Cullen | Dykman

An Employee Who Refuses Rehire Will Not Trigger PPP Loan Forgiveness Issues for Employers, According to New SBA Guidance

May 7, 2020

On March 27, 2020, the Coronavirus Aid, Relief, and Economic Security Act ("CARES Act") became law. A key part of the CARES Act was the Paycheck Protection Program ("PPP"), a loan program intended to help small businesses during the coronavirus ("COVID-19") pandemic. (For more information on the CARES Act generally, including the PPP, please see Cullen and Dykman's previous client alert here.)

The PPP is administered by the Small Business Association ("SBA") in conjunction with the Treasury Department. Since the PPP was implemented, the SBA has released periodic guidance and information on its website. On May 3, 2020, the SBA updated its Frequently Asked Questions ("FAQ") to include additional guidance on an important feature of the PPP: loan forgiveness. (For a discussion of highlights of the SBA's previously issued guidance, please see Cullen and Dykman LLP's previous client alert here.)

As explained by the SBA's PPP Information Sheet, the loans issued under the PPP will be forgiven if "loan proceeds are used to cover payroll costs, and most mortgage interest, rent, and utility costs over the 8 week period after the loan is made" and "[e]mployee and compensation levels are maintained." Assuming that the borrowing business uses the loan money for the designated purposes during the 8 week timeframe, there are still two scenarios in which the loan amount would not be fully forgiven.

The forgiveness amount "will be reduced" if the borrowing business decreases either "full-time employee headcount" or "salaries and wages by more than 25% for any employee that made less than $100,000 annualized in 2019." However, if the business "restore[s] [its] full time employment and salary levels for any changes made between February 15, 2020 and April 26, 2020" prior to June 30, 2020, then the business once again becomes eligible for full loan forgiveness.

Many employers have expressed a concern that laid off or furloughed employees might be reluctant to be recalled to work. Employees may have safety concerns, and some employees may earn more receiving unemployment insurance benefits than they earned while working (when including the temporary Federal supplement to employees of $600 per week, regardless of their actual salaries). The new SBA FAQ guidance addresses this concern. The SBA stated that, if certain requirements are met, a business will not be penalized with a reduced forgiveness amount "if the borrower laid off an employee, offered to rehire the same employee, but the employee declined the offer." The requirements to be exempt from penalization are that the offer of

reemployment be “for the same salary/wages and same number of hours,” that the business “made a good faith, written offer of rehire,” and that the business documents “the employee’s rejection of that offer.” A forthcoming interim final rule is expected to be issued to this effect. The SBA also noted that “employees who reject offers of re-employment may forfeit eligibility for continued unemployment compensation.”

We will continue to update this as more information becomes available. In the meantime, if you have questions regarding any aspects of employment law and/or the implications of the coronavirus (“COVID-19”) on your place of business, feel free to contact James G. Ryan at (516) 357-3750 or via email at jryan@cullenllp.com, Thomas B. Wassel at (516) 357-3868 or via email at twassel@cullenllp.com, or Hayley B. Dryer at (516) 357-3745 or via email at hdryer@cullenllp.com.

Please note that this is a general overview of developments in the law and does not constitute legal advice. Nothing herein creates an attorney-client relationship between the sender and recipient.

Practices

- Labor and Employment