

SBA and Treasury Issue Guidance Regarding Employees Who Decline Rehire Offer

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On Sunday night, the SBA published questions 40-42 of the Paycheck Protection Program (PPP) frequently asked questions (FAQ) file it maintains with the Treasury. Among the new questions, the SBA provided guidance for small businesses regarding employees who reject offers of reemployment.

Per FAQ 40, the SBA and Treasury intend to issue an interim final rule that will exclude laid-off employees whom the borrower has offered to rehire (for the same salary/wages and same number of hours) from the loan forgiveness reduction calculations under Section 1106 of the CARES Act. To qualify for this exemption, the guidance states that employers must have "made a good faith, written offer of rehire, and the employee's rejection of that offer must be documented..."

In addition to the exemption for employers who attempt to rehire employees, the SBA warned that employees who reject a good faith offer of re-employment "may forfeit eligibility for continued unemployment compensation." The interim rule promised by the SBA and Treasury will likely contain some clarification as to under what circumstances such employee will forfeit unemployment eligibility.

This guidance comes in light of reports that a number of employers who have received PPP funds and have begun their rehiring efforts are finding that some employees are turning down offers. The rejection of rehire offers appears to largely come as a result of the additional \$600 per week in unemployment compensation paid

to qualified persons under Section 2104(b)(1)(B) of the CARES Act.

We also wish to point out that while FAQ 40 does not directly address employees who resign (which would be expected to happen in the normal course of business), it does indicate that the SBA and Treasury are viewing the employee reduction issue from an economic layoff perspective. While this could reasonably be interpreted as consistent with the spirit of the law, Title 1 of the CARES Act itself does not use the concept of "layoffs" nor does it address the purpose of any such layoffs, but it instead simply looks at headcounts regardless of the reasons for any reduction of such headcounts.

This begs the question of whether the SBA and Treasury will take the next logical step of permitting employers to disregard employee resignations in calculating headcount reductions for the purposes of calculating the amount of a PPP loan that may be forgiven. One might argue that an employer who actually laid off employees should clearly not be treated more favorably than an employer who did not, but it remains to be seen if SBA and Treasury should agree.

Question 41 of the FAQ clarified that for purposes of calculating maximum loan amount, seasonal employers may elect to use average monthly payroll for the time from February 15, 2019, to June 30, 2019, or a 12-week period between May 1, 2019, and September 15, 2019 (per the April 28 Interim Final Rule).

Question 42 provides some guidance on whether not-for-profit hospitals exempt from taxation under Section 115 of the Internal Revenue Code will be eligible for PPP loans as "nonprofit organizations" under Section 1002 of the CARES Act.

One particular issue that still remains unclear is the definition that the SBA will be using for "full-time equivalent employees" (FTEs) when calculating loan forgiveness reduction as a result of cutback on headcount and hours. Further, clarity is also required regarding how forgiveness reduction will be calculated.

Additional guidance from the SBA and Treasury regarding forgiveness was promised 30 days after the enactment of the CARES Act and is past due as of April 26.

We will continue to monitor any additional guidance issued by the SBA and Treasury and will provide you with any updates as they become available.

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