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# SBA Issues New FAQ Clarifying Effect of Employees Who Won't Return to Work on Paycheck Protection Program Loan Forgiveness

*Hinckley Allen Corporate & Business*
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One of the most attractive features of the Small Business Administration's ("SBA") Paycheck Protection Program ("PPP") loans is a borrower's eligibility for loan forgiveness if loan proceeds are spent appropriately. However, the amount of the loan eligible for forgiveness may be reduced if (among other factors) there have been reductions to full-time equivalent employees ("FTE") or salaries/wages.

The borrower must compare its average FTE numbers during the 8-week period after receiving a PPP loan to its average FTE numbers during the "baseline period" (either February 15, 2019 – June 30, 2019 or January 2020 – February 2020, whichever the borrower chooses). If there has been a reduction, the borrower's PPP forgiveness amount will be reduced proportionately (i.e., a 10% reduction in average FTE numbers will result in a 10% reduction to the forgiveness amount). Any reductions to FTE numbers made between February 15, 2020 and April 26, 2020 will not affect a borrower's forgiveness if the reductions are eliminated prior to June 30, 2020.

But what if, prior to June 30, 2020, an employer tries to rehire employees it laid off between February 15, 2020 and April 26, 2020, but some or all of those former employees refuse the offer? Up until recently, the SBA had not offered any guidance on this point. On May 3, the SBA gave some relief to employers who are, or will be, experiencing this problem. But it comes with conditions.

**SBA Update to FAQs**

On May 3, 2020, the SBA updated its Paycheck Protection Program Loans Frequently Asked Questions to add three more questions, including Question 40. Question 40 asks:

*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?*

The answer? No.

**Key Takeaways for Employers**

First, the FAQ makes it clear that the employee who refuses to be rehired must be the *same* employee who the borrower laid off. A borrower will not be given credit under this rule for other potential employees who turn down offers of employment, such as individuals who have not worked for the borrower before.

Second, the FAQ states that, to qualify for this exception, a borrower must:

- Make a good faith, written offer to rehire the employee at the same salary/wages and same number of hours; and
- Document the employee's rejection of the offer.

Therefore, a borrower should carefully document all rehire offers, any rejection of those offers, and save the documentation to the borrower's files. Additionally, the borrower should make this offer well in advance of June 30, 2020 to give the former employee time to respond to the offer before the deadline for eliminating layoffs set forth in the CARES Act.

Third, the FAQ warns borrowers and employees that employees who reject offers of re-employment may forfeit eligibility for continued unemployment compensation.

Finally, the FAQ states that the SBA will release a subsequent interim rule further clarifying this exception in the near future. We will update this Client Alert if and when such interim rule is released.

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*This summary does not include or address every provision of Paycheck Protection Program under the CARES Act, which should be read in its entirety. Furthermore, pursuant to the CARES Act, the SBA continues to promulgate regulations for the implementation of the Paycheck Protection Program and, as such, there is still uncertainty relating to details of implementation.*

*We are here to help answer specific questions and offer advice on your options. Please contact any member of our Corporate & Business Group to discuss.*

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