

SBA: Employees Who Decline Offers of Reemployment Will Not Reduce Amount of Borrower's PPP Loan Forgiveness

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On April 2, 2020, the Small Business Association (SBA), in consultation with the Department of the Treasury, published its Interim Final Rule ("Rule") announcing the Paycheck Protection Program. While the Rule provided some helpful (and surprising) interpretations of the program, lenders and borrowers still had many questions.

In response to these questions, the SBA has been providing additional guidance in the form of Frequently Asked Questions on the Department of the Treasury's website. The guidance is updated frequently, with the most recent update occurring on May 5, 2020. This guidance is important because the SBA states that: 1) borrowers and lenders may rely on the guidance as the SBA's interpretation of the CARES Act and of the Rule and; 2) the U.S. Government will not challenge lender actions that conform with the guidance.

Though borrowers and lenders should review the guidance in its entirety (and continue to check for updates), the SBA provided one important clarification for borrowers that laid off employees who now refuse offers to be rehired:

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

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

Though this guidance is helpful, it raises new questions. For example, Section 1106(d) of the CARES Act appeared, for forgiveness purposes, to focus on the average number of full-time equivalent employees employed before the COVID-19 pandemic and on June 30, 2020, not the employment status of individual employees. Accordingly, if one employee refuses to return to work, is the employer obligated to attempt to fill that position under with a new employee or can it leave that position vacant?

Moreover, this guidance does not nearly answer all outstanding questions regarding steps borrowers must take to ensure loan forgiveness remain. For example, as set forth in an earlier post, Section 1106 of the CARES Act provides that "costs incurred and payments made" within the 8-week covered period will be forgiven, but the SBA still has not clarified whether an expense must be incurred and paid within the eight-week period to be eligible for forgiveness or whether "costs incurred" and "payments made" during the eight-week period are both forgivable. This is an important question because, under the former interpretation, a borrower could not use the funds to pay employees for work performed prior to receiving the loan.

Based on the language used FAQ #40, the SBA appears to be on the verge of releasing its guidance on forgiveness of PPP loans. Until the SBA provides this guidance, however, borrowers and lenders must proceed with caution.

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