

COVID-19 – Help for Small Businesses

April 3, 2020

Good evening,

We have fielded questions from many of you this week about the Paycheck Protection Program under the CARES Act (“Act”), so our blast begins with more information following Department of Treasury Guidance on that program.

Also, late yesterday, the Department of Labor (DOL) issued regulations on the leave provisions under the Families First Coronavirus Response Act, which in some ways is different than the DOL’s prior guidance, particularly with respect to how state stay-at-home orders may trigger leave. That information is below in the section entitled “Employment Law Update.”

Department of Treasury Guidance on Paycheck Protection Program

The PPP was included in the Act, which became law a week ago, and provides for emergency SBA loans up to \$10 million that are forgivable if used for allowable purposes. The Department of Treasury recently issued Temporary Final Regulations concerning the PPP loan program (the “DOT Guidance”), effective immediately. Established SBA regulations continue to apply to PPP loans except as waived or modified by the Act. Below we discuss certain information contained in the DOT Guidance. For additional information about the PPP loan program see our summary dated April 1, 2020.

1. Eligibility

A “small business concern” with 500 or fewer employees is eligible, unless rendered ineligible under established SBA rules. In addition, the Act authorizes certain other borrowers to be eligible for a PPP loan who are ineligible under other SBA loan programs, including a tax-exempt nonprofit under Section 501(c)(3) of the Internal Revenue Code.

A “small business concern” is defined in the SBA Act as one which is independently owned and operated and which is not dominant in its field of operation.

2. Ineligible Businesses

Ineligible businesses are defined in established SBA regulations and continue to apply to PPP loans. These include financial businesses (e.g., banks), passive businesses, life insurance companies, businesses located outside the U.S., pyramid sales distribution plans, businesses deriving more than one-third of their revenue from legal gambling activities, any illegal activity, private clubs and businesses that limit membership (other than due to capacity reasons), businesses engaged in teaching religious

beliefs or engaging in other religious activities, businesses who have previously defaulted on an SBA loan, and businesses with a 20% or greater owner who is incarcerated, on probation, on parole, subject to an indictment, or has been convicted of a felony within the last five years.

3. 500 Employee Limit

Generally, we are looking at whether the number of employees is greater than 500. A business with more than 500 employees will still be eligible if the number of employees does not exceed a size standard issued by the SBA for the particular industry. For purposes of determining the number of employees, the established SBA regulations require inclusion of employees of U.S. and foreign affiliates (generally determined by a control test). These affiliation rules continue to apply to PPP loans, except for limited exceptions in the Act in which the affiliation rules are waived, i.e., a business concern with 500 or fewer employees with a NAIC code beginning with 72 (Accommodations and Food Service), a business concern operating as a franchise that has an SBA franchise identifier code, and a business concern that receives financial assistance from a “small business investment company” licensed by the BSA.

4. Amount of Loan

The maximum loan a company may obtain is 2.5 times its average monthly payments for “payroll costs” during the 12 months prior to the PPP loan, plus, if the company obtained a disaster relief SBA loan between January 1, 2020 and March 27, 2020, that loan can be rolled into a covered loan under the PPP. The maximum loan amount is \$10 million. The applicant should be prepared to submit accurate documentation for the lender to confirm the requested loan amount.

Even though the Act defines “payroll costs” to include certain payments to a sole proprietor or independent contractor, the DOT Guidance states that independent contractors may not be included as employees for purposes of a PPP loan because they are eligible to obtain their own loans.

Also, for purposes of determining the amount of the PPP loan, the applicant may only take into account its own payroll costs, and not the payroll costs of its affiliates, and each affiliated entity that is eligible to apply for a PPP loan would submit its own loan application. A sample PPP loan Application Form has been published by the SBA and is available here: <https://www.sba.gov/document/sba-form-paycheck-protection-program-borrower-application-form>.

5. Loan Forgiveness

According to the Act, the loan will be forgiven to the extent it is used, during the eight weeks following the loan date, for “payroll costs,” mortgage interest, rent and/or utilities. According to the DOT Guidance, not more than 25% of the loan forgiveness amount may be used for non-payroll costs. The borrower will have to document the use of the loan proceeds, and lenders are allowed to rely on the borrower’s documents and certifications without having to conduct an independent verification of the amounts.

The amount otherwise forgivable is reduced for reductions in full-time equivalent employees and certain reductions in compensation. The DOT Guidance makes clear that independent contractors are not counted as employees for purposes of determining loan forgiveness.

6. Other Loan Terms

- a. Interest rate – a rate of 1% will apply.
- b. Payment deferral for six months following the loan date. Interest will accrue.
- c. Maturity – two years.

Employment Law Update

1. DOL Issues Temporary Rule on Eligibility for Paid Leave under the Families First Coronavirus Response Act.

The U.S. Department of Labor (“DOL”) issued temporary rules regarding how employers and employees will benefit from the protections and relief offered by the Emergency Paid Sick Leave Act and Emergency Family Medical Leave Expansion Act, both of which are part of the Families First Coronavirus Response Act (“FFCRA”).

As you may know, the Emergency Paid Sick Leave Act describes circumstances under which a covered employer must provide paid sick leave under FFCRA:

1. the employee is subject to a federal, state or local quarantine or isolation order related to COVID-19;
2. the employee is advised by a health care provider to self-quarantine due to COVID-19 concerns; or
3. the employee is experiencing COVID-19 symptoms and seeking medical diagnosis;
4. the employee is caring for an individual subject to a federal, state or local quarantine or isolation order or advised by a health care provider to self-quarantine due to COVID-19 concerns;
5. the employee is caring for the employee’s child if the child’s school or place of care is closed or the child’s care provider is unavailable due to public health emergency; or
6. the employee is experiencing any other substantially similar condition specified by the Secretary of Health and Human Services in consultation with the Secretary of the Treasury and the Secretary of Labor.

Among other things, under this new temporary rule the DOL advises that “quarantine or isolation orders” referenced in paragraph 1, above, include “a broad range of governmental orders, including orders that advise some or all citizens to shelter in place, stay at home, quarantine, or otherwise restrict their own mobility.” Although not confirmed by the Governor’s office, it is presumed that Michigan’s “Stay Home, Stay Safe” Executive Order 2020-21 could be deemed a “quarantine or isolation order” as defined by the DOL. Also, it is possible that the Amended Emergency Order (2020-5) for Control of Pandemic issued by the Oakland County Local Health Officer could be considered an “quarantine or isolation order” also.

What does this mean for employers? The DOL offers the following test to determine whether paid sick leave applies: “whether the employee would be able to work or telework ‘but for’ being required to

comply with a quarantine or isolation order.” In other words, if the quarantine or isolation order is *the* reason the employee is unable to work or telework then paid sick leave is triggered.

However, the DOL identifies three circumstances where employees may not take paid sick leave:

- If the employer does not have work for the employee because the employee would be unable to work even if he or she were not required to comply with the quarantine or isolation order.
- If the employee’s place of employment is closed temporarily due to COVID-19.
- If the employee is able to work remotely, but only if:
 - The employer has work for the employee to perform;
 - The employer permits the employee to perform that work from the location where the employee is being quarantined or isolated; and
 - There are no extenuating circumstances preventing that employee from performing that work. The DOL’s example of an extenuating circumstance is the event of a power outage that would prevent an employee from using his or her computer to perform their work.

Also, an employer may exclude employees who are “health care providers” or emergency responders from leave requirements under the Acts. Notably, the definition of a “health care provider” for these purposes is not limited to medical professionals. Rather, such health care providers include (but are not limited to) any individual who is capable of providing health care services necessary to combat the COVID-19 public health emergency, as well as other workers who are needed to keep hospitals and other health care facilities well supplied and operational.

The full text of the temporary rule is available [here](#). This rule is effective from April 2, 2020 through December 31, 2020.

2. IRS Issues Guidance Related to Tax Credits for Required under the FFCRA.

The Internal Revenue Service (“IRS”) published new guidance clarifying how employers can claim tax credits for providing employees paid leave under FFCRA, and the documentation that employers must obtain and maintain from employees who request leave. The agency explains that employers can start taking these credits immediately and outlines the documents employers should retain to support their request for credits. The guidance includes 66 FAQs, available [here](#).

3. Governor’s Executive Order Barring Employers from Retaliating Against Employees Who Stay Home due to COVID-19.

Governor Whitmer today signed [Executive Order 2020-36](#), prohibiting all employers from discharging, disciplining, or otherwise retaliating against an employee for staying home from work if they or one of their close contacts tests positive for COVID-19 or has symptoms of the disease.

This Order also adds to the Governor’s “Stay Home, Stay Safe” Executive Order by declaring that it is the public policy of the state that all Michiganders who test positive or show symptoms, or who live with someone who tests positive or shows symptoms, should not leave their homes unless absolutely necessary.

GMH's Coronavirus Task Force is here to answer your questions. While GMH is complying with Governor Whitmer's Executive Order, we are working remotely and available to assist you. Please contact any of the below lawyers for more Coronavirus support.

THE LOCAL, STATE AND FEDERAL GOVERNMENT REQUIREMENTS RELATED TO COVID-19 MAY CHANGE, AND ADDITIONAL GUIDANCE, RULES, LAWS AND REGULATIONS MAY BE ISSUED OR AMENDED, AT ANY TIME. ACCORDINGLY, OUR GUIDANCE OR POSITION ON THESE TOPICS MAY ALSO CHANGE, WITH OR WITHOUT NOTICE, AND THE ABOVE INFORMATION IS FOR EDUCATIONAL PURPOSES ONLY AND SHOULD NOT BE INTERPRETED OR RELIED UPON AS LEGAL ADVICE. EACH SITUATION IS UNIQUE AND SHOULD BE REVIEWED WITH THE ASSISTANCE OF COMPETENT PROFESSIONALS.



Elizabeth "Liza" A. Favaro
(Employment, Insurance, Supply Chain)

(248) 457-7181
efavaro@gmhlaw.com



Bruce W. Haffey
(Corporate, M&A, Supply Chain)

(248) 457-7140
bhaffey@gmhlaw.com



Alexander Lebedinski
(Health Care, Business Transactions, Immigration)

(248) 457-7058
alebedinski@gmhlaw.com



James Y. Rayis
(International)

(248) 457-7173
jrayis@gmhlaw.com



Nina M. Jankowski
(Employment)

(248) 457-7183

njankowski@gmhlaw.com