



Treasury Department Leverages PPP Forgiveness to Require Employers to Disclose Job Offer Rejections to State Unemployment Agencies

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As uncertainty surrounding loan forgiveness under the CARES Act's Paycheck Protection Program (PPP) continues to loom over the heads of small business owners throughout the nation, the Department of the Treasury issued an **interim final rule** (IFR) on May 22, 2020 in an attempt to clarify one of the ways that borrowers can prevent a reduction in loan forgiveness based on employee headcount.

Under the CARES Act, the amount of PPP forgiveness may be reduced if the borrower reduces its workforce or salary levels during the first eight weeks of the loan (the Covered Period). A reduction in loan forgiveness based upon employee headcount occurs if a borrower's average number of full-time-equivalent (FTE) employees during the Covered Period is less than the average number of FTE employees during the period of February 15, 2019 to June 30, 2019, or January 1, 2020 to February 29, 2020. However, a statutory exemption is provided for borrowers who rehire employees (or restore salary or wage levels) by June 30, 2020. Thus, borrowers seeking to maximize loan forgiveness have an incentive to rehire employees after obtaining a PPP loan.

But what happens if the borrower offers to rehire an employee at the same salary and hours, but the employee declines the offer?

On May 3, 2020, the Small Business Administration, in consultation with the Department of the Treasury, published the following **FAQ**:

40. 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.

Notably absent from the above FAQ is an affirmative duty on the part of the employer to inform the applicable state unemployment insurance office of an employee's rejection of the re-employment offer. The FAQ simply states that employees and employers should "be aware" that a rejection may impact the employee's eligibility for unemployment benefits.

However, in its May 22, 2020 IFR, the Department of Treasury stated for the first time that borrowers must inform "the applicable state unemployment insurance office of such employee's rejected offer of re-employment within 30 days of the employee's rejection of the offer." As such, making the offer, and documenting the rejection internally, is no longer sufficient to qualify for the PPP forgiveness.

The employer must affirmatively notify the state unemployment commission. The employer should maintain documentation that it has done so.

Individual State Forms and Duty to Disclose Rejected Job Offers

Virginia: The Virginia Employment Commission has a form available for employers to report employees who have rejected job offers. *Virginia's form can be found [here](#).*

North Carolina: The North Carolina Division of Employment Security states, "Employers may report to DES that employees have not returned to work when work is available. Sign into your online account at des.nc.gov and click on the form on your "Employer Homepage" to submit information about an employee's refusal to return to work. We will review the information to help determine the employee's eligibility for unemployment benefits." See the ***North Carolina Division of Employment Security's COVID-19 Information for Employers*** page for additional information.

South Carolina: The South Carolina Department of Employment and Workforce indicates that employers are to report offers/refusals to return on their respective online portals. The South Carolina DEW states, "[i]f you have offered an individual a job and they refused, it is important for you to report the incident to DEW through your **Employer Self Service Portal**." See ***this posting*** for additional information.

Employers with operations and employees in other states should consult that state's unemployment compensation commission or department for forms and guidance.

Only time will tell how strictly the above disclosure requirements will be enforced. In the meantime, it is important for borrowers to carefully review available guidance prior to completing their PPP loan forgiveness applications.

Please note: This alert contains general, condensed summaries of actual legal matters, statutes and opinions for information purposes. It is not meant to be and should not be construed as legal advice. Readers with particular needs on specific issues should retain the services of competent counsel.

Please click [here](#) for additional legal updates from Williams Mullen regarding COVID-19.

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