's school or place of care has been closed due to COVID-19 precautions.
- The employee is experiencing "any other substantially similar conditions" as specified by the Secretary of Health and Human Services.

Paid FMLA Leave: Eligible employees are entitled to emergency FMLA leave if they are unable to work or telework due to any of the following condition:

- The employee is caring for a son or daughter because the son's or daughter's school or place of care has been closed due to COVID-19 precautions.
3. How much paid leave is required?

**Paid Sick Leave:** Full-time employees are eligible for up to 80 hours of paid sick leave and part-time employees are eligible for up to their two-week equivalent of work hours of paid sick leave calculated based on their regular rate of pay, or the applicable state or Federal minimum wage, whichever is highest. Paid sick leave is paid at the following rates per employee:

- 100% for leave taken for the following reasons, limited to $511 daily and $5,110 total.
  - The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.
  - The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19.
  - The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.
- 2/3 for leave taken for the following reasons, limited to $200 daily and $2,000 total.
  - The employee is caring for an individual who is subject to an order described in the first bullet point above or has received advice as described in the second bullet point above.
  - The employee is caring for a son or daughter because the son's or daughter's school or place of care has been closed due to COVID-19 precautions.
  - The employee is experiencing "any other substantially similar conditions" as specified by the Secretary of Health and Human Services.

**Paid FMLA Leave:** Full-time employees are eligible for up to 10 weeks of paid emergency FMLA leave and part-time employees are eligible for paid FMLA leave for the number of hours that the employee is normally scheduled to work over the leave period. The Emergency FMLA does not pay for the first two weeks (10 days) of leave, but employees may use available paid leave, including paid leave under the Emergency Paid Sick Leave Act for those ten days.

Paid FMLA leave is calculated based on the higher of their regular rate of pay, or the applicable state or Federal minimum wage, whichever is higher, and paid at the following rate per employee:

- 2/3 for leave taken for the following reason, limited to $200 daily and $10,000 total.
  - The employee is caring for a son or daughter because the son's or daughter's school or place of care has been closed due to COVID-19 precautions.

<table>
<thead>
<tr>
<th>Conditions</th>
<th>Paid Sick Leave (full-time employees)</th>
<th>Paid FMLA Leave (full-time employees)</th>
</tr>
</thead>
<tbody>
<tr>
<td>1. The employee is subject to a federal, state, or local quarantine or isolation order related to COVID-19.</td>
<td>YES</td>
<td>NO</td>
</tr>
<tr>
<td></td>
<td>Up to 80 hours paid at 100%, up to $511 daily and $5,110 total</td>
<td></td>
</tr>
</tbody>
</table>
2. The employee has been advised by a health care provider to self-quarantine due to concerns related to COVID-19

3. The employee is experiencing symptoms of COVID-19 and is seeking a medical diagnosis.

4. The employee is caring for an individual who is subject to an order described in item 1 above or has received advice as described in #2 above.

5. The employee is caring for a son or daughter because the son's or daughter's school or place of care has been closed due to COVID-19 precautions.

6. The employee is experiencing "any other substantially similar conditions" as specified by the Secretary of Health and Human Services.

4. Can employees be required to use other paid leave first?

No, employees are entitled to use paid sick leave or paid FMLA leave provided under the Act before they are required to use any other paid leave benefit provided by the employer including vacation, regular sick leave or other paid time off.

5. Are employers required to notify employees?

Yes, employers are required to post this Department of Labor notice in the workplace. Employers may also want to consider adopting a temporary policy, that ends when the law
sunsets on December 31, 2020, to clarify the coordination of these new benefits with their existing leave benefits.


Eligible private small business employers providing paid leave required under EPSL and EMFLA will receive a 100% tax credit against employer payroll tax liability for the paid leave subject to the caps.

THE CORONAVIRUS AID, RELIEF, AND ECONOMIC SECURITY ACT (CARES ACT)

The two trillion-dollar federal CARES Act was signed into law on March 27, 2020. The reported purpose of the CARES Act is to provide economic relief to employees and businesses facing economic hardship and possible business closure due to the pandemic.

For the benefit of employees, the CARES Act includes an additional $600 payment to unemployment recipients per week for up to four weeks and extends unemployment benefits to self-employed workers, independent contractors and those with a limited work history. Additionally, the federal government will fund an additional thirteen weeks of unemployment benefits through December 31, 2020 after unemployed workers have exhausted state unemployment benefits.

For the benefit of small employers (and thus their employees), the CARES Act provides grants and forgivable loans. The emergency grant terms provide for up to $10,000 to provide emergency funds to small businesses to cover immediate operating costs.

Additionally, the Act provides for up to $10,000,000 per business in forgivable loans. Any portion of that loan used to maintain payroll, keep employees on the books or pay for rent, mortgage or utilities may be forgiven provided employees remain employed through the end of June 2020. The amount of the loan forgiveness shall be reduced generally by the percentage equal to the difference of the number of employees during the covered period as compared to the period March 1 to June 31, 2019.

OREGON UNEMPLOYMENT WORK SHARE PROGRAM

Under the Oregon Unemployment Work Share Program, an employer has the option to reduce the hours of a group of employees rather than implementing layoffs. Partial unemployment benefits are then paid to supplement the worker’s reduced wages.

An employer must apply for the program by sending a written plan to the Oregon Employment Department. The employer must select three or more employees with reduced hours to participate in the Work Share Program.

The employer must verify that the hours worked and wages will be reduced by at least 20% but no more than 40% per week and that the normal workweek is 40 hours or less.

Each qualified employee must have worked full-time for six months or part-time for twelve months before the Work Share Plan is submitted by the employer.

An additional resource regarding Oregon’s Work Sharing Program can be found here:
Work Share Oregon Home Page
Work Share Oregon - Frequently Asked Questions
CALIFORNIA UNEMPLOYMENT INSURANCE WORK SHARING PROGRAM

Pursuant to the California Unemployment Insurance Work Sharing Program, an employer has the option to reduce the hours and wages of a group of employees in order to minimize or eliminate the need for layoffs. Partial unemployment benefits are then paid to supplement employees' reduced wages, enabling them to keep their current jobs and avoid financial hardships.

An employer must apply for the program by mailing a Work Sharing Unemployment Insurance Plan Application to the California Employment Development Department.

The employer must select at least 10% of the employer's regular workforce or a unit of the workforce, and a minimum of two employees, affected by a reduction in hours and wages to participate in the Work Sharing Program. Each participating employee's hours and wages must be reduced by at least 10% but not more than 60%. The Work Sharing Program cannot be used as a transition to a layoff.

Participating employees must be regularly employed by the employer, either full or part time, and must have completed a normal work week with no hour or wage reductions prior to participating in the Work Sharing Program. Leased, intermittent, seasonal, temporary service employees, and corporate officers or major stockholders with investment in the employer's company cannot participate in the Work Sharing Program.

Additional resources regarding California's Work Sharing Program can be found here:
A Guide For Work Sharing Employers (PDF)
FAQs – Work Sharing Information for Employees
FAQs – Work Sharing Information for Employers

WASHINGTON UNEMPLOYMENT INSURANCE SHARED WORK PROGRAM

Under the Washington Unemployment Shared Work Program, an employer has the option to reduce the hours of a group of employees rather than implementing layoffs. Partial unemployment benefits are then paid to supplement the worker's reduced wages.

An employer must apply for the program by submitting a written signed program application to the Washington Employment Security Department. Applications may be submitted online, by electronic upload or fax.

The employer must select two or more permanent employees with reduced hours to participate in the Shared Work Program. The work hours for each participating employee will be reduced by at least 10% but no more than 50%.

Each qualified employee must be hired on a permanent basis. Corporate officers cannot participate in the Shared Work Program.

Additional resources regarding Washington's Shared Work Program can be found here:
Washington SharedWork Home Page
FAQs – SharedWork for Employees
FAQs – SharedWork for Employers

The laws related to this pandemic are subject to change based upon evolving interpretation.
However, the legal options stated above provide current options for employees and employers alike to weather this storm.
Shared Work Programs as an Option to Furloughs or Layoffs in Response to Economic Impact of COVID-19

During the COVID-19 pandemic, businesses have been forced by economic conditions to balance the long term need of retaining valued employees against the competing need of surviving an unprecedented economic slow-down and paying the bills with reduced income. Some businesses incorrectly think that the only options are layoffs or furloughs, which are not ideal for either employers or employees; particularly at a time when having health insurance is so important. In the long term, layoffs or furloughs creates challenges, including losing key employees, damaged morale, potential discrimination suits and possible labor shortages when business returns to normal. To deter laying offs and furloughs, many states, including Pennsylvania, New York and New Jersey, have Shared Work Programs, which provide a way for employers to reduce labor costs while at the same time keeping workers, who are paid lower wages for reduced work hours while, at the same time, receiving partial unemployment insurance benefits.

The idea behind Shared Work Programs is that instead of layoffs or furloughs, businesses reduce the hours worked and wages earned for a segment of workers (an “Affected Unit”). In both Pennsylvania and New York, the Affected Unit is defined by the employer but subject to state mandated guidelines, which include a requirement that hours must be reduced by not less than 20% or more than 40% in Pennsylvania and not more than 60% in New York and New Jersey. Both Pennsylvania and New
York allow employers to have multiple Shared Work Programs for each Affected Unit identified by the Employer.

While the basic principles on which Shared Work Programs are based are the same (i.e. avoiding layoffs), the programs are not uniform with each state adopts its own unique requirements. For example, in New York, unlike Pennsylvania and New Jersey, employers must also apply the reductions in hours and wages equally to all of the employees in the chosen unit or department. For its part, New Jersey has a unique provision which reduces or, in some cases eliminates the benefits that an employee can receive if, in addition to working in the Shared Work Program, they also have other employment.

Most states follow the basic principle that a worker in a Shared Work Program should receive a percentage of the unemployment benefits that they would been given if they were totally unemployed. For example, if an employer has 10 office workers (i.e. the Affected Unit”) but they are working at only 60% capacity, the business, could instead of laying off four employees, reduce the work and wages of all employees in the Affected Unit by 40%, who each receive reduced wages from the employer and 40% of the unemployment benefits that it would have received from the State if they were fully unemployed.

Unlike filing for unemployment benefits, which typically are initiated employees, the process of creating Shared Work Programs usually begins with an application filed by the Employer, which, among other things identifies each employee in the Affected Unit. After submission of the
Shared Work Plan application, it is reviewed and approved or rejected by the state Department of Labor, which in Pennsylvania has fifteen (15) days to rule on each application. In New York, both employers and employees are both required to make weekly filings during the effective period of the Shared Work Program.

In some states, like Pennsylvania and New York, the requirements for maintaining Shared Work Programs contain other provisions that protect workers, such as requiring employers to continue provide the same benefits that their employees previously received. Pennsylvania also protects workers in its Shared Work Program by making their employers agree not to lay off workers while the Shared Work Program is in effect. In New York, there is a little less protection for workers because employers are allowed to lay off some workers in Shared Work provisions but only if the Shared Work Program continues to avoids the mandated amount of layoffs. However the protection that employees receive under Share Work Programs is not absolute as both Pennsylvania and New Jersey employers have the right to terminate Shared Work Programs, which allows flexibility of business conditions worsen.

Additional factors may also need to be considered by Employers before pursuing Shared Work Programs. For unionized businesses, Shared Work Programs must also be approved by any collective bargaining representative if there is an agreement in place. In addition, employers need to realize and consider that their contributions to unemployment compensation funds may increase as a result of Shared Work Programs. Each of these factors, together with state specific eligibility requirements, should be considered when assessing the Shared Work Program option.

Unlike some of the programs that have been created specifically in response to the pandemic, most Shared Work Programs pre-date the pandemic. New York, (https://labor.ny.gov/formsdocs/ui/sw2.1.pdf) New Jersey (https://www.nj.gov/labor/forms_pdfs/ea/Shared-Work%20Plan%20Application%20204-07-2014.pdf) and Pennsylvania (https://www.uc.pa.gov/employers-uc-services-uc-tax/shared-work/Pages/default.aspx) have pre-existing application processes and forms to allow employers to participate. Although there could be changes
in the administration of these programs due to an increase in applications, these existing structures may be easier for businesses to navigate.

Rawle & Henderson is working with its clients to assist them in evaluating and applying to establish Shared Work Programs as business solutions for enduring economic challenges of the COVID-19 pandemic. We also have assisted our clients in filing and obtaining waivers to allow continued operations as essential businesses under state mandated stop work orders. If you have questions about shared work plan programs, requesting essential business waivers, or other legal issues affecting the operation of your business at this difficult time, Rawle & Henderson's attorneys are prepared to provide remote legal consultation.

David Rosenbaum, Esquire of the Philadelphia Office and Laura Bower Braunsberg Esq. of the Delaware office wrote this article.

David's Contact Information

Laura's Contact Information
PAYCHECK PROTECTION PROGRAM – AN ECONOMIC LIFELINE DURING AN UNPRECEDENTED CRISIS

This article does not address businesses that employ seasonal workers, which have separate requirements.

Information contained in this publication is the interpretation of the Act by the authors as of the date the article was published. Technical guidance and other interpretations may be released subsequent to the date of this publication which may not be reflected or updated herein. Before making business decisions with respect to the Act, we recommend you consult with a qualified attorney or CPA that can provide you with any necessary information that may have been updated.

APRIL 7, 2020 UPDATE

The U.S. Treasury Department released new implementation guidance on April 6, 2020 regarding the Paycheck Protection Program (PPP), including changes to interpretations for loan amount calculation. Additionally, the new guidance provides relaxed standards for applicants and underwriting banks. These changes could have a material impact on a borrower's loan amount (it will likely increase the loan amount) and should make the funding process much more efficient. Even though the guidance may not be entirely consistent with certain provisions of the CARES Act, borrowers and lenders have been reassured by the following statement contained in the guidance: “Borrowers and lenders may rely on the guidance provided in this document as SBA's interpretation of the CARES Act and of the Paycheck Protection Program Interim Final Rule ***. The U.S. government will not challenge lender PPP actions that conform to this guidance, and to the PPP Interim Final Rule and any subsequent rule-making in effect at the time.” Where we have updated this article in light of the guidance, we note those differences in blue text below. To aid the reader, we provide the following chart that identifies key updates contained in the April 6, 2020 guidance.
<table>
<thead>
<tr>
<th>ISSUE</th>
<th>GUIDANCE CLARIFICATION</th>
</tr>
</thead>
<tbody>
<tr>
<td>“Small business concern”</td>
<td>A “small business concern” under 15 USC § 632, even one with more than 500 employees, may participate in the PPP. The PPP is an expansion on the requirement that only small businesses can qualify for a SBA loan. The PPP permits participation by business entities that do not qualify as a “small business concern” to participate, including businesses with fewer than 500 employees with US residency, qualifying 501(c) tax exempt organizations, veterans organizations under 501(c)(19), tribal businesses, sole proprietors, and independent contractors.</td>
</tr>
<tr>
<td>Affiliation rules</td>
<td>Borrowers must apply the affiliation rules contained in the SBA’s Interim Final Rule of Affiliation.</td>
</tr>
<tr>
<td>$100,000 compensation cap</td>
<td>The $100,000 cap applies to cash compensation only, not non-cash benefits which include employer retirement contributions, health care benefits, or payment of state and local payroll related taxes. This means that Payroll costs for employees earning in excess of $100,000 annually can be increased (or “stacked”) for employer contributions to defined-benefit or defined-contribution retirement plans; payment for the provision of employee benefits consisting of group health care coverage, including insurance premiums; and payment of state and local taxes assessed on compensation of employees.</td>
</tr>
<tr>
<td>Applicable time period to determine FTE status and payroll costs to calculate maximum loan amounts</td>
<td>To determine payroll costs and FTE amounts, borrowers can base calculations either on previous 12 months, or calendar 2019. Seasonal businesses have different time periods. Additional guidance was provided for determining FTE status for businesses that have not been operational for 12 months: “the average number of employees per pay period in the 12 completed calendar months prior to the date of the loan application (or the average number of employees for each of the pay periods that the business has been operational, if it has not been operational for 12 months).”</td>
</tr>
<tr>
<td>Accounting for federal taxes when determining payroll costs for purpose of maximum loan and loan forgiveness amounts</td>
<td>Payroll costs are calculated on a gross basis without regard for federal taxes imposed or withheld. Borrowers do not add to payroll costs the employer’s share of FICA or Medicare and do not decrease payroll costs by the employee's share of FICA or Medicare or federal income tax withholdings.</td>
</tr>
<tr>
<td>Amending application given new guidance</td>
<td>Borrowers and lenders can rely on the laws, rules, and guidance existing at the time of a PPP application, but if the application has not been processed, a borrower may revise its application based on clarifications in current guidance.</td>
</tr>
</tbody>
</table>
SUMMARY OF THE EIDL PROGRAM
A more detailed explanation of the EIDL program will be forthcoming. We would be remiss if we did not briefly summarize the EIDL and its interplay with the PPP. The EIDL provides up to a $10,000 loan advance to small business owners impacted by COVID-19. It also permits loans up to $2 million at a low interest rate. Importantly, the amount awarded as a loan advance (up to $10,000) becomes a grant and does not need to be repaid. Any additional funds obtained under the EIDL program are treated as a loan that will not be forgiven. The advantage of an EIDL advance/grant (up to $10,000) is that it is available within three days of the EIDL application. There are certain underwriting requirements for an EIDL loan, such as the ability to repay. Personal guarantees are required for loans in excess of $200,000, and collateral is required for loans in excess of $25,000. EIDL loan proceeds can be used to pay payroll costs, fixed debts, accounts payable, and other bills that would be paid if not for COVID-19.

Funds received from the EIDL loan program work in conjunction with funds received from a PPP loan as follows. First, the loan advance/grant of up to $10,000 will reduce the amount forgiven on a PPP loan. These funds cannot be stacked. Further, any funds obtained through an EIDL loan cannot be used for the same purpose as a PPP loan. The US Senate Committee on Small Business & Entrepreneurship issued guidance on this point saying, “For example, if you use your EIDL to cover payroll for certain workers in April, you cannot use PPP for payroll for those same workers in April, although you could use it for payroll in March or for different workers in April.” A consult with an accountant can help your business understand whether it is better to furlough employees or maintain a business workforce, and whether there is an advantage to obtaining an EIDL loan to supplement funds received from a PPP where a workforce is maintained.

INTRODUCTION TO THE PPP PROGRAM
To better understand the PPP, we have provided a matrix of pertinent terms and their import below. In summary, the PPP authorizes up to $349 billion of forgivable loans for small businesses, sole proprietorships, independent contractors, non-profits, Tribal concerns, and self-employed individuals to maintain their workforce. The PPP accomplishes this goal by providing loans, up to $10,000,000, that can be forgiven if the loan recipient maintains their workforce during the eight week period beginning on the date of the origination of a covered PPP loan at close to the pre-pandemic pay rate. An exception is granted to employers where a reduction, as compared to February 15, 2020, occurs between February 15, 2020 and April 26, 2020, and the reductions have been eliminated by June 30, 2020.

Who Qualifies for a PPP?
Any small business concern under 15 U.S.C. 632, self-employed individual (passive income is excluded), independent contractor, or any business concern, non-profit organization, veterans organization, or tribal business that employs no more than 500 employees or the size standard number of employees established on March 27, 2020, the President signed into law the “Coronavirus Aid, Relief, and Economic Security Act” or the “CARES Act.” Key components of the CARES Act include loans to help businesses minimize the economic impacts of the COVID-19 virus. Two loan options under the CARES Act are: the Economic Injury Disaster Loans & Emergency Economic Injury Grant (EIDL), and the Paycheck Protection Program (PPP). This article focuses on the PPP which can help companies pay their staff, interest on their mortgages or their rent, and utilities for an eight week period at no cost to the business. This is a first-come, first-served program, so time is of the essence in pursuing this opportunity.
by the Administration for Industry in which the entity operates. Under certain circumstances, a small business concern can have more than 500 employees.

**Ineligibility rules**

According to interim final rules issued by the Small Business Administration (SBA) on April 2, 2020, the following business categories are not eligible under the PPP:

- Businesses identified in SOP 50-10, including certain lending institutions, passive businesses, life insurance companies, gambling companies, marijuana businesses, etc.
- Any company engaged in illegal activities;
- Household employers;
- Any business in which the owner of 20 percent or more of the equity of the applicant is incarcerated, on probation, on parole, subject to an indictment, or other means by which formal criminal charges are brought in any jurisdiction, or has been convicted of a felony in the last five years;
- Or any business that is delinquent on an SBA loan, or has defaulted on the last seven years and caused a loss to the government.

**Does the 500 employee limit apply per location?**

Generally, no. The 500-employee limit applies per business, and not per business location. However, there is an exception for certain accommodation (hotel/motel, etc.) and food services (restaurants/bars, etc.) entities that fit within the North American Industry Classification System code beginning with 72.

**What is the maximum PPP loan amount?**

The maximum PPP loan amount is the lesser of:

- For businesses that were in business between February 15, 2019 to June 30, 2019, 2.5 times the average total monthly payments for payroll costs incurred in the year preceding the application, plus the amount of any outstanding disaster loan (including an EIDL loan);
- For businesses that were not in business between February 15, 2019 to June 30, 2019, 2.5 times the average total monthly payments for payroll costs between January 1, 2020 and February 29, 2020, plus the amount of any outstanding disaster loan (including an EIDL loan); or
- $10,000,000.

**What costs can be used to compute the maximum PPP loan amount?**

The PPP maximum loan amount is based on payroll costs. Payroll costs are treated differently for entities than they are for sole proprietors or independent contractors.

Entities can include the following in calculating payroll costs:

- Salary, wage, commission or similar compensation (but not more than $100,000/year/employee);
- Cash tip or equivalent;
- Vacation/parental/family/medical or sick leave;
- Allowance for dismissal or separation;
- Group health care benefits (including insurance premiums);
- Retirement benefit; or
- Payment of state or local tax assessed on the compensation of employees.

The statute indicates that entities cannot include the following in calculating payroll costs:

- Taxes under Chapters 21, 22, or 24 of the IRC (FICA, RRTA, Unemployment);
- Compensation for non-US residents;
- Qualified sick leave for which a credit is allowed under § 7001 of the Families First Coronavirus Response Act;
• Qualified family leave wages for which a credit is allowed under § 703 of the Families First Coronavirus Response Act; or
• Payments to independent contractors (because they can get their own loans).
• Sole proprietors or independent contractors can include the following in calculating payroll costs:
  • Income that is a wage, commission, income, net earnings from self-employment and that is in an amount that is not more than $100,000/year as prorated for the covered period.
  
  The April 6, 2020 guidance clarifies that the $100,000 salary cap is for cash payments only and is not intended to exclude the costs of health insurance, retirement, or state or local taxes related to those employees. In other words, after the $100,000 limit for cash payments, taxes and benefits can be stacked to obtain payroll costs in excess of $100,000 for those employees.

  Sole proprietors or independent contractors can not include the following in calculating payroll costs:
  • Taxes under Chapters 21, 22, or 24 of the IRC (FICA, RRTA, Unemployment);
  • Compensation for non-US residents;
  • Qualified sick leave for which a credit is allowed under § 7001 of the Families First Coronavirus Response Act; or
  • Qualified family leave wages for which a credit is allowed under § 703 of the Families First Coronavirus Response Act.

  The April 6, 2020 guidance clarifies that the $100,000 salary cap is for cash payments only and is not intended to exclude the costs of health insurance, retirement, or state or local taxes related to those employees. In other words, after the $100,000 limit for cash payments, taxes and benefits can be stacked to obtain payroll costs in excess of $100,000 for those employees.

What is the interest rate for a PPP loan?
According to the statute, the interest rate will be no more than 4%. Recent guidance issued by the US Treasury Department states that the interest rate is 0.50% fixed rate. However, guidance issued by the SBA on April 2, 2020 indicates that the rate will be 1%.

How can the PPP loan proceeds be used?
The proceeds of a PPP loan can be used for payroll costs, continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums; employee salary, commission or similar compensation; mortgage interest (but not prepayment of interest or principal); rent; and utilities.

When do payments under a PPP loan start?
All payments are deferred for six months, but interest accrues during that period.

Can the PPP loan be forgiven?
Yes, but only for payroll costs (which according to SBA guidance should account for 75% of the amount forgiven), interest on covered mortgage obligations, covered rent obligations, and/or covered utility payments (which should be limited to 25% of the amount forgiven) for the eight week period after the loan is originated. And, any amount forgiven will not be treated as cancellation of debt income. But, there are limits on the loan forgiveness. The amount forgiven may not exceed the principal amount of a covered loan, and the amount forgiven will be reduced if the number of employees has been reduced (see formula below) or where the total salary or wages of an employee during the covered period is more than 25% lower than the employee’s wages during the most recent quarter of employment.
What happens if only part of the PPP loan is forgiven?

Any portion of the PPP loan that is not forgiven continues to be guaranteed by the Administration and according to the statute, has a maximum ten year maturity from the date of any application for forgiveness with an interest rate up to 4%. Cancellation of a portion of the debt does not otherwise modify the loan terms. The Interim Final Rules indicate that the maturity date of all PPP loans will be two years.

Are owners of the company personally responsible to repay the loan?

These are non-recourse loans. So long as the loan proceeds are spent consistent with the PPP, and absent fraud or other criminal conduct, owners of the company are not personally liable to repay any portion of the loan.

What information is required to apply for the PPP loan?

The US Treasury has issued guidance to lenders regarding underwriting requirements. That guidance states that banks “will need to verify that a borrower was in operation on February 15, 2020. [Lenders] will need to verify that a borrower had employees for whom the borrower paid salaries and payroll taxes. [Lenders] will need to verify the dollar amount of average monthly payroll costs. [Lenders] will need to follow applicable Bank Secrecy Act requirements.”

More recent guidance from the SBA indicates that the SBA will not require lenders to comply with § 120.150 “What are SBA's lending criteria?” The guidance further states that the SBA will allow lenders to rely on certifications from borrowers in order to determine eligibility of the borrower and use of loan proceeds, and to rely on specified documents provided by the borrower to determine qualifying loan and forgiveness eligibility.

The guidance goes on to say that each lender will be required to confirm:

- Receipt of the PPP Application form certifications;
- Receipt of information demonstrating that a borrower has employees for whom the borrower paid salaries and payroll taxes on or around February 15, 2020;
- The dollar amount of average monthly payroll costs for the preceding calendar year by reviewing payroll documentation submitted with the borrower’s application; and
- Lenders should continue to follow their BSA protocols when making PPA loans to new or existing eligible borrowers under the PPP. The guidance later suggests the following documents to satisfy a lender’s underwriting obligations:
  - Payroll processor records;
  - Payroll tax filings; or
  - For sole proprietorships and presumably independent contractors, Form 1099-MISC or income and expenses.

This is a fluid situation, and the process is moving faster than financial institutions are likely to be able to meet the need. Be prepared for banks to request the following categories of documents when applying for a PPP loan:

- PPP Loan application;
- Organization documents;
- Bylaws or operating agreements;
- Driver’s license;
- IRS Form 940 or 941;
- Payroll summary report;
- Bank statements;
When should a business apply for the PPP loan?

In guidance issued by the US Treasury, applicants are encouraged to apply as quickly as possible because there is a funding cap. The most recent guidance from the SBA explains that PPP Loans will be made on a first-come, first-served basis. The timing of any application should be coordinated with your accountant and/or your legal advisors. This is particularly important given the funding cap on the PPP loans which will be awarded on a first-come, first-served basis.

What are some of the issues an applicant should consider before applying for a PPP loan?

Interest rate differences between an EIDL and a PPP Loan

As of April 2, 2020, the interest rate for an EIDL loan is 3.75% (2.75% for nonprofits), and the interest rate for a PPP loan is 1.0% fixed rate. There may be advantages to seeking an EIDL for costs not covered by the PPP and rolling the EIDL into the PPP. This decision should be made in consultation with accounting and legal advisors.

Accurately calculating payroll costs

The PPP does not permit more than one loan. This program is a work in progress, and changes are occurring regularly. The current application lists payroll costs, then asks the applicant to multiply those costs by 2.5, add in any EIDL amount, minus any advance as the total loan request. The current loan application now explains the component parts of what can be included, and what must be excluded, in payroll costs under the PPP.

There are two very important considerations in calculating payroll costs. The first, of course, is not to overinflate payroll costs. Equally important, is to make sure all permissible costs, such as health insurance, retirement benefits, and state and local taxes are included. Failure to include these components could significantly reduce the amount of a PPP loan. This is particularly important because the PPP permits only one loan per business.
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<tr>
<td>Eligible self-employed individual</td>
<td>An individual who earns income from any trade or business carried on by that individual or a partnership of which he/she is a member.  (This does not include an individual whose income is derived from passive income.)</td>
<td>15 U.S.C.A. § 636 (36) (A)(v); Section 7002(b) of the Families First Coronavirus Response Act; 26 U.S. Code § 1402</td>
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| Eligible businesses and organizations     | During the covered period, in addition to small business concerns, any business concern, nonprofit organization, veterans organization, or Tribal business concern shall be eligible to receive a covered loan if it employs not more than the greater of:  
  • 500 employees; or  
  • if applicable, the size standard in number of employees established by the Administration for the industry in which the business concern, nonprofit organization, veterans organization, or Tribal business concern operates. | 15 U.S.C.A. § 636 (36) (D) (i)                                                               |
| Business concerns with more than 1 covered location | Business concerns with more than 1 physical location are eligible to receive a covered loan if, during the covered period, they do not employ more than 500 employees per physical location and they fit within North American Industry Classification System code beginning with 72 – accommodation and food services including hotels and motels and other travel accommodations including RV parks and recreational camps, restaurants, drinking places, mobile food services, caterers, and special food services. | 15 U.S.C.A. § 636 (36) (D) (iii)                                                             |
| Sole proprietors, independent contractors, and eligible self-employed individuals | Individuals who operate under a sole proprietorship or as an independent contractor and eligible self-employed individuals are eligible to receive a covered loan | 15 U.S.C.A. § 636 (36) (D) (ii)                                                             |
| Payroll costs                              | For employees:  
  • Salary, wage, commission or similar compensation (except compensation over $100,000/year);  
  • Cash tip or equivalent;  
  • Vacation/parental/family/ medical or sick leave;  
  • Allowance for dismissal or separation;  
  • Group health care benefits (including insurance premiums);  
  • Retirement benefit; or  
  • Payment of state or local tax assessed on the compensation of employees. | 15 U.S.C.A. § 636 (36) (A)(viii); 26 U.S. Code §§ 21, 22, and 24 |
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| Payroll costs (continued) | **For sole proprietor or independent contractor:**  
• Income that is a wage, commission, income, net earnings from self-employment and that is in an amount that is not more than $100,000/year as prorated for the covered period.  
  
**Exclusions:**  
• Taxes under Chapters 21, 22, or 24 of the IRC (FICA, RRTA, Unemployment);  
• Compensation for non-US residents;  
• Qualified sick leave for which a credit is allowed under § 7001 of the Families First Coronavirus Response Act; or  
• Qualified family leave wages for which a credit is allowed under § 703 of the Families First Coronavirus Response Act.  
• For businesses, payments to independent contractors (because they can get their own loans).  
  
**The April 6, 2020 guidance clarifies that the $100,000 salary cap is for cash payments only and is not intended to exclude the costs of health insurance, retirement, or state or local taxes related to those employees. In other words, after the $100,000 limit for cash payments, taxes and benefits can be stacked to obtain payroll costs in excess of $100,000 for those employees.**  
  
**Additionally, the April 6, 2020 guidance clarifies that employee or employer paid federal payroll or income taxes withheld do not increase or decrease the calculation. In other words, borrowers do not add to payroll costs the employer’s share of FICA or Medicare and do not decrease the payroll costs by the employee’s share of FICA or Medicare or federal income tax withholdings.** | 15 U.S.C.A. § 636 (36) (A)(viii); 26 U.S. Code §§ 21, 22, and 24                                                                                           |
<p>| Employee                 | <strong>For purposes of determining whether a business concern, non-profit organization, veterans organization or Tribal concern has fewer than 500 employees, the term “employee” includes individuals employed on a full-time, part-time, or other basis.</strong>                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                                  | 15 U.S.C.A. § 636 (36) (D)(v)                                                                                                                         |</p>
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<td>Maximum loan amount</td>
<td>During the covered period the maximum amount of a covered loan is the lesser of:</td>
<td>15 U.S.C.A. § 636 (36) (E) (West)</td>
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|                     | • The product obtained by multiplying the average total monthly payments for payroll costs incurred during the preceding 1-year before the date on which the loan is made (except for seasonal workers) by 2.5, and the outstanding amount of any disaster loan under subsection (b)(2) made between January 21, 2020 and the date covered loans are made available to be refinanced under the covered loan; or  
|                     | • If requested by an otherwise eligible recipient not in business between February 15, 2019 and June 30, 2019, the product obtained by multiplying the average total monthly payments by the applicant for payroll costs incurred during the period beginning on January 1, 2020 and ending on February 29, 2020 by 2.5 and the outstanding amount of any disaster loan under subsection (b)(2) made between January 21, 2020 and the date covered loans are made available to be refinanced under the covered loan; or  
|                     | • $10,000,000                                                                                                                                  |                                                 |
| Allowable uses of covered loans | • Payroll costs;  
|                     | • Costs related to the continuation of group health care benefits during periods of paid sick, medical, or family leave, and insurance premiums;  
|                     | • Employee salaries, commissions, or similar compensation;  
|                     | • Payments of interest on any mortgage obligation (which shall not include any prepayment of or payment of principal on a mortgage obligation);  
|                     | • Rent (including rent under a lease agreement);  
|                     | • Utilities; and  
<p>|                     | • Interest on any other debt obligations that were incurred before the covered period.                                                              | 15 U.S.C.A. § 636 (36) (F) (i)                |
| Nonrecourse         | There is no recourse against any individual shareholder, member, or partner of an eligible recipient of a covered loan for nonpayment of any covered loan, except to the extent that such shareholder, member, or partner uses the covered loan proceeds for a purpose not authorized. | 15 U.S.C.A. § 636 (36) (F) (v)                |</p>
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| Borrower certification | Eligible recipients applying for a covered loan must make a good faith certification:  
• that the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient;  
• acknowledging that funds will be used to retain workers and maintain payroll or make mortgage payments, lease payments, and utility payments;  
• that the eligible recipient does not have an application pending for a loan under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan; and  
• during the period beginning on February 15, 2020 and ending on December 31, 2020, that the eligible recipient has not received amounts under this subsection for the same purpose and duplicative of amounts applied for or received under a covered loan. | 15 U.S.C.A. § 636 (36) (G)       |
| Treatment of remaining balance | The balance of a covered loan after loan forgiveness shall have a maximum maturity of ten years from the date upon which the borrower applied for loan forgiveness and shall bear an interest rate not to exceed 4 percent. | 15 U.S.C.A. § 636 (36) (K)       |
| Loan deferment        | Lenders are required to provide complete payment deferment (including payment of principal, interest, and fees) for impacted borrowers with covered loans for a period of not less than 6 months, and not more than 1 year. The statute presumes that all applicants have been adversely impacted by COVID-19. | 15 U.S.C.A. § 636 (36) (M)       |
| Loan forgiveness      | A recipient of a covered PPP loan shall be eligible for forgiveness of indebtedness for the following amounts for the eight-week period beginning on the date of the origination of a covered loan  
• Payroll costs.  
• Any payment of interest on any covered mortgage obligation (which shall not include any prepayment of or payment of principal on a covered mortgage obligation).  
• Any payment on any covered rent obligation.  
• Any covered utility payment. | 15 U.S.C.A. § 636 (36) (K); § 1106 of the CARES Act. |
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<tr>
<td>Loan forgiveness</td>
<td>Limits on amount of forgiveness</td>
<td>15 U.S.C.A. § 636 (36) (K); § 1106 of the CARES Act.</td>
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<td>• Amount may not exceed principal amount of a covered PPP loan.</td>
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<td>• Amount will be reduced where the number of employees has been reduced by the quotient obtained by dividing the average number of full-time equivalent employees per month employed by the eligible recipient during the 8 week period beginning on the date of the origination of a covered PPP loan; by at the election of the borrower:</td>
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<td>• the average number of full-time equivalent employees per month employed by the eligible recipient during the period beginning on February 15, 2019 and ending on June 30, 2019; or</td>
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<td>• the average number of full-time equivalent employees per month employed by the eligible recipient during the period beginning on January 1, 2020 and ending on February 29, 2020.</td>
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<td>• Amount will be reduced by the amount of any reduction in total salary or wages of an employee during the 8 week period beginning on the date of the origination of a covered PPP loan 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.</td>
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<td>• Exemption for rehires where a reduction, as compared to February 15, 2020, occurs between February 15, 2020 and April 26, 2020, and the reductions have been eliminated by June 30, 2020.</td>
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<td>Taxability</td>
<td>For tax purposes, any amount of the PPP that is forgiven and would otherwise be includable in gross income of the eligible recipient is excluded from gross income.</td>
<td>§ 1106 of the CARES Act. (i)</td>
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Laura Caldera is the Practice Group Leader of Bullivant Houser’s Business Law Group. She is a trial attorney focusing her practice on complex business, professional liability, and intellectual property disputes. Her approach is consistent regardless of the area of the law: gain a full understanding of the issues, but more importantly, the client’s needs. Once understood, she prepares a vigorous defense or representation that draws on her many years of successful trial experience. Ms. Caldera can be reached at laura.caldera@bullivant.com.

Tom Hutchinson is a trial lawyer whose Washington and Oregon business litigation practice focuses on advising entities and individuals regarding a wide range of issues with an emphasis on disputes involving financial matters. After obtaining a Bachelor of Science degree in Accounting, he spent three years as a financial consultant with a top-tier CPA firm. His areas of expertise include all varieties of commercial disputes, litigation involving claims against attorneys, accountants, and financial advisors, and general contract litigation. Mr. Hutchinson can be reached at tom.hutchinson@bullivant.com.

Bill Holmes (CPA/ABV/CVA/CFE) is a certified public accountant, business valuation expert and fraud examiner with Holmes & Co. with offices in Portland, Oregon and Los Angeles, CA. He is the Vice-Chair of the Accountants’ Specialized Litigation Group (SLG) for the Defense Resource Institute (DRI) and served on the Oregon Board of Accountancy Complaints Committee (BOACC) for five years. He has published articles on the standard of care for accountants, is an invited speaker at national litigation conferences involving accounting malpractice and advanced damages topics, and assists trial lawyers nationally in complex litigation matters. His firm provides full service public accounting services, including auditing, taxation, and business consulting services to a broad range of clients. He can be reached at wholmes@pdxcpas.com.