

Coronavirus: Legal and Practical HR Guidance for Employers - FSLA, FMLA, FFCRA & PPP Updates

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**BERN
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Bernstein Shur's Coronavirus Legal Response Team



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FFCRA, EPSLA, EFMLA and Unemployment

- Exhausted Leave
- ADA considerations
- Intermittent leave
- Unemployment: Lost Wages Assistance Program
- Expectations regarding symptoms



Paycheck Protection Program: Forgiveness

- **Paycheck Protection Program Flexibility Act** (Reminder)
 - Extended loan period to 24 weeks
 - 60% of non-payroll costs
 - Exceptions for rehiring employees
- **New Interim Final Rule**, August 10, 2020: Non-payroll costs and ownership interests
 - PPP borrowers who have tenants and subtenants, those amounts are excluded.
 - Home-based businesses: household costs limited only to deductible expenses.
 - Rent payments to a related party are permitted *up to the amount of mortgage interest owed on the property*, and the lease was entered into before February 15.



Paycheck Protection Program: Forgiveness

- Recent Guidance from SBA and Treasury (FAQs)

Forgiveness FAQs (Aug. 4)

- No payments on loan required pending forgiveness determination.
- SBA confirms, "payroll costs " are gross amounts of cash compensation before taxes, benefits, or other withholdings for employees, and includes hazard pay.
- Owner compensation capped at \$20,833 per individual for all businesses s/he owns, or \$15,385 for 8-week period.
 - **C-Corps**: 2.5/12 total 2019 cash compensation, employer portions of (1) state and local taxes, (2) health insurance and retirement included, with caps.
 - **S-Corps**: Same, but health insurance not included if employee has 2% or higher stake in the business or family members of that employee.
 - **Schedule C**: Self-employed, 2.5/12 of 2019 Schedule C net profit, no state and local taxes, no health insurance, and no retirement.
 - **General Partner**: 2.5/12 net earnings from self-employment, no state and local taxes, no health insurance, and no retirement.
- *Caps do not apply if you have less than 5% ownership stake in the business.
- Unsecured credit not eligible for forgiveness.

Interim Final Rule (Appealing SBA Decisions)

- SBA will review all loans over \$2m, but can review any loan.
- Appeals must be within 30 days to General Counsel for SBA.



Paycheck Protection Program: Forgiveness

- **Current Sources of Confusion**

- In the M&A context, confusion on buying, selling, investment, and financing involving PPP borrowers or assets.
 - How to treat outstanding PPP loans in M&A transactions?
 - Impact on certification of necessity for proceeds.
 - Ensuring loan proceeds stay separate following merger.
 - Eligibility questions for PPP loans.
- President's Memo allowing employees to defer payroll taxes.
 - If employees defer payroll taxes, can borrowers count it as an eligible "payroll cost"?



Liability for COVID-19 Claims

- Employee Litigation
 - Lawsuits in other states, injunctive relief, PPE, remote work, or leave.
 - Breach of Employment Agreement
 - Interference with FFCRA or FMLA, including misclassification
 - Non-compete
 - WARN Act (mass layoffs)
 - Whistleblower (masks, healthcare worker PPE)
 - Retaliation
 - Worker's Compensation
 - Discrimination
 - 537 Complaints as of yesterday, only 1 in Maine—prisoner seeking unemployment
- Liability to customers, (Millinocket wedding venue example).
 - Three tools for plaintiffs:
 - Contact Tracing
 - Widespread Testing
 - Genetic mapping ("deep sequencing")



Liability for COVID-19 Claims

- Key Takeaways:
 - **Follow health and safety guidance and enforce it.**
 - **Pandemic Policy**
 - Screening
 - Social distancing
 - Masking, PPE
 - Hygiene
 - What will occur in the event of an illness
 - **Policies for Families First Coronavirus Response Act Leave (Emergency Paid Sick and Expanded Family & Medical Leave)**
 - **DECD Checklists, Postings**
- **Protect yourself**
 - **Liability Waivers**
 - **Understand your insurance coverage**



Q&A



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