

RCCB EMPLOYMENT PRACTICE GROUP REVIEWS DETAILS OF FEDERAL GOVERNMENT PROGRAMS RELATING TO COVID-19

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COVID-19 LOAN AND GRANT PROGRAMS FOR BUSINESSES, INDEPENDENT CONTRACTORS,
AND THE SELF-EMPLOYED

The federal government has rolled out several programs to help small businesses, independent contractors, the self-employed, and gig workers through the economic challenges they face as the result of the COVID-19 pandemic. Chief among these are the Paycheck Protection Program (“PPP”) and Economic Injury Disaster Loans (“EIDL”).

EMPLOYERS AND THEIR EMPLOYEES

Prior to the implementation of federal relief programs under the federal CARES Act (including PPP and EIDL), in the initial weeks of the COVID-19 crisis, employers were forced to make quick decisions on cost saving measures, including reductions in force, salary reductions, and other economic employment actions, to save their businesses. These decisions were made in the context of anticipated significant expansions to unemployment benefits for employees and even independent contractors. As a consequence of this situation, PPP and EIDL generally incentivize rehiring and restoring employees to their previous levels of compensation. However, the operational needs of and current restrictions on a business may have a significant impact on whether they use PPP or EIDL loans to bring employees back to work, versus continuing their unemployment or even engaging in further layoffs and furloughs.

As an initial matter, employers should remember that, depending on the number, length, and amount of unemployment claims from their former employees, their unemployment contribution tax rate may increase in the next calendar year. The full extent of this impact on employers (including whether employers will face any additional rate increase as the result of additional unemployment sums payable to employees through federal programs, discussed in more detail below) remains to be seen.

As it relates to employees, whether it is better for them to return to or remain at work with a business that has obtained a PPP loan versus remain on or apply for unemployment depends on their normal rate of compensation, as well as the anticipated duration of their unemployment. The amounts of and eligibility requirements for unemployment vary from state to state. In Pennsylvania, for example, the short term maximum weekly benefit available is currently approximately \$1173 (the current Pennsylvania weekly maximum of \$573, plus an additional \$600 in weekly benefits for up to 18 weeks, or until July 31, 2020). The overall period

of eligibility for unemployment benefits has been increased nationally to 39 weeks (available through December 31, 2020). Under the PPP, payroll costs for the eight-week period after the PPP loan is made will be forgiven 100 percent for individuals whose annual compensation is set at less than \$100,000 (up to approximately \$1,923 a week for eight weeks). In addition to this, the loan can include employer-paid retirement contributions, health insurance contributions, and state and local taxes.

Depending on an employee's normal rate of pay and the duration of their anticipated unemployment, different strategies may be employed to both maximize the potential benefits to employees and contribute to the employer's ability to obtain maximum loan forgiveness under the PPP. While additional guidance on PPP forgiveness is still forthcoming, it appears that employers seeking forgiveness of payroll expenses under the PPP loan must retain employees at least through June 30, 2020. To date, there is no specific guidance regarding how long employees must remain employed past June 30, 2020 in order to maximize forgiveness.

INDEPENDENT CONTRACTORS, GIG WORKERS, AND THE SELF-EMPLOYED

Another significant measure taken by the federal government is to make independent contractors and the self-employed, who would otherwise generally be ineligible for unemployment benefits, eligible under certain circumstances related to the COVID-19 pandemic, through Pandemic Unemployment Assistance ("PUA").

An individual who is self-employed, an independent contractor, or a gig worker can receive unemployment benefits if the individual self-certifies that he or she is able and available to work within the meaning of applicable state law and is "unemployed, partially unemployed or unable or unavailable to work" because of one or more of the following COVID-19-related reasons:

- The individual is diagnosed with COVID-19
- The individual has symptoms of COVID-19 and is in the process of seeking a medical diagnosis
- A household member has been diagnosed with COVID-19
- The individual is providing care to a household member with COVID-19
- A child or other person in the household for which the individual is the primary caregiver is unable to attend school or daycare due to COVID-19
- The individual is unable to reach work due to a quarantine
- The individual is unable to attend work because a healthcare professional advised him or her to self-quarantine
- The individual is scheduled to commence employment and does not have a job or is unable to reach the job as a direct result of COVID-19

- The individual is the sole wage earner in his or her household due to death of the head of household as a direct result of COVID-19
- The individual was required to quit his or her job as a direct result of COVID-19
- The individual's place of employment closed as a direct result of COVID-19
- The individual is self-employed, is seeking part-time employment, and does not have sufficient work history or otherwise would not qualify for unemployment benefits under another state unemployment program

Benefits for qualifying individuals under these provisions are calculated the same way as they would be for employees (a benefit calculation pursuant to state unemployment parameters, an additional \$600 for up to 18 weeks until July 31, 2020, and overall eligibility for up to 39 weeks).

The CARES Act does not define what it means for an independent contractor, self-employed person, or gig worker to be "required to quit his or her job as a direct result of COVID-19." The Department of Labor also merely refers to "leav[ing] employment due to a risk of exposure or infection" As such, for the time being, it appears that PUA has potentially broad application to entitle the self-employed, independent contractors, or gig workers to unemployment benefits. For these individuals, it is still unclear whether and to what extent businesses who use independent contractors, the self-employed, or gig workers will need to contribute to the cost of their unemployment compensation.

It is further unclear what documentation independent contractors will be required to submit to show their compensation for purposes of calculating benefit amounts. Unlike W-2 employees, contractors will not be able to provide paystubs to the state unemployment agencies to establish compensation. It is likely that requirements for such proofs will vary from state to state.

As a consequence of this new potential eligibility for unemployment compensation, self-employed persons and independent contractors must also consider the pros and cons of applying for unemployment benefits versus availing themselves of potential relief under PPP or EIDL (it has been reported that the EIDL three-business-day \$10,000 grant is changing to \$1,000 per employee – although it is unclear how independent contractors are treated for this purpose – with unknown time to receipt, and it is unclear whether EIDL loans are available beyond any grant). Independent contractors or the self-employed must apply independently for PPP, however, because the cost of paying these individuals/entities is not a qualifying expense under PPP as to the hiring business (it is unclear whether these costs are qualifying expenses under the EIDL for the hiring business).

While application for a PPP loan now requires borrowers to certify that they will use 75 percent of proceeds to pay payroll costs, there is not at the moment a bright line rule against getting an EIDL loan as a self-employed person or independent contractor, and still applying for unemployment because of lack of work. For example, a self-employed person or independent

contractor whose business has been ordered to close could use an EIDL loan to continue to pay rent or other qualifying costs, and still apply for unemployment because the business is not operational. In any event, if a self-employed person or independent contractor does use a PPP or EIDL loan to pay his or her salary, those amounts would have to be reflected on an unemployment application, and would offset in whole or in part unemployment benefits. It is also important to note that in many states, it is necessary to show that the applicant is actively looking for work while receiving unemployment benefits (this requirement is currently suspended in Pennsylvania under the CARES Act). If a self-employed person or independent contractor receives a PPP or EIDL loan that allows it to remain operational, it may be difficult to demonstrate that unemployment benefits are warranted. While some states have suspended work search requirements due to COVID-19, it remains to be seen how relaxing these requirements will interact with independent contractors or the self-employed who otherwise obtain PPP or EIDL loans.

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