

LEGAL UPDATES

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A Checklist for Addressing the Multiple Business Challenges Presented by COVID-19

It's been a hectic three weeks of pretty much non-stop developments and activity, so I thought it might help to lay out a checklist of issues we've been discussing with many of you during the COVID-19 crisis. If we have not touched base on these and you wish to do so, please let us know.

Below, we have taken inventory of some of the concerns and questions we've heard from you and have provided some information addressing these.

Also, check out a short Q&A that I've posted that provides a checklist of ESOP-related issues.

A lot of these questions are answered in postings on our website and I have provided links below, but many of you have felt more comfortable discussing them. If you'd like to talk, please call us. Stay well!

1. Consider applying for the PPP

I listed this first because it is generally the best program, and it is time-sensitive: [FAQ: CARES Act SBA Loan Programs - Paycheck Protection Program \(PPP\)](#). Good news, we are starting to hear of PPP application approvals and some funding, but I've been told that the bulk of it could take another 2-3 weeks.

Figure out whether you are eligible for PPP:

Under my NAICS code, there is a revenue test in addition to a number of employees test. Does the revenue test apply for purposes of my eligibility for PPP? (A: if you have fewer than 500 employees, you qualify without regard to revenue)

Under my NAICS code, the number of employees test is greater than 500. If I'm over 500 employees but under the threshold for my code, am I eligible for PPP? (A: potentially, yes, if you meet all of the small business concern tests, including any applicable revenue test)

How do the affiliation rules apply to me in determining whether I am eligible for PPP?

My business is doing great. Does that mean I'm not eligible for PPP? (A: no; almost every business faces economic uncertainty; what if there were a mass virus exposure at your worksite?)

To qualify, must I certify that I won't lay off a certain percentage of my employees? (A: no, but see the following, re: forgiveness: FAQ: Paycheck Protection Program Loan Forgiveness)

I have individual subsidiaries that have 500 or fewer employees, but my affiliated group is over 500. Is eligibility for PPP tested on an affiliated group basis? (A: yes)

My business has a private equity or venture capital investor; does that impact my eligibility? (A: possibly)

May I take a PPP loan if I already have an Economic Injury Disaster Loan (EIDL), or I've applied for one and received the \$10,000 grant? (A: yes, but see guidance)

If you are eligible for PPP: PPP Loan Amounts and Use of Proceeds

For purposes of calculating the eligible loan amount, over what period is average payroll counted? (A: use either calendar year 2019 or the 12 months ended before the application date, unless you are using a seasonal measure)

How do I apply the \$100,000 per employee limit on counting payroll cost? (A: it applies to salary, wages, commissions and other cash compensation [e.g., bonuses], it does not apply to other payroll costs not paid in cash to the employee [including health, retirement and taxes])

Does it require that I recalculate my 401(k) match to what it would have been had I applied that to only a maximum of \$100,000 of compensation? (A: no)

I have a seasonal business. Do I have an alternative to using a 12-month period to calculate average payroll? (A: yes, in general, you may use either 2/15/19 – 6/30/19, or 3/1/19 – 6/30/19)

Is it important that I apply ASAP? (A: yes; it's first come, first served and there is a limited amount of money available)

If you take out a PPP loan:

May I pay dividends? (A: apparently, yes)

May I lay off employees? (A: apparently, yes, but see the following re: forgiveness: FAQ: Paycheck Protection Program Loan Forgiveness)

How do I prove that I spent the loan proceeds on qualifying expenditures? (A: awaiting guidance, but you definitely should keep evidence)

May I also apply for an EIDL? May I also receive the \$10,000 EIDL application grant? (A: generally, yes, but see guidance re: FAQ: CARES Act SBA Loan Programs - Paycheck Protection Program)

Watch for guidance, re: how to prove that you are entitled to forgiveness (e.g., would it be best to set up a separate bank account?): PPP Lending Criteria and Loan Forgiveness

2. Consider applying for an Economic Injury Disaster Loan (EIDL).

EIDL is another SBA-administered loan program that can benefit small businesses. Check out the link above to our website's FAQ or go to the Small Business Administration to check on your eligibility and the status of loan availability.

3. If you are not eligible for PPP, then consider:

May I defer payment of employer portion of payroll tax? (A: yes – A Summary of CARES Act Tax Relief Provisions)

May I take advantage of the Employee Retention credit? FAQ: Employee Retention Credit for Employers under CARES Act

Are there any other loan programs potentially available to me? FAQ: Coronavirus Economic Stabilization Act of 2020

4. Determine whether you or any of your subs are subject to FFCRA: Does the Families First Coronavirus Act (FFCRA) Apply to Your Company?

I'm not eligible for PPP because I have more than 500 employees. Is it possible that I or any of my subsidiaries are nevertheless subject to the FFCRA (which also has a 500-employee test)? (A: yes, because the affiliation rules are different for FFCRA than for PPP)

How do I get reimbursed for providing paid leave?

If an employee refuses to come to work out of fear of exposure (e.g., a member of my employee's household is in a high-risk category), must I/may I provide paid leave? (A: such an employee is not eligible for paid leave under FFCRA)

5. If you can't afford to continue to pay everyone on your payroll, consider:

What are the advantages/disadvantages of termination of employment vs. furlough (unpaid leave) vs. an across-the-board pay cut?

If I terminate employees, must I fully vest them in the 401(k) and employee stock ownership plan (ESOP)? COVID-19-Related Issues for 401(k) Plan Sponsors (note that the same rules apply to ESOPs as apply to 401(k) plans.)

6. Determine whether any of your locations are in an area that is impacted by a closure order: State-by-State COVID-19 Guidance

If so, is my business "essential" and may it remain open? As Shelter-in-Place Orders Spread, What Businesses are Essential?

Is there any reason for me to get a legal determination on that to send to employees, suppliers, regulators or others?

I consider my business to be essential. Should I notify my suppliers and customers? (A: yes)

7. To the extent you have employees who are not working from home:

What are my obligations to protect them? Workplace Issues and COVID-19

How do I respond if an employee does not want to come into work (even though he/she is otherwise healthy and able to do so)?

Should I require the employees to wear face masks or offer them for voluntary use? See OSHA guidance: Guidance on Preparing Workplaces for COVID-19

8. Consider the impact on your 401(k) plan of the new 401(k) provisions designed to help your employees during this crisis: The CARES Act: Key Changes Affecting Retirement Plan Sponsors

Are those provisions required or optional?

When do I need to amend the plan for these new provisions?

9. Determine COVID implications to your health plan, particularly if it is self-insured. See, e.g., The CARES Act: Key Changes Affecting Retirement Plan Sponsors

What COVID-related expenses may my health plan pay before reaching the deductible in a high-deductible health plan?

What other expenses may my flexible spending account (FSA), health savings account (HSA), or health reimbursement account (HRA) pay for?

What happens to health coverage if we place employees on a long-term leave of absence?

How do the Affordable Care Act (ACA) and the look-back measurement methods affect eligibility for health coverage during a leave of absence? Does it matter whether that is paid or unpaid?

Will the insurance carrier cover employees if we allow them to stay on the plan longer than as provided in the plan document?

When does COBRA start and end?

How do we address premium payments for health coverage while employees are on a leave of absence, particularly where it is uncertain whether the employee will return?

10. Consider your and your customers'/suppliers' rights not to perform contracts due to the pandemic (so-called *force majeure*): How COVID-19 Affects Contractual Obligations

11. Consider whether you have any insurance claims related to losses you've experienced.

COVID-19 resource

Husch Blackwell has launched a COVID-19 response team providing insight to businesses as they address challenges related to the coronavirus outbreak. The page contains programming and content to assist clients and other interested parties across multiple areas of operations, including labor and unemployment, retailing, and supply chain management, among others.