Should companies apply for PPP loan under CARES, and then rehire employees or vice versa?

Current guidance is that companies should make payroll decisions based on current funds available (and of course, making sure that employment decisions are made on a non-discriminatory basis), then reassess if/when the loan is granted.

As a general matter, a PPP loan will be fully forgiven if the funds are used for payroll costs, interest on mortgages, rent, and utilities (due to likely high subscription, at least 75% of the forgiven amount must have been used for payroll). Loan payments will also be deferred for six months. No collateral or personal guarantees are required. Neither the government nor lenders will charge small businesses any fees. Forgiveness is based on the employer maintaining or quickly rehiring employees and maintaining salary levels. Forgiveness will be reduced if full-time headcount declines, or if salaries and wages decrease. However, this reduction penalty doesn’t apply to the extent the borrower restores their workforce count and salaries/wages by June 30, 2020.

This loan has a maturity of 2 years and an interest rate of 1%. A sample form is available [here](#).

How does a business obtain an FFCRA small-business exemption?

Current guidance from the DOL states:

An employer, including a religious or nonprofit organization, with fewer than 50 employees (small business) is exempt from providing (a) paid sick leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons and (b) expanded family and medical leave due to school or place of care closures or child care provider unavailability for COVID-19 related reasons when doing so would jeopardize the viability of the small business as a going concern. A small business may claim this exemption if an authorized officer of the business has determined that:

1. The provision of paid sick leave or expanded family and medical leave would result in the small business’s expenses and financial obligations exceeding available business revenues and cause the small business to cease operating at a minimal capacity;
2. The absence of the employee or employees requesting paid sick leave or expanded family and medical leave would entail a substantial risk to the financial health or operational capabilities of the small business because of their specialized skills, knowledge of the business, or responsibilities; or
3. There are not sufficient workers who are able, willing, and qualified, and who will be available at the time and place needed, to perform the labor or services provided by the employee or employees requesting paid sick leave or expanded family and medical leave, and these labor or services are needed for the small business to operate at a minimal capacity.

There is no application form or process at the moment and the DOL has instructed employers not to submit any documentation at this time. If you plan to claim this exemption, make sure you can properly demonstrate one of the above circumstances.
How do I assess whether to send an employee home? What if an employee refuses to come to work but does not qualify for one of the reasons under the FFCRA?

I recommend following the CDC risk assessment guidelines for exposure available here. OSHA also has a comprehensive guide for businesses on the subject, available here.

**Does the EDD make up different in pay for reduced hours? What if an employee is over threshold to earn unemployment benefits?** Yes, an employee working reduced hours may be eligible for unemployment benefits to make up the difference, up to the current weekly limits. I actually do not see much risk of an employee quitting to take unemployment benefits instead of working. For one thing, unemployment benefits generally do not apply for a voluntary resignation. Establishing a constructive termination to trigger unemployment benefits is a high burden for the employee to overcome. Second, (and with the caveat that this is more of a practical opinion than a legal one), given the tenuous economic state in the US, I suspect most people would rather stay employed than risk not having a job down the line.

**Does a PPP loan work to pay for reduced salary?**

It can, but forgiveness levels can be reduced accordingly. The purpose the PPP loan is to maintain existing employee count and salary levels.

**Do outside employees count for PPP loans?**

No. For a PPP loan, the calculations for the loans are based on the average monthly payroll costs from the last 12 months for employees who principal place of residence is the US (please note these calculations also exclude any compensation for each employees that exceeds $100k/year). Please see additional Interim Guidance from the SBA here.

**FFCRA loan v. SBA loans. $10k advance need to be repaid? Can you get both? Does one reduce the other?**

I believe that this question was asking about the interplay between the PPP loans and the Economic Injury Disaster Loans (EIDL).

To qualify for an EIDL under the CARES Act, the applicant must have suffered “substantial economic injury” from COVID-19. EIDL loans under the CARES Act are based on a company’s actual economic injury determined by the SBA (less any recoveries such as insurance proceeds) up to $2 million. EIDL loans may be used for payroll and other costs as well as to cover increased costs due to supply chain interruption, to pay obligations that cannot be met due to revenue loss and for other uses. The interest rate on EIDL loans is 3.75% fixed for small businesses and 2.75% for nonprofits. The EIDL loans have up to a 30-year term and amortization (determined on a case-by-case basis).
SBA Loan Guidance Re: COVID-19
Released 4/3/2020
Under the EIDL program, small business owners are eligible to apply for an Economic Injury Disaster Loan advance of up to $10,000. This advance will provide economic relief to businesses that are currently experiencing a temporary loss of revenue. This advance is essentially a grant and is not required to be repaid, even if the application is denied, but the amount of the advance must be deducted from any loan forgiveness amounts under a PPP loan, described above.

Funds will be made available within three days of a successful application. According to the SBA, lenders may begin processing loan applications as early as Friday, April 3, 2020. The EIDL loan application is available here. Applications for EIDL loans should be submitted directly to the SBA, while PPP loans will be available from SBA-approved lenders.

Businesses that have pending or existing SBA disaster assistance loans can still receive funding through the Paycheck Protection Program as long as the loans are not being used to pay for the same thing. You also can still apply for a loan if you have an insurance claim pending. A single business cannot apply for more than one Paycheck Protection Loan, however.

**Is there any personal liability on these loans?**

Unlike most typical SBA loans, the PPP Loans are unsecured loans requiring no collateral, no personal guarantee, and no showing that credit is unavailable elsewhere. EIDL loans up to $200,000 will not require personal guarantees, but loans in excess of that amount will.

Finally, I wanted to follow up with additional information we have received on the following:

**Documentation**

The IRS issued the following guidelines regarding what information the employer will need to submit to get the FFCRA tax credit for wages paid out under Paid Sick Leave and Expanded FMLA Leave:

**Paid Sick Leave Documentation:**

An Eligible Employer will substantiate eligibility for the sick leave or family leave credits if the employer receives a written request for such leave from the employee in which the employee provides:

1. The employee’s name;
2. The date or dates for which leave is requested;
3. A statement of the COVID-19 related reason the employee is requesting leave and written support for such reason; and
4. A statement that the employee is unable to work, including by means of telework, for such reason.

In the case of a leave request based on a quarantine order or self-quarantine advice, the statement from the employee should include the name of the governmental entity ordering quarantine or the name of the health care professional advising self-quarantine, and, if the person subject to quarantine or advised to self-quarantine is not the employee, that person’s name and relation to the employee.
In the case of a leave request based on a school closing or child care provider unavailability, the statement from the employee should include the name and age of the child (or children) to be cared for, the name of the school that has closed or place of care that is unavailable, and a representation that no other person will be providing care for the child during the period for which the employee is receiving family medical leave and, with respect to the employee’s inability to work or telework because of a need to provide care for a child older than fourteen during daylight hours, a statement that special circumstances exist requiring the employee to provide care.

**EFMLA Leave Documentation:**

An Eligible Employer will substantiate eligibility for the sick leave or family leave credits if, in addition to the information set forth in FAQ 44 (“What information should an Eligible Employer receive from an employee and maintain to substantiate eligibility for the sick leave or family leave credits?”), the employer creates and maintains records that include the following information:

1. Documentation to show how the employer determined the amount of qualified sick and family leave wages paid to employees that are eligible for the credit, including records of work, telework and qualified sick leave and qualified family leave.
2. Documentation to show how the employer determined the amount of qualified health plan expenses that the employer allocated to wages. See FAQ 31 (“Determining the Amount of Allocable Qualified Health Plan Expenses”) for methods to compute this allocation.
3. Copies of any completed Forms 7200, Advance of Employer Credits Due To COVID-19, that the employer submitted to the IRS.
4. Copies of the completed Forms 941, Employer’s Quarterly Federal Tax Return, that the employer submitted to the IRS (or, for employers that use third party payers to meet their employment tax obligations, records of information provided to the third party payer regarding the employer’s entitlement to the credit claimed on Form 941).

**Tax Credits**

As we discussed in the meeting, one option to offset the financial burden of the FFCRA is through a payroll tax credit. In the event that an employer is paying out more in COVID-19 required leave than its payroll tax liability, the employer can immediately file for a refund on the new IRS Form 7200 and the IRS will process the refund as quickly as possible, or wait to claim the refund on their regular employment tax return.

Another option to the FFCRA tax credit is the “Employee Retention Credit” created by the CARES act. This is a fully refundable tax credit for employer equal to 50 percent of certain qualified wages (including allocable qualified health plan expenses) paid from March 13, 2020 through December 31, 2020, paid as compensation to employees other than FFCRA-mandated leave, including payments to employees who are not providing services to the employer.
The maximum amount of qualified wages taken into account with respect to each employee for all calendar quarters is $10,000, so that the maximum credit for an Eligible Employer for qualified wages paid to any employee is $5,000. Additional information about this credit is available from the IRS website [here](#).

Please note that employers are not permitted to count the same wages towards both the FFCRA and the Employee Retention tax credits (although it is possible to receive both types of tax credits). Additionally, an employer that receives a PPP loan should not claim Employee Retention Credits and will not be able to claim the FFCRA tax credits. Please speak with your CPA or financial advisor about the best strategy for your business.

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