

NECA Legal Webinar 2 Q&A and Updated PPP Forgiveness Guidance

What is the Coronavirus?

Coronavirus Disease 2019 (COVID-19) is a respiratory disease caused by the Severe Acute Respiratory Syndrome (SARS)-CoV-2 virus. The current mutation is a new strain of the SARS virus and no individual has any immunity prior to an exposure. The CDC has reported that testing has begun on a vaccine but for now, everyone should prepare and plan for possible impacts resulting from COVID-19. It has spread from China to many other countries around the world, including the United States.

Questions and Answers 2

- 1 Question: What is allowed in the term “Transportation” to be deducted in the PPP?**
- 2 Question: If employees refuse to work due to concerns of contracting COVID-19, can the employer replace them? Does the employer have to pay individuals who choose to not work?**

Updated 5/27/20 Under the FFCRA, the fear of sickness does not trigger the required wages and the employer would not get the tax credits for paying the wages. The employee may be replaced as necessary but subject to recall under the terms of the NDERA. You should consult your CBA on pay as you may have a sick leave policy. Under the NDERA, the employer should truthfully respond to any unemployment inquiry from the state.

- 3 Question: Can we be exposed to wrongful death lawsuits? If so, what is the probability of a successful claim under a COVID-19?**

Any employer can be sued for anything at any time. However, there must be some basis to impose liability. It would be challenging to tie a case of COVID-19 definitively to a construction jobsite, unless an employer was truly negligent or willfully disregarded updated directives or safety guidance. In addition, if a case of COVID-19 was determined to be incident to the employment, it would most likely be covered by workers' compensation and subject to the bar that applies to any additional remedy against a contractor. But each case is fact specific and subject to the application of local laws.

- 4 Question: Have definitions been established for what is covered under “Utilities” for PPP loans? Electric, water, gas, internet, phone, cell phone, etc.?**

Payments for business related utilities (for the distribution of electricity, gas, water, transportation, telephone, or internet access) for which service began before February 15, 2020.

- 5 Question: If I already applied for a PPP loan through my local bank, do I need to reapply if/when more funds become available?**

You should check with the lender that you applied through as to the status of your application.

- 6 Question: What insurance premiums beyond health insurance premiums are forgivable under the PPP loan?**

Although it is not clearly defined, certain standard employment provided insurance likely qualifies, such as dental, vision, and disability and life. The good news is that none of these costs are specifically excluded.

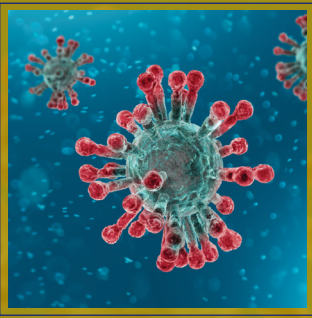


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7 Question: If an existing lease expired 4/1/2020, but a new lease with an increase on the same property was executed, will that be forgivable?

Possibly. Although the lease renewed in April, the tenancy was created prior to the pandemic.

8 Question: What are the dates that qualify for 8-week period of the PPP loan?

The eight-week period of the PPP loan refers to the period following the loan being provided (funded) to the employer.

9 Question: Do you know if ancillary/other hourly cost can be included in the forgivable amount (like JATC, LMCC, AMF/CAF, NECA Service Charges)?

Employers should seek forgiveness of these costs along with payroll under the PPP loan. Existing guidance is not specific, but the intent of the legislation is to keep employees on the payroll at their current compensation and benefit. Until specific guidance otherwise is provided by SBA, you could use an expansive interpretation. As new guidance is available, updates will be provided.

10 Question: An employer advised they were informed by their lender they could only use the loan for rent and payroll costs, not just to have it forgiven, but in general. Could that be a rule by the lender outside of the law? Could a lender enforce the uses of the loan outside of forgiveness?

The Federal rules on use of the loan are broad, but 75% of the loan must be used for payroll. You should review the promissory note provided by the bank to see if additional terms were added.

11 Question: What happens with employees who voluntarily quit or retire?

The requirement of the PPP loan is to maintain the number of FTE employees and salary for the eight-week period. They do not have to be the same people or have the same position/responsibilities. You also have the ability to restore lost FTE and salary by June 30, 2020. The CARES Act includes a “savings” provision that allows businesses that conduct layoffs or furloughs or salary reductions for one or more employees between February 15, 2020, and April 26, 2020 (the reduction window) to receive the full amount of forgiveness to which they would otherwise be entitled provided that: (i) any reduction in FTEs that occurs during the reduction window is restored by June 30, 2020, to at least to the number of FTEs employed on February 15, 2020; and (ii) the reduction in salary or wages for each employee compared to February 15, 2020, has been restored by June 30, 2020.

12 Question: How will full-time equivalent (FTE) employees be defined/ calculated for purposes of determining the potential reduction in forgiveness?

Full Time Equivalents is a term of art in the labor and employment law arena. Employers should use the definition defined by their respective company. Full time generally ranges between 35-40 hours depending on how the employer has defined full time.

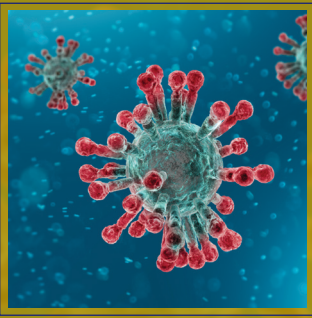
13 Question: Is the \$100,000 salary cap in the PPP loan limited to a weekly basis? Example: An individual may work overtime in one week and



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may exceed \$100,000 annualized, but the individual may/may not earn \$100,000 for the year.

This is not addressed by the law or in the guidance.

14 Question: What is the process of accounting for the seasonal nature of FTE employees in construction?

Instead of using twelve months, the seasonal business should use either February 15, 2019 through June 30, 2019 or March 1, 2019 through June 30, 2019.

15 Question: How is interest being applied given it is unknown the amount to be repaid until after the eight-week period? Is there is a 6-month deferral of payment of any loan amount that is not forgiven?

The six-month deferral will generally mean no interest will be paid in the 8-week period. Check the language of your lender's promissory note.

16 Question: With regards to the 8-week period for spending of the Payroll Protection Program (PPP) loan, the time starts when the money is received and ends 8 weeks later. For payroll purposes, is it when the payroll liability is incurred (time worked) or when it is actually paid (paycheck date)?

This "cash VS accrual" question is another unknown with the current rules. Because some employers pay biweekly, semi-monthly, or monthly, we expect further guidance on how these calculations should be completed. The best advice is to pick a methodology and stick to it.

17 Question: Are 501(c)(6) organizations eligible for the PPP loans?

No. A 501(c)(6) is eligible for the Economic Injury Disaster Loan. NECA government affairs is lobbying for a change to this position.

18 Question: If an employer had 100 employees and currently has 50 employees, so essentially only 50% will be forgiven, can you hire employees over the next 8 weeks to get more forgiveness? When is the deadline to hire? Can you lay them off after the 8 weeks if you don't have enough work?

75% of the total loan amount received must be used for payroll. The amount of the PPP loan available to an employer is based on the average monthly payroll of the last twelve months times 2.5. This does not mean that an employer must take the maximum amount.

The forgiveness of the loan is based on the number of full-time equivalent employees (and salary) for the 8-week period after the loan is provided to the employer. If the employer's headcount during that period is lower than the previous year's average, the employer may, before the end of the 8-week period, rehire employees back to the former level to avoid the penalty of lower forgiveness. That deadline is June 30, 2020 – and both the FTE and salary levels must be restored. There is no guidance on how long the re-hired employees must be retained.

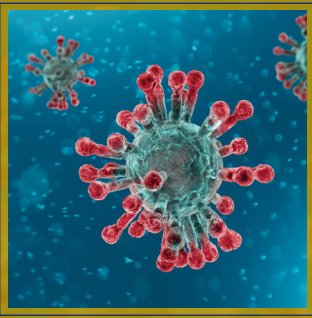
19 Question: What happens if the SBA changes the rules for forgiveness after the loan has been received?



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There is no pre-payment penalty. If you feel that you cannot meet the forgiveness rules, you can immediately repay the lender. Or, the loan proceeds will convert to a two-year, one-percent note.

20 Question: Would you agree that the period that you can determine your FTE number and the period that you utilize to create the average monthly cost is different? For example, the FTE period is the January 1 through February 15 (as allowed in PPP) and the payroll period is the year 2019 payroll costs.

Yes. There are multiple ways to conduct the various calculations.

21 Question: Where is the link for the state by state guidance on whether construction is open?

www.necanet.org/coronavirus. Navigate to the State Government portion of the page and click *view the survey*.

Updated PPP Forgiveness Guidance

A. Document the need for and use of your PPP Loan or return the money

Updated 5.6.2020

There has been a public backlash over perceived abuses in the PPP loan process. With reports of publicly traded companies such as Ruth's Chris getting loans, the federal government has changed the tenor of its guidance. On April 28, 2020, U.S. Secretary of Treasury Steven Mnuchin announced that all Paycheck Protection Program (PPP) loans over \$2 million are subject to audits. The SBA has issued new guidance on the PPP loan process, and the information related to loan forgiveness is of particular importance. It is also lacking in specificity, which is frustrating.

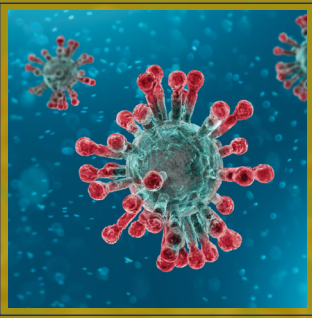
In particular, the latest guidance creates a safe harbor rule that provides that if an employer decides to return PPP money that it does not need or cannot use, it should return the money on or before **May 14, 2020**. NECA's government affairs department successfully pushed hard for an extension from the original date of May 7, and we continue to press for additional definitions, parameters and other guidance on the loan forgiveness process.

At this point, it is imperative for employers to take the additional time that NECA helped procure to work with their accountants, tax advisors and payroll specialists to set aside documentation showing the need for the PPP funds for which they apply. The SBA guidance makes it clear that "all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application." This analysis should be made in lockstep with your financial advisors.

The following is a non-exhaustive list of the documentation and information that should be compiled and considered when making your decisions regarding the PPP loan application and retention of funds.

- Actual business disruptions and loss of revenue due to governmental closures or restrictions;
- The cost of maintaining payroll, and in particular, those non-working (and non-revenue producing) employees on the payroll;





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- Increases in the cost of raw materials due to disruptions in the supply chain;
- Delayed payments given cash flow issues from those to whom you extend credit;
- Requests for write-offs or bad debt;
- Limitations on your ability to access or qualify for a line of credit or other working capital;
- Adjusted budget forecasts resulting from layoffs or other reduced manpower;
- Loss of investment income that affects reserves

Each employer must certainly assess its own financial situation with the help of competent local financial, tax and legal counsel to adapt this general guidance to its individual business situation.

NECA will continue to lobby for the industry on this issue and we will keep you informed of all relevant developments.

The following question numbers refer to the document **Paycheck Protection Program Loans FAQ** which can be found at www.necanet.org/coronavirus

31 Question: Do businesses owned by large companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?

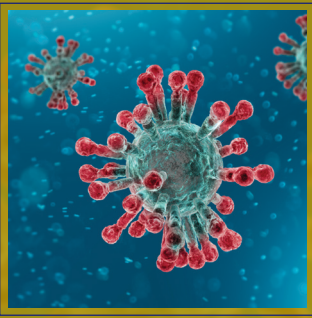
In addition to reviewing applicable affiliation rules to determine eligibility, all borrowers must assess their economic need for a PPP loan under the standard established by the CARES Act and the PPP regulations at the time of the loan application. Although the CARES Act suspends the ordinary requirement that borrowers must be unable to obtain credit elsewhere (as defined in section 3(h) of the Small Business Act), borrowers still must certify in good faith that their PPP loan request is necessary. Specifically, before submitting a PPP application, all borrowers should review carefully the required certification that “[c]urrent economic uncertainty makes this loan request necessary to support the ongoing operations of the Applicant.” Borrowers must make this certification in good faith, taking into account their current business activity and their ability to access other sources of liquidity sufficient to support their ongoing operations in a manner that is not significantly detrimental to the business. For example, it is unlikely that a public company with substantial market value and access to capital markets will be able to make the required certification in good faith, and such a company should be prepared to demonstrate to SBA, upon request, the basis for its certification.

Lenders may rely on a borrower's certification regarding the necessity of the loan request. Any borrower that applied for a PPP loan prior to the issuance of this guidance and repays the loan in full by May 7, 2020 will be deemed by SBA to have made the required certification in good faith.

37 Question: Do businesses owned by private companies with adequate sources of liquidity to support the business's ongoing operations qualify for a PPP loan?

See response to FAQ #31.





B. Good faith written offer of re-hire sufficient for forgiveness

Late last week, the SBA promised an interim final rule that will provide additional clarity on loan forgiveness. As a preview, the SBA issued Question and Answer 40 below, which indicates that good faith efforts to re-hire employees will be count toward the forgiveness calculation for PPP loans at the June 30, 2020 deadline:

40 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?

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.

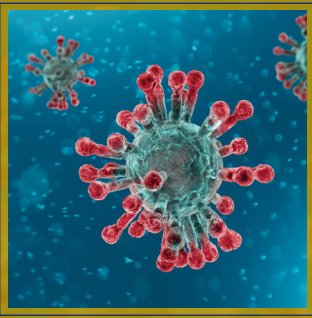
Updated June 8, 2020 The SBA Interim Final Rule provides, among other things, additional clarity and new obligations on employers that want to use the good faith written offer of rehire exception to the requirement of returning to full FTE status in the PPP loan forgiveness process. The Interim Final Rule provides in relevant part:

"a. Will a borrower's loan forgiveness amount be reduced if the borrower laid-off or reduced the hours of an employee, then offered to rehire the same employee for the same salary and same number of hours, or restore the reduction in hours, but the employee declined the offer?"

No. Employees whom the borrower offered to rehire are generally exempt from the CARES Act's loan forgiveness reduction calculation. This exemption is also available if a borrower previously reduced the hours of an employee and offered to restore the employee's hours at the same salary or wages. Specifically, in calculating the loan forgiveness amount, a borrower may exclude any reduction in full-time equivalent employee headcount that is attributable to an individual employee if:

- i. the borrower made a good faith, written offer to rehire such employee (or, if applicable, restore the reduced hours of such employee) during the covered period or the alternative payroll covered period;
- ii. the offer was for the same salary or wages and same number of hours as earned by such employee in the last pay period prior to the separation or reduction in hours;
- iii. the offer was rejected by such employee;
- iv. the borrower has maintained records documenting the offer and its rejection; and
- v. the borrower informed the applicable state unemployment insurance office of such employee's rejected offer of reemployment within 30 days of the employee's rejection of the offer."





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As a result, it is important to note that PPP borrowers seeking to take advantage of the good faith offer of return to work exception during the PPP loan forgiveness process must comply with these directives. Of particular note is the obligation to affirmatively inform the state unemployment insurance office of “such employee’s rejected offer of reemployment within 30 days of the employee’s rejection of the offer.” Please note that this legal requirement would control over any interpretation of the NDERA in these particular and specific factual scenarios; in other words, inside of the PPP loan forgiveness process.

NECA will continue to monitor guidance and update its material as necessary.

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