

# A PPP Dilemma: Can Employers Exclude Employees Who Refuse to Return to Work from their Loan Forgiveness Calculation?

By **Richard L. Gillespie and William Hays Weissman** on May 7, 2020

One of the most enticing reasons to obtain a loan under the Paycheck Protection Program (PPP) is the potential for the loan's forgiveness.<sup>1</sup> The federal Coronavirus Aid, Relief, and Economic Security (CARES) Act authorized the U.S. Department of the Treasury to create the PPP through the Small Business Administration's (SBA) 7(a) lending program.<sup>2</sup> The loan forgiveness aspect allows employers to obtain business-saving funds without simply "kicking the can down the road" to face debt obligations in a financially uncertain future. The loan forgiveness, however, is contingent on the use of the loan funds for employee payroll.<sup>3</sup> While promising, the program poses a serious dilemma for some employers: as a practical matter, can employers afford to take out small business loans that may or may not be forgiven, especially when employees refuse to return to work?

This quandary arises because another provision of the CARES Act essentially runs at odds with the PPP's loan forgiveness incentives. Some employers are finding it difficult to get hourly employees to return to work following furloughs and layoffs because, depending on the circumstances, employees can make more by staying home. For example, California offers unemployed workers up to \$450 per week of unemployment benefits.<sup>4</sup> They can receive an additional \$600 a week through the CARES Act's Pandemic Unemployment Assistance (PUA) Program.<sup>5</sup> Together, these programs entitle some workers to more than \$26.00 an hour for a standard 40-hour workweek, and \$35.00 an hour for a 30-hour workweek.<sup>6</sup> While these funds are certainly essential for workers who cannot find work, or who are required to stay home to take care of sick family members or school-age children, they also provide a disincentive for others who are fully able to return to work.

California, like other jurisdictions, traditionally disqualifies employees from receiving unemployment benefits if they refuse work without good cause. However, the number of unemployment claims and filings caused by the COVID-19 pandemic makes the traditional processes used by states to police against such actions impractical, if not impossible. Given the tension between the PPP and PUA, employers are left to wonder if their repayment obligations under the PPP will be affected if employees refuse to work.

The SBA, in consultation with Treasury, maintains a "[Frequently Asked Questions](#)" (FAQ) page concerning PPP loans. On May 4, 2020, the SBA updated the page to add a FAQ (No. 40), which addresses the above-stated issue concerning loan forgiveness and provides some direction for employees as well. It states:

**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.

According to FAQ No. 40, the "SBA and Treasury intend to issue an interim final rule excluding laid-off employees whom the [employer] offered to rehire" but that refused to return to work from the PPP loan forgiveness calculation. The FAQ specifies that the employer must make a "good-faith, written offer" to rehire the employee, and must specifically document the employee's rejection of that offer. The FAQ also indicates that the offer should be "for the same salary/wages and same number of hours" that the employee worked before the lay-off.

The FAQ does not specify how employers must document a former employee's rejection to return to work, or if reducing an employee's salary or hours will foreclose the exemption. Further, there are additional nuanced fact patterns that could use further clarification. For example, an individual may not refuse to return to work because of a COVID-19-related reason within the meaning of PUA. While presumably that should fall within the FAQ's intent, further clarification is needed. Hopefully these uncertainties will be addressed by the final interim rule. Finally, FAQ No. 40 reminds employees of the importance of their return to work by stating that "employees who reject offers of re-employment may forfeit eligibility for continued unemployment compensation."

While it is uncertain when the final interim rule will be released, it is important to note that the second paragraph of the SBA's FAQ provides: "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 Rules ("PPP Interim Final Rules"). The U.S. government will not challenge lender PPP actions that conform to this guidance, and to the PPP Interim Final Rules and any subsequent rulemaking in effect at the time." This express statement provides employers direction that they may rely on FAQ 40 when applying for SBA loans, in seeking to rehire employees, and in calculating the amount of the loan that may be forgiven.

The SBA's updated FAQ recognizes the loan forgiveness issue, promises a solution, and removes some of the strain employers are facing in deciding whether to apply for small business loans. This is a small win, which is all most of us are looking for during these trying times. Until further guidance is issued, whether through more FAQs or the final interim rule, we recommend that employers:

- Make any offer to return to work in writing
- Include a clear date by which the employee must respond, with notice that failure to respond shall be treated as a refusal to return to work
- Also include a statement that refusal to return to work may result in the individual being ineligible for continued unemployment benefits

<sup>1</sup> H.R. 748, Section 1106(b)-(d).

<sup>2</sup> H.R. 748, CARES Act, Public Law 116-136; 15 U.S.C. 636(a); Small Business Admin., *Types of 7(a) Loans*.

<sup>3</sup> H.R. 748, Section 1106(d)(2)(A).

<sup>4</sup> Cal. Employment Development Department, *Pandemic Unemployment Assistance*.

<sup>5</sup> See 2020 U.S. Department of Labor, *Unemployment Insurance Program Letter No. 15-20* (Apr. 4, 2020).

<sup>6</sup> For a point of reference, California's current minimum wage is \$13.00 an hour for employers with more than 26 employees, and \$12.00 an hour for employers with less than 26 employees. The federal minimum wage is \$7.25.

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