Coronavirus: Legal and Practical Tips for Businesses and Employers – Maine Reopening Plan and PPP Guidance + Live Q&A Webinar

May 28th, 2020

PORTLAND Regional Chamber of Commerce

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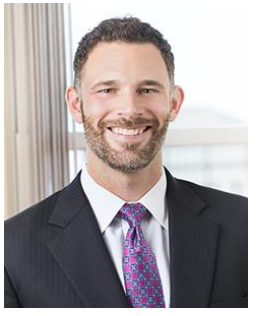

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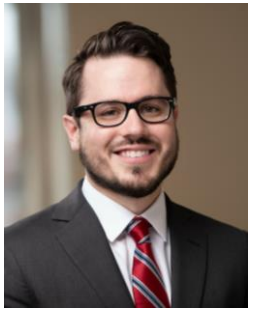

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Agenda

1) Overview

2) PPP: New Forgiveness Application and Guidance

3) Guidance for Employers Creating a Reopening Plan

4) Latest Issues from the Trenches

5) Questions and Answers

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Paycheck Protection Program: Loan Forgiveness Application

Loan Forgiveness for Eligible Costs During 8-Week Period Post-Origination

- "**Costs incurred and payments made**" during 8 weeks covered period may be forgiven. Loan Application Form makes clear this is either/or.
  - Thus, eligible payroll and other costs that are ***paid*** during the 8 weeks, as well as any such costs ***incurred*** during the same period, are forgivable (provided that costs that were "incurred only" during the 8 weeks are subsequently paid for during the next paycheck and/or billing period).
  - "Incurred only" costs, paid for in the next billing or payroll period, are on a *pro rata* basis to cover only those costs that were incurred during the 8 weeks.
- At least 75% of forgivable costs must be for eligible payroll costs.
- Eligible non-payroll costs include rent, utilities, and mortgage interest
- Same "either/or" costs incurred or payments made applies to non-payroll costs.

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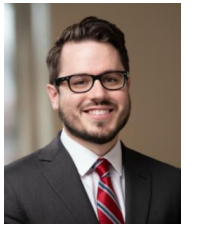
Paycheck Protection Program: Loan Forgiveness Application

Expansions, Limitations, on Loan Forgiveness Application

- On the one hand, the Loan Forgiveness Application *limits* the amount of *cash compensation* that may be paid to employees, by utilizing a hard cap of **$15,385** in cash compensation per employee (8/52 of $100,000).

- For some employers, this may mean that a portion of **bonus payments** and/or **hazard pay** issued during the 8-week period may not be forgiven, to the extent such payments increase compensation above $15,385.

- On the other hand, the Application *expands* what is forgivable:
  - (a) Increases definition of 8-week period to be "either/or" (for costs incurred *or* paid during period, or both), which may result in more than 8 weeks of coverage
  - (b) Special bonuses, hazard pay, and commissions, are included in definition of "payroll costs" provided they are paid for during 8 weeks (or next paycheck)
  - (c) Provides new categories of exemptions to FTE headcount reductions.
  - (d) Will not count employees who refuse to return.



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- (c) provides new categories of exemptions to FTE headcount reductions --
  - Good-faith written offers to re-hire during 8 week period;
  - Employees who resigned, voluntarily asked for hours reduction, or fired for cause during 8 week period
  - [NOTE: these four new categories are IN ADDITION to June 30 re-hire]

- **What if employee refuses to return.** The SBA will not count against you for the headcount or the wage reduction the following:
  - You have made a good faith, WRITTEN offer of rehire (or if applicable, restored the hours reduced) during the covered period.
  - The offer was for the same salary or wages and same hours as earned by the employee in the pay period *before separation or before hours were reduced*;
  - The employee rejected the offer
  - The borrower informed the unemployment insurance office of the offer and rejection.

Paycheck Protection Program: Forgiveness Headcount Reduction

Full-Time Equivalency (FTEs):

- What is a "full-time equivalent" employee?
- What if my employees are not working full-time hours?
- How will the "penalty" be calculated?
- What is the "safe harbor"?
- What if employees have refused to come back, even though I have a PPP and can rehire?

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- **What is a "full-time equivalent" employee?** The regulation issued on Friday specifies FTEs are "an employee who works 40 hours or more, on average, each week." How do you calculate how many FTEs you have? Take a hypothetical: You have 10 employees, 5 are working an average 40+ hours per week, 3 are working an average of 30 hours per week, and 2 are working an average 20 hours per week. You're allowed to do this one of two ways, you CHOOSE: (1) you can apportion the hours based on the proportion of hours worked. Therefore, in our example the 5 employees would be assigned a 1.0 each, the 3 employees a .75 each, and the 2 employees a .5 each. Therefore, you would have **8.25 FTE employees**. (2) Alternatively, you could elect to use a .5 FTE for each part-time employee. So in our example above, you would only have **7.5 FTE employees**.

- **How do I know which one to choose?** If you have not lost employees, this won't matter. If you have, run your calculations to pick the more advantageous one. You must pick only one method and apply that method consistently to all of your part-time employees for both periods.

- **What if my employees are not working full-time hours?** The PPP program is about making sure that paychecks are continuing. Employees can be paid to do little or nothing during this time, it is the payment of those employees, not the assignments or duties, that the SBA and your bank will look to.

- **How will the "penalty" be calculated?** The forgiveness "penalty" is a percentage. Coming back to our original example, if 2 of our employees are no longer working or paid by the employer, it will reduce the forgiveness by the same percentage as compared to the comparator period that you choose, (either 2/15/19 to 6/30/19 or 1/1/20-2/29/20). The two employees who are no longer working are 1 of the 5 who were working 40+ hours per week, and 1 of the 2 who were working 20 hours per week. If we had used the first calculation, we had 8.25 FTEs, now we have 6.75, resulting in an equivalent percentage reduction in forgiveness (18%).

- If we had calculated the second way, you would have instead of 7.5 FTE employees, now we have 6 FTE employees, resulting in a 20% forgiveness reduction. Why would anyone choose the second way? If you have many employees working just under 40 hours a week, it may work out better. Compare this, by the way, to the manner in which the Affordable Care Act calculates full-time equivalent employees for the purposes of eligibility for employer-provided coverage (calculate the total hours of service for a month, but not more than 120, and divide by 120). This is a more generous way of allowing you to calculate your employees.

- **What is the "safe harbor"?** If you have this reduction, but can rehire employees by June 30, you will not be subject to this reduction. I've seen very few people use. The new rules have clarified another big safe harbor, you offer to reinstate employees, but they decline to return.

Returning to Work: Reopening Plan Guidance

At a minimum, your plan should cover:

1) Screening procedures for employees/customers.

2) Protocols for good hygiene and social distancing in the workplace, which can include:
    1) Hazard assessments,
    2) Physical distancing procedures,
    3) Changes to workspace use (like bathrooms, breakrooms or lunch areas)
    4) Implementing separation, depending on the workspace,
    5) Staggering entry or exits, restricting outside visitors/vendors.
    6) Policies for employees on practicing hygiene and use of protective equipment;
    7) Changes to air filtration or access to outside air.
    8) Cleaning and sanitation processes.

3) What will happen if an employee tests positive or shows symptoms of COVID-19; and

4) Restrictions on travel and procedures.

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1) Screening. DECD General Checklist screening procedures: Ask employees and customers the following questions to screen for illness:

- Have you had a cough or sore throat?
- Have you had a fever or do you feel feverish?
- Do you have shortness of breath?
- Do you have a recent loss of taste or smell?
- Have you been around anyone exhibiting these symptoms within the past 14 days?
- Are you living with anyone who is sick or quarantined? o Have you been out of state in the last 14 days?

2) Protocols for Sanitation and Social Distancing: These are largely industry and workplace specific and will come from prevailing guidance including DECD checklists, CDC guidance, OSHA guidance, and there are many good resources out there from professional associations.

3) Exclusion. Clear protocols so employees know both what will happen if they are sick (Exclusion from the workplace? Use of Emergency Paid Sick Leave and other continuation of pay? And when they can expect to return?) if a coworker becomes sick (Changes to reporting structures, work assignments, etc.) and sanitation of the work environment (Closure to allow for cleaning and cleaning procedures).

4) Travel. Both work-related and personal travel may be restricted if appropriate for your workplace. Work-related travel may be essential, but comply with the Governor's orders on mandatory quarantining periods. Restrictions on personal travel may take the form of advising employees that if they travel, due to the mandatory quarantining period, if they are unable to work remotely, the Company retains the discretion NOT to approve time off requests, as the employee understands it may add 14 additional days for out-of-state travel to allow for quarantining.

Returning to Work: Reopening Plan Guidance

Top 5 Considerations for Reopening Plans:

1) Follow applicable law.

2) Stay flexible.

3) Set the tone for your employees.

4) Stay mindful of privacy issues.

5) Keep your perspective.

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1) Follow applicable law. The difficulty for businesses in this climate is that there is not one clear message on what's required. Each agency, on both the state and federal levels, including the Centers for Disease Control and Prevention, the DOL, EEOC, the SBA, Department of Treasury, and Department of Economic and Community Development, and the Governor, are each issuing orders, regulation, or guidance in their respective areas. How do we wade through this morass of information? What is actually required, versus what is recommended?

Initially, when we did not have as much information, there was a greater emphasis on following official proclamations and guidance to the letter, and reading those as the standard of care for the OSHA general duty clause. Now that we have more guidance, some of which can be conflicting and much of which is unclear, that creates a higher hurdle for businesses. Our advice at this time: Stay vigilant. It can seem overwhelming, but much of the guidance, checklists, rules, and regulations contain very similar and overlapping requirements—particularly around those areas we all now know well: frequent handwashing, adjustments to provide for social distancing, masking when social distancing is not possible. You should follow the Governor's orders and certify that you have complied with CDC checklists.

2) Stay Flexible. For many companies, setting up a small committee or group of people who are tasked with reviewing guidance recommending changes to your plan helps divide this labor and keep you abreast of what's happening. Public health officials seem to expect that there will be spikes in COVID-19 cases in various areas and in the months to come, including a potential second wave in the fall or winter months. In these events, you should be prepared to make changes, implement emergency measures, even if you have little warning from local authorities. What can you do now to prepare for a potential recurrence of what happened in March?

3) Set the Tone for your Employees: This will probably be the most challenging part of a reopening plan. Frankly, we're all tired of having to upend our lives. If you're requiring masking of employees in certain areas of your facility, the continued compliance with your policy and efforts by your employees will be the biggest barrier to effective, safe reopening. Set the tone from the beginning: we're all working for the same thing. We want to be open, to run our business or organization, and the more safely we can do that, the longer we can stay at work. Be creative, think about ways to incentivize employees to follow the procedures and not to pull off masks when the weather heats up, or to get too close to one another as they go back to work.

On a related point, you'll also want to create clear communications with visitors and customers as well. As with employees, knowing what to expect in the workspace will help reduce anxiety, and focus on the steps and expectations for anyone entering the space. Update your websites and social media profiles to explain to those entering the space what to expect, what your procedures are, and how to navigate them.

4) Stay mindful of privacy issues. As we go forward, whether it is through rigorous screening (self-reporting) procedures from employees who may have had contact or shown symptoms of COVID-19, or testing for COVID-19, or in some cases, potential antibody testing, employers are expected to get more medical information, more regularly. Remember under Maine and federal law, that information must be kept separately from an employee's personnel file. It cannot be disclosed except on a need-to-know basis.

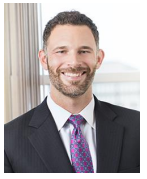
5) Keep your perspective. This has been a difficult time for everyone. We also recognize that employee issues are just one facet of a myriad of issues that businesses are facing in our new reality. Supply shortages, labor shortages (surprisingly), stoppages and closings, logistical hurdles in shipping, all standing in the way of your organization doing what it is supposed to do.

Returning to Work: Common Issues from the Trenches

1) What can I do if my employees refuse to return?

2) Should I be testing for COVID-19 before allowing employees to return to work?

3) What about antibody testing?



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1) **What can I do if my employees refuse to return?** It very much matters WHY they will not return. If an employee is refusing to return to work due to an underlying medical condition, you should be considering this as a potential disability claim. Keep in mind, Congress made some changes to the Americans with Disabilities Act (ADA) in 2008, the Americans with Disabilities Act Amendments Act (ADAAA) (two "acts") substantially broadening the definition of a "disability" and changing how it is analyzed. You should be engaging in the "interactive process" with this employee to determine if their needs can be reasonably accommodated without creating a direct threat to the health or safety of employees or an undue hardship on the business. This can be fraught with issues and challenging to analyze, before taking any adverse action against an employee, you should talk to counsel.

If employees claim that the hazard is an "imminent danger" under OSHA, employee may refuse to work, but that is extremely unlikely if you're following prevailing guidance. The Labor Secretary recently noted, on this front "*Coronavirus is a hazard in the workplace. But it is not unique to the workplace or (with the exception of certain industries, like health care) caused by work tasks themselves. This by no means lessens the need for employers to address the virus. But it means that the virus cannot be viewed in the same way as other workplace hazards*."

Is it protected concerted activity? Most likely not, but if it is group activity (two or more employees) or a single employee seeking to incite group action, or a single employee bringing group complaints to management, it may be protected for non-supervisory non-management personnel. Caution around disciplinary action, but talk to counsel as you may be able to seek replacements in some instances even if it does constitute concerted action.

1) **Should I be testing for COVID-19 before allowing employees to return to work?** As testing becomes more readily available, some employers may consider testing before permitting employees to return to work. The EEOC recently indicated that testing is permitted as a medical examination under the ADA because COVID-19 clearly creates a "direct threat" to the health of others. Right now, we have not seen guidance that says that you are *required* to test before employees return to work, but this too may change in the future. Keep in mind, if you do test, it is just a snapshot. There may be false positives and false negatives with any form of testing. As the EEOC instructs, you should look to the CDC and the FDA on what is considered safe and accurate testing. Remember your obligations to maintain employee privacy of confidential medical information.

2) **What about antibody testing?** Antibody testing or "serology" tests measure the antibodies that are present when the body is responding to a particular infection. Antibodies that respond to COVID-19 may indicate that the virus has been present in the person's system, and that they have developed an immune response. Unlike COVID-19 testing, the EEOC has not yet issued guidance on whether antibody testing is permissible medical examinations under the ADA, and for that reason, we would urge caution before using these tests. Prevailing guidance from the CDC and other public health authorities at the moment also suggests that the presence of antibodies in a person's blood should not be read as being equivalent to immunity to COVID-19, which some have suggested.

Returning to Work: Common Issues from the Trenches – the Childcare Conundrum

1) Families First Coronavirus Response Act
   - Emergency Paid Sick Leave
   - Expanded Family and Medical Leave

2) When is childcare "unavailable" due to COVID-19?

3) New births: FMLA versus Expanded Family & Medical Leave

4) Don't forget about potential exemption for businesses with less than 50 employees.

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As we return to work, some issues we have discussed in previous webinars take on new forms. One of those is the childcare conundrum: schools remain shut down still months after the initial closing in mid-March, but as the economy begins its phased reopening, we are encountering new issues with childcare. Reminder of Families First Coronavirus Response Act (FFCRA) has two parts: (1) Emergency Paid Sick Leave for up to 40 hours of leave if an employee is sick with symptoms of COVID-19, caring for someone who is sick, or a child when care is unavailable because schools are closed. (2) Expanded Family Medical Leave, 10 weeks for childcare.
New Issues: As summer camps reopen, daycares, we are finding some employers are having a harder time determining when childcare is in fact **unavailable.** The Guidance tells us that schools closing for summer vacations is not a qualifying reason, unless the parent's plan for summer care is also unavailable (camps/daycares). Remember, in order to qualify, childcare must be *unavailable due to COVID-19. You are allowed to ask questions of employees about their childcare arrangements, why they're unavailable. **What if parents just do not feel comfortable returning children to daycare?** No easy answers here, but early guidance suggested that if it is a grandparent or relative was not able to provide care due to concerns about transmission, that would be considered "unavailable." If a daycare is open, however, it is not likely the parent will qualify for Expanded Family & Medical leave.

New Births: Typically Emergency Paid Sick and Expanded Family & Medical Leave must be provided first. What about a child that is born—for those employers for whom FMLA ordinarily applies, we usually see FMLA leave combined with short-term disability benefits. Childcare may not be "unavailable," because the child would not be placed in childcare at that age anyway. Those with new births are typically providing parental leave or FMLA in accordance with their policies, and then, after those leaves expire, if the employee wants to take Expanded Family Leave, s/he may do so. Don't forget that use of regular FMLA will be counted against the overall available Expanded Family & Medical Leave time six weeks of regular FMLA will leave the employee with only 6 weeks of available FFCRA leave).

Q&A

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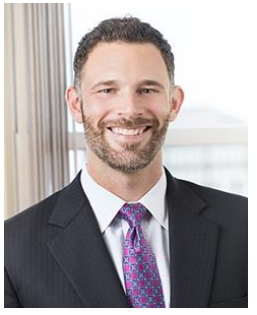

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