

## COVID-19: Help for Small Businesses

### Reopening Michigan and Certification of Need for PPP Loans

May 7, 2020

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Governor Gretchen Whitmer signed Executive Order 2020-77 to extend Michigan's Stay Home, Stay Safe order to May 28, but to allow manufacturing workers to resume work on Monday, May 11 as part of her MI Safe Start Plan. As sectors of Michigan's economy begin to re-open, the Equal Employment Opportunity Commission (EEOC) has issued additional guidance on accommodations to employees at "higher risk for severe illness" from COVID-19 (available [here](#)).

At the same time, some businesses have inquired about recent news and official guidance from the U.S. Department of Treasury and SBA emphasizing the certification of need required to obtain PPP loans and reminder of possible criminal sanctions for a false certification.

Tonight, GMH's Coronavirus Task Force offers help on these issues; specific questions can be directed to one of the attorneys below.

#### PPP LOAN UPDATES:

##### 1. Certification of Need for PPP Loan

In order to obtain a PPP loan, a borrower must make a good faith certification that "the uncertainty of current economic conditions makes necessary the loan request to support the ongoing operations of the eligible recipient." When it became known that companies such as Ruth's Chris Steakhouse, Potbelly Sandwich Shop and various publicly traded companies obtained PPP loans, there was a backlash from small business owners and the public at large.

Due in large part to this negative publicity, in recent FAQs the U.S. Department of Treasury has emphasized the certification of need that is required in order to be eligible for a PPP loan. The FAQs state that "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."

The FAQs also state that all loans in excess of \$2 million will be reviewed following their applications for forgiveness.

The CARES Act expressly waives the normal SBA lending requirement that the business is unable to obtain credit elsewhere. The waiver of the credit elsewhere test seems contrary to the emphasis in the FAQs on taking into account the ability to access other sources of liquidity in certifying a borrower's need for a PPP loan to support ongoing operations. As a result, borrowers are understandably nervous about accepting a PPP loan.

The FAQs further state that if a PPP loan is repaid in full by May 14 (extended from the original date of May 7), sanctions will not be asserted against the borrower for having made a false certification.

In determining whether a borrower can make the required good faith certification, the FAQ states that the funds must be necessary "to support . . . ongoing operations in a manner that is not significantly detrimental to the business." This is an uncertain standard both as to other sources of liquidity and as to ongoing operations. It seems reasonable to consider this certification in the context of the fundamental purpose of the PPP loan program, to maintain staffing levels and keep paychecks flowing. In other words, it would seem relevant that in the absence of a forgivable PPP loan the business would be forced to make staffing reductions or layoffs.

## **2. Reduction in Forgiveness Not Affected by Employees Declining to Return to Work**

Under the PPP loan program, the amount of a loan otherwise forgivable will be reduced in proportion to a reduction in full-time equivalent employees. The recently updated FAQs issued by DOT and SBA included a question whether forgiveness would be reduced if the borrower had laid off an employee, offered to rehire him or her, and the employee declined the offer. The FAQ says, "No," and that DOT and SBA intend to issue an interim final rule to this effect, provided that the borrower made a good faith, written offer of rehire, and the employee's rejection of that offer is documented by the borrower. The FAQ further states that employees who reject offers of re-employment may forfeit eligibility for continued unemployment compensation.

## **3. Effect of PPP Loan / Forgiveness on Eligibility for Certain Tax Credits**

In determining whether to apply for a PPP loan, a business should consider the effect on its eligibility for other tax benefits.

- An employer who obtains a PPP loan is ineligible for the refundable employee retention tax credit allowed under the CARES Act equal to 50% of qualified wages up to \$10,000.
- An employer who obtains forgiveness of a PPP loan is ineligible for deferment of payment the employer's share of FICA taxes (50% due on 12/31/2021 and the remainder on 12/31/2022) authorized under the CARES Act.

### **EEOC GUIDANCE: RETURN-TO-WORK ACCOMMODATIONS:**

#### **1. What Medical Conditions are Considered "Higher Risk for Severe Illness" from COVID-19?**

Based on information known to the Centers for Disease Control and Prevention (CDC), people [65 years and older](#) or who live in a nursing home or long-term care facility are deemed at high-risk for severe illness from COVID-19. The CDC also characterizes the following people of all ages with [underlying medical conditions, particularly if not well controlled](#) at high-risk, including people with:

- Chronic lung disease or moderate to severe asthma
- Serious heart conditions
- Compromised immune systems
  - Many conditions can cause a person to be immunocompromised, including cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, and prolonged use of corticosteroids and other immune weakening medications
- Severe obesity (body mass index [BMI] of 40 or higher)
- Diabetes
- Chronic kidney disease undergoing dialysis
- Liver disease

## 2. What If an Employee Is At “Higher Risk for Severe Illness”?

Employees should be advised that if they have one of the medical conditions that the CDC says may put them at a higher risk for severe illness from COVID-19, they [must let their employer know](#) and request accommodation. Employees may request accommodation in conversation or in writing and do not need to use the term “reasonable accommodation” or reference the ADA.

If an employee does not request a reasonable accommodation, the ADA does not require that the employer take action. And, if the employer is concerned about an employee’s health being jeopardized by returning to work, the ADA does not allow the employer to exclude the employee or take any other adverse action solely because they are at “higher risk for severe illness.”

Additionally, the ADA does not allow the employer to exclude the employee or take any other adverse action unless the employee’s disability poses a “direct threat” to their health that cannot be eliminated or reduced by reasonable accommodation. The “direct threat” requires an employer to show that the employee has a disability that poses a “significant risk of substantial harm” to his own health under [29 C.F.R. section 1630.2\(r\)](#). This is a high standard and cannot be based solely on the condition being on the CDC’s list of medical conditions. If you have an employee in this type of situation, we recommend consulting with an attorney.

## 3. What Types of Accommodations Should an Employer Provide?

Identifying an effective accommodation depends on, among other things, the employee’s job duties and the design of the workplace. An employer and employee should keep an open line of communication and discuss possible solutions.

Possible reasonable accommodations may include:

- Additional or enhanced protective gowns, face masks, gloves, or other protective gear beyond what the employer may generally provide to its employees returning to work.
- Additional or enhanced protective measures, such as:
  - Erecting barriers that provide separation between other employees and/or the public;
  - Increasing the space between other employees and/or the public; and
  - Designating one-way aisles.

- Eliminating or substituting less critical job duties.
- Temporary modifications to work schedules.
- Moving the location where the employee performs works to provide more social distancing.

The above are only a few ideas; the [Job Accommodation Network](#) is another resource that may help identify possible accommodations.

GMH's Coronavirus Task Force is here to answer your questions. GMH continues to comply with Governor Whitmer's "Stay Home, Stay Safe" Order, but 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.*



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