



# Emerging HR Issues in a Post-Paycheck Protection Program Universe

April 17, 2020



Presented by:

**Melanie L. Webber, Esq.**

[mwebber@fisherphillips.com](mailto:mwebber@fisherphillips.com)



**Jerry P. Cline, Esq.**

[jcline@fisherphillips.com](mailto:jcline@fisherphillips.com)



# General Information

Below are some useful informational links about the Coronavirus in general, and a link to Frequently Asked Questions (FAQs) prepared by a team of FP attorneys and updated almost daily.

- CDC Coronavirus page: <https://www.cdc.gov/coronavirus/2019-ncov/index.html>
- Guidance for Ohio employers: [www.coronavirus.ohio.gov](http://www.coronavirus.ohio.gov)
- FAQs updated regularly: <https://www.fisherphillips.com/faqs>

# General Information

## **The CARES Act & the Paycheck Protection Program Loan:**

- Loan of up to 2.5 times the applicant's average monthly payroll.
- Proceeds must be spent during the 8-week period immediately after loan is received.
- To obtain maximum loan forgiveness:
  - 75% or more of the loan must be spend on payroll costs;
  - Other 25% may be spent on mortgage interest, rent and covered utilities.
  - Must also maintain headcount and average wages during the 8-week period as compared to a prior, defined period under the CARES Act.
  - It is not known at this time if forgiveness for “rent” includes amounts due on equipment and other non-real estate leases.

# General Information

- **Ohio Unemployment:** Laid off employees are not entitled to unemployment benefits if they have a job to come back to. Barring COVID-19 related reasons for not returning to work, continued receipt of unemployment benefits could constitute unemployment fraud.
- **PPP Loan Forgiveness:** The total amount of loan forgiveness you are entitled to may be affected (reduced) if your laid off employees fail to return to work. However, until more guidance is issued from the SBA, document all efforts to notify employees of their return to work date, their failure to return to work, and your hire/replacement efforts.

A group of diverse business professionals, including men and women of various ethnicities, are smiling and looking towards the camera. They are dressed in business attire. The image is used as a background for a text overlay.

We laid off our employees  
and want to recall them...

# Questions

## **Is there a notice we should provide employees? If so, what should it say (or not say)?**

*The notice should be sent certified mail or in some other way so that you can prove that they received it. The notice itself should inform each employee of the following:*

1. The date the employee is expected to return to work;
2. The employee should not return to work if the employee has COVID-19 or is suspected of having or has been exposed to COVID-19 until they either meet CDC guidelines for returning to work or have tested negative for COVID-19; and
3. Failure to return to work may detrimentally affect the employee's ability to receive unemployment compensation benefits and may also affect the employee's future employment status.

# Questions

## Should we notify ODJFS? How?

*Yes. If your employee fails to return to work, you may notify ODJFS in the following ways:*

- Reporting it by going to:  
<https://secure.jfs.ohio.gov/feedback/ouc/ouc-fraud/index.stm>
- Calling the toll-free fraud hotline at 1-800-686-1555
- Sending an email to [ucbenprotest@jfs.ohio.gov](mailto:ucbenprotest@jfs.ohio.gov)
- Sending a fax to 1-614-752-4808 or
- Writing to:  
Benefit Payment Control, P.O. Box 1618, Columbus, OH 43219-1618

# Questions

**Should our employees notify ODJFS that they have been recalled, or should they just report the income?**

**Is there a right way to do this, given the concern that this may be a temporary return to work?**

*Claimants are required to accept suitable offered work. Most claimants will simply stop submitting claims for weekly benefits. Regardless, if the claimant stopped submitting claims for weekly benefits or if they earned more than their weekly benefit amount, they would have to file again to restart their claim.*



# Questions

## If we stopped paying for benefits, do we treat the employees as new employees?

*Whether benefits should be continued immediately upon return depends upon:*

- (1) Employment action – was the employee terminated, laid off or furloughed; and*
- (2) Plan document – the eligibility method chosen.*

*For questions regarding benefits, please contact Jeff Smith in our office: 440-838-8800.*

What options to I have if  
employees do not want to  
return to work...



# Questions

**Should I treat this as job abandonment or voluntary termination? Should I let them stay on unemployment?**

*The refusal to return to work should be considered job abandonment/voluntary quit. You should report this refusal to return to work to ODJFS.*

**If I need to hire people to replace those who refuse to return, is there anything I need to worry about - how do I hire in this pandemic?**

*You should proceed in the hiring process as you would regardless of the pandemic.*

# Questions

**If I terminate people for refusing to return, do I need to worry about claims of discrimination?**

*While there is always the possibility of a charge of discrimination, as long as you treat all laid off employees who refuse to return the same regardless of protected class (i.e. race, sex, religion, national origin, sexual orientation etc.), you will have a good defense against the charge.*

**If I terminate people, do I notify ODJFS?**

*If someone refuses to return to work, you should categorize that as job abandonment/voluntary quit. You should then notify ODJFS.*

BACK  
TO  
WORK

If I bring  
people back  
to work...

# Questions

## **Do I have to have them come back to the dealership?**

*No. for purposes of your Paycheck Protection Program loan (“PPP loan”) forgiveness, the employee does not have to perform actual work so, theoretically, they could still receive their payroll check but still be home.*

## **Can they get a paycheck even if I have very little work for them to do? Stay at home and get a paycheck?**

*Yes. The PPP loan program is not designed to “create work.” Its main purpose is to maintain employment until such time that there is actual work to do. Generally, the 8-week loan spending period is designed to end between June 1, 2020 and June 30, 2020. Congress has anticipated that most employers should be open for business by then.*

# Questions

**If employees stay home and we pay them, is it fraud (SBA/bank fraud)? Is it fraud for unemployment comp purposes?**

*No. It is neither SBA/bank nor unemployment compensation fraud for an employer to pay employees through the PPP loan even if there is no work to do.*

*There is nothing under the CARES Act's PPP loan sections that would require employers to pay employees only if they have work to do. That is not what the PPP loan program was designed to do.*

# Questions

**What if this return to work during the 8-week period is only temporary?**

**After the 8-week period, can I use “lack of work” as a reason to layoff, when I didn’t have work when they were being paid via PPP loans?**

*Probably. Once the 8-week loan spending period expires, there is nothing in the CARES Act to prohibit an employer from laying off employees again, but this could affect the forgiveness of the loan.*

*Without additional SBA guidance, it is unclear whether a layoff after the 8-week period and prior to June 30, 2020 would affect forgiveness of the PPP loan.*



# Questions

## How do I calculate wages for flat-rate techs and sales people on commission during this PPP 8 week period?

*For purposes of forgiveness, you must pay employees at least 75% of what they averaged per week (or per pay period)\* during the most recent complete quarter prior to the issuance of the loan.*

*This means the first quarter of 2020: 1/1/20 to 3/31/20. So, even if your flat-rate techs and commissioned sales people do not make at least 75% or more per week during the 8-week period of what they earned per week on average from 1/1/20 to 3/31/20, **you must still pay them at least 75% or more of that first quarter weekly average during the 8-week period to avoid any salary/wage reduction penalty on the forgiveness of your PPP loan.***

*\*At this time, the SBA has not released guidance on forgiveness and the salary reduction test is poorly written and seemingly contradictory. We do not know if these calculations will be weekly averages or pay period averages or some other average.*

# Questions

**Can I terminate for cause during the 8-week period?**

**What are the consequences of this?**

*There is nothing in the CARES Act to prevent an employer from terminating an employee for cause during the 8-week period.*

*However, it is not known how the SBA will consider this situation when calculating the headcount reduction test for forgiveness.*

*Until additional guidance on forgiveness is released by the SBA, we recommend that you document the termination and also document your efforts to replace this employee to mitigate against any reduction of the forgiveness due to the termination.*

# Questions

## **Does the 8 week period begin as soon as the money is received?**

*Yes. Section 1106 of the CARES Act states that the 8-week period for spending the loan proceeds means the “8-week period beginning on the date of the origination of a covered loan.”*

## **Does the 8-week period have to end on or before June 30<sup>th</sup>?**

## **What if you don’t get the loan proceeds until after May 5<sup>th</sup> so that the 8-week period extends after June 30<sup>th</sup>?**

*It is unclear. Under Section 1102, June 30, 2020 is the deadline to apply for the PPP loan but it is also appears to be the deadline for spending the loan proceeds.*

*However, Section 1106 (“Loan Forgiveness”) provides no such deadline (see above). Until further guidance is issued, it is presumed that the 8-week period can extend past June 30, 2020.*

# Questions

**If part of our staff is paid on commission (paid in July for June work) – how will that calculate into the 8 weeks if that runs May to June?**

*There is no clear answer to this question.*

*Until further guidance on the forgiveness provisions of the Act are issued by the SBA, we simply do not know how this should be calculated.*

*Depending upon when the layoff occurred, there would be no commissions paid during the 8-week period from a prior period. As such, it would make sense to include those commissions “earned” but not yet “paid” until after the 8-week period for purposes of maintaining the 75% or higher wages in order to avoid reduction of the forgiveness. However, the intent of the PPP loan is to put cash in the hands of employees quickly. Further guidance is needed.*

# Questions

## What are the tax implications of any money that isn't forgiven?

*At this time, as long as the loan proceeds are spent on the permissible categories listed in the Act, any unforgiven loan proceeds will continue to be charged 1% interest and the unforgiven loan amount must be paid within two years of receipt of the loan proceeds.*

*As for tax implications, we suggest you contact your accounting firm for additional guidance regarding SBA loans in general and the PPP loan in particular.*

# Questions

**Is there any plan to extend the 8-week period or any change for the allocation that at least 75% of the loan proceeds must be used for payroll?**

**Some businesses are reporting that, under the loan's current configuration, while it may help employees, it will not do much for the business itself.**

*There is no known plan to extend the 8-week period. Of note, the 75% requirement is not even in the CARES Act. This 75% requirement was added by the SBA in their Interim Final Rule and is required for all borrowers.*

*However, the SBA has not issued guidance on how this 75% rule will apply to the forgiveness of the loan.*

# Questions

**Is there additional SBA guidance to clarify what amount must be paid to the employees during the 8-week period, and how many must be on payroll during the 8-week period, to maximize the amount of the forgiveness of the loan?**

*Unfortunately, no. On April 3, 2020, the SBA issued their first Interim Final Rule which promised additional guidance on the forgiveness aspects of the PPP loan. To date, no such guidance has been issued.*

# Questions

It isn't fair to just pay some to stay home and others come to work. With the showrooms not being open and service limited there won't be enough work for everyone to do. What should we do?

*It is true that some departments will have more work than others and that some departments may have no work at all. For those departments with work, we suggest that you split up the available work so that all employees of a particular department work and stay home in equal amounts. Teleworking may also be an option depending upon the job (i.e. sales).*



# Questions

If we might have to provide copies of front and back of cancelled checks, first, we have one guy that waits 2 months to cash his checks so it would fall out of the timeframe.

Secondly, how might we prepare when paychecks are direct deposited?

*The PPP loan application states only that the borrower will provide, among other things, the “sum of documented payroll costs” during the forgiveness process. As long as you have proof that you paid these employees, that should suffice. Whether they actually “cash” the payroll check should not matter, as long as you have proof that the employee received the payroll check or direct deposit.*



# Reductions in Force...

# Questions

**If I have to reduce my workforce after the 8-week period ends, are there special considerations for determining who to lay off or terminate given that productivity will be a skewed metric?**

- Establish legitimate non-discriminatory criteria (e.g., length of service, disciplinary record, attendance, performance\*).
- Consider the *impact* of the decision on protected classes (*i.e.*, race, gender, age) – even if your rationale is facially non-discriminatory.
- RIF, temporary layoff or furlough? If layoff, how recall?
- Severance? If so, obtain a release. And remember the OWBPA requirements to effectively waive age discrimination claims.
- Document your rationale.
- Accurately communicate the decision to your employees (RIF, layoff, expectations).

\* Could consider pre-COVID-19 performance so long as you do the same for everyone.

# Thank You Questions?

Presented by:

**Melanie L. Webber, Esq.**  
[mwebber@fisherphillips.com](mailto:mwebber@fisherphillips.com)

and

**Jerry P. Cline, Esq.**  
[jcline@fisherphillips.com](mailto:jcline@fisherphillips.com)

440/838-8800

The logo for Fisher Phillips, featuring the company name in white text on a red, stylized banner.

**Fisher  
Phillips**